INDEX

AUTHORITIES CITED

CASES:

Page

STATUTES: Page

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, three Justices dissenting, is reported at 227 A.2d 874 (R. 101). The opinion of the Court of Common Pleas of Blair County, Pennsylvania, is unreported (R. 87-99).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 21, 1967 (R. 101, 106). An order was entered on June 6, 1967 by Mr. Justice William J. Brennan, Jr., extending the time for filing a petition for a writ of certiorari to August 18, 1967. The petition for a writ of certiorari, filed on August 10, 1967, was granted on October 23, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra,* p. 8, n. 4.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in the Appendix (*infra,* pp. 57-60).

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing at the premises of a store located within a shopping center informing the public that the store "is Non-Union, these employees are not receiving union wages or other union benefits." The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to ajudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the federal right to engage in "concerted activities for . . .

mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATEMENT

Logan Valley Mall is a shopping center (R. 87, 101). Owned by Logan Valley Plaza, Inc. (Logan), it is a newly-developed and sizeable commercial complex (R. 87, 86). Its perimeter spans about 5,740 feet or 1.1 miles (R. 86). It is situated in Logan Township, near the City of Altoona, Pennsylvania, at the intersection of two public highways known as Plank Road (U.S. Route 220) to the east and Good's Lane to the south (R. 87, 101). Plank Road is a heavily traveled highway, with cars moving at very good speed (R. 45, 50). Of the five entrances to the shopping center, three are located on Plank Road and two on Good's Lane (R. 86, 59-60, 49-50). The shopping center is separated from the highways by earthen berms, unbroken except for the five paved entrances providing ingress and egress between the highways and the center (R. 88). At entrances 1 and 2, the berm is 15 feet in width from the highway to the edge of the ditch; at entrances 3, 4, and 5, 12 feet in width; and the paved entrances are 20 feet in width (R. 35-37).

At the time of the events in this case, the shopping center was occupied by Weis Markets, Inc. (Weis) and Sears, Roebuck and Co. (Sears) (R. 88). Other occupants were of course expected (R. 88, 51, 59, 73, 101, 104).[1] Sears operates a department store

[1] We are informed that at present, in addition to Weis and Sears, the shopping center is occupied by the following 15 enterprises: Penney's, First National Bank, Ormand's Girl Shop, Murphy's 5 & 10, Mall Barber Shop, Thrift Drugs, Miller's Auto Supply, Kinney's Shoe Store, Father N Son Shoe Store, Seni's Hair Fashions, De Roy's Jeweler, Singer Sewing, Lester's Dress Shop, Schiff's Shoes, and Book and Record Shop.

and an automobile service station (R. 88, 101). Weis operates a supermarket engaged in selling food and sundry household articles (R. 88, 101). The business operations of Weis and other occupants of the shopping center affect interstate commerce and their labor relations are therefore governed by the National Labor Relations Act.[2]

The Weis property consists of an enclosed modern market building with an open but covered porch running north and south along its front and a pick-up zone directly along the porch for unloading purchased goods into customer's cars (R. 88, 101). The pick-up zone, 4-5 feet in width and 30-40 feet in length, is marked off with yellow lines (R. 55, 101, n. 2); it can accommodate three, possibly four, cars (R. 55). Between the supermarket area and the highway berms are extensive parking lots to the east and south of Weis; these

[2] The NLRB has often exercised jurisdiction over Weis. *Weis Markets*, 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708. Weis is "engaged in the sale of food and sundry household articles, employing approximately two thousand two hundred persons in its business, and having its principal place of business at . . . Sunbury, Pennsylvania" (R. 6). Its store at the shopping center, No. 40 (R. 20), is one of twenty-nine in its Northern Division (R. 38, 28). In the overall Weis "operates 52 retail food stores (12 in shopping centers) in 36 communities in Central Pa. within a 125-mile radius of Sunbury. All stores sell groceries, meats, bakery products, produce, dairy products, frozen foods and health and beauty aids, tobacco and certain other nonfood items"; its net sales in 1965 were $111,024,294 and its net income $4,659,103; it has 3,055,000 shares of common stock listed on the New York Stock Exchange. Standard & Poor's Corporation Records, T-Z, p. 2751 (1966). Weis also operates two stores in Maryland. *Weis Markets* v. *Retail Store Employees Union, Local No. 692*, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967). Sears is of course a national enterprise over which the NLRB regularly exercises jurisdiction (*e.g., Sears, Roebuck & Co.*, 151 NLRB 1356), as is J. C. Penney Co., identified as an occupant of the shopping center on the latter's plan (R. 86, 79; *e.g., J. C. Penney Co.*, 151 NLRB 53).

macadam lots have parking spaces and driveways distinctly lined off on the ground; these areas constitute a common parking lot for Weis and Sears customers, and eventually for other stores in the center as they open (R. 88, 101). There are also pedestrian ways (R. 86). The distance across the parking lots from the highway entrances to the Weis property is 350 feet at entrances 1 and 2, further from entrance 4, and 450-500 feet at entrance 5 (R. 34-35). Entrance 5 is the main entrance to the shopping center, and the most heavily used (R. 39, 60). Except for entrance 3, used primarily for access to the Sears automobile service station (R. 63-64, 40), all entrances are used by customers shopping at both Weis and Sears, and eventually other stores (R. 39-41, 50, 63-64).

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees (R. 89). Beginning on December 17, 1965, small groups of men and women picketed the Weis store within the shopping center wearing placards reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits. Amalgamated Food Employees Union Local 590" (R. 89, 29, 102, n. 3). They walked back and forth in front of the Weis supermarket, primarily at the pick-up zone adjacent to the covered porch (R. 89). The average number of pickets was variously estimated at 5, 6, or 7 (R. 39, 61-62). All were members of petitioner Union (R. 66). They were employed by A & P, Quaker, and Acme, neighboring stores, and volunteered to picket at Weis on their own time (R. 66-68, 73-74, 102, n. 3). They were not and never had been employees of Weis (R. 92, 106). The picketing was peaceful and unaccompanied by either oral threats or actual violence (R. 90, 101, 102, 106).

A few days after it opened for business on December 8, Weis posted a sign between its entrance and exit doors reading, "No trespassing or soliciting is allowed on Weis Market porch or parking lot by any one except Weis employees without the consent of the management" (R. 33-34, 105). On December 20, Weis' Assistant General Superintendent approached the individual he thought was in charge of the arriving pickets (R. 32). After ascertaining that they intended to picket, the superintendent stated, "Do you know you are picketing on private property? . . . [T]his property belongs to Weis Markets. . . . [The Weis property ends] Out along the highway right at the edge of the macadam. . . . If you want to picket do your picketing out there" (R. 33).

On December 27, 1965, at the instance of Weis and Logan, the Court of Commons Pleas of Blair County issued an *ex parte* injunction prohibiting all picketing within the shopping center, and in consequence limiting the picketing to the highway berms (R. 6-21, 98, 102, n. 4). The order enjoined the Union and its members *inter alia* from (R. 20):

> (a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area.
>
> (b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exists leading to said parking area.

After the *ex parte* injunction issued, picketing was conducted on the highway berms at the entrances to

the shopping center, two pickets at entrance 5, two at entrance 4, and one or two at entrances 1 and 2 (R. 62). Entrance 3 primarily served the Sears automobile service station, and when that fact was ascertained, picketing at that entrance was discontinued (R. 64). When picketing at the highway entrances began, leaflet distribution at these points was also commenced (R. 58-59). The handbills read: "We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market". . . . "Please Patronize Union Markets! A & P—Quaker—Acme". . . . "We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets" (R. 89, 102, n. 3).

On January 4, 1966, the Union moved to dissolve the *ex parte* injunction (R. 22-26). It urged that (1) "the activity here complained of amounts to nothing more than peaceful, informational picketing by Union Members for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc., at said store . . ." (R. 22-23); (2) "the area whereon the defendant was conducting a peaceful and lawful picketing in a shopping center, pedestrian and parking area and as such, constitutes quasi-public property even though privately owned" (R. 24); (3) "picketing [at the highway entrances] indirectly affects other tenants of the Logan Valley Plaza, Inc. Shopping Center which in no way is desired by the defendant" (R. 25); and (4) "by reason of the Labor Management Relations Act, 29 USCA §§ 141 et seq., your Honorable Court is without jurisdiction in this labor dispute whatsoever . . ." (R. 26).

