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CITATIONS

*Cases:* PAGE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

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AMALGAMATED FOOD EMPLOYEES UNION

LOCAL 590, *et al.*,

*Petitioners,*

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### Question Presented

Whether this Court should exercise its jurisdiction to review an Order of the Supreme Court of Pennsylvania, affirming the continuance of a preliminary injunction, enjoining Petitioners from trespassing on private property within a shopping center.

### Statement of the Case

Respondent Weis Markets, Inc. is the owner-occupant of one of two stores which, at the time of the commencement of this proceeding, were within the shopping center owned

by Respondent Logan Valley Plaza, Inc. (R. 33a, 88a). The plaza is located at Altoona, Pennsylvania, within the intersection of public highways known as Plank Road (U.S. Route 220) to the east, and Goods Lane to the South (R. 87a).

On December 8, 1965, Weis opened for business. A few days thereafter it posted a sign on its property reading as follows:

> "No trespassing or soliciting is allowed on Weis Market porch or parking lot by anyone except Weis employees without the consent of the management." (R. 33a, 34a).

On December 17, 1965, pickets appeared in front of the store (R. 28a, 29a). None of the pickets were employees of Weis (R. 38a, 89a).

The pickets picketed within Weis' parcel pick up area. This area is located alongside the front of the store; it is four to five feet wide and is marked off with yellow lines. It is set aside from the store's parking lot so that customers may conveniently have their purchases loaded into their automobiles by Weis employees (R. 29a, 55a, 84a). Occasional picketing also took place on the covered porch (R. 89a).

Twelve of the pickets were employed at three A & P stores in the area; two were employed at the Acme store, and one at the Quaker store (R. 66a, 67a). In addition to picketing, these employees of Weis' competitors distributed handbills to members of the public, asking them to patronize A & P, Acme and Quaker super markets, instead of Weis' store (R. 89a).

On the evening of December 21, 1965, there were thirteen pickets in the parcel pick-up zone. They marched two, three, and often four abreast (R. 32a, 47a). Customer

traffic was disrupted. Customers were forced to "navigate in and out" among the pickets to avoid hitting them (R. 30a, 44a, 47a).

Weis' Assistant General Superintendent advised the pickets that they were picketing on private property. He called their attention to the no-trespassing sign, and requested that they picket on the berms of the road. The berms separate the Mall from the respective highways (R. 88a). The pickets refused (R. 32a, 33a).

The picketing in front of the store continued daily (except December 24, 1965) until December 27, 1965, at which time the Court of Common Pleas of Blair County directed that it be removed to the berm areas (R. 32a).

## Summary of Argument

The Court should not grant certiorari, as the decision below was decided on the adequate and independent non-federal ground of trespass to private property.

The Petitioners seek to raise the question of preemption before this Court. They are precluded from doing so, not having raised it before the Supreme Court of Pennsylvania. Assuming, *arguendo*, that federal preemption may properly be raised, the state courts of Pennsylvania are not preempted in the circumstances of the instant case. Nor is Petitioners' trespass picketing constitutionally protected. Consequently, the Court should not take jurisdiction herein.

## POINT I

**The decision below was decided upon an adequate and independent non-federal ground.**

### A. *Trespass to Private Property*

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. *Herb* v. *Pitcairn,* 324 U.S. 117, 125; *Henry* v. *Mississippi,* 379 U.S. 443, 446.

The instant matter presents such a case. The state court decision is based *solely* upon the non-federal ground of trespass to private property. The Supreme Court of Pennsylvania framed the issue as follows:

> "Our immediate inquiry is whether, in the factual matrix of the case at bar, the conduct of these pickets constituted an invasion of the *private property* of Weis and/or Logan." 425 Pa. 382, 386, 227 A. 2d 874, 877. (Emphasis added)

The court added:

> "These pickets . . . had no right or authority whatsoever to utilize the *private property* of Weis and/or Logan for such picketing purposes; *such use constituted a trespass* which very properly was restrained." 425 Pa. at 389, 227 A. 2d at 878. (Emphasis added)

*The Respondents sought injunctive relief not as employers, nor as parties to a labor dispute,*[1] *but as property*

[1] There was no labor dispute. The Court of Common Pleas so found: "Neither plaintiff Logan Valley Plaza, Inc. nor Sears are parties to a labor dispute nor involved in any labor trouble." (R. 90a). " . . . Weis . . . is not engaged in labor trouble." (R. 92a).

