refrain from unfair labor practices should not be heard to complain that his rights have been unfairly curtailed.

In the *Ford* case, the board's order directed the Ford Company to cease and desist from "disseminating among its employees statements or propaganda which disparages or criticizes labor organizations or which advises its employees not to form such organizations." Presumably the board assumed that if unfair labor practices existed in the recent past, any statement by an employer as to unions is coercive. The employer apparently is even prohibited from revealing in a non-coercive manner facts which, if known, would persuade the employees not to join a particular union. If this is the correct interpretation, the order would seem to violate the employer's right to freedom of speech. Once the court has enjoined the employer's unfair labor practices, there may be a broad area within which the employer can speak without reasonable employees feeling they are being coerced.[18]

Labor Law—Picketing and Strike Arising out of Breach of Contract Not to Deal with Companies Not in Good Standing with Union—[Washington].—A baking company executed a contract with a union under which it agreed to hire only members in good standing with the union, and agreed to certain hours of labor and wages. The contract contained the following clause: "There shall be no goods delivered to or sold at the plant for resale from trucks to persons not in good standing with local union No. 524." The baking company continued to sell half of its output of goods to Paddy Kake Sales Company, which was not in good standing with the union. Regarding these sales as a breach of contract, the union called a strike and refused to handle any of the baking company's goods going to Paddy Kake, and picketed the baking company's place of business. In a suit by the baking company for an injunction and damages, relief was granted by the trial court. Damages and an injunction were denied the defendant union on a cross complaint based on the contract. On appeal, *held*, the breach of contract constituted a basis for a labor dispute. Picketing did not constitute a secondary boycott. The denial of damages for the breach of contract was affirmed. *Marvel Baking Co. v. Teamsters' Union Local No. 524.*[1]

Under Washington statutes[2] a breach of contract may be the basis of a labor dispute. "Self-help"—peaceful picketing[3] and striking[4]—can be used where such action

[18] Cf. dissent of Judge Lehman in Busch Jewelry Co. v. United Retail Employee's Union, 281 N.Y. 150, 157, 22 N.E. (2d) 320, 322 (1939), noted in 7 Univ. Chi. L. Rev. 171, 174 (1939).

[1] 105 P. (2d) 46 (Wash. 1940).

[2] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–13 (the term "labor dispute" includes any controversy covering terms and conditions of employment and their maintenance).

[3] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–14 (e); Safeway Stores v. Retail Clerks' Union, 184 Wash. 322, 51 P. (2d) 372 (1935); United Electric Coal Co. v. Rice, 80 F. (2d) 1 (C.C.A. 7th 1936); Adams v. Building Service Employees' Union, 197 Wash. 242, 84 P. (2d) 1021 (1938); Fornili v. Auto Mechanics' Union, 200 Wash. 283, 93 P. (2d) 422 (1939); Yakima v. Gorham, 200 Wash. 564, 94 P. (2d) 180 (1939), noted in 7 Univ. Chi. L. Rev. 388 (1939); Kimbel v. Lumber & Saw Mill Workers' Union, 189 Wash. 416, 65 P. (2d) 1066 (1937) (reasonable distance of picketing allowed). See The Status of the Right to Picket in Washington, 5 Wash. L. Rev. 126 (1930); Status of Picketing in Washington, 15 Wash. L. Rev. 47 (1940), for history of picketing in Washington.

[4] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–4 (a) (no court shall issue an injunction or prohibit persons interested in a labor dispute from "ceasing or refusing to perform any work or to remain in any relation of employment").

does not constitute a secondary boycott.[5] Although the remedies sought for breach of contracts are traditionally damages or specific performance, union contracts seem to reserve the right of "self-help" by picketing or strike.[6] This reservation apparently rests on the seriousness of the contractual breach, the relative slowness of the courts in affording relief,[7] and the unsatisfactory character of injunctive relief.[8] By its decision in the principal case the court sanctioned "self-help" by denying both the injunction sought by the producer and the damages sought by the union in its cross complaint, thus putting the parties in their original positions.

An employer cannot complain of the strike and picketing which implement a labor dispute, except where the existence of a secondary boycott affords him relief.[9] Courts in Washington and other jurisdictions have attempted to distinguish kinds of secondary boycotts,[10] usually speaking in ambiguous terms of pressure and coercion against third parties.[11] While a primary boycott is one applied directly to the "offending" person,[12] a secondary boycott is said to exist where pressure is put upon the cus-

[5] Barnard and Graham, Labor and the Secondary Boycott, 15 Wash. L. Rev. 137, 146–47 (1940), and cases cited; Frankfurter and Greene, The Labor Injunction 44–45, 174, 39 (1930).

