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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 RESPONDENTS

Question Presented

It is the public policy of the Commonwealth of Pennsylvania that peaceful picketing on a retailer's private property, within a shopping center, is a trespass. The Supreme Court of Pennsylvania, in declaring this policy, affirmed a preliminary injunction regulating such picketing. The question presented is whether, under these circumstances, the Petitioners' freedom of speech was abridged.

Statement of the Case

Weis Markets, Inc. (Weis) is the owner-occupant of a supermarket in the shopping center known as Logan Valley Plaza, Inc. (Logan). Weis owned the real property on which it constructed its store, porch and parcel pick-up zone, and has retained ownership in this property. Logan owns all other property in the shopping center (R. 9, 42, 51, 52).

The only other occupant of the shopping center at the commencement of this proceeding was a Sears, Roebuck store and service station (R. 51). Construction of other stores was contemplated (R. 51). 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. 87). The main entrances used by customers of Weis are Entrances 1 and 2 off of Goods Lane (R. 49, 50; see photograph, Ex. No. 1, R. 80). The distance between the store and these two entrances is 350 feet (R. 35).

On December 8, 1965, Weis opened for business. It posted a sign on its property prohibiting trespassing or soliciting on its property (R. 33, 49).

On December 17, 1965, picketing was commenced by Petitioners (hereinafter referred to as the union) "directly in front of the (Weis) store," (R. 54, 55) and continued daily (except December 24, 1965) until December 27, 1965 (R. 28, 29, 31, 32), when it was enjoined.

The pickets paraded within Weis' parcel pick-up zone. This zone is located alongside the front of the store; it is four to five feet wide, 30-40 feet in length, and is marked

off with bold double yellow lines (R. 101, n.2, 55).[1] The words "Parcel Pick-Up" are printed in large letters. (See Photographs R. 84, 85.) *This zone is Weis property and is owned by Weis,* together with the store proper and porch adjacent thereto (R. 9; Order of Court, par. (a), R. 20; R. 33, 41, 42, 52, 101).

The pick-up area is used "strictly for customers to come and enter to pick up their parcels which they had purchased. . . . They drive (their automobiles) into this particular area, and there the groceries are loaded into the cars by (Weis employees) on . . . pick-up duty" (R. 29).

December 17th was a Friday. A witness described what occurred:

> "(I)t was a Friday night, which is quite busy." Cars were moving continuously in the vicinity of the parcel pick-up zone (R. 29).
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> The picketing was "causing congestion out there (in the parcel pick-up zone) and customers were milling around trying to get in as well as leave. After they had the groceries loaded in the car they had a problem of waiting until some of the pickets stepped out of the way (so) that they could leave the zone" (R. 30).
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> This required "constant navigating by customers in and out. . . ." One customer stated she had almost hit one of the pickets (R. 44).
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> * * *
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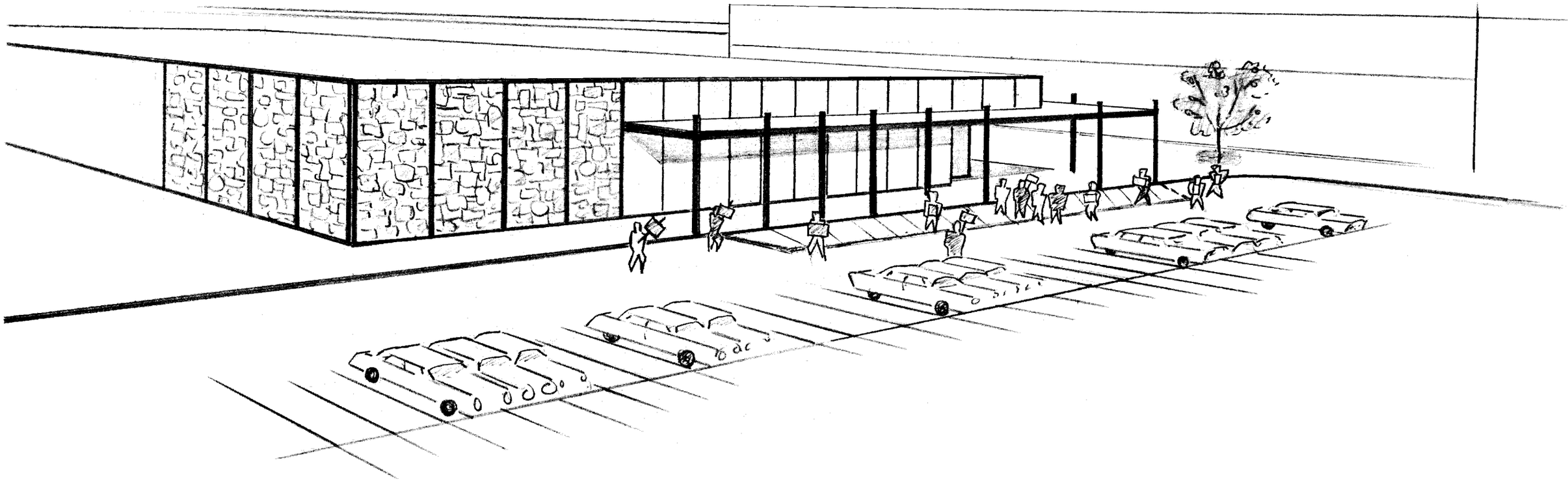
> The picketing took place "right where the cars will drive in for the groceries." The pickets "hindered"

[1] The Exhibits in the Appendix do not clearly or completely depict this area. A schematic, based upon the record in this case, follows this page.



PARCEL PICK-UP ZONE

4-5' x 30-40'

the cars from driving in, causing annoyance to the customers (R. 47).

The number of pickets varied from 4 to 13 (R. 102). During the afternoon of December 21st, "13 were there . . . walking four abreast many times" (R. 47). None of the pickets were employees of Weis (R. 38, 89). 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. 66, 67).

The avowed purpose of the picketing was to inform the public that the employees of Weis at this store were not members of its union (R. 23, 29, 54). It was testified that "Weis Markets (was not) involved in a labor dispute" with the union (R. 37) and the trial court found that "the Weis supermarket is not engaged in labor trouble" (R. 92).

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 parking lot from the respective highways, and are approximately 12 and 15 feet in width (R. 35, 37, 101). The pickets refused (R. 32, 33).

Thereupon, on December 27, 1965, Logan and Weis filed a complaint with the Court of Common Pleas of Blair County, Pennsylvania (hereinafter referred to as the trial court). The court on the same date issued an injunction restricting the picketing to the public berms (R. 19-21, 102, n. 4).

Thereafter, the picketing continued on the berms at each of four entrances to the shopping center (R. 32, 39, 64), with one or two pickets at each entrance, depending on the number available to picket (R. 62). In addition to

picketing on the berms, the pickets also picketed across the driveway of the entrances and exits leading to the general parking area (R. 75).

On January 4, 1966, a hearing was held at which testimony was taken (R. 27). On February 16, 1966, the trial court ordered that the preliminary injunction theretofore issued be "continued until further adjudication of the case" (R. 4). On March 21, 1967, the Supreme Court of Pennsylvania affirmed (R. 5, 106). On October 23, 1967, this Court granted certiorari.

Summary of Argument

The issue is simple. A retailer builds his own store on his own land in a shopping center. On his property, he provides a parcel pick-up area for use by his customers. A union seeks to picket him. Must the retailer suffer the conversion of the *pick-up* area to a *picket* area?

This simple issue is before this Court as a result of an Order of the trial court, issued after a full hearing (R. 99, 100).

The Supreme Court of Pennsylvania, in affirming the trial court, summarized the Order's prohibitory aspects as follows:

"That injunction restrained the Union from:

1. picketing and trespassing on Weis' property, i.e., the store proper, the porch and the parcel pick-up area;
2. picketing and trespassing upon Logan's property, i.e., the parking area and entrances and exits thereto;
3. physically interfering with Weis' business invitees entering or leaving the store or parking area;

4. violence toward Weis' business invitees;

5. interference with Weis' employees in the performance of their duties" (R. 102).

The union's position, in the courts below, and here, may be ascertained from what it has stated, as well as what it has left unsaid.

Activity Restrained	*Union's Position on Restraint*
(1) Picketing	
a. inside the store	No expressed disagreement
b. on the porch	No expressed disagreement
c. within the parcel pick-up area	Expressed disagreement
(2) Picketing	
a. in the parking area	Expressed disagreement
b. on the entrances and exits to parking area	Expressed disagreement[2]
(3) and (4) Physical interference with and violence toward Weis' business invitees	No expressed disagreement
(5) Interference with Weis' employees	No expressed disagreement

[2] However, the union interpreted the court's order to permit picketing across the driveways of the entrances and exits (R. 77-78). Accordingly, the union instructed its pickets to walk across these driveways (R. 75). This interpretation and instruction were not objected to. Consequently, the court's restraint in (2)b was never enforced.