After an evidentiary hearing the Court of Common Pleas ruled against the Union (R. 87-100). It held

that the picketing "constitutes a trespass on the Mall premises and is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union" (R. 99).[3] It decided that the pickets were not within the class to whom the shopping center had been opened; "Such a commercial premises may properly be classified as quasi-public only for the use of lessees, employees and business invitees, and those not falling within either group are not upon the premises for the purposes for which the enterprise was constructed and intended" (R. 95-96). It therefore rejected the Union's argument that "a shopping center constitutes quasi-public property and, therefore, picketing on the Mall premises is not a trespass, but merely a lawful exercise of the constitutional right of free speech" (R. 91). It did not address itself to the Union's claim that paramount federal law "has removed this type of labor dispute from the sphere of state action and thereby precludes your Honorable Court from entering any decree whatsoever in this matter" (R. 26). Accordingly, the Court of Common Pleas entered an order "making permanent the injunction as previously decreed" (R. 98).[4]

---

[3] Based on the finding that the picketing was in part designed to coerce union membership, the conduct is clearly within the area preempted by the NLRB. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542. However, in affirming the *nisi prius* judgment, the Pennsylvania Supreme Court disclaimed reliance on this finding (R. 106).

[4] As described by the Court of Common Pleas, the *ex parte* injunction it had entered was a preliminary injunction (R. 90), and it made that preliminary injunction permanent after an evidentiary hearing (R. 98), in accordance with the prayer of the complaint that the "Court enter a decree preliminarily until hearing and thereafter perpetually enjoining the Defendants . . ." (R. 12). The decree entered by the Court of Common Pleas con-

On appeal, three Justices dissenting, the Supreme Court of Pennsylvania affirmed the *nisi prius* decree (R. 101-106). The court began with the premise that the picketing was "concedely peaceful in nature" (R. 101). Its companion premise was that "the Commonwealth has not only the power but the duty to preserve the property of its citizens from invasion by way of tresspass . . ." (R. 104). It therefore turned the va-

---

tinued the injunction in effect "until further adjudication of this case or until further order of this Court . . ." (R. 100). This explicit retention of jurisdiction to vacate or modify an injunction operating *in futuro* is familiar equity procedure (*System Federation* v. *Wright*, 364 U.S. 642; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 298; *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94, 103), and does not detract from the finality of the decree (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307, n. 4; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24; *cf., Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70, n. 3). Furthermore, treating the *nisi prius* decree as a preliminary injunction, the judgment is nevertheless final. First, requisite finality exists because the judgment constitutes "a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state is preempted by federal law and by the exclusive power of the National Labor Relations Board . . . ." *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 552, 543-550. Second, apart from preemption, there is in any event "nothing more of substance to be decided in the trial court," and the judgment is therefore final for this independent reason. *Id.* at 550-551. The federal questions "have reached a definitive stop" (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71); as the case comes here, "the federal question is the controlling question; 'there is nothing more to be decided' " (*Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382). See also, *Mills* v. *Alabama*, 384 U.S. 214, 217-218. Lastly, well-founded acquistion of jurisdiction on any ground empowers a court to decide the entirety of the controversy. *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 629. Upon any hypothesis, therefore, the judgment below is final within the meaning of 28 U.S.C. § 1257, and this Court has jurisdiction to decide the federal questions presented.

lidity of the peaceful picketing upon the question whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property" (R. 104). It answered that question by its determination that the shopping center had been opened "only to those members of the public who would . . . possibly contribute to the financial success of the venture" (R. 105); the "invitation to the public . . . was limited to those who might benefit Weis' and Logans' enterprises, including potential customers as well as the employees of the shopping center concerns" (R. 105). Since the pickets "certainly were not within the orbit of the class of persons entitled to the use of the property" (R. 105), the picketing, "even though . . . of a peaceful nature, . . . constituted trespass which very properly was restrained" (R. 106). The court fortified this conclusion with its observation that "the pickets were not and never had been employees of Weis" (R. 106). Based on its determination that the picketing was enjoinable as trespass, the court below deemed "it unnecessary to determine whether the instant picketing was for an unlawful purpose" (R. 106), thereby disclaiming the companion ground invoked by the Court of Common Pleas that the picketing was "designed, at least in part, to pressure Weis . . . to compel its employees to join a union" (R. 99). The Pennsylvania Supreme Court did not address itself to the question of federal preemption.

Three Justices dissented (R. 106), Mr, Justice Cohen writing a dissenting opinion (R. 107-111). Citing this Court's opinion in *A.F.L.* v. *Swing,* 312 U.S. 321, the dissent observed that " 'stranger picketing' is . . . constitutionally protected" (R. 107). Citing this Court's opinion in *Marsh* v. *Alabama,* 326 U.S. 501,

the dissent reasoned by analogy that, as the shopping center "was open to the public in general and, though privately owned, served a public function, private management could not curtail precious constitutional liberties" (R. 107-108). Trespass aside, the dissent continued, "there arises the question of federal preemption" (R. 111). The dissent emphasized that "federal decisions stress the high degree of freedom allowed union activity on the property of the employer" (R. 111). Furthermore, apart from the protected character of peaceful picketing, "restricting picketing to the berm areas at the entrances and exits . . . has overtones of a secondary boycott", for it risks "unlawful and harmful effects . . . to neutral employers . . ." (R. 111). The dissent regretted the failure of the majority opinion to face the "inescapable conflicts" with paramount federal law (*ibid.*).

SUMMARY OF ARGUMENT

I

Prohibition of peaceful picketing within a shopping center as a trespass abridges freedom of speech guaranteed by the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution. The pickets in this case carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" (*supra,* p. 5). Communication of this message by peaceful picketing is the dissemination of information concerning the facts of a labor dispute which must be regarded as within that area of free discussion guaranteed by the Constitution.

The court below nevertheless affirms the prohibition of this picketing upon the primary if not sole ground

that the pickets had "no right or authority whatsoever to utilize the private property" of the shopping center, and therefore peaceful picketing within it "constituted trespass which very properly was restrained" (R. 106). Peaceful picketing within a shopping center cannot be prohibited on this basis. The property is private but the use is public. It is a complex of streets, sidewalks, parking lots, and stores open to the customer and the would-be customer, the employee and the would-be employee, the deliveryman and the salesman, the garbage collecter and the postman, and all the rest of the community that makes the center function. The shopping center is a market place whose very being inheres in its openness to the public.

But the court below holds that, unlike other members of the public, the picket with a labor message has not been invited to enter and therefore his unconsented presence is a prohibited trespass. And so it creates a special privilege insulating the businesses within the center from peaceful picketing in front of the premises of the individual store. This special privilege relates solely to the abutment of the store on a street privately owned, for a store facing a street publicly owned must bear peaceful picketing at its premises and endure the impact of the message which its disfavored labor policy evokes. Yet no interest relevant to restricting freedom of expression enters by way of the private rather than the public title to the open property on which the picket walks. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama,* 326 U.S. 501, 505-506. The

shopping center takes the community in its entirety or not at all.

The court below secondarily suggests that the injunction is supportable because in this case "the pickets were not and never had been employees of Weis" (R. 106). This hoary ground has been squarely repudiated by this Court in *American Federation of Labor* v. *Swing,* 312 U.S. 321. "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." *Id.* at 326.

Nor is the prohibition of peaceful picketing in front of the store's premises supportable on the ground that the picketing can be conducted at the distant highway entrances to the shopping center. The vicinity of the store is the natural and effective place to communicate the picket's message pertaining to that store and its labor policy. Liberty of expression in an appropriate place cannot be abridged on the plea that it may be exercised elsewhere. This is especially so because shopping centers are numerous and growing, and access to the businesses located within them is essential if the workers' side of a controversy is to receive a fair airing.