*owners.* They alleged no unfair labor practice, but rather a violation of Pennsylvania Property Laws, and their property rights.

By Petitioners' own admission, it was *not* seeking to organize the Weis employees, but sought to enter upon Weis' property for the purpose of informing the public that the store was non-union. (Petition for Writ of Certiorari, page 2).

*The Respondents did not seek to prohibit the picketing. They only sought to have it regulated. The state court did not prohibit it. It only relocated it to berms adjacent to Respondents' property.*

It is clear, therefore, that the decision of the Supreme Court of Pennsylvania affirming the Court of Common Pleas' granting of injunctive relief was based *solely* upon the non-federal question of trespass to private property.[2]

**B. *Pennsylvania's Law Applies***

The finding by the State of Pennsylvania in the instant matter that the complained of acts constitute a trespass within the framework of the Pennsylvania common law, is a determination that this Court will follow.

The uniform practice of this Court has been to concede that the state courts speak with final authority on questions of state law. This proposition has consistently been reflected in this Court's decisions. *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 78. *Accord, Bell* v. *Maryland,* 378 U.S. 226, 237; *United Gas Pipe Line Co.* v. *Ideal Cement Co.,* 369 U.S. 134, 135; *Brady* v. *Maryland,* 373 U.S. 83, 90.

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[2] In fact, the Supreme Court of Pennsylvania, in noting that the trespass to private property was a reasonable ground upon which to grant injunctive relief, deemed it "unnecessary to determine whether the instant picketing was for an unlawful purpose." 425 Pa. at 389, 227 A.2d at 878.

There can also be little question that the non-federal ground of trespass to private property *adequately* supports the state's decision.

The law of Pennsylvania is that every unauthorized entry upon the real property of another is a trespass. 87 C.J.S. *Trespass,* §13 (1954). Trespass *quare clausum fregit* lies where there is the doing of an unlawful act, or the doing of a lawful act in an unlawful way, to the detriment of another's property. *Kelly* v. *Bell Tel. Co.,* 72 Montg. 236, 70 York 35.

The courts of Pennsylvania have inherent jurisdictional authority to enjoin picketing on private property and have done so upon countless prior occasions. The Court of Common Pleas in the instant matter recognized this inherent right when it noted:

> "We need involve ourselves in no detailed discussion of our jurisdiction and power to regulate the location of picketing of the type here engaged in so as to prevent trespassing on private property; defendant union concedes such authority, which is supported by the case law of this Commonwealth." (R. 90a).[3]

Upon review, the Supreme Court of Pennsylvania also noted:

> "That the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass is clear beyond question: (Citations omitted)." 425 Pa. at 386, 227 A. 2d at 876-77.

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[3] Equitable relief is proper, since the trespass is continuing, and damages are difficult, if not impossible, to ascertain. *Kramer* v. *Slattery,* 260 Pa. 234, 103 A. 610.

This Court has long recognized this right of the state to protect the property of its citizens. It recently stated:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida,* 385 U.S. 39, 47.

### C. *Respondents Did Not Dedicate Their Property to Petitioners' Trespass*

The Logan Valley Plaza is private property. This fact is conceded by Petitioners. (Petition for Writ of Certiorari, page 14). There has been no attempt to open the Logan Valley Plaza to free and uninhibited use by the public and there has never been, nor is there presently, any intention of making the Plaza a public area.