Picketing Inside the Store

The union has not expressed disagreement with the trial court's injunction against picketing inside Weis' store. It has not commented, either affirmatively or negatively. The National Labor Relations Board has. In its *amicus* brief, it stated:

> "Assume, for example, that outside organizers or pickets entered the selling area of the Weis store and disrupted its business. . . . (T)he State would not be barred from acting. . . ." (Brief, p. 17.)

Picketing On the Porch

The union has not expressed disagreement with the statement of the Supreme Court of Pennsylvania that they "do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5).

Picketing In the Parking Area

It is uncontroverted that no picketing took place in the general parking area. Although the union expressed disagreement with the trial court's barring it from engaging in picketing in the general parking area, if it chose to do so in the future, *the union at no time suggested this area as an alternative to picketing within the parcel pick-up zone.* Its position was that it should be permitted to continue to picket "at the Weis Market area" (R. 53).

The Question To Be Decided

Thus, stripped of all rhetoric, the narrow issue is simply this: "(I)n the factual matrix of the case at bar" (R. 104) should the trial court be prohibited from reasonably regulating picketing which occurred within Weis' wholly-owned parcel pick-up zone?

Questions Not Before This Court

Thus, this Court is not asked to decide whether, under any and all circumstances, a state court may regulate picketing within a shopping center.[3] Nor is it necessary in this case to decide whether picketing in the general parking area of a shopping center is subject to regulation, for none took place. It is respectfully submitted that this case of first impression calls for a narrow decision based squarely on the narrow issue tendered.

In the light of the *amici* briefs filed by the American Civil Liberties Union, the Retail Clerks International Association, and the American Federation of Labor and Congress of Industrial Organizations, it is important to further clarify what is *not* at issue in this case.

The *American Civil Liberties Union* argues in support of "the union man fighting for the right to bargain collectively . . . the Negro fighting for a job . . . the housewife fighting an inexplicable rise in the price of eggs. . . ." (Brief, p. 8.) But, of course, the rights of such disputants are not in issue in this case. This Court only "deal(s) with concrete and specific issues raised by actual cases . . . not with . . . theoretical disputes." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740, 746. Additionally, "courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press* v. *NLRB,* 301 U.S. 103, 132.

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[3] An attempt to do so would present insuperable problems. The size, shape, structure, depth, and height of present day shopping centers vary. No two are alike. (See the *amicus* brief of R.C.I.A., p. 5: "Shopping centers vary in size. The shopping center in the instant case has 17 stores. . . . Many shopping centers have paved streets, traffic signs and traffic lights, (and) sidewalks. . . .") *What may be reasonable regulation of picketing in one case may be unreasonable in another.*

The *Retail Clerks International Association* argues that "it is . . . concerned about the right of *unorganized* (emphasis in original) workers in shopping centers to receive information from unions. . . ." (Brief, p. 3.) It asserts that "the instant case is typical" of a situation where a union seeks access to privately-owned shopping centers "to communicate with employees." (Brief, p. 9.)

The right of unions to communicate with employees, organized or unorganized, is not in issue here. Repeatedly, the union in this case has asserted that the picketing was directed toward members of the public (actual or prospective Weis customers), rather than to Weis' employees (See *infra,* pp. 43-44).

The *American Federation of Labor and Congress of Industrial Organizations* opens its argument with the statement that "in the instant case the Pennsylvania courts have used the State's trespass laws to . . . immunize (Weis) . . . from peaceful picketing and handbilling. . . ." (Brief, p. 2.) It then discusses this Court's decisions involving handbilling, acknowledging, however, ten pages later, that *"this case involves dissemination of views to the general public through placards held aloft, i.e. picketing,* and the cases just discussed dealt with the circulation of handbills." (Brief, p. 11.) (Emphasis added.)

Of course this latter statement was correct, and the opening statement incorrect. The trial court did not regulate handbilling. At the time of the filing of this suit the only activity engaged in by the union was picketing.[4] Consequently, the only relief sought and the only relief

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[4] This point was made by the union in its brief to the Supreme Court of Pennsylvania: "We would also respectfully point out that the only testimony in the record with regard to handbills is found at page 58a where it is made clear that no literature was passed out to the public by the pickets while they were picketing within the shopping center area, in fact, the handbill referred to by the lower court was not, as we recall,

granted involved picketing. The question of handbilling is not before this Court.[5]

The Narrow Issue to be Decided—
Picketing in the Pick-Up Zone

Thus, we return to the narrow issue of whether this union must be permitted to picket within Weis' parcel pick-up zone. The union claims this right because of its asserted effectiveness in conveying its message to the public. This is a matter of conjecture. But it is not conjectural that the union effectively disrupted Weis' business when its thirteen pickets marched four abreast in the pick-up zone.

The National Labor Relations Board concedes that had the picketing taken place within the selling area of the Weis store, disrupting its business, it could have been enjoined by the State. There is no less a disruption of business when pickets interfere with the entrance of customers into the pick-up zone, interfere with the placing of purchased merchandise in automobiles, and interfere with the exit of customers from the zone.

The duties of Weis' employees require them to work in the parcel pick-up zone, loading merchandise into the customers' automobiles (R. 29). The interference of the pickets with these duties was as much a disruption of business

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even introduced into evidence." (Brief for Appellants, p. 13, a copy of which was lodged with this Court on November 20, 1967; to the same effect, see Brief for Petitioners, p. 7.)

[5] Similarly, the AFL-CIO's reliance on *Marsh* v. *Alabama,* 326 U.S. 501, is inapplicable. As its *amicus* brief notes at p. 8, the *Marsh* case "dealt with the power of a state to apply its trespass law to prohibit *handbilling* on a street in a company owned town. . . ." (Emphasis added.) Furthermore, there are numerous distinctions between a company owned town and the shopping center in this case. One obvious distinction is that the owners of a company town, unlike the owners of a shopping center, can regulate the full spectrum of human activity, since the inhabitants of the town may never have occasion to leave it.

as interference with the performance of their duties within the store. In fact, it was this very interference which the trial court enjoined, namely:

> "(f) Physically interfering with . . . the plaintiffs employees from performing their duties . . ." (R. 21).

Incontrovertibly, Weis' business was disrupted when the thirteen pickets "caused congestion" and "milling around by customers who were trying to get in as well as leave" (R. 30).

Its business was disrupted when the pickets, "marching abreast," (R. 32) "hindered" automobiles and "annoyed" customers (R. 47).

Its business was disrupted when the pickets forced customers to "navigate in and out" to avoid hitting them (R. 44).

By December 27th, a crisis had been reached. Weis' predicament had become intolerable. If its newly opened store were to remain open, it had to seek immediate relief.

The Law

We submit that the trial court acted in the proper exercise of its equity jurisdiction. The Commonwealth of Pennsylvania should not be foreclosed from fulfilling its obligation to protect the private property and business of its citizens.

There can be no doubt that "a state is not required to tolerate in all places and all circumstances even peaceful picketing . . .," *Bakery Drivers Local 802, IBT* v. *Wohl*, 315 U.S. 769, 775 (concurring opinion), and that a state may enjoin peaceful picketing in enforcement of its public policy. Certainly, state power to "constitutionally enjoin

peaceful picketing . . .," *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284, 293, was not abused by the issuance of the narrowly drawn injunction *allowing picketing,* but prohibiting it from a particular area.

This Court's primary concern in reviewing a state court injunction is to determine whether a proper balance has been struck between competing interests. *International Bhd. of Teamsters* v. *Vogt, Inc., supra* at 289-90. The trial court recognized that "we do not have the right totally to prohibit the picketing of Weis supermarket . . ." (R. 96). However, the court correctly believed that it was "invested with authority to balance the equitable considerations and to impose reasonable controls . . ." (R. 96). The balance struck by Pennsylvania in the instant matter is eminently sound. The pickets were not directed to cease their activity, but merely to move it a relatively short distance away.

The trial court's balancing of the equities in the instant matter was an exercise of reasonable regulation and entitled to "weighty respect." In exercising such authority President Judge Klepser was able to draw upon his "knowledge and appraisal of local, social and economic factors," *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 475, and his personal knowledge of the physical characteristics of the area (R. 50). The result was a narrowly drawn injunction, which permitted picketing at a readily available alternative area. *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112.

The union argues, however, that the trial court was without jurisdiction to act because it was preempted. The union's claim of federal preemption was neither raised nor argued before the Pennsylvania Supreme Court and therefore, under this Court's holdings, this defense may not be raised here.