The ingredients in peaceful picketing which differentiate it from pure speech do not justify suppression of its message at the natural and effective place of its dissemination in the name of naked title to property or the nonemployee status of the pickets. Neither property ownership *per se* nor the absence of a proximate

employer-employee relationship expresses *valid* state substantive policy, and therefore the ban of picketing cannot be supported on the ground that its suppression is essential to effectuation of a proper substantive governmental interest. Since the ban cannot be related to a substantive evil, it must rest on the nonverbal elements inherent in peaceful picketing standing alone. But that cannot be a proper basis for prohibiting peaceful picketing, for this characteristic of picketing would justify its ban at any time, in any place, for any reason. Yet recognition that peaceful picketing is more than speech does not mean that it is not speech at all. And as speech it is not subject to blanket suppression.

If peaceful picketing within a shopping center may be prohibited, so may leaflet distribution. For the handbill distributor, no less than the peaceful picket, is on the hypothesis of the court below a nonemployee trespasser. Yet the prohibition of leaflet distribution cannot possibly be justified by reliance upon nonverbal elements in the means of communication, for handbilling involves no patrol and evokes no responses other than those which flow from the content of the appeal itself. Since uninvited entry by nonemployees is the basis of the decision below, and that covers persons engaged in pure speech as well as admixed communication, the sole criterion for prohibition is the identity of the speaker and the message he delivers, not the mode of his address. The First Amendment does not tolerate that suppression of the freedom to communicate.

II

Constitutionality aside, peaceful picketing in a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the

field preempted by the National Labor Relations Board whether or not conducted inside a shopping center.

1. Peaceful picketing publicizing a lawful position is a preeminent expression of the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection" safeguarded by section 7 of the National Labor Relations Act. A state court therefore enters the preempted domain of the National Labor Relations Board insofar as it enjoins peaceful picketing. The circumstance that peaceful picketing is conducted within a shopping center does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution is part of its routine business. The claim that peaceful picketing may be prohibited within a shopping center because the property is private although the use is public poses the precise kind of question that the NLRB has been commissioned to decide.

2. Prohibition of peaceful picketing within the shopping center on the ground that "the pickets were not and never have been employees of Weis" (R. 106) conflicts fundamentally with the federal scheme. In defining an "employee," section 2(3) of the NLRA provides that the term "shall not be limited to the employees of a particular employer," and in defining a "labor dispute," section 2(9) of the NLRA provides that a labor-affected controversy exists "regardless of whether the disputants stand in the proximate relationship of employer and employee." The retrogressive confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated.

When Congress in 1959 addressed itself with particularity to so-called stranger picketing, it acted with discriminate care to accommodate competing interests. Section 8(b)(7) of the NLRA, added in 1959, regulates organizational and recognition picketing. Congress did not prohibit such picketing but determined instead when and how it may be conducted. Thus, even when picketing has organization or recognition as "an object," there is with certain qualifications no prohibition of "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." And picketing is not within the prohibitable scope of section 8(b)(7) at all if it is construed as a protest against substandard employment terms, undermining prevailing area standards, unrelated to the attainment of an immediate organizational or recognition object.

It is thus apparent that to say in this case that "the pickets were not and never have been employees of Weis" is by itself not even relevant to determining the permissibility of the picketing in which they engaged. That picketing may be altogether within the protected domain; it may be subject to limited restraint; and it can be reached only in accordance with the standards and pursuant to the means prescribed by the Act.

3. The court below requires that peaceful picketing aimed at the disfavored store inside the shopping center be conducted at the distant highway entrances to the center (R. 102, n. 4). This divorcement of the picketing from the immediate locale of the store conflicts with the accommodation that Congress has made between protected primary activity and prohibited secondary

pressure. The result of relegating the picketing to entrances serving the entirety of the shopping center is that, despite punctilious efforts at the removed locations to confine the message to the disfavored store, customers may be dissuaded from buying and employees from working at *other* establishments inside the center because of unwitting belief that the shopping center as a whole is the object of protest, thereby unnecessarily drawing others into a controversy not their own. The picketing union, on the other hand, is not only ousted from the natural and effective place of picketing; it is also subjected to the risk that its conduct will be found to be secondary because of the entanglement of others and the unintentional failure to confine the message as nearly as possible to the disfavored store. The court below thus artificially creates a secondary situation in conflict with the adjustment that the federal scheme contemplates.

4. The elements of the controversy thus place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245. Heedless of this principle, the court below "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139.

III

But even if the court below is empowered to adjudicate the controversy, its decision conflicts with

federally protected rights and therefore cannot stand. Peaceful picketing at the premises of a disfavored employer informing the public that the employer is "Non-Union" and "these employees are not receiving union wages or union benefits" is concerted activity for mutual aid or protection. It does not lose its protected status because it is conducted on private property open to the public. Prohibition of the picketing on the ground that the participants in it are not employees of the disfavored employer repudiates Congress' premise that protected concerted activity extends beyond an employer and his employees. And relegation of the picketing to distant entrances shared by others results in the twin evils of destroying the right to picket at the primary employer's premises and of exposing neutral employers to picketing in a controversy not their own. Accordingly, in prohibiting peaceful picketing safeguarded by the NLRA, Pennsylvania by the common law formulated and enforced by its judiciary forbids the exercise of protected rights, and it goes without saying that state law cannot supersede federal law.

ARGUMENT

I. PROHIBITION OF PEACEFUL PICKETING WITHIN A SHOPPING CENTER AS A TRESPASS ABRIDGES FREEDOM OF SPEECH.

Prohibition of peaceful picketing within a shopping center as a trespass abridges freedom of speech guaranteed by the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution. The pickets in this case carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" (*supra,* p. 5). Communication of this message by

picketing is "the dissemination of information concerning the facts of a labor dispute [which] must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *Alabama,* 310 U.S. 88, 102.[5] "Peaceful picketing is the workingman's means of communication" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 293); it is therefore "in part an exercise of the right of free speech guaranteed by the Federal Constitution" (*Building Service Union* v. *Gazzam,* 339 U.S. 532, 536-537).

The court below nevertheless affirms the prohibition of this picketing upon the primary if not sole ground that the pickets had "no right or authority whatsoever to utilize the private property" of the shopping center, and therefore peaceful picketing within it "constituted trespass which very properly was restrained" (R. 106). Peaceful picketing within a shopping center cannot be prohibited on this basis. The property is private but the use is public. A shopping center is a multi-store complex on a large tract of land with access from public ways to a parking area for motor traffic and to sidewalks fronting on the stores for walking. It is open to the customer and the window shopper, to the employees working within the stores and to the employees delivering to the stores, to applicants for employment seeking work at the stores and to salesmen seeking to sell their wares to the stores, to the garbage collector and the postman, and to all the rest of the community that makes the center function. A motorist needs no pass to drive into the center and a pedestrian no leave to walk its streets. The shopping center is a

---

[5] See also, *Chauffeurs Local Union 795* v. *Newell,* 356 U.S. 341.

market place whose very being inheres in its openness to the public.

But the court below holds that, unlike the other members of the public, the picket with a labor message has not been invited to enter and therefore his unconsented presence is a prohibited trespass. And so it creates a sheltered enclave insulating the businesses within the center from peaceful picketing in front of the premises of the individual store. This special privilege relates solely to the abutment of the store on a street privately owned. A store facing a street owned by the township must bear peaceful picketing at its premises and endure the impact of the message which its disfavored labor policy evokes. Only a store facing a street owned by a private holder is given immunity from peaceful picketing conveying the identical message. Yet no interest relevant to restricting freedom of expression enters by way of the private rather than the public title to the open property on which the picket walks.