[6] See generally Christenson, Legally Enforceable Interests in American Labor Union Working Agreements, 9 Ind. L. J. 69 (1933); Witmer, Collective Labor Agreements in the Courts, 48 Yale L. J. 195 (1938); cf. Williams v. Quill, 277 N.Y. 1, 12 N.E. (2d) 547 (1938).

[7] Witmer, op. cit. supra note 6, at 210.

[8] A provision of the Washington statutes (Wash. Rev. Stat. Ann. (Remington, 1931) § 7612) providing for injunctive relief where it is necessary to prevent irreparable damage to property is modeled after Section 20 of the Clayton Act (38 Stat. 738 (1914), 29 U.S.C.A. § 52 (1927)), which was construed in Duplex Printing Press Co. v. Deering (254 U.S. 443 (1920)) not to prevent injunctions against stranger picketing. A later provision (Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–1) prevents issuance of injunctions where a labor dispute is involved, or where contrary to public policy, augmenting this by the provision (Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–7) for injunctions in case of irreparable damage as in the Clayton Act. But Section 7612–7 has been held unconstitutional (Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 411, 63 P. (2d) 397, 404 (1936); Chin On v. Culinary Workers' and Soft Drink Dispensers' Union, 195 Wash. 530, 81 P. (2d) 803 (1938)) while Section 7612–1 has been held to afford relief against stranger picketing where no labor dispute exists (Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 412, 63 P. (2d) 397, 404 (1936); Safeway Stores v. Retail Clerks' Union, 184 Wash. 322, 51 P. (2d) 372 (1935)).

Cf. Oakes, Organized Labor and Industrial Conflicts 949–72 (1927); Frankfurter and Greene, op. cit. supra note 5, at 173–75 (1930); Berman, Labor and the Sherman Act 220–24 (1930).

[9] Note 5 supra.

[10] United Union Brewing Co. v. Beck, 200 Wash. 474, 490, 93 P. (2d) 772, 779 (1939); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 446 (1920); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 50 (1927); cf. Oakes, op. cit. supra note 8, at 605, 651 (1929).

[11] Barnard and Graham, op. cit. supra note 5, at 141 (1940); Gray v. Building Trades Council, 91 Minn. 171, 97 N.W. 663 (1903); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Smythe Neon Sign Co. v. Local Union No. 405, 226 Iowa 191, 284 N.W. 126 (1939).

[12] Booker and Kinnaird v. Louisville Board of Fire Underwriters, 188 Ky. 771, 781, 224 S.W. 451, 455 (1920); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 460 (1920).

tomer or supplier in order to cause them to withhold patronage from or goods to the "offending" person.[13] In the principal case the court held there was no secondary boycott because there had been no harassing or threatening of customers, distinguishing two earlier Washington cases in which secondary boycotts had been found. In one a sympathetic strike had been called by the union to force the complaining company's customers into complying with union demands,[14] and in the other customers of the complaining company were picketed for handling the company's products.[15]

The producer's ability to trade freely is restricted when he signs a contract not to deal with one not in good standing with a union; in the present case, pressure by the union to sign the contract is indicated by the fact that the producer faced the loss of half of his business if the contract was fulfilled. The purpose of such an agreement is to give the producer's customer the alternative of unionizing or being deprived of business relations with the producer. Such pressure brought to bear upon a customer, even though indirect, would seem indicative of a secondary boycott, and the absence of harassment of or threats against the customer seems not to be a tenable distinction. In a recent New York case,[16] a lower court—although seeking to follow the liberal view of the Court of Appeals in *Goldfinger v. Feintuch*[17]—found a secondary boycott in a situation in which no contract was involved but pressure was put upon the customer through the producer.

If, however, the situation in the instant case is not to be called a secondary boycott, the fulfillment of a contract which creates the pressure on the customer might be considered unenforceable as against public policy.[18] The contract in the principal case, the validity of which was not questioned by the Washington court, is not unlike other trade agreements which have been viewed as restraints of trade and considered invalid.[19] The very purpose of the producer-union contract in the principal case was a restraint. Nor does the contract seem conceptually different from the "yellow dog" contract, in which an employee must agree with the employer as a condition of employment not to join or remain a member of a union. Following the National Labor Relations Act[20] in which the "yellow dog" contract was designated an unfair labor practice, Washington, like other states, enacted a statute declaring a "yellow dog" contract "contrary to public policy."[21] The contract in the principal case restricts the freedom of the employer, who

[13] Ellis v. Journeymen Barbers' Int'l Union, 194 Iowa 1179, 191 N.W. 111 (1922); cf. cases cited in note 11 supra.