Assuming, arguendo, that the federal preemption question was not waived, the issue before this Court is whether this state court is preempted from reasonable regulation of picketing upon private property in the circumstances of *this case.* Within the narrow framework of the case at bar, the Pennsylvania courts were not preempted from exercising control. The complained of activity was not even arguably subject to the Labor Management Relations Act. Weis and Logan did not allege in their complaint that the union's activity was subject to the Act, and the union has failed to show that it was.

It is clear that there are many areas of labor activity which remain subject to state regulation. This Court has indicated that much is left to the states. *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 619. The conduct in the instant matter is "deeply rooted in local feeling and responsibility" and therefore within the area subject to state regulation. In the instant matter, the Supreme Court of Pennsylvania expressed the Commonwealth's deeply rooted state interest in the preservation of private property.

Clearly, there was no transgression by Pennsylvania upon the national labor policy, as the conduct controlled by the lower court in the instant matter was merely conduct which "finds itself at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193, n. 14.

Under the facts of the instant case it cannot be argued that Congress intended this activity to be within the exclusive jurisdiction of the National Labor Relations Board. The judgment of the Supreme Court of Pennsylvania, therefore, should be affirmed.

POINT I

THE UNION'S PICKETING WAS SUBJECT TO REASONABLE REGULATION.

What is picketing? Is it speech, pure and simple? This Court has often considered this question, and has answered that "picketing (is) not . . . the equivalent of speech. . . ." *Hughes* v. *Superior Court,* 339 U.S. 460, 465. It "is more than speech. . . ." *Building Service Employees Union* v. *Gazzam,* 339 U.S. 532, 537; *Bakery Drivers Local 802, IBT* v. *Wohl,* 315 U.S. 769, 776 (concurring opinion). It "cannot dogmatically be equated with . . . freedom of speech. . . . (It) is 'indeed a hybrid.' " *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 474.

" 'Picketing,' in common parlance . . . includes at least two concepts: (1) *patrolling,* that is, standing or marching back and forth or round and round . . . (2) *speech,* that is, arguments, usually on a placard. . . ." *NLRB* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 77 (concurring opinion). (Emphasis added.)

"*(P)atrolling is, of course, conduct, not speech,* and therefore is not directly protected by the First Amendment." Mr. Justice Black concurring in *NLRB* v. *Fruit & Vegetable Packers, supra* at 77. (Emphasis added.)

In the present case the "conduct" of the pickets warranted regulation. As the record shows, picketing was carried on to such an extent that the orderly operation of the Weis business became an impossibility.

The parcel pick-up area is an essential operation of Weis' business. It is set apart for use by Weis' customers;

entrance by other vehicles is prohibited.[6] It has great customer appeal. Most of Weis' customers come to the center by car. After completing his purchase, the customer drives his car into the parcel pick-up zone and an employee loads the merchandise into the car. Thus, within seconds, packages may be taken from the store and loaded into the customers' cars. Customers are relieved of the burden of carrying heavy loads of groceries to a car parked some distance away.

The parcel pick-up area is an adjunct to the store. This parcel pick-up zone is actually part of the merchandising of the product. Its operation is as much an integral part of the store's operations as the stocking of the shelves, or the payment for purchases at the check-out counters. It is the place of last impression upon a customer; efficient handling of his purchases enhances the likelihood that he will return.

But on Friday evening, December 17th, the normally smooth functioning and efficient merchandising operation within the zone was disrupted by marching pickets, and its use significantly curtailed. Packages could not be loaded into vehicles; automobiles could not proceed through the area; pickets, employees and customers were placed in danger of bodily harm; and vehicles were abnormally backed-up for some distance awaiting service. All of this was a consequence of the "conduct" of the union's picketing. It was this "conduct" which required regulation. In doing so, the trial court preserved the "speech" aspects of the picketing by permitting its continuation at the berms.

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[6] The enforcement of this prohibition was illustrated when an A & P store manager sought to interfere with the ordinary functioning of this zone by parking and leaving his car there. The Weis employees working in the parcel pick-up area reported this to their supervisor, claiming that "Our pick-up zone is completely halted." The A & P manager was requested to remove his car immediately so that the zone could be reopened to customers (R. 30).

Thus, the "speech" element of the picketing remained unimpaired. Eight pickets continued to communicate their message to the public at the entrances to the shopping center (R. 62). And, as "the placards . . . (were) plainly legible to passing motorists" (R. 98), not a person could enter the shopping center without being aware of the message. The trial court concluded that, as a result, the union's audience was increased (R. 98).[7]

In addition, as stated in Brief for Petitioners, p. 7, "when picketing at the highway entrances began, leaflet distribution at these points was also commenced (R. 58-59)." Hence, the union's media of communication was further expanded. Its "freedom of speech" was not abridged; it was enlarged.

The union's claim that its sole objective was communication with the public, rather than interference with the store's operations, is belied by its actions. If its purpose was communication alone, one picket, with sandwich placards in front and back, would have been sufficient. Every prospective customer would have been communicated with. The physical presence of 13 pickets, marching four abreast, evidences the union's intention to disrupt Weis' business.

The claim of abridgment of constitutional rights should not be used as a shield for transgression of another's property rights. The law will not "sanction trespass in the name of freedom." [8]

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[7] This may be the reason why some unions always picket at the entrances to shopping centers.

[8] "(F)reedom 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, 48, 5 So. 2d 377, 380; quoted in *Good* v. *Dow Chemical Co.,* 247 S.W. 2d 608, 611, *cert. denied,* 344 U.S. 805.

POINT II

THIS COURT WILL SUSTAIN STATE COURT INJUNCTIONS EFFECTUATING STATE PUBLIC POLICY.

This Court will sustain state court injunctions against peaceful picketing, where the state acts in enforcement of its public policy. There is "a broad field" in which the state can "constitutionally enjoin peaceful picketing" in enforcing its policy, *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284, 293, for "a state is not required to tolerate in all places and all circumstances even peaceful picketing." *Bakery Drivers Local 802, IBT* v. *Wohl,* 315 U.S. 769, 775 (concurring opinion).

This Court has emphatically rejected the claim that the "states (are) powerless to confine the use of this industrial weapon (peaceful picketing) within reasonable bounds." [9] *Carpenters Union* v. *Ritter's Cafe,* 315 U.S. 722, 725. On the contrary, "where . . . claims on behalf of free speech are met with claims on behalf of . . . the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain." *Carpenters Union* v. *Ritter's Cafe, supra* at 725-26. It will uphold such regulation where "the manner in which picketing is conducted . . . gives ground for its disallowance," *Hughes* v. *Superior Court,* 339 U.S. at 465-66, for "freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses." *Breard* v. *Alexandria,*

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[9] As this Court noted in *Giboney* v. *Empire Storage Ice Co.,* 336 U.S. 490, 498: "Neither *Thornhill* v. *Alabama, supra,* nor *Carlson* v. *California,* 310 U.S. 106, both decided on the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried out by a display of placards by peaceful pickets."

341 U.S. 622, 642. "The Constitution does not demand that the element of communication in picketing prevail . . ." over a state's public policy. *Hughes* v. *Superior Court,* 339 U.S. at 464.

This Court's primary concern in reviewing a state court injunction enforcing public policy is not so much a question of free speech, as a review of the balance struck by a state between picketing and competing interests of state policy. *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284.

In reviewing the balance struck by the state, this Court will not judge the wisdom of the state policy, *Building Service Employees Union* v. *Gazzam,* 339 U.S. 532, 536-37; *Giboney* v. *Empire Storage Ice Co.,* 336 U.S. 490; *Carpenters Union* v. *Ritter's Cafe,* 315 U.S. 722, 725; nor the wisdom of its exercise. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287, 298.

In *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 477, this Court reaffirmed this rule:

> "Washington here concluded that, even though the (injunction) . . . entailed restrictions upon communication that the unions sought to convey through picketing, it was more important to safeguard the value which the State placed upon self employers, leaving all other channels of communication open to the union."
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> * * *
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> "It is not our business even remotely to hint at agreement or disagreement with what has commended itself to the State of Washington, or even to intimate that all the relevant considerations are exposed in the conclusions reached by the Washington Court. They seldom are in this field, so deceptive and opaque are the elements of these problems. That is precisely what is

meant by recognizing that they are within the domain of a State's public policy." 339 U.S. at 478.

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"*(A) State's judgment in striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to the Court bearing a weighty title of respect.*" 339 U.S. at 475. (Emphasis added.)