A shopping center open to that part of the public which benefits it economically cannot be closed to that part of the public seeking to disseminate an adverse message flowing from the disfavored manner in which a business inside the center operates. The shopping center takes the community in its entirety or not at all. Entry into a "business block" used as a "regular shopping center" in "a company-owned town", this Court held, could not be shut to the distribution of religious literature on the ground that "the title to the property belongs to a private corporation." *Marsh* v. *Alabama,* 326 U.S. 501, 502-503. "We do not agree," this Court explained, "that the corporation's property interests settle the question. . . . Ownership does not always

mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 505-506. A facility open to the public, "though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence." Mr. Justice Douglas concurring in *Lombard* v. *United States,* 373 U.S. 267, 275. "Fundamentally, the property involved is not 'private' any more. That is why the competing interest of freedom of speech must be served." *Maryland* v. *Williams,* 44 LRRM 2357, 2362 (Md. Crim Ct. June 10, 1959). When the consumer is invited to buy and the employee hired to work inside the shopping center, the state cannot by injunction bar the worker from informing them by peaceful picketing within the center in front of the store that the place is "Non-Union" and that "these employees are not receiving union wages or other union benefits."

Land ownership by a private holder is as irrelevant as land ownership by a governmental entity when the question is the exercise of free speech on property opened to public entry. This Court has rejected the view that a municipality is empowered blanketly to suppress the expression of First Amendment rights on public grounds because "the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof. . . ." *Hague* v. *C.I.O.,* 307 U.S. 496, 514. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communi-

cating thoughts between citizens, and discussing public questions." *Id.* at 515. When the issue is freedom of speech on grounds otherwise open to the public, it can make no difference whether title to the property is in a municipality or a private holder. Property interest *per se* is in either case equally insubstantial as a basis for a state court injunction prohibiting the expression of First Amendment rights. "Where constitutional rights are involved, the proprietary interests of individuals must give way." Mr. Justice Douglas concurring in *Garner* v. *Louisiana,* 368 U.S. 157, 181.[6]

---

[6] By an equal 4-4 division the Michigan Supreme Court affirmed an order enjoining a shopping center owner from interfering with handbilling within the center, one branch of the court observing that a shopping center "is simply a modern market place", no different from "the historic public markets of earlier days", and the "public outdoor walkways and malls are equally as public during business hours regardless of whether the fee rests with a public or private freeholder." *Amalgamated Clothing Workers* v. *Wonderland Shopping Center,* 370 Mich. 547, 122 N.W. 2d 785, 796-797. As the Wisconsin Supreme Court ruled, where "the property involved is a multi-store shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing." *Moreland Corp.* v. *Retail Store Employees Union Local No. 444,* 16 Wis. 2d 499, 114 N.W. 2d 876, 879. The core of the idea was succinctly expressed in *Weis Markets* v. *Retail Store Employees Union, Local No. 692,* 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967), involving the very respondent-employer in this case in its operation of a store at Hagerstown, Maryland, the court observing that (*id.* at 2167):

> The Court finds there was no trespass. A modern shopping center has characteristics differentiating it from private property. A shopping center, inviting the public to come patronize it, takes on the nature of a quasi-public place. The owner's rights becomes secondary to broad use by the

The court below secondarily suggests that the injunction is supportable because in this case "the pickets were not and never had been employees of Weis" (R. 106). This hoary ground has been squarely repudiated by this Court in *American Federation of Labor* v. *Swing,* 312 U.S. 321. This Court answered yes to the question whether "the constitutional guaranty of freedom of discussion [is] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute" (*id.* at 323). "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.

---

public, which includes the right of a labor union to engage in peaceful picketing.

Respondents' reliance on *Adderley* v. *Florida,* 385 U.S. 39, to support the decision below is of course misplaced. In distinguishing *Edwards* v. *South Carolina,* 372 U.S. 229, this Court exposed the fallacy of the position that respondents espouse. "In *Edwards,* the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds *are open to the public.* Jails, built for security purposes, *are not.*" *Id.* at 41, emphasis supplied. So here, shopping centers "are open to the public," and nothing in the denial of access to nonpublic property, whether privately or governmentally owned, can justify debarment from property open to the public and concomitant suppression of the exercise of First Amendment rights in that public place.

Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's Case.*" *Id.* at 326. Paramount federal labor policy is built on the premise that labor activity is not rightfully confined to disputants standing in the proximate relationship of employer and employee (*infra,* p. 37). In stating that workers who are not employed by the enterprise are trespassers when they picket inside the shopping center, in implied contrast to workers hired by the enterprise who are not deemed trespassers when they stop work and stay to picket, the court below is regulating labor relations in the guise of determining property interests.

Nor is the prohibition of peaceful picketing in front of the store's premises supportable on the ground that the picketing can be conducted at the distant highway entrances to the shopping center. The vicinity of the store is the natural and effective place to communicate the picket's message pertaining to that store and its labor policy. It does not justify denial of communication at that place because picketing can be conducted "at other, admittedly less advantageous, locations off plaintiff's premises." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 923, cert. denied, 380 U.S. 906. ". . . [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *Irvington,* 308 U.S. 147, 163. "First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." Mr. Justice

Black concurring in *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 80. Furthermore, picketing at distant places, with the concomitant difficulty of confining the message and the response to the store at which it is directed, risks enveloping others to their detriment in a controversy in which they are unconcerned (*infra* pp. 42-49).

Prohibition of peaceful picketing within a shopping center as a trespass would ban "the workingman's means of communication"[7] in a large and growing area in which retail and service enterprises do business. "The suburban movement in America has been accompanied by a revival of the all-purpose market, recast in the form of the shopping center, a planned arrangement of individual retail units on a single large tract."[8] "By the end of 1966, there will be between 10,000 and 11,000 shopping centers in the United States and Canada, and these shopping centers will account for almost $79 billion in annual sales—or approximately 37 percent of the total retail sales in the United States and Canada. From 1964 through 1966 shopping centers enjoyed an annual increase of more than 2 percent per year in the share of total retail sales. If that growth rate continues through 1970, shopping centers will then account for more than 45 percent of the total retail sales. By the end 1966, more than $25 billion will have been invested in the United States and Canada. An obscure but perhaps interesting figure is that these shopping centers at the end of this year

---

[7] *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 293.

[8] Note, *Shopping Centers and Labor Relations Law,* 10 Stan. L. Rev. 694 (1958).

will provide almost 12 million parking spaces for cars."[9] The importance of peaceful picketing at the scene of the dispute within the shopping center is therefore self-evident. In order that the workers' side of the controversy receive a fair airing it is essential that access to the shopping center be open.[10]

As the entire justification for the prohibition of picketing, respondents repeatedly incant the slogan "picketing is more than speech" (Br. in Opp. pp. 20-22). The expression of First Amendment rights can-

---

[9] Keller, *Publicity Picketing and Shopping Centers,* 111, 112, *Labor Law Developments 1967,* 13th Ann. Inst. Labor Law, Southwestern Legal Found. (1967). The source of these statistics is Kaylin, *A Profile of the Shopping Center Industry,* Chain Store Age, May 1966.

[10] "Suburbs pose new organizing problems as unions expand drives. Just entering suburban shopping centers, where the owner controls accesses and parking lots, can be tough for organizers of the Retail Clerks Union and the Hotel and Restaurant Employees Union. The clerks have won several 'trespass cases' in state courts, but, says a spokesman, it's tough 'hedgerow fighting.'" Wall Street *Journal,* June 13, 1967, p. 1, col. 5. In addition to cases cited elsewhere in this brief, for other reported instances of attempted or successful debarment from a shopping center, see *Blue Ridge Shopping Center* v. *Schleininger,* 65 LRRM 2911 (Mo., July 10, 1967); *Nahas* v. *Local 905, Retail Clerks,* 144 Cal. App. 2d 808, 301 P. 2d 932, 302 P. 2d 829; *New Jersey* v. *Green,* 56 LRRM 2661 (J.J. Cty. Ct., April 29, 1964). Reported cases are merely the visible cap of the iceberg, for there are many unreported *nisi prius* determinations, as exemplified by the references in the opinion of the Court of Common Pleas in this case to numerous unreported Pennsylvania decisions (R. 91, 92), and many police actions which never reach court. The instant case is entirely typical of the generality of shopping center cases. The common pattern is that nonemployees picket or handbill the premises of a store within a shopping center communicating the store's disfavored labor policy.

not be silenced so simplistically. The ingredients in peaceful picketing which differentiate it from pure speech do not justify suppression of its message at the natural and effective place of its dissemination in the name of naked title to property or the nonemployee status of the pickets. Neither property ownership *per se* nor the absence of a proximate employer-employee relationship supports a valid governmental interest sufficient to prohibit peaceful picketing. Its ban is therefore not sustainable as a necessary step to realization of a "*valid* state policy in a domain open to state regulation." *International Brotherhood of Teamsters* v. *Vogt,* 354 U.S. 284, 291 (emphasis supplied). While petitioners have "amply shown" that their "activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner[s]' activities, which can justify the broad prohibitions which it has imposed." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 444; *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, 7-8. See also, *United Mine Workers of America, District 12* v. *Illinois State Bar Assn.,* No. 33, October Term, 1967, sl. op. p. 5, decided December 5, 1967.