In order for the property to be considered open for the public's general use, there would have to be some form of common law dedication. For there to be such dedication, there must be assent of the owner and "the fact of its being used for the public purposes intended by the appropriation." *City of Cincinnati* v. *White's Lessee,* 31 U.S. (6 Pet.) 431, 440. Can it be said that Respondents have dedicated their land for use by the public in a manner detrimental to the very purpose of the land itself? The land is for business purposes, whereas the purpose of the picketing was to drive business away.

The no-trespassing sign which Weis had posted, clearly evidenced an intent to restrict the use of the area to business purposes only.

*Indisputably, Weis did not invite its competitors' employees to confront its customers in front of its store with placards and handbills. Unquestionably, there was no invitation to these thirteen pickets to advertise their employer's attributes at Weis' storefront.*

**D. *The Injunction Was Narrowly Drawn***

The Respondents did not seek to prohibit the Petitioners from picketing them. Their *only* request of the Pennsylvania state courts was that the location of the picketing be regulated. The Court of Common Pleas did not enjoin all picketing, but merely removed the pickets from the Respondents' private property, to the berms outside of the shopping area. It did not deprive Petitioners of the right to picket. On the contrary, it recognized this right by permitting picketing in the berm areas. Nor did it deprive Petitioners of their opportunity to communicate with the public. It increased this opportunity. In this connection, the Court of Common Pleas stated:

> "By limiting the pickets to the highway berms we are not diminishing their ability to communicate with and inform the public, since there are no other means of vehicular adit or exit from the Mall premises; we are thereby actually increasing their audience . . ." (R. 98a).

Thus, the Petitioners could reach the public through "other available channels of communication" at a nearby and equally appropriate location. *NLRB* v. *Babcock & Wilcox,* 351 U.S. 105, 112.

Although this Court may not sustain a state court's prohibition of a union's picketing "in its entirety," it has *not* held that a state injunction "aimed narrowly at a trespass" in a shopping center is improper. See *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U.S. 20, 24-25, where the question "whether a State may frame and enforce an injunction aimed narrowly at a trespass" was left open.[4]

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[4] This Court's remand to the state was interpreted by the Washington Supreme Court as sanctioning such narrowly drawn injunctions when in a concurring opinion four members of the court stated:

## POINT II

**The Petitioners are precluded from raising the question of preemption before this Court.**

The issue of preemption was not argued before the Supreme Court of Pennsylvania. Therefore, under this Court's holdings it may not be raised here.

The Petitioners in their "Motion to Dissolve or Modify Preliminary Injunction" before the Court of Common Pleas did raise the issue of preemption arguing that the complained of activity was removed from the sphere of state action by virtue of the Labor Management Relations Act.

The Petitioners, however, abandoned this argument when the matter came before the Pennsylvania Supreme Court.

The fact that the issue of federal preemption was raised at the trial level is not enough. It must also have been pursued on appeal. This Court is precluded from reviewing a federal question that has not been preserved on appeal in the state courts. Failure to pursue the federal issue on appeal will be deemed a waiver of this issue.

In the case of *CIO* v. *McAdory,* 325 U.S. 472, this Court denied review of a federal question that, although raised at the trial level, was abandoned on appeal to the state supreme court. This Court noted:

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"Unless the court there believed it possible to frame an injunction and enforce an injunction aimed narrowly at a trespass, it did a vain and useless thing in making a remand to the state court.

"Until the Supreme Court of the United States holds that the law of trespass is no longer applicable to pickets under any circumstances, the state courts not only have the right, but the duty to determine the extent to which pickets may utilize the property of nonparticipants in a labor dispute." *Freeman* v. *Retail Clerks Union, Local 1207,* 58 Wash. 2d 426, 434, 363 P. 2d 803, 807-08.

> "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been presented to that court for decision, we are without jurisdiction to consider it in the first instance here." 325 U.S. at 477.

Also, in another decision this Court dismissed for want of jurisdiction for the reason that "the federal questions sought to be presented were by the record abandoned in the State Supreme court." *Beaty* v. *Richardson,* 276 U.S. 599.