POINT III

THE BALANCE STRUCK HERE BY THE COMMONWEALTH OF PENNSYLVANIA SHOULD BE ACCORDED A "WEIGHTY TITLE OF RESPECT" AND ITS JUDGMENT AFFIRMED.

We start with the decision of the trial court. Did it follow this Court's teachings concerning the balancing of the interests of the parties and the exercise of reasonable regulation? Judge Klepser did just that when he said, speaking for the court:

> "(W)e are invested with authority to *balance the equitable considerations* and to impose *reasonable controls* . . ." (R. 96). (Emphasis added.)

In exercising such authority, Judge Klepser was able to draw upon his "knowledge and appraisal of local social and economic factors," *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 475, and his personal knowledge of the physical characteristics of the area. He had undoubtedly passed by, or shopped in the shopping center. He knew, for example, which road was the most heavily traveled.[10] He could find, therefore, based upon personal observation, that "the placards or banners will be plainly legible to passing motorists on both highways" (R. 98). As such, his judgment is entitled to "weighty respect."

We proceed to the Supreme Court of Pennsylvania, which has the authority to announce public policy, and enforce it by "constitutionally enjoin(ing) peaceful picketing aimed

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[10] At the trial, union counsel commented: "I am sure the Court knows (which is the most heavily traveled road)" (R. 50).

at preventing effectuation of that policy." *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284, 293.

The Supreme Court of Pennsylvania stated that the issue before it was whether "in the factual matrix of the case at bar, the *conduct* of the pickets constituted an invasion of the private property of Weis and/or Logan," and whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property." (Emphasis added.) It stated that the "resolution of that question involves the consideration of many factors" (R. 104-05). It proceeded to analyze the "social and economic factors," *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 474, to be considered.

It pointed out that "the success of both Weis' store and the Logan shopping center depends upon the extent to which both are able to induce and persuade the public to visit and shop in the area" (R. 104). But, said the court, it "lacks any basis in law or common sense" to hold that by such solicitation of patronage "these property owners (also) solicited the use of their property by persons who were attempting to discourage the public from patronizing the store facilities . . ." (R. 106).

The court thus concluded that the property on which the picketing took place was private property and that "such use (picketing) constituted a trespass which very properly was restrained" (R. 106). In so declaring, it reaffirmed its public policy that it was "clear beyond question" 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 . . ." (R. 104).

Similarly this Court 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.

But the union asserts that although "the property is private . . . the use is public." (Brief for Petitioners, p. 12.) Was it a public use "to which (the parcel pick-up zone) was lawfully dedicated?" *Adderley* v. *State of Florida, supra.* The Supreme Court of Pennsylvania responded that "neither the record nor common sense would justify such a finding" (R. 104).

Certainly, there was no common-law dedication.[11] In the present case, there was a clear intention not to dedicate, but to retain control and exercise exclusive ownership. The no-trespass rule posted by the owner of the property, Weis, evidences an intent not to open the area to the public's general use. Nor could any dedication have taken place in the few days the store was opened prior to the commencement of the picketing. Certainly, under these circumstances, the parcel pick-up area and the front porch owned by Weis could not be deemed to have been dedicated to public use.

The pickets in the instant matter were all employees of Weis' competitors.[12] *Indisputably, Weis did not invite its competitors' employees (the pickets) to confront Weis' customers at the threshold of Weis' property, so that they could there promote their employers' businesses, and destroy that of Weis.*

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[11] In 3 American Law of Property, §12.132 (1952), "Dedication" is defined as: "the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use." See also, 4 Tiffany, Real Property, §1098, p. 329 (3rd ed., 1939).

[12] In distinguishing a prior holding, the Supreme Court of Pennsylvania took note of the fact that the pickets were non-employees. The Supreme Court, of course, did not "justify the prohibition of peaceful picketing" based on this fact, as the union incorrectly argued in its Brief at p. 37, and elsewhere.

The objective of these pickets was the antithesis of lawful business invitees. "To hold that (Weis) solicited the use of this property by persons who were attempting to discourage the public from patronizing the store facilities lacks any basis in law or common sense," stated the Supreme Court of Pennsylvania, in affirming the decree of the trial court (R. 106).

It is submitted that the courts below struck a reasonable balance after considering the social and economic factors in this case. Under these circumstances, their judgment should be accorded a weighty title of respect by this Court, and affirmed.

POINT IV

THIS COURT RECOGNIZES THAT DIVERGENT SOCIAL AND ECONOMIC VIEWS HELD BY STATES MAY RESULT IN THEIR STRIKING DIFFERENT BALANCES.

In affirming an Illinois judgment upholding an injunction against picketing, this Court stated:

> "That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296.

This Court has also noted that:

> "The policy of a state may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate." *Hughes* v. *Superior Court,* 339 U.S. 460, 468.

Whichever course the state takes, this Court will not assess the wisdom of its policy. *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722, 725; *Giboney* v. *Empire Storage Ice Co.*, 336 U.S. 490; *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, 536-37.

Accordingly, that California has struck a different balance, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Union,* 61 Cal. 2d 766, 394 P. 2d 921, *cert. denied,* 380 U.S. 906, only underscores the fact that states have different social and economic views, resulting in different public policy.

California's public policy relative to the respective rights of pickets and property owners was enacted into statute form. The California Supreme Court held that the statute "specifically subordinated the rights of the property owner" to that of a labor union, and excepted picketing by a labor union from its criminal trespass statute, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Union*, *supra* at 769. Thus, it relied on its statutory declaration of public policy, when it weighed the competing interests of a retailer in a shopping center, against that of a union engaged in picketing therein. It had no difficulty, therefore, in holding that the scales tipped in favor of the union.

That Pennsylvania balances the interests differently, is not unconstitutional, for the Constitution does not command "logical symmetry." *Hughes* v. *Superior Court*, 339 U.S. at 468.

POINT V

THE NARROWLY DRAWN INJUNCTION HEREIN IS VALID UNDER THE FEDERAL CONSTITUTION.

The injunction issued by the trial court did not enjoin all picketing. It merely regulated the place of the picketing, the number of pickets, and prohibited physical interference and violence (R. 102, 102 n.4). It expressly permitted continued picketing elsewhere, where the pickets "will be still in the vicinity and clearly within view of the Weis supermarket," and where the pickets' banners "will be plainly legible to passing motorists . . ." (R. 98).

This Court has sanctioned the use of narrowly drawn injunctions. In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298, this Court stated:

> "The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely. . . . An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo."

In *Building Service Employees Union* v. *Gazzam,* 339 U.S. 532, this Court noted, in finding no unwarranted restraint of picketing, that:

> "The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated. . . ." 339 U.S. at 541.

In the instant matter there was no unwarranted restraint of picketing. The injunction granted was tailored to prevent a "specific violation of an important state law." The

decree was limited to the "wrong being perpetrated," namely, the tort of trespass. It did not "reach the union's conduct in its entirety." *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U.S. 20. It expressly recognized that it did not have the right "totally to prohibit the picketing" (R. 96).

It is submitted, therefore, that this narrow limitation of picketing accommodated the interests of all parties. The union's opportunity to communicate with the public was preserved and enlarged, Weis' property rights were protected and the public's right to trade without interference was secured.

POINT VI

THE UNION'S FEDERAL PREEMPTION DEFENSE WAS NEITHER RAISED NOR ARGUED BEFORE THE SUPREME COURT OF PENNSYLVANIA. THEREFORE, THIS DEFENSE MAY NOT BE RAISED HERE.

A. *This Court Will Not Entertain Defenses That Were Not Raised Before A State Supreme Court.*

Under an "unbroken line of precedent," this Court has held that contentions or defenses not raised before a State Supreme Court may not be entertained here. *Beck* v. *Washington*, 369 U.S. 541, 553; *State Farm Mut. Auto Ins. Co.* v. *Duel*, 324 U.S. 154; *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334; *Wilson* v. *Cook*, 327 U.S. 474; *Blair* v. *Oesterlein Co.*, 275 U.S. 220. "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." *Whitney* v. *California*, 274 U.S. 357, 362. A failure to pursue properly the question of federal preemption on appeal in a state court proceeding, precludes this Court from review of that question. *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334, 342 n.7. Thus, this Court is limited in the scope of its review of the judgment of the Supreme Court of Pennsylvania to federal issues which were properly raised before that tribunal.

B. *The Defense Of Federal Preemption Was Never Presented To The Supreme Court Of Pennsylvania For Its Determination, Nor Did That Court Address Itself To The Question.*[13]

1. The Rules of the Supreme Court of Pennsylvania require that questions be properly presented.

In order to properly raise a question before the Supreme Court of Pennsylvania, the question must be included in the Statement of Questions Involved. *Rules Of The Supreme Court of Pennsylvania,* Rule 59. The Rule is mandatory:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. . . . *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or necessarily suggested by the statement of questions involved.*" (Emphasis added.) Pa. Sup. Ct. R. 59 (as amended to Jan. 1, 1967).