Justification of the ban must accordingly rest, not upon the need to effectuate a valid substantive governmental object with which peaceful picketing is incompatible, but merely on the nonverbal elements inherent in peaceful picketing standing alone. But if the nonverbal elements of peaceful picketing were alone a sufficient basis for its prohibition, it could be banned at any time, in any place, for any reason. Yet it goes without saying that "the mere fact that there is 'pick-

eting' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing." *International Brotherhood of Teamsters* v. *Vogt,* 354 U.S. 284, 294-295. Since no substantive evil exists to support the ban of picketing, all that is left to justify its prohibition would be the manner in which it was conducted. In this case, however, both courts below were emphatic that the picketing was peaceful (R. 90, 101, 102, 106). If it were not, a curb of its excesses would be justified, not its prohibition.

In short, to say that picketing is more than speech is not to say that it is not speech at all. As speech it is constitutionally protected. The message it imparts cannot be suppressed simply on the ground that as a means of communication peaceful picketing entwines verbal and nonverbal elements. "This Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, . . . to mere verbal expression." Mr. Justice Harlan concurring in *Garner* v. *Louisiana,* 368 U.S. 157, 201.

The fallacy of the respondents' argument is revealed by the fact that, were the State's justification for prohibiting peaceful picketing within a shopping center valid, it would be quite as valid as a justification for prohibiting the distribution of handbills within the center. For the handbill distributor, no less than the peaceful picket, is on the hypothesis of the court below a nonemployee trespasser. His entry into the center is equally uninvited whether he comes to broadcast leaflets or carry a placard, and his purpose in either case is to publicize the nonunion status of the disfavored store to

its economic disadvantage. Indeed, in this case, the Court of Common Pleas was ready to enjoin the distribution of handbills. It desisted with the observation that "not being specifically requested directly to restrict defendant union in the use of handbills we will refrain from so doing" (R. 98). And, but for this implied limitation on the reach of the injunction, it would extend to leaflet distribution. It is not in terms restricted to picketing, but bans any unconsented entry, for it prohibits "Picketing *and trespassing* upon the private property" of the shopping center (R. 20, emphasis supplied).

Yet the prohibition of leaflet distribution, which the rationale of the court below reaches as fully as peaceful picketing, cannot possibly be justified by reliance upon nonverbal elements in the means of communication. Handbilling involves no patrol and evokes no responses other than those which flow from the content of the appeal itself. *Hughes* v. *Superior Court,* 339 U.S. 460, 464-465 (distinguishing newspaper publication and "distribution of circulars" from picketing). The nonverbal elements of picketing are therefore irrelevant to the rationale adopted to support its suppression in this case. Uninvited entry by nonemployees is the basis of the decision below, and that covers persons engaged in pure speech as well as in admixed communication. The sole criterion is the identity of the speaker and the message he delivers, not the mode of his address. The First Amendment does not tolerate that suppression of the freedom to communicate.

The nub of the matter was laid bare by the California Supreme Court in upholding the right of peaceful picketing inside a shopping center at the premises

of the disfavored store. "The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 926, cert. denied, 380 U.S. 906. The First Amendment is on the side of free speech, and its preferred place cannot be subordinated to a naked property interest and a discredited constriction of the bounds of a labor dispute.

II. PEACEFUL PICKETING IN A LABOR DISPUTE IS WITHIN THE EXCLUSIVE REGULATORY SCOPE OF THE NATIONAL LABOR RELATIONS ACT AND THEREFORE WITHIN THE FIELD PREEMPTED BY THE NATIONAL LABOR RELATIONS BOARD WHETHER OR NOT CONDUCTED INSIDE A SHOPPING CENTER.

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the National Labor Relations Board. We shall show that (1) the NLRB has exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing, and it is not divested of its sole jurisdiction because the picketing is conducted on the private but open property of a shopping center, (2) the confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated; Congress has legislated a comprehensive code governing organiza-

tional and recognition picketing; and in the congressional scheme regulating peaceful stranger picketing with particularity, the non-employee status of the pickets is irrelevant, (3) the relegation of peaceful picketing to the distant highway entrances serving all establishments within the shopping center, and the concomitant divorcement of the picketing from the immediate locale of the disfavored store, upsets the congressional reconciliation of protected primary picketing and prohibited secondary pressure, and (4) considered in its ramified entirety, therefore, peaceful picketing within a shopping center is an activity within the exclusive scope of the NLRA committed to the sole jurisdiction of the NLRB.

A. A State Court Enters the Preempted Domain of the NLRB Insofar as It Enjoins Peaceful Picketing, and the Circumstance That the Picketing Is Conducted Within a Shopping Center Does Not Empower the State Court To Act.

Section 7 of the National Labor Relations Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, 498-499. Similarly, in regulating organiza-

tional and recognition picketing, Congress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters,* 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63.

It is therefore clear that a state court enters "the pre-empted domain of the National Labor Relations Board insofar as it enjoin[s] . . . peaceful picketing. . . ." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted within a shopping center does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution " 'belongs to the usual administrative routine' of the Board." [11] In a variety of contexts private property has been required to yield

---

[11] *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 130.

to the statutory guaranty of protected concert.[12] "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[13]

Commitment of the question to initial determination by the NLRB is illustrated by that agency's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use"

---

[12] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2).

[13] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951. See also, *N.L.R.B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26, 29-30 (C.A. 2), enforcing as modified, 156 NLRB 233, 247-265.

(98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the shopping center situation to the standard expressed by this Court in *N. L. R. B.* v. *Babcock & Wilcox,* 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike a shopping center, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the shopping center is crucial. To prohibit peaceful picketing on otherwise open property is to hold that a "theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924).

The *Babcock & Wilcox* standard supports no such result.[14]

Furthermore, banning peaceful picketing on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry into the shopping center of every element of the public except that part of the community with a labor message directed at and adverse to a store within the center is invidious. The court below justifies this discriminatory debarment on the explicit ground that the invitation to enter extends "only to those members of the public who would be potential customers and possibly would contribute to the financial success of the venture" (R. 105). Conversely, therefore, it excludes other members of the public who by peaceful picketing "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute" (*Thornhill* v. *Alabama,* 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from

---

[14] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston,* Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[15]

Debarment from the shopping center offends the principle central to realization of the rights conferred by the NLRA. The premise of the statute is that the means and media of communication must be kept free and open. As stated in the Senate Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

It is the function of the NLRB to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.*, 8 NLRB 25, 32.

---

[15] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226. " 'It is not every interference with property rights that is within the Fifth Amendment . . . .' " *Id.* at 232; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 802, n. 8. In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499).

The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing simply because the picketing is conducted on the private but open property of a shopping center. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of private property. Peaceful picketing inside a shopping center is no exception.

B. The Confinement of a Labor Dispute to an Employer and His Employees Adopts a Standard That Congress Has Repudiated, and the Nonemployee Status of the Pickets Is Irrelevant in the Scheme Congress Adopted To Regulate Peaceful Stranger Picketing.