Clearly, therefore, the federal question of preemption now raised, having been abandoned before the Supreme Court of Pennsylvania, cannot be reviewed by this Court.

## POINT III

**Assuming, *arguendo*, that preemption may properly be raised before this Court, the Supreme Court of Pennsylvania is not preempted in the circumstances of the instant case.**

This Court in its landmark decision in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, stated its rule with respect to when a state court is ousted from asserting jurisdiction in labor cases. In this decision it was noted, however, that where there is a ". . . clear determination that an activity is neither protected or prohibited . . ." by the Act, *the state courts can exercise jurisdiction.* 359 U.S. at 246.

Both Board and court precedent in this area clearly establish that the complained of activity cannot be considered subject to either the protection of Section 7 or the prohibition of Section 8 of the Act.

### A. *The Activity Is Not Subject to the Protection of Section 7*

#### 1. Not all concerted[5] activity is protected

Although Section 7 of the Act gives "employees" the right of concerted activity, it cannot be said that this Section's intent is that all "concerted" activities are to be provided the protection of the Act under all circumstances. For example, if a retailer were to direct his employees to picket a competitor, urging the competitor's customers to transfer their business, this would not be concerted activity within the meaning of Section 7 of the Act. Here we have knowledge and acquiescence (R. 9a and 17a), rather than explicit direction. However, in either case the fruits

[5] It is not conceded that the activity herein was concerted.

of the activity are the same—more business for the competitors and less for Weis. Surely, Section 7 cannot be stretched so far as to embrace such unfair competitive tactics.[6]

In *Automobile Workers* v. *Wis. Board,* 336 U.S. 245, 257, this Court noted that not "... every type of concerted activity is beyond the reach of the state's adjudicatory machinery." Nor is "... otherwise illegal action ... made legal by concert." 336 U.S. at 258. Similarly, in *NLRB* v. *Electrical Workers,* 346 U.S. 464, employee activity going beyond the pale was held by this Court to be outside Section 7.

**2. Non-employees may be prohibited from trespassing on private property**

If certain illegal conduct by an employer's employees can be considered without the protection of Section 7 of the Act, certainly, unlawful activities on the part of non-employees can be afforded no greater protection. In fact, this Court has recognized that non-employees may be entirely barred from entering upon a private parking lot. In *NLRB* v. *Babcock & Wilcox,* 351 U.S. 105, this Court distinguished between rules of law applicable to employees and those applicable to non-employees. This Court stated:

> "No restriction may be placed on the employees' right to discuss self-organization among themselves ... *But no such obligation is owed nonemployee organizers.*" 351 U.S. at 113. (Emphasis added)[7]

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[6] Not to be overlooked is that the picketing began only nine days after Weis commenced business. Query: Is competitive picketing a new way to recoup lost sales?

[7] The National Labor Relations Board follows this distinction in its interpretation of the Act. In *General Dynamics/Telecommunications, etc.,* 137 N.L.R.B. 1725 it held that distribution of literature on a private street by non-employees was not protected by the Act.

**3. The absence of organizational activity**

The complained of activity has nothing whatsoever to do with the right of Weis' employees, or any other employee, to engage in self-organization or concerted activities as traditionally defined under the Act.[8] Unlike *Babcock, supra,* it did not even have an organizational object. This picketing, conducted by non-employees, was conceded to be an intrusion upon private property for the purpose of driving customers away from Respondent Weis. Obviously, this was not the type of activity intended to be within the coverage of Section 7 of the Act.

**4. Prevention of trespass to private property is an interest "deeply rooted" in the public policy of the state**

In *Garmon, supra,* this Court noted that:

> ". . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of power to act." (Citations omitted) 359 U.S. at 244.

More recently, in *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, this Court, in holding that an employer had a cause of action for libel in state court, noted:

> ". . . the States need not yield jurisdiction . . . 'where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not

[8] The record is completely barren of any reference to organizational activity on the part of the Petitioners. They were not seeking to organize Weis' employees through the means of the picket line, or independent thereof.