The Supreme Court of Pennsylvania has consistently held that it will refuse to consider questions not presented as the Rule dictates. The point or defense is considered abandoned or waived. *Dunmore* v. *McMillan*, 396 Pa. 472, 152 A. 2d 708; *Kuhns* v. *Brugger*, 390 Pa. 331, 135 A. 2d

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[13] In its Brief before this Court, the union notes that: "The Pennsylvania Supreme Court did not address itself to the question of federal preemption." (Brief for Petitioners, p. 10.)

395; *Kerr* v. *O'Donovan*, 389 Pa. 614, 134 A. 2d 213; *Blue Anchor Overall Co.* v. *Pennsylvania Lumbermens Mut. Ins. Co.*, 385 Pa. 394, 123 A. 2d 413; *Snyder Estate*, 346 Pa. 615, 31 A. 2d 132, *cert. denied*, 320 U.S. 750, rehearing denied, 320 U.S. 812; *Commonwealth* v. *Cauffiel*, 298 Pa. 319, 148 Atl. 311.

2. The defense of federal preemption was not included in the union's statement of questions involved.

The union, in its Brief filed with the Supreme Court of Pennsylvania, set forth the following as its Statement of Questions Involved.[14]

"STATEMENT OF QUESTION INVOLVED"

"Did the lower court err in granting a Preliminary Injunction without hearing and thereafter, denying and dismissing appellant's motion to dissolve or modify said injunction and further, continuing said Preliminary Injunction, where in a suit in equity by the owner of a shopping center and one of its tenants it is established that appellant-union peacefully picketed near tenant's building within the confines of said shopping center; that no picketing efforts were directed toward the shopping center or other tenants; that picketing efforts were merely to inform the public of the labor dispute?

"Negatived by the Court below by the granting and continuance of a Preliminary Injunction which restrained appellant-union from picketing within the entire limits of the shopping center area." (Emphasis in original.)

[14] The Union's "Brief for Appellants" was lodged with this Court on November 20, 1967.

It is crystal clear, and beyond peradventure, that the union did not include the question of federal preemption in its Statement.[15] Thus, since it is mandatory that "no point will be considered which is not thus set forth," (Rule 59), "the Pennsylvania Supreme Court did not address itself to the question of federal preemption." (Brief for Petitioners, p. 10.) Consequently, the defense of federal preemption was waived before that court. Accordingly, it may not now be raised before this Court.

This Court so held in *Beck* v. *Washington*, 369 U.S. 541. In that case, this Court was confronted with a similar state Rule of Court,[16] and a similar failure by a petitioner to comply. This Court flatly refused to entertain an argument based on a point not properly raised.

In an analogous case, *CIO* v. *McAdory*, 325 U.S. 472, one of the questions before this Court was whether a state statute was in conflict with the National Labor Relations Act. However, the question of federal preemption had not been considered by the Alabama Supreme Court. In interpreting an appellate rule very similar to Rule 59 of the Supreme Court of Pennsylvania, this Court found that the Alabama Supreme Court would not consider errors which had not been assigned or which had not been specifically and precisely raised in the assignments of error. This Court held in that case that because of the failure of the parties to comply with the Alabama Supreme Court Rules, this Court would not consider the preemption issue.

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[15] Contrast the specific presentation of the defense of federal preemption in the "QUESTIONS PRESENTED" to this Court in Brief for Petitioners, p. 2 with its complete omission in the court below.

[16] "Rule 43 of the Rules on Appeal, Revised Code of Washington, provides that '[n]o alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the "assignments of error" in appellant's brief.'" 369 U.S. at 552.

> "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. *Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Hulbert* v. *Chicago*, 202 U.S. 275, 280, 281; *Dorrance* v. *Pennsylvania*, 287 U.S. 660; *Chandler* v. *Manifold*, 290 U.S. 665; see also *Flournoy* v. *Wiener*, 321 U.S. 253; *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 185 and cases cited." 325 U.S. at 477.

In another case where this Court was confronted with a defense that had not been asserted below (the petitioner having failed to comply with the State Supreme Court Rules), this Court refused to listen to the plea and stated:

> "The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court. . . ." *Wolfe* v. *North Carolina*, 364 U.S. 177, 196, rehearing denied, 364 U.S 856.

3. The defense of federal preemption was not argued before the Supreme Court of Pennsylvania.

Rule 55 of the Supreme Court of Pennsylvania requires that briefs filed with it contain a "Summary of Argument" and "Argument."

Rule 61½ of the Supreme Court of Pennsylvania requires that the "Summary of Argument" contain a concise summary of the party's arguments in the case.

In its "Summary of Argument," the union urged that: (1) a labor dispute existed within the meaning of the Pennsylvania Labor Anti-Injunction Act and thus could not be enjoined; (2) the picketing was peaceful; (3) there was no trespass, since the property, while technically private, was quasi-public in nature; (4) the right of control "is subordinated to the constitutional rights of the members of the public who use the property." (Brief for Appellants, p. 6.)

Rule 62 requires that each question before the court be argued under separate headings, which headings should indicate the particular point treated therein.

Under "Argument for Appellant" the union set forth its arguments concerning freedom of speech, the peaceful nature of its picketing, the quasi-public character of the property, and the inapplicability of the Pennsylvania Anti-Injunction Act. (Brief for Appellants, pp. 7-21.) It declared that "the problem of trespassing" was "the real issue here involved." (Brief for Appellants, p. 14.)

4. The defense of federal preemption was not argued before the trial court.

On January 19, 1966, the union filed its "Brief for and on behalf of Defendant in Support of its Motion to Dissolve or Modify the Preliminary Injunction," together with a Reply Brief.[17]

The arguments presented were similar to the arguments later presented to the Supreme Court of Pennsylvania, discussed above. The union did not argue federal preemption in either its Brief or Reply Brief. On the contrary, the

[17] Petitioners' "Brief in Support of its Motion to Dissolve or Modify the Preliminary Injunction," including the attached Reply Brief, was lodged with this Court on November 29, 1967.

Opinion of the trial court recited that the union conceded the court's jurisdiction.[18]

5. The Supreme Court of Pennsylvania has decided questions of federal preemption when properly raised.

The Supreme Court of Pennsylvania has decided many cases in which this defense has been raised. Whenever it is presented, it is resolved by the court. See, e.g., *City Line Open Hearth, Inc.* v. *Hotel Employees Union,* 413 Pa. 420, 427, 197 A. 2d 614, and cases cited; and *Lay* v. *Local 174, International Bhd. of Electrical Workers*, 427 Pa. 387, 235 A. 2d 402, and cases cited.

In *Lay*, the most recent case in which the defense of preemption was raised before the Supreme Court of Pennsylvania, the Court discussed the problem at great length. It set forth the elements a party must prove in order to establish that the state court is ousted of jurisdiction:

> "(I)t is necessary, in this class of cases, for the parties who claim that the N.L.R.B. has exclusive jurisdiction to prove, inter alia, (1) that the employer was engaged in interstate commerce . . . and (2) that the challenged activities were expressly or arguably within the jurisdiction of the N.L.R.B. . . ." 427 Pa. at 389, 235 A. 2d at 403.

The Supreme Court of Pennsylvania further noted:

> " 'Furthermore, the jurisdiction of the N.L.R.B. must be readily ascertainable from the averments of fact con-

[18] "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. 90).

> tained in the Complaint itself, or must be affirmatively proved by the party alleging such jurisdiction.'" 427 Pa. at 389, 235 A. 2d at 403.

It is readily apparent that at the hearing on January 4, 1966, the union had no intention of seriously raising the issue of federal preemption. It presented no evidence to prove either that "the employer was engaged in interstate commerce" [19] or "that the challenged activities were expressly or arguably within the jurisdiction of the NLRB." The fact is, contrary to the requirement of proof so clearly set forth by the Supreme Court of Pennsylvania, that jurisdiction of the National Labor Relations Board is altogether unascertainable from the complaint and the record in this matter.

In *Lay,* the Supreme Court of Pennsylvania held that the matter was subject to exclusive Labor Board jurisdiction. In doing so, it discussed in detail the preemption decisions of this Court.

It is clear therefore that the Supreme Court of Pennsylvania has extensive expertise on the subject of federal preemption in labor matters.[20] Had the union raised the defense, the court would have "addressed itself to the question." The detailed and thorough discussion of the pre-

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[19] At the Hearing, the union cross-examined Weis' Assistant General Superintendent at length (R. 38-48). It would have been a simple matter to adduce evidence through him on the subject of interstate commerce, or to propose a stipulation.