The secondary reason by which the court below justifies the prohibition of peaceful picketing—that "the pickets were not and never have been employees of Weis" (R. 106)—likewise conflicts fundamentally with the federal scheme. Section 2(3) of the National Labor Relations Act states that the term "employee" "shall not be limited to the employees of a particular employer," and section 2(9) of the Act defines a "labor dispute" to mean any labor-affected controversy "regardless of whether the disputants stand in the proximate relation of employer and employee." "The broad definition of 'employee' . . . as well as the definition of 'labor dispute' . . . expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.'" *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U.S. 177, 192. The retrogressive confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated.

When Congress in 1959 addressed itself with particularity to so-called stranger picketing, it acted with discriminate care to accommodate competing interests. Section 8(b)(7) of the Act, added in 1959, regulates organizational and recognition picketing. Congress did not prohibit such picketing but determined instead how and when it may be conducted. The picketing in this case informed the public that the disfavored store was "Non-Union" and "these employees are not receiving union wages or other union benefits" (*supra,* p. 5). This picketing is arguably either within or outside the scope of section 8(b)(7)(C). It might be construed as picketing to cause acceptance or selection of the picketing union by the store employees as their representative. In that event the picketing becomes an unfair labor practice where it has been conducted without a representation petition "being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ." If a timely petition is filed an expedited election is conducted to determine whether or not the union is the employees' majority choice as their representative. But picketing will not be prohibited despite the failure to file a representation petition, and an expedited election will not be conducted even if a petition is timely filed, if the picketing falls within the scope of the final proviso to (C):

> Nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by another person in the course of his employment,

not to pick up, deliver or transport any goods or not to perform any services.

Furthermore, the picketing in this case would not be within the prohibitable scope of section 8(b)(7) at all if it is construed as a protest against substandard employment terms, undermining the prevailing area standards, unrelated to the attainment of an immediate organizational or recognition object.[16] A union's objective to require an employer "to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may be legitimately concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal working conditions are eliminated from area considerations."[17] The line which the NLRB draws in the administration of section 8(b)(7) is that, unless acquisition of representative status is a fairly immediate and tangibly realizable aim of picketing, it will not be deemed to have recognition or organization as "an object" simply because it trends in that direction. "We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and or-

---

[16] *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321.

[17] *Id.* at 323, quoting from *International Hod Carriers Union, Local No. 41 (Calumet Contractors Association)*, 133 NLRB 512. See also, *Local Union No. 741, Plumbers (Keith Riggs Plumbing and Heating Contractor)*, 137 NLRB 1125; *Deaton Truck Lines* v. *Local Union 612, Teamsters*, 314 F. 2d 418, 422 (C.A. 5).

ganization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist."[18]

It is thus apparent that to say in this case that "the pickets were not and never have been employees of Weis" is by itself not even relevant to determining the permissibility of the picketing in which they engaged. That picketing may be altogether within the protected domain; it may be subject to limited restraint; and it can be reached only in accordance with the standards and pursuant to the means prescribed by the Act. "Peaceful stranger picketing by a labor organization in the course of a labor dispute is therefore an activity subject to injunction only through the procedures authorized in the Act, and, if not so condemned, is protected by Congress against injunctive prohibition arising outside the Act." *Aetna Freight Lines* v. *Clayton,* 228 F. 2d 385, 388 (C.A. 2), cert. denied, 351 U.S. 950.

Accordingly, as this Court has held, a state court is "without jurisdiction to enjoin . . . organizational picketing, whether it . . . [be] activity protected . . . or prohibited" by the National Labor Relations Act. *Hotel Employees Union* v. *Sax Enterprises,* 358 U.S. 270.[19] In a series of *per curiam* opinions this Court

---

[18] *International Hod Carriers Union, Local 840 (C.A. Blinne Constr. Co.),* 135 NLRB 1153, 1168, n. 29. For the scope of section 8(b)(7), see generally Dunau, *Some Aspects of The Current Interpretation of Section 8(b)(7),* 52 Geo. L. J. 220 (1964).

[19] Reversing *inter alia Fontainebleau Hotel Corp.* v. *Hotel Employees Union,* 92 So. 2d 415, 420, in which the Florida Supreme Court stated that "we hold . . . that the union as such, and as distinquished from the individual employees, may not . . . engage in picketing by use of the members of the union as pickets who are not employees of the subject employer."

has reversed judgments as intrusions upon the field preempted by the NLRB where the state court justified prohibition of peaceful picketing on the ground of the absence of an immediate employer-employee relationship between the persons engaged in picketing and the enterprise that was picketed.[20] Federal preemption of state prohibition of peaceful stranger picketing, firmly fixed even before Congress in 1959 by section 8(b)(7) addressed itself with particularity to the subject, is now beyond any possibility of doubt by reason of the specific and detailed regulation of the matter that Congress has prescribed. The 1959 amendment "goes beyond the Taft-Hartley Act to legislate a comprehensive code governing organizational strikes and picketing and draws no distinction between 'organizational' and 'recognitional' picketing. While proscribing peaceful organizational strikes in many situations, it also establishes safeguards against the Board's interference with legitimate picketing activity." *N.L.R.B.* v. *Drivers Local Union No. 639,* 362 U.S. 274, 291. However viewed, therefore, the picketing in this case

---

[20] *Waxman* v. *Virginia,* 371 U.S. 374, reversing 203 Va. 257, 123 S.E. 2d 381, adhering to *Dougherty* v. *Virginia,* 199 Va. 515, 100 S.E. 2d 754, 760 (The pickets "were not and never had been employees of the establishments" picketed); *Mahon* v. *Milan Mfg. Co.,* 368 U.S. 7, reversing 240 Miss. 358, 127 So. 2d 647, 651 ("In the present case, there was no employer-employee relationship between Milan and the strikers or the pickets."); *Retail Clerks International Association, Local No. 560* v. *J. J. Newberry Co.,* 352 U.S. 987, reversing 78 Idaho 85, 298 P. 2d 375, 379 ("In the present situation the Union represented none of Newberry's employees, none desired Union representation, and none of such employees took any part in the picketing of the Newberry store"); *Pocatello Building & Construction Trades Council* v. *C. H. Elle Const. Co.,* 352 U.S. 884, reversing 77 Idaho 514, 78 Idaho 1, 297 P. 2d 519, 524 ("The Union did not represent a majority, a minority, or any of Simplot's employees").

is wholly within the ambit of the NLRA, to be protected, restricted, or prohibited exclusively by the NLRB.

C. Divorcement of the Picketing From the Immediate Locale of the Disfavored Store Within the Shopping Center, Relegating It to the Distant Highway Entrances Serving All Establishments Within the Center, Conflicts With the Accommodation That Congress Has Made Between Protected Primary Activity and Prohibited Secondary Pressure.

The court below requires that peaceful picketing aimed at the disfavored store inside the shopping center be conducted at the distant highway entrances to the center (R. 102, n. 4). This divorcement of the picketing from the immediate locale of the store conflicts with the accommodation that Congress has made between protected primary activity and prohibited secondary pressure. The result of relegating the picketing to entrances serving the entirety of the shopping center is that, despite punctilious efforts at the removed locations to confine the message to the disfavored store, customers may be dissuaded from buying and employees from working at *other* establishments inside the center because of unwitting belief that the shopping center as a whole is the object of protest, thereby unnecessarily drawing others into a controversy not their own. The picketing union, on the other hand, is not only ousted from the natural and effective place of picketing; it is also subjected to the risk that its conduct will be found to be secondary because of the entanglement of others and the unintentional failure to confine the message as nearly as possible to the disfavored store. The court below thus artificially creates a secondary situation in conflict with the adjustment that the federal scheme contemplates.

Congress sought to reconcile "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N. L. R. B.* v. *Denver Bldg. Trades Council,* 341 U.S. 675, 692. One preeminent means by which that end is achieved is to picket the primary employer at his immediate premises which he solely occupies and at which he conducts his regular business. *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667; *Steelworkers* v. *N. L. R. B.,* 376 U.S. 492, 498-500. The court below destroys the confinement of picketing to the "geographically restricted area near" the primary employer's premises "in a manner traditional in labor disputes"[21] by precluding picketing at that place and removing it instead to the distant highway entrances serving others as well as the primary employer. It therefore forces the creation of a common situs and compels recourse to the standards which prevail where the primary and neutral employers occupy the same premises and where the picketing at the shared premises is primary only "if it meets the following conditions" (*Moore Dry Dock Co.,* 92 NLRB 547, 549; *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667, 676-677):

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer.