[14] Pacific Typesetting Co. v. Int'l Typographical Union, 125 Wash. 273, 216 Pac. 358 (1923).

[15] United Union Brewing Co. v. Beck, 200 Wash. 474, 93 P. (2d) 772 (1939).

[16] Feldman v. Weiner, 173 Misc. 461, 446, 17 N.Y.S. (2d) 730, 734 (S. Ct. 1940).

[17] 276 N.Y. 281, 11 N.E. (2d) 910 (1937) noted in 5 Univ. Chi. L. Rev. 518 (1938). See 8 Univ. Chi. L. Rev. 356 (1941).

[18] 5 Williston, Contracts §§ 1629A–30 (rev. ed. 1937). Cf. People v. McFarlin, 43 Misc. 591, 89 N.Y. Supp. 527 (County Ct. 1904); Oakes, op. cit. supra note 8, at 226–29.

[19] 5 Williston, Contracts § 1633, p. 4576 (rev. ed. 1937) ("any bargain or contract which purports to limit in any way the right of either party to work or do business . . . . the manner in which it shall be done . . . . may be called a bargain or contract in restraint of trade"); Rest., Contracts §§ 513–15; Wash. Rev. Stat. Ann. (Remington, 1931) § 2382. See also Jaffe, Some Comments on the Price Discrimination Act, 10 U. of Cin. L. Rev. 402, 412 (1936).

[20] § 8(3), 49 Stat. 449 (1935), 29 U.S.C.A. § 158(3) (Supp. 1939).

[21] Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 7612–2 and 3.

is amenable to a closed shop in his own plant, to contract freely in pursuit of his business.[22]

The "unity of interest" theory developed by the New York courts to avoid the consequences of secondary boycotts by allowing the union to follow the non-union product and persuade the public not to purchase it,[23] may have application in the principal case. Although no non-union product was involved and the plant picketed supplied the non-union shop, it might be contended that the plaintiff manufacturer in the principal case is in "unity of interest" with the non-union Paddy Kake company so that the union may strike and picket the manufacturer, stopping the sale of union goods to a non-union shop, thereby causing Paddy Kake to unionize.[24] That the plaintiff had an economic benefit from the sale to the non-union shop is shown by the fact that the shop purchased fifty per cent of the plaintiff's output.

Labor Law—Picketing User of Non-Union Service—Unity of Interest—[New York]. —A company installed a burglar alarm system in a retail haberdashery, retaining title in and agreeing to maintain and service the system. In the course of a dispute over wages and hours between the company and a union representing its employees, the union picketed the haberdashery, carrying in a peaceful and orderly manner signs which read, "Maintenance of Burglar Alarm in this store unfair. . . . ." Upon complaint of the haberdasher, the pickets were prosecuted for disorderly conduct under Section 722 of the Penal Code of New York.[1] Upon appeal from convictions, *held*, there was "unity of interest" between the company and the store, thus making the picketing lawful. Judgments reversed. *People v. Muller*.[2]

The term "unity of interest" gained general currency when it was used to describe the economic relations between the manufacturer and the retailer in *Goldfinger v. Fein-*

[22] It should be noted that the plaintiff in the instant case went bankrupt before the final determination by the Washington Supreme Court. It is not shown what factors were instrumental in causing this insolvency. Brief for Appellant, at 57, Marvel Baking Co. v. Teamsters' Union Local No. 524, 105 P. (2d) 46 (Wash. 1940).

[23] Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910 (1937). See also Aeolian Co. v. Fischer, 29 F. (2d) 679 (C.C.A. 2d 1928); Duplex Printing Press Co. v. Deering 254 U.S. 443, 479 (1920); Thornhill v. Alabama, 310 U.S. 88 (1940); 8 Univ. Chi. L. Rev. 357 (1941).

[24] But cf. Feldman v. Weiner, 173 Misc. 461, 466, 17 N.Y.S. (2d) 730, 734 (S. Ct. 1940) ("the conclusion reached is that defendants' action amounts to a secondary boycott which does not come within the permissible legal exceptions noted in the Goldfinger case. . . . . To hold otherwise would be to hold that a union-shop manufacturer of garments, for example, could be picketed if any one of his many customers, wholesale or retail, did not have a union shop.").

[1] N.Y. Cons. Laws (McKinney, 1938) c. 40, § 722. This statute reads in part as follows: "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct . . . . 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others. . . . ."

[2] 174 Misc. 872, 21 N.Y.S. (2d) 1003 (N.Y. City Cts. 1940). The convictions below resulted in suspended sentences because the labor dispute had been settled. Permission to appeal to the Court of Appeals has been granted.