[20] Similarly, its expertise extends to other areas concerning federal supersession. See that court's extensive analysis of this question in *Commonwealth* v. *Nelson,* 377 Pa. 58, 104 A. 2d 133, affirmed 350 U.S. 497, where, in finding federal supersession, it stated:

> "(W)e are met at the outset with this question which was *pressed timely in the trial court, was urged upon the Superior Court on appeal and has been stressed before us.*" 377 Pa. at 64, 104 A. 2d at 136. (Emphasis added.)

emption question by the Supreme Court of Pennsylvania in *Lay* demonstrates the very reason for this Court's waiver doctrine. The state courts should be given the opportunity to evaluate and decide all of the litigants' arguments before this Court is called upon to make a determination.

C. *Since The Union Failed To Raise The Defense Of Federal Preemption Before The Supreme Court Of Pennsylvania, It May Not Be Raised Before This Court.*

In the leading preemption cases, this Court has consistently made clear the fact that the preemption defense had been raised in the state courts below and had not been waived or abandoned. *Vaca* v. *Sipes,* 386 U.S. 171, 173; *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 187; *Hattiesburg Bldg. & Trades Council* v. *Broome Co.,* 377 U.S. 126; *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 303; *Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 263; *Division 1287, Bus Employees Ass'n* v. *Missouri,* 374 U.S. 74, 77; *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690, 692; *Local 438, Construction Union* v. *Curry,* 371 U.S. 542, 545; *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 196; *Marine Engineers Ass'n* v. *Interlake Steamship Co.,* 370 U.S. 173, 176; *Plumbers' Union* v. *County of Door,* 359 U.S. 354, 355; *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 238; *Guss* v. *Utah Labor Bd.,* 353 U.S. 1, 5; *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U.S. 20, 22. The consistent noting that the defense of preemption was raised below underscores its significance.

The instant case is unlike a diversity case in the federal district courts where the fact of diversity of citizenship is so fundamental that it cannot be waived. This is not a case where the issue is the basic elementary jurisdiction

of a court. Under the rulings of this Court, a state court through the exercise of its equity power can still issue injunctions in labor cases. *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284; *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131; *UAW* v. *WERB,* 351 U.S. 266; *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740. The Pennsylvania courts therefore had the power to act here.

The allegation that a court has exceeded its power, is a defense which, if not raised, is considered waived. This Court has held innumerable times that it will not entertain the defense that a state court has unconstitutionally exceeded its power, if such defense has not been first presented to the State Supreme Court. *Beck* v. *Washington,* 369 U.S. 541; *Wolfe* v. *North Carolina,* 364 U.S. 177; *State Farm Mut. Auto Ins. Co.* v. *Duel,* 324 U.S. 154.

There is no valid reason for this Court to change or modify its long standing policy, propounded in detail above, that defenses not raised in the State Supreme Court cannot be raised here. Accordingly, since the defense of federal preemption was not raised before the Supreme Court of Pennsylvania, it may not be raised here.

POINT VII

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.

A. *The Picketing Did Not Violate Any Section Of The Labor Management Relations Act.*

1. The complaint did not allege that the union had engaged in unfair labor practices.

The complaint alleged that the union caused large numbers of persons to congregate in front of the store and in the parcel pick-up area (par. 6). The complaint also alleged that a no-trespassing notice had been posted (par. 11), that the union had been advised of it (par. 10) but that, notwithstanding, the union continued to trespass (par. 12) (R. 8-10).

Nowhere in the complaint was there an allegation that the union had committed an act which constituted an unfair labor practice, nor were there any acts complained of which could be interpreted as constituting unfair labor practices.

2. The union's Motion to Dissolve did not specify any particular unfair labor practice.

In its Motion, the union only adverted to "an unfair labor practice," in its generic sense. Not until this matter reached this Court, did the union specify any particular section of the Act. It is obvious, therefore, that its belated particularization of two alleged unfair labor practices was an afterthought. The union made no argument and offered no evidence during the hearing as to what conduct it was claiming it had engaged in which constituted an un-

fair labor practice, nor what sections of the Act it was violating. This mute position should be contrasted with its extensive argument here (Brief for Petitioners, pp. 30-56.) Regardless of whether its failure to raise the defense of preemption constituted a waiver, its bare assertion—and nothing more—until here, is evidence, at the least, that heretofore it considered this defense jejune.

3. The asserted unfair labor practices are confined to two sections of the Act.

In the Appendix to its Brief, the union sets forth two sections of the Labor Management Relations Act on which it relies, Section 8(b)(4) and Section 8(b)(7). Therefore, "the first inquiry . . . must be whether the conduct called into question may *reasonably* be asserted to be subject to Labor Board cognizance." *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690, 694. (Emphasis added.) We shall show that the union's conduct did not violate either section, either in fact or arguably.

(a) *Section 8(b)(4)*

The conduct which this Court has been asked to review was primary, not secondary. The picketing took place immediately in front of the Weis store, and the name "Weis Markets" was clearly identifiable on the signs (R. 89). The picketing was "for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc. at said store . . ." (See Motion to Dissolve (R. 23).)

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

The union concedes that *this* primary picketing did not violate Section 8(b)(4) of the Act. Its contention is that, if it is *required* to picket at the entrances to the shopping center, a "secondary situation" *might* be created. (Brief for Petitioners, p. 42.) It does not contend, however, that this "secondary situation" is unlawful. Nor does the union contend that it would not picket at the entrances, of its own volition. What it seeks to do is reserve to itself the option to picket at the storefront *and* at the entrances.

Of course, the issue is whether the picketing from December 17, 1965, through December 27, 1965 in front of the Weis store, was a secondary boycott.[21] This was the activity enjoined, not the subsequent picketing at the berms, which was permitted. Whether a "secondary situation" was created by the court's order is not the question, "(n)or will (this Court) assume in advance that a State will so construe its law as to bring it into conflict with the Federal Constitution or an Act of Congress." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740, 746.

The union evinces a concern about the "entanglement of others" and "exposing neutral employers to picketing in a controversy not their own." (Brief for Petitioners, p. 42, 55.) It lists seventeen enterprises presently occupying the center. (Brief for Petitioners, p. 3.) This of course does not appear in the record; if this be so, it may be noted

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[21] The National Labor Relations Board (unlike the union) apparently contends that the picketing in front of the store, "might be . . . proscribed by Section 8(b)(4)(B) of the Act." Its thesis is that "since the shopping center where the picketing was conducted had employers other than Weis, the Union was obligated to conduct its picketing with due regard for the right of those other employers. . . ." (Brief for National Labor Relations Board, p. 8.) It is possible that this statement was inartistically drawn and that the Board was referring to the picketing that took place after the issuance of the injunction.

that from the time the trial court directed the picketing to the four entrances to the center on December 27, 1965, until the picketing ceased on June 8, 1967, none of these tenants had filed an unfair labor practice charge objecting to the picketing. Moreover, Logan, the owner, has raised no objection. It is before this Court seeking affirmance of the decision below.

That the unions professed concern about neutral employers is a stratagem, is evidenced by its statement at page 44 of its Brief where it states, inconsistently, "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." (Emphasis added.)[22]

(b) *Section 8(b)(7)*

This section condemns, as unlawful, picketing for recognition—i.e. picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization." Was the object of the union's picketing "to force or require Weis to recognize or bargain with it?" The answer must be negative. The complaint con-

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[22] The union cites *Honolulu Typographical Union No. 37* (Hawaii Press Newspapers), 167 N.L.R.B. No. 150, as support for its argument that picketing outside of a shopping center presents questions of secondary activity. In *Honolulu,* a union had a "dispute" with a newspaper publisher (the primary employer). In aid of this primary dispute, it attempted to exert secondary pressure (picketing) upon five advertisers, whose businesses were located within a shopping center. The instant matter is not concerned with primary and secondary employers. The only employer involved is Weis. The union is not picketing Weis because it has a dispute with any other employer. The union in *Honolulu* also parked a flat bodied truck in front of the shopping center, upon which a series of Hawaiian, Tahitian and Samoan musicians and dancers gave free performances. We trust that this is not the type of activity the union is suggesting should be permitted to take place in the parcel pick-up zone in front of Weis' store.

tained no such allegation and there was no evidence to this effect in the record. On the contrary, the union alleged that the picketing was "nothing more than . . . informational picketing . . . for the purpose of informing the public . . ." (R. 22-23).