---

[21] *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665, 671.

Comparatively nice refinements of time, place, and circumstances determine adherence to or departure from the standards for picketing at a common situs. On the one hand, picketing at the access to a shopping center housing many establishments obviously opens the union to the risk of a finding that "the union did not attempt to minimize the effect of its picketing, as required in a common situs case, on the operations of the neutral employers utilizing the market." *Local 761, I. U. E.* v. *N. L. R. B.,* 336 U.S. 667, 678-679; *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856, enforced, 249 F. 2d 591 (C.A. 9). On the other hand, if the picketing at the common situs is otherwise primary, it is of no moment that neutral employers may suffer because the picketing, though properly circumscribed, may nevertheless envelop their operations.[22] For, "however severe the impact of primary activity on neutral employers, it . . . [is] not thereby transformed into activity with a secondary objective." *National Woodwork Manufacturers Assn.* v. *N. L. R. B.,* 386 U.S. 612, 627.

The mischievous consequences of divorcing the picketing from the immediate locale of the disfavored store within the shopping center is vividly illustrated by the NLRB's decision in *Honolulu Typographical Union No. 37 (Hawaii Press Newspapers)*, 167 NLRB No. 150. A union had a dispute with a newspaper publisher; five establishments—four restaurants and a jewelry store—advertised in the papers put out by the

[22] *Local 761, I.U.E.* v. *N.L.R.B.,* 366 U.S. 667, 673-674; *N.L.R.B.* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 68 (C.A. 2); *Sales Drivers* v. *N.L.R.B.,* 229 F. 2d 514, 517 (C.A.D.C.), cert. denied, 351 U.S. 972; *N.L.R.B.* v. *Local Union No. 55,* 218 F. 2d 226, 230 (C.A. 10); *Seafarers International Union* v. *N.L.R.B.,* 265 F. 2d 585, 590, 591 (C.A.D.C.).

publisher; in furtherance of its dispute with the publisher, the union sought by picketing and handbilling to persuade the customers of the five establishments to refrain from patronizing the restaurants and from buying jewelry advertised in the papers. The sole legal question which should have been presented, decided adversely to the union by the NLRB, was whether consumer picketing at the restaurants and jewelry store constituted following the struck service—advertising—and was therefore primary activity, conduct akin to following the struck product to urge discontinuance of trade in that product. *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58. Whatever the legality of the picketing, however, leaflet distribution at the premises of the five establishments would be clearly legal in any event, by reason of the second proviso to section 8(b)(4)(B) excepting from the ban of secondary activity "publicity, other than picketing, for the purpose of truthfully advising the public" that the establishment is advertising in a newspaper with which the union has a primary dispute. *N.L.R.B.* v. *Servette, Inc.,* 377 U.S. 46; *Great Western Broadcasting Co.* v. *N.L.R.B.,* 356 F. 2d 434 (C.A. 9).

But this fairly narrow controversy overspilled its boundaries because the five establishments operated within a shopping center consisting of fifty to sixty shops, and the police refused to permit the union representatives to enter the shopping center to picket and handbill at the premises of the five establishments. The union therefore picketed and distributed handbills to the public at the entrance to the shopping center. The pickets carried a sign which had pasted on the top the name of one of the five advertisers; the remainder of the sign stated that the named shop advertised in the

struck newspaper and requested the public not to buy the shop's products advertised in the paper. The handbills distributed in conjunction with the picketing requested the public not to patronize "this establishment."

And so the issue was joined, not simply on the narrow question whether the picketing directed at the five establishments was a permitted consumer appeal, but on the broader question as well whether the picketing and handbilling went beyond the five establishments to the entirety of the shopping center. The Trial Examiner found that the picketing was aimed at the center as a whole, and therefore illegal on that ground, observing that (TXD, sl. op. p. 9):

> At different times some 40-50 pickets, carrying signs, patrolled in front of Market Place. Each picket sign named *one* of the *five* advertisers, who were the targets of the picketing. The presence of 40-60 pickets in front of Market Place, which had 40-50 shops, at first glance suggested to the casual observer that *all* shops of Market Place were being picketed. Only if the observer watched several complete rounds of the picket line, would he discover that *five names only* were duplicated by the pickets, and thereby come to the dubious conclusion that *maybe* only *five* of the shops in Market Place were being picketed. But who, of the public or consumers, is going to take such time and care, to learn, what the handbills and the picket signs should have stated in the first place? [Emphasis in original.]

The NLRB majority agreed with the examiner's result but not with his reasoning, stating that: ". . . the picket signs were defective not because each one failed to list all the secondary employers involved, but because the picketing was directed to a total boycott of

the secondary employers" (sl. op. p. 1). The dissenting member was of the view that the picketing in its entirety was legal, observing as to the manner of its conduct that (sl. op. pp. 15-16):

> That the picketing took place at the main entrance to the entire shopping plaza in which the several establishments were located, rather than immediately before the premises of the advertising establishments, is not sufficient to support a violation in the circumstances here. The Union desired and attempted to picket at each individual establishment but was prevented from doing so by the police, and thereafter conducted the picketing as close to those establishments as was possible. Nor is there any defect in the picket signs' identification of those whose patronage the Union sought to interrupt. The establishments were named on the signs, and there was no plea to cease doing business with anyone else.

The leaflet distribution, otherwise entirely proper, was found to be illegal solely because the target of the handbill was thought to be the entirety of the shopping center rather than the five advertising establishments within it. The Trial Examiner found that (TXD sl. op. pp. 8-9):

> . . . the Union's handbill in this case did not identify only the *five* establishments who were advertisers in the struck Waikiki Beach Press. On the premises of Market Place, which is a large shopping complex, there are approximately 50 to 60 shops, restaurants, and bars. Of these only five were advertisers in the Waikiki Beach Press. However, the handbills appealed in most general terms to the public not to patronize "this establishment" which certainly included *all* the retailers in Market Place, the non-advertisers and advertisers

> alike. Certainly the handbills alone did not "truthfully" advise the public that "a product or products" were produced by an employer with whom the labor organization had a "primary dispute." These handbills, which should have specified the five advertisers, specified only "this establishment," obviously Market Place, which, in effect, untruthfully misled the public into the belief that *all* shops, bars, restaurants, etc., in Market Place and Market Place were the targets of the Union's handbilling. This type of handbill, . . . indefinite and thereby actually misleading, cannot be considered as within the protection of the proviso. [Emphasis in original.]

The NLRB majority agreed, stating that (sl. op. p. 7):

> The handbills, distributed . . . at the entrance to a shopping complex of 50 to 60 shops, requested the public not to patronize "this establishment." The reference clearly was to all the shops in International Market Place, both advertisers and non-advertisers. The handbills were therefore appealing to the public not to patronize any of the establishments. By referring only to "this establishment" and not specifying the advertisers, the handbills were misleading and therefore not "for the purpose of truthfully advising the public" within the meaning of the proviso.

The dissenting member disagreed, taking the view that this interpretation was based on a truncated version of the events. He explained that (sl. op. pp. 16-17):

> As for the handbilling, though the leaflets did not name the establishments at which they were directed, they were distributed to consumers only simultaneously with and in the immediate area of the picketing. They had originally been intended for distribution in front of the individual estab-

> lishments, but . . . the police prevented this. To hold that "this establishment" in the leaflets is readily susceptible of meaning non-advertising stores in the shopping center (and that therefore this object must be inferred) is to disregard the surrounding circumstances and treat as discrete and wholly separate the handbilling which was part and parcel of the picketing. The Union's object in the handbilling was clearly to reach only the advertisers, and this object is not unlawful.