> infer that Congress had deprived the states of the power to act.' " 383 U.S. at 59.

This Court has upon many occasions upheld injunctions, where the complained of activities were in contravention of a valid public policy of the state. In *Hughes* v. *Superior Court,* 339 U.S. 460, this Court held proper the use of the injunction to prohibit picketing of a place of business solely to secure compliance with a demand that its employees be hired in a percentage to the racial origin of its customers.

In *Teamsters Union* v. *Hanke,* 339 U.S. 470, this Court held that the state was not restrained from enjoining picketing of a business conducted by the owner himself with no employees where the intent of the picketing was to enforce union demands for this business to become a union shop. Also, in *Building Service Employees* v. *Gazzam,* 339 U.S. 532, this Court affirmed a state's injunction against picketing where the state held that it was in violation of its statutory policy against employer coercion of employees' choice of a bargaining representative.

In *Teamsters Union* v. *Vogt,* 354 U.S. 284, this Court stated that its prior discussions:

> ". . . established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." 354 U.S. at 293.

**5. The trial court's action has no bearing upon national labor policy, nor is it of sufficient national importance to warrant review**

This Court's intent in limiting state action in *Garmon,* 359 U.S. 236, 242, was to minimize the danger of state interference with national policy.

The trial court's enjoining of picketing and removing it from private property to a public area does not in any way run the risk of state interference with activity even remotely touching upon national labor policy.

Where *Garmon, supra,* was concerned with the exercise of state power which would threaten interference with the "clearly indicated policy of industrial relations," 359 U.S. at 243, the facts here indicate action that does nothing to threaten this policy. At most, the complained of activity could be considered merely a "peripheral concern" of the Labor Management Relations Act and not considered preempted under *Garmon,* 359 U.S. at 244.

Furthermore, the judgment in this case is of importance only to the litigants herein. It cannot possibly have national significance or importance. Nothwithstanding the development of shopping centers in this country, the issue in this case—the right of non-employees to picket for non-organizational purposes on private property within a shopping center—has been seldom raised in the past. Nor is it likely to be raised again in the future.

**B. *The Picketing Patently Did Not Violate Any Section of the Labor Management Relations Act***

None of the allegations of Respondents' Complaint to the trial court praying for injunctive relief, alleged that Petitioners had committed acts which constituted unfair labor practices, nor were there any acts complained of which could be interpreted as unfair labor practices.

**1. Clearly No 8(b)(1)(A) Violation**

Recently this Court in holding that there was no violation of this section of the Act referred to its legislative history and noted that the mischief against which the statute inveighed ". . . was restraint and coercion by unions in *organizational campaigns.*" *NLRB* v. *Allis-Chalmers Mftg. Co.,* 388 U.S. 175, 186.[9] (Emphasis in original)

Thus, there could be no violation here, since the Petitioners were not engaged in an organizing campaign. Its picketing was directed solely to the public and "was peaceful and unaccompanied by either oral threats or actual violence." (Petition for Writ of Certiorari, page 6).

**2. Clearly No 8(b)(4) Violation**

There was no secondary boycott. The pickteing was primary, not secondary. It was directed toward "members of the public (actual or prospective Weis customers) . . ." (R. 89a).[10] The picketing took place immediately in front of the Weis store and the name "Weis Markets" was clearly identifiable on the signs (R. 89a).

There was no attempt by the Petitioners to "induce . . . any (employee) to strike . . . or refuse to . . . perform any service;" nor did Petitioners "threaten, coerce, or restrain any person," as provided in the statute.

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[9] To the same effect see *NLRB* v. *Drivers Local 639,* 362 U.S. 274, 286, where this Court recognized that the "note repeatedly sounded" by Congress, in enacting Section 8(b)(1)(A), was " . . . the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal."