Further condemned as unlawful is organizational picketing, i.e. picketing "where an object thereof is forcing or requiring the employees of the employer to accept or select such labor organization." Was the object of the picketing to "force or require the employees of Weis to accept the union?" Again, the answer must be negative. There was no such allegation in the complaint. Furthermore, the record is completely barren of any reference to organizational activity on the part of the union, such as the solicitation of signatures from Weis employees on authorization cards, conversations with them by union representatives, on or off the picket line, seeking their support or affiliation, or any of the numerous other ways in which a union organizes. On the contrary, as asserted by the union, the picketing was "nothing more than . . . informational picketing . . . for the purpose of informing the public . . ." (R. 22-23). This limited purpose has been consistently set forth by the union in its argument before the lower courts and here.

In its Brief to the trial court, the union stated:

> "The activity complained of . . . amounts to nothing more than peaceful, informational picketing by union members for the purpose of informing the public. . . ." (Brief, p. 1.)
>
> "The pickets here involved have been carrying signs directed to the public. . . ." (Brief, p. 3.)
>
> "Such a message is designed to inform the public only. Such a message may be embarrassing to Weis . . . how-

ever, there is certainly no element of coercion on them to compel their employees to join a union." (Brief p. 3.)

In its Brief to the Supreme Court of Pennsylvania, the union stated:

"The activity complained of by the appellee amounts to nothing more than peaceful, informational picketing. . . ." (Brief, p. 7.)

"It is further quite clear that . . . (the) picketing is for the purpose of inducing plaintiff's customers to discontinue patronage. . . ." (Brief, p. 8.)

"It therefore appears that mere information picketing by union members for the purpose of informing the public. . . ." (Brief, p. 9.)

"The pickets here involved have been carrying signs directed to the public. . . ." (Brief, p. 10.)

Again, in its Brief here, the union described the purpose of its picketing as:

"peaceful picketing . . . informing the public. . . ." (Brief for Petitioners, pp. 2, 55.)

Finally, the union representative, when asked to describe "what type of picketing it is" testified that "it is strictly informational directed to the public" (R. 54).

Thus, the fact that the picketing was "informational" as contrasted with "organizational" or "recognitional" precludes the finding of an 8 (b)(7) violation. For "the thrust of all the Section 8(b)(7) provisions is only upon picketing for an object of recognition or organization, and not upon picketing for other objects." *International Hod Carriers,*

Local 840 (C.A. Blinne Const. Co.), 135 N.L.R.B. 1153, 1159.[23]

In its *amicus* brief, the Board acknowledges that informational picketing does not violate 8(b)(7)(C):

> "Moreover, if the picketing were found not to be recognitional or organizational in nature, but merely to protest the failure of Weis to conform to working standards prevailing in the area,[24] the picketing would not be within Section 8(b)(7)(C) at all. See *Houston Bldg. & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321." (Brief for the National Labor Relations Board, p. 8.)

Thus, the union did not even arguably violate any section of the Labor Management Relations Act when it picketed in the parcel pick-up zone. The state courts were, therefore, not preempted by Federal law from acting.

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[23] "The principal requirement for an 8(b)(7) violation is that 'an' object of the picketing be 'forcing or requiring' the employer to recognize the picketing union as his employees' bargaining agent, or 'forcing or requiring' the employees to organize as members of the union." *NLRB* v. *Suffolk County District Council of Carpenters,* Docket Nos. 31151, 31152, 2d Cir., December 13, 1967, p. 649.

[24] It should be noted that the picket signs did not, *in haec verba* "protest the failure of Weis to conform to working standards prevailing in the area." The signs stated that: "(Weis) employees are not receiving union wages or other union benefits" (R. 89). This was true. Weis employees were not receiving wages or benefits resulting from union representation. Their wages were higher, and their benefits greater.

B. *Many Areas Of Labor Activity Remain Subject To State Regulation.*

Through the "process of litigating elucidation" this Court has "translated into concreteness" "what has been taken from the States and what has been left to them." *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 619.

Of course, "the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. *But the other half of what was pronounced in Garner —that the Act 'leaves much to the states'—is no less important." International Ass'n of Machinists* v. *Gonzales, supra,* at 619. (Emphasis added.)

We shall show that the "implications of exclusive federal authority" do not extend to the narrow area in which this state court acted. We shall show that "the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility. . . ." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 244. Finally, we shall show that there was no transgression by Pennsylvania upon national labor policy. Therefore "in (view of) the absence of compelling congressional direction," this Court will "not infer that Congress had deprived (Pennsylvania) of the power to act." *San Diego Bldg. Trades Council* v. *Garmon, supra,* at 244.

We start with a review of this Court's decisions holding that where activity is either a "peripheral concern of the Labor Management Relations Act," "deeply rooted in local feeling and responsibility," or there exists an "overriding state interest," the State may regulate it. *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236; *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690.

1. State court action for libel published during union organizing campaign.

This Court held that the exercise of state jurisdiction over malicious libels would be of "peripheral concern" to the Labor Management Relations Act. In addition, this Court recognized "an overriding state interest" in protecting its residents from malicious libels. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 61.

2. State court action by employees for malicious interference with lawful occupation.

This Court held that:

> "(A)n employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be preempted without a clearer declaration of congressional policy than we find here." *International Union, UAW* v. *Russell,* 356 U.S. 634, 646. (Emphasis in original.)

3. State court action by employee for wrongful expulsion from union membership.

This Court held that:

> "(T)he potential conflict (between a state court's award of damages and restoration to membership, and an NLRB proceeding) is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 621.

4. State action prohibiting mass picketing and interference with free use of public streets and sidewalks.

This Court noted that it was dealing with:

"a State . . . exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. . . . We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

* * *

"(W)e (cannot) say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive . . . as to prevent Wisconsin . . . from supplementing federal regulation in the manner of this order."

* * *

"(T)he state system of regulation . . . can be reconciled with the federal Act and . . . the two . . . can consistently stand together. . . ." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740, 749-51.[25]

5. State court regulation of organizational picketing directed toward supervisors.

This Court stated that "secondary pressure wielded to impose representation on unwilling supervisors, finds itself at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193, n. 14.

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[25] In *UAW* v. *WERB,* 351 U.S. 266, 274, this Court stated that: "The fact that the Labor Management Relations Act covered union unfair practices for the first time does not make the *Allen-Bradley* case obsolete."

6. State court action by employee alleging breach of union duty of fair representation.

This Court stated that it could not assume "that Congress, when it enacted N.L.R.A. Sec. 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." *Vaca* v. *Sipes,* 386 U.S. 171, 183. Citing *Linn, Russell, Gonzales, Allen-Bradley,* and *Hanna,* this Court stated that these cases:

> "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies. *Vaca* v. *Sipes, supra* at 180.

7. State Board action based on violence.

This Court stated:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect." *UAW* v. *WERB,* 351 U.S. 266, 274-75.

8. State court action based on violence.

This Court held:

> "If petitioners were unorganized private persons conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with re-

spondent or its employees, provides no reasonable basis for a different conclusion." *United Construction Workers* v. *Laburnum,* 347 U.S. 656, 669.

9. State court action by employee against employer for breach of union contract.

This Court stated:

"If . . . there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them . . . ." *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 197-98.

We submit that the rationale of these cases establishes that there is no basis for extension of the preemption concept to the circumstances of this case.

C. *Pennsylvania's Deeply Rooted Interest In Protecting The Property Of Its Citizens Should Not Be Abrogated.*

The Supreme Court of Pennsylvania expressed the State's deeply rooted feelings with respect to regulating the use of property, as follows:

> "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. *Thornhill* v. *Alabama,* 310 U.S. 88, 105 . . ." (R. 104). (Emphasis added.)

The citation of *Thornhill* reveals the origin of the words "power," "duty," "protect" and "preserve." For it was in *Thornhill* that this Court underscored state authority to regulate the use of property:

> "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." 310 U.S. 88, 105. (Emphasis added.)

The choice of these 'words of power' by the Supreme Court of Pennsylvania, standing alone, reflects the depth of its feelings and interest.

The National Labor Relations Board concedes that "a State has a legitimate interest in protecting private property against trespass," but argues reversal because "here the State is not undertaking to protect its citizens against unwanted intruders in the customary sense. . . ." (Brief for the National Labor Relations Board, p. 17.) On the contrary, the Commonwealth's statement that it has "the duty to protect and preserve the property of its citizens from invasion" (R. 104) reflects its understanding of its obliga-

tion. Certainly, the Supreme Court of Pennsylvania is acting in the customary sense when it protects its citizens' property interests from trespass.[26] This strongly expressed interest should not be abrogated, for "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.