For the purpose of the present case it of course does not make the slightest difference whether the NLRB majority, the dissenting member, or the examiner is right in *Honolulu Typographical.* The point simply is that whether the picketing and handbilling were directed at the entirety of the center, or were aimed instead at the five advertising establishments within the center, would not even have existed as a question if the activity had taken place at the premises of the five stores inside the center, where the union wanted to conduct it, rather than at the entrance serving the whole of the center, where the police removed it. This multiplication of risks for the union and true neutrals arises solely from the erection of an artificial barrier around a shopping center.

The upshot is that the court below removes the picketing from its natural primary habitat, subjects the union to the resultant risk that its picketing at shared entrances will be found to be secondary because not sufficiently circumscribed, and needlessly embroils neutral employers by exposing them to picketing in a controversy not their own. The decision below is therefore faithless to the congressional reconciliation of protected primary picketing and prohibited secondary pressure.

D. The State Court Entered the Preempted Domain of the NLRB by Enjoining Peaceful Picketing Within the Shopping Center.

The elements of the controversy thus placed its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245. Heedless of this principle, the court below "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139.

To resist preemption respondents urge that "Congress has not given the National Labor Relations Board any authority to enjoin or to act in any manner concerning a union's trespass to private property" (Br. in Opp. p. 18). But this formulation of the issue is question-begging. It assumes that entry into a shopping center is a state-prohibitable trespass rather than the exercise of a federally-protected right. Yet the very question the NLRB must decide is whether access to the private but open property of a shopping center is within the ambit of rights safeguarded by section 7 of the NLRA. And an affirmative determination would of course bar state derogation of the federal right. Furthermore, respondents disregard NLRB power to reach the picketing if it is organizational or recognitional in character, and concomitantly disregard the congressional determination that the picketing should be let alone if it is not in that class. It is the role of the NLRB to draw this line in the administra-

tion of section 8(b)(7). Similarly, respondents ignore the dislocation of the primary-secondary adjustment that Congress has effectuated, a disruption which necessarily flows from according primacy to respondents' claim that land ownership standing alone should be given pristine preeminence. Yet it is the function of the NLRB to reconcile divergent values none of which can be given full sway without colliding with the other.

Both in its potentially protected and prohibited aspects peaceful picketing within a shopping center is therefore a subject deeply embedded in the work that the NLRB has been commissioned to do. To divest the NLRB of its jurisdiction in the name of trespass is to assume an answer to every question that the NLRB has been established to decide. When the Board has not answered the questions, but when instead they remain unanswered, a state court has no jurisdiction to act. This has been made unmistakably clear by this Court in *Garmon* (359 U.S. at 245-246):

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic

> problem in *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1. In that case we held that failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

For the same reasons respondents' companion formulation of the issue—"Clearly the complained of activity in the present case 'is governable by the State or it is entirely ungoverned' " (Br. in Opp. p. 18)—is likewise question-begging. For until the NLRB holds that peaceful picketing within a shopping center is not activity protected by section 7, *and* holds that particular picketing is not organizational or recognitional activity prohibited by section 8(b)(7), *and* holds that to oust picketing from a shopping center does not upset the primary-secondary adjustment, it is not possible to state that the conduct is not within national governance. Furthermore, even were it true that the NLRB would not reach the conduct either to protect or to prohibit it, this would simply "raise the question whether such activity may be regulated by the States." *Garmon,* 359 U.S. at 245. It would not answer it. For the judgment of Congress might then well be that the

conduct should be let entirely alone. If the picketing is not specifically restrained by the NLRA, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner* v. *Teamsters Union,* 346 U.S. 485, 500. See *Hannah Mining Co.* v. *MEBA,* 382 U.S. 181, 188, 189.

The fallacy of respondents' use of the word "trespass" as a talisman to avoid preemption is further apparent from their citation of *Automobile Workers* v. *Wisconsin Board* (*Briggs-Stratton*), 336 US. 245, to support their thesis (Br. in Opp. p. 18). Of the latter case this Court stated in *Garmon* that the "approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application" (359 U.S. at 245, n. 4). As thereafter elaborated, "of special significance is the fact that the approach to pre-emption taken in *Briggs-Stratton* was that the state courts and this Court on review were required to decide whether the activities were either protected by § 7 or prohibited by § 8. This approach is 'no longer of general application,' . . . as this Court has since developed the doctrine in preemption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes. . . ." *N.L.R.B.* v. *Insurance Agents' International Union,* 361 U.S. 477, 493, n. 23. It is this "now discarded approach to pre-emption" (*ibid.*) that respondents would restore.

This case is therefore squarely within settled and conventional preemption principles. *Freeman* v. *Retail Clerks Union Local No. 1207,* 58 Wash. 2d 426, 368 P. 2d 803; *Maryland* v. *Williams,* 44 LRRM 2357, 2362-64 (Md. Crim. Ct., June 10, 1959); *Weis Markets* v. *Retail Store Employees' Union, Local No. 692,* 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967). "Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act. . . . If the peaceful picketing complained of in this case is such conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it. . . . The issuance of the state injunction in this case tended to frustrate this federal policy. This would be true even if the picketing were prohibited conduct." *Liner* v. *Jafco,* 375 U.S. 301, 306-307.[23]

---

[23] In *Hanna Mining Co.* v. *MEBA,* 382 U.S. 181, this Court found no preemption where the disputed conduct was engaged in by supervisors who are not within the coverage of the NLRA. *Hanna* is notable because of the presence in this case of every factor absent in *Hanna.* In *Hanna,* quite unlike this case, the picketing could not "be protected by § 7 of the Act, arguably or otherwise" (*id.* at 188); there could "be no breach of § 8(b)(7), curtailing organizational or recognitional picketing" (*ibid.*); the supervisory status of the employees, upon which the arguably prohibited or protected character of their activity hinged, had been settled with unclouded legal significance (*id.* at 190); and there was a minimal risk of dislocating the primary-secondary adjustment in the exertion of economic pressure (*id.* at 191-194). Every negative in *Hanna* is a positive in this case. And so, as we deal here with workers within "the regime of the Act", the "central interests served by the *Garmon* doctrine" are endangered by the state injunction; and there exists here "the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered" (*id.* at 193).

III. THE DECISION OF THE STATE COURT CONFLICTS WITH FEDERALLY PROTECTED RIGHTS AND THEREFORE CANNOT STAND EVEN IF THE STATE COURT IS EMPOWERED TO ADJUDICATE THE CONTROVERSY.

But even if the court below is empowered to adjudicate the controversy, its decision conflicts with federally protected rights and therefore cannot stand. What Congress has given a State may not take away. *Nash* v. *Florida Industrial Commission,* No. 48, October Term, 1967, December 5, 1967. A " 'State may not prohibit the exercise of rights which the federal Acts protect.' " *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 75.

Peaceful picketing at the premises of a disfavored employer informing the public that the employer is "non-Union" and "these employees are not receiving union wages or union benefits" is concerted activity for mutual aid or protection. It does not lose its protected status because it is conducted on private property open to the public. Prohibition of the picketing on the ground that the participants in it are not employees of the disfavored employer repudiates Congress' premise that protected concerted activity extends beyond an employer and his employees. And relegation of the picketing to distant entrances shared by others results in the twin evils of destroying the right to picket at the primary employer's premises and of exposing neutral employers to picketing in a controversy not their own.

Accordingly, in prohibiting peaceful picketing safeguarded by the National Labor Relations Act, Pennsylvania by the common law formulated and enforced by its judiciary "has forbidden the exercise of rights explicitly protected by § 7 of that Act"; "a state law which denies that right cannot stand under the Su-

premacy Clause of the Constitution." *Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74, 83. For in an area where federal law operates and is paramount, "the inconsistent application of state law is necessarily outside the power of the State." *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 296.

CONCLUSION

For the reasons stated the judgment should be reversed and the case remanded with directions to dismiss the complaint.

Respectfully submitted,

LESTER ASHER
228 North LaSalle Street
Chicago, Illinois 60601

BERNARD DUNAU
912 Dupont Circle Building
Washington, D. C. 20036

Attorneys for Petitioners

December 1967.

APPENDIX

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et. Seq.)

SEC. 2. When used in this Act—

* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

* * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to

recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other thon the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a

petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

* * *