[10] That the picketing was directed to the public cannot be questioned (R. 89a). Petitioners' Writ to this Court under "Questions Presented" p. 2, notes that there was " . . . peaceful picketing at the premises of the store located within a shopping center informing the public . . ." The handbills also were addressed to the public (R. 89a).

### 3. Clearly No 8(b)(7) Violation

Was the object of the picketing herein to "force or require Weis to recognize or bargain with Petitioners?" There was no such allegation by Respondents; the Petitioners do not so contend. Nor was the object for the purpose of forcing Weis' employees to select Petitioners as their representative. On the contrary, the object of the picketing, in the Petitioners' own words, is for the ". . . purpose of informing the public . . ." (R. 23a). As such, there can be no violation of this section of the Act.

Nor do Petitioners allege to the contrary. Rather, Petitioners are unsure of how to characterize the picketing. They argue that the picketing is ". . . either within or outside the scope of Section 8(b)(7)(C)." (Petition for Writ of Certiorari, page 25). Surely, this Court would not "preempt" a state court of jurisdiction premised on such a tenuous position.

### C. *There Is No Preemption Where the Tortious Acts Are Outside the Power of the Board to Regulate*

Where the alleged tortious act concerns "matters wholly outside the scope of the National Labor Relations Board's determination" the state is not preempted from acting. *Machinists* v. *Gonzalez,* 356 U.S. 617, 622.

Similarly, where ". . . Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *United Workers* v. *Laburnum Corp.,* 347 U.S. 656, 665. The Act certainly ". . . did not require mutilation of 'the comprehensive relief of equity.' (Citation omitted)." *Plumbers' Union* v. *Borden,* 373 U.S. 690, 697.

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. Clearly the complained of activity in the present case "is governable by the State or it is entirely ungoverned." *Automobile Workers* v. *Wis. Board,* 336 U.S. 245, 254.

**D. *This Court Has Recognized the Inherent Right of the State to Regulate Certain Conduct Even Though Arguably Subject to the Act***

This Court has upheld the right of a state tribunal to regulate certain conduct even though the conduct was admittedly or arguably subject to the National Labor Relations Act.

In *Machinists* v. *Gonzalez, supra,* this Court in considering a suit brought in the state court by a union member for restitution of his membership and for damages for his illegal expulsion, recognized that the circumstances imbedded in such a suit could constitute an unfair labor practice under 8(b)(2) of the Act. Nevertheless, this Court held in part that the state could act because the possible conflict between the Board and the state court in this type of case did not "'. . . present potentialities of conflicts in kind or degree which require a hands-off directive to the states.'" 356 U.S. at 622.

Similarly, in *Automobile Workers* v. *Russell,* 356 U.S. 634 this Court allowed the state to entertain a non-union employee's common law tort action against a labor union to recover compensatory and punitive damages for malicious interference with his lawful occupation. State action in this matter was allowed even though it was assumed that the facts of the case indicated a violation of 8(b)(1)(A) of the Act. This Court noted that Congress had not ". . . deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered." 356 U.S. at 641-42.

**E. *Other State Courts Have Exercised Jurisdiction***

The *Illinois Supreme Court* exercised jurisdiction to enforce its criminal trespass statute against union organizers on a retail store's parking lot. The court stated:

> "We believe that the maintenance of domestic peace and the absence of any preventive relief for the protection of the employer's property rights is of sufficient importance to give our State courts jurisdiction to enforce the criminal trespass statute under the circumstances of this case." *People* v. *Goduto,* 21 Ill. 2d 605, 611-12, 174 N.E. 2d 385, 388; *cert. denied,* 368 U.S. 927.

Similarly, the *Supreme Court of Tennessee* upheld its jurisdiction to sustain a finding of trespass by union members in the parking area of a retail store. The court stated:

> "Under the present state of the law, freedom of speech does not entitle one to come upon the property of another and commit a trespass and, while in the act of thus trespassing, seek to persuade the public not to trade with such other. . . . (I)n our opinion, the ordinance is valid and enforceable in the State Courts." *Hood* v. *Stafford,* 213 Tenn. 684, 697-98, 378 S.W. 2d 766, 772.