Furthermore, here the trial court enforced an injunction aimed narrowly at a trespass, but permitted the continuation of non-trespass picketing. It has been argued that this Court would approve such an injunction. In *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U.S. 20, the Ohio court's *broad* injunction against picketing within a shopping center was considered improper. This Court held that Ohio was clearly preempted from enjoining the union's conduct *"in its entirety."* However, it left open the question "whether a state may frame and enforce an injunction aimed narrowly at a trespass. . . ." It remanded for further proceedings, observing that "whether (the Ohio court's) conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know." 353 U.S. at 24-25.

It is possible, of course, that this Court did not want to reach and decide this question at that time. However, it may reasonably be argued, as did four members of the Washington Supreme Court, that "unless the court there (*Fairlawn Meats*) believed it possible to frame an injunction and enforce an injunction aimed narrowly at a tres-

[26] States have resolved questions concerning real property since this nation was founded. The overriding interest of states in resolving disputes concerning the use of real property, and specifically the right of state courts to enjoin unlawful trespasses, cannot be disputed. See 43 C.J.S. *Injunctions,* §64 (1945), reporting 140 cases involving trespass actions instituted in 34 different states.

pass, it did a vain and useless thing in making a remand to the state court." *Freeman* v. *Retail Clerks Union,* 58 Wash. 2d 426, 434, 363 P. 2d 803, 807-08 (concurring opinion). Thus it may be said that this Court would not have remanded if a narrow injunction against trespass was preempted. Nor would this Court have remanded if the entire scope of the union's activity, including the trespass, were protected under Section 7 of the Act.

The Board concedes that "indoor picketing" [27] is not protected by the Act. In its *amicus* brief (p. 17) it stated:

> "Assume, for example, that outside organizers or pickets entered the selling area of the Weis store and disrupted its business. The interest of the State in providing a remedy for that conduct is so great and the danger of interference with the federal regulatory scheme is so slight that the State would not be barred from acting, notwithstanding that a federal remedy might also be available."

As stated at page 11, *supra,* the pickets interference with the merchandising operation in the parcel pick-up zone was as much a disruption of Weis' business, as would be their entrance into the selling area. If the protection of the Act did not extend to picketing in the selling area causing a disruption of business, it similarly did not extend to the disruption of business caused by pickets in the parcel pick-up zone.[28] The State's interest is so great and the degree of

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[27] The phrase "indoor picketing" is the Board's. See *Gimbel Bros., Inc.,* 100 N.L.R.B. 870, 877, cited in Brief for the National Labor Relations Board, p. 17 n. 16.

[28] Nor would the Act's protection extend to picketing on the porch. See comment by Supreme Court of Pennsylvania, that they "do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5).

interference with the federal regulatory scheme so slight that the State courts should not be barred from acting here.

D. *There Was No Transgression Upon The National Labor Policy.*

The touchstone of most of the preemption cases before this Court is whether the state action might transgress upon the national labor policy. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53.[29]

The "national labor policy" may be readily found in Section 1 of the National Labor Relations Act.

> "The policy of the United States . . . (is to) encourage the practice and procedure of *collective bargaining* and (to) protect the exercise by workers of full freedom of association, *self-organization* and designation of representatives of their own choosing. . . ." (Emphasis added.)

In this case we have an absence of collective bargaining or organizational activity. We have only informational picketing to communicate to the public that the employees in the store do not belong to the picketing union.

We do not even have a labor dispute. Logan was not involved in a labor dispute. The trial court noted: "Neither plaintiff Logan Valley Plaza, Inc. nor Sears are parties to a labor dispute nor involved in any labor trouble" (R. 90). Weis was not involved in any labor dispute. The

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[29] As one commentator has noted: "Nonetheless, the only variable in the formula is the interest asserted by national labor policy; any legitimate state interest, whether grave or trivial, will support state remedies given a less than substantial federal interest." Currier, *Defamation in Labor Disputes: Preemption And The New Federal Common Law,* 53 Va. L. Rev. 1, 11 n. 47 (1967).

trial court held that: "Weis . . . is not engaged in labor trouble" (R. 92). Furthermore, it was incontrovertibly testified that Weis was not involved in a labor dispute (R. 37). This absence of a labor dispute further distinguishes this case from other cases where this Court has found preemption.[30]

Furthermore, the parties to this action had no relationship, other than as litigants. Accordingly, there is "no need for concern over the climate of labor relations that (this) action might impair." *International Union, UAW* v. *Russell,* 356 U.S. 634, 656 (dissenting opinion). Thus on its facts, this case stands "at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193 n. 14.

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[30] This is not a case involving an "economic strike by employees, a sphere in which federal interest is especially pervasive." (*Hanna,* 382 U.S. at 193 n. 14, commenting on *Teamsters* v. *Morton,* 377 U.S. 252). Nor does it involve picketing to compel execution of a union shop agreement (*Garmon*), or picketing in the context of a jurisdictional dispute (*Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468).

E. *Pennsylvania Should Be Permitted To Exercise Its Inherent Equity Powers.*

It cannot be denied that a state must be allowed to "exercise the historic powers over such traditionally local matters as public-safety and order, the use of streets and highways." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740. To the same effect, see *International Union, UAW* v. *Russell,* 356 U.S. 634 (dissenting opinion).

Similarly, in *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131, 139, this Court sustained a state court injunction which, in part, prohibited the union from "obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from that property. . . ."

In the instant matter, the picketing created acute congestion, presented a hazard to customers, and obstructed their free ingress and egress from the store (R. 44). *Whether Weis' property in this case is considered private, quasi-public or public, Pennsylvania should have the right to guarantee to the public the free and uninhibited use and access to this property.*[31]

The equity jurisdiction of a local court is especially suited to the type of control, regulation and accommodation of interests that arise in this type of case. It is "on the scene" and is familiar with the premises. In seeking an accommodation, it can discuss the respective positions with counsel in chambers, and work out an acceptable formula for the location and number of pickets.

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[31] The Supreme Court of Pennsylvania expressly held that Weis' parcel pick-up zone was private, and not quasi-public, property (R. 104-106). We, of course, agree.

The trial court need not issue a "cease and desist" order prohibiting all picketing, as does the National Labor Relations Board when it prohibits picketing. The court can, and did, permit picketing to continue; it can limit the numbers and provide that entrances shall not be obstructed. This type of order is especially suited to the flexible handling of a local court of equity. As this Court has stated in another context: "(I)t can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts. . . ." *Vaca* v. *Sipes,* 386 U.S. 171, 181.

There is further justification for permitting the state court to act in this case. A tort was committed—trespass. The state courts have so found, and it is not seriously disputed. The state court remedied the tort through its Order. The Board cannot remedy it at all. There is no unfair labor practice of trespass. Therefore,

> "To the extent . . . that 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 Construction Workers* v. *Laburnum,* 347 U.S. 656, 665.

Furthermore, the Board's inability to remedy the tort of trespass might lead to other untoward consequences—self-help. This Court adverted to such a possibility when it stated:

> "The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the

victim to take matters into his own hands." *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 64 n. 6.[32]

In the instant matter, the Assistant General Superintendent of Weis advised the pickets that they were picketing on private property and requested that they picket on the berm of the road. The pickets disregarded this notice to desist and continued to picket as before (R. 32-33). The instant proceeding resulted.

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[32] The Supreme Court of Illinois made a similar observation in upholding the conviction of union representatives' trespass on a retail store's parking lot:

"When a person refuses to leave another's property after he had been ordered to do so, a threat of violence becomes imminent. The defendants were on property occupied by Sears, Roebuck and Company. The company's agent believing the defendants had no right to be on the property ordered them to leave three times. The defendants believing they had a right to be there refused to leave. At this point, the Company called the police. If the State had not taken charge of the situation, the Company would have had no alternative but to forcefully remove the defendants. We cannot know the amount of force that would have been necessary to remove them, but the threat of violence in such a situation is imminent." *People* v. *Goduto,* 21 Ill. 2d 605, 609-10, 174 N.E. 2d 385, 387, *cert. denied,* 368 U.S. 927.

CONCLUSION

This Court has observed in one case that the employer's "motive in asking help from the state is . . . merely a desire to keep its plant in operation." *International Union, UAW* v. *WERB,* 336 U.S. 245, 256.

This is all that Weis seeks. Its motive in seeking judicial aid is wholly ~~defense~~. *It merely wants to keep its store in operation.* defensive

Weis obtained relief from its ordeal on December 27, 1965. Had it been denied, and the trespass complained of continued, its newly opened store in Altoona, Pennsylvania, would today be **closed,** its business **terminated,** its customers **dispersed,** and its employees **discharged.**

These undesirable results were properly obviated by the Pennsylvania courts. We urge affirmance.

Respectfully submitted,

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