The *Supreme Court of Pennsylvania,* in the present case emphatically stated:

> "That the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass is clear beyond question: (Citations omitted)." 425 Pa. at 386, 227 A. 2d at 876-77.

The enjoining of a trespass to private property by a state is certainly a matter that cannot involve a conflict

between the state and the Board which would require a hands-off policy by the state. Therefore, for all of the above reasons, Pennsylvania's action in the present case cannot be held to be preempted.[11]

## POINT IV

**Petitioners' trespass picketing is not constitutionally protected.**

Petitioners' request assertion of jurisdiction by this Court on the ground that their freedom of speech was abridged. This claim is wholly specious. This Court's absolute equation of picketing and free speech has long been discarded:

"Picketing . . . is more than free speech . . ."

*Wohl.*[12]

". . . picketing (is) not . . . the equivalent of speech . . ."

*Hughes.*[13]

". . . picketing is more than speech . . ."

*Gazzam.*[14]

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[11] As noted above at page 9, although Petitioners raised the question of federal preemption in the lower court, they abandoned this issue in the Supreme Court of Pennsylvania. Obviously, this was no oversight on Petitioners' part. The only conclusion is that Petitioners felt that their argument concerning federal preemption was of little merit.

[12] *Bakery Drivers Local 802* v. *Wohl,* 315 U.S. 769, 776 (concurring opinion).

[13] *Hughes* v. *Superior Court,* 339 U.S. 460, 465.

[14] *Building Service Employees* v. *Gazzam,* 339 U.S. 532, 537.

". . . picketing . . . cannot dogmatically be equated with . . . freedom of speech . . . . [P]icketing is 'indeed a hybrid.' "

*Hanke.*[15]

". . . a State, in enforcing some public policy . . . (may) constitutionally enjoin peaceful picketing . . . "

*Vogt.*[16]

"The rights of free speech and assembly . . . do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

*Cox.*[17]

"We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as . . . picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

*Cox.*[18]

"Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute . . . "

*Adderley.*[19]

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[15] *Teamsters Union* v. *Hanke,* 339 U.S. 470, 474.

[16] *Teamsters Union* v. *Vogt,* 354 U.S. 284, 293.

[17] *Cox* v. *Louisiana,* 379 U.S. 536, 554.

[18] *Id.* at 555.

[19] *Adderley* v. *Florida,* 385 U.S. 39, 47.

> ". . . the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please . . . was vigorously and forthrightly rejected in . . . *Cox* v. *Louisiana* . . . We reject it again."
>
> *Adderley*.[20]

Thus, this Court unequivocally holds that trespass picketing may be enjoined.

In sum, the trial court's narrowly drawn injunction did not violate Petitioners' freedom of speech. The injunction certainly did not diminish Petitioners' ability to communicate with the public; on the contrary, its public audience was increased.

Under these circumstances, Petitioners may not argue that their speech was silenced or their constitutional rights abridged. The law will not "sanction trespass in the name of freedom." [21]

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[20] *Id.* at 47-48.

[21] " . . . freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begin." *State* v. *Martin*, 199 La. 39, 47, 5 So. 2d 377, 380; quoted in *Good* v. *Dow Chemical Co.*, 247 S.W. 2d 608, 611; *cert. denied* 344 U.S. 805.

## CONCLUSION

In *Thornhill* v. *Alabama,* 310 U.S. 88, 105, this Court stated:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

Respondents submit that Pennsylvania followed this precept when it acted to protect the property of Respondents from trespass. Its narrowly drawn injunction did not conflict with any federally protected rights. Thus, no federal question is presented, nor is the matter of sufficient importance to national labor policy to warrant an assertion of jurisdiciton. The Writ should be denied.

Respectfully submitted,

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