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THE MARYLAND LAW OF STRIKES, BOYCOTTS, AND PICKETING

By LEONARD E. COHEN*

Maryland labor lawyers are sometimes faced with the situation in which a relatively small business is being struck, boycotted, or picketed by a labor union, or is threatened with such measures. The question immediately arises whether such activity is permissible. If the business is engaged in or affects interstate commerce, then there is a large body of federal labor law which is applicable. The National Labor Relations Act1 (hereinafter called "NLRA"), provides that some types of strikes, boycotts, and picketing are unfair labor practices and, therefore, illegal. For example, the NLRA prohibits picketing which has as its object the forcing of an employer to recognize a union as the representative of his employees when another union has been certified by the National Labor Relations Board (hereinafter called "NLRB") as the representative of such employees.2 The problems existing under federal labor law have been thoroughly discussed by other writers, and it is not the intention of this article to repeat such discussions. Rather, the purpose of this article is to consider the legality of strikes, boycotts, and picketing in situations where federal labor law does not apply. Such a situation would occur if the business involved did not engage in or affect interstate commerce. Also, under a recent amendment to the NLRA, it seems that federal labor law would not apply when the business affected interstate commerce to such a small extent that the NLRB refused to take jurisdiction over it.3 In either situation, the question would be primarily one of state law, and this article will attempt to describe the rather skimpy Maryland law which does exist in this area.

As an illustration of the type of problem which will be discussed, assume that a tavern located within Baltimore City employs three bartenders. Everything sold in the tavern is purchased from distributors which are themselves

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3 See discussion, infra, circa, n. 14.
located within Baltimore City. The tavern makes no purchases or sales directly outside of Maryland. A union claims to represent all of the employees of the tavern, but the union refuses to submit proof of its authority. When the owner of the tavern refuses to recognize the union, a picket line appears in front of his establishment. As another illustration, assume that a trucking company serves small retail stores within Baltimore City. The company employs five truck drivers, who are not members of any union. In an attempt to organize the employees of the company, a union calls a strike of its members who are employed at several of the retail stores served by the company. In both of the above illustrations, it is reasonable to assume that only intrastate commerce is involved, or that the NLRB would refuse to take jurisdiction. Thus, the question would be whether the employer in such cases is entitled to relief under Maryland law.

Before the relevant Maryland law in this area can be discussed, it will be necessary to mention very briefly two issues which could determine whether Maryland law would even apply. These two issues are whether federal law has preempted the area, and whether there is a constitutional right to picket which could not be abridged by the state.

Preemption of State's Labor Jurisdiction by NLRA

In a series of decisions the Supreme Court of the United States has indicated that when federal labor law controls a situation, the states have no authority to act in the matter. The typical case involved an attempt by an employer to obtain relief from a state court or board against union activity which violated the NLRA and thus was subject to the jurisdiction of the NLRB. In such a situation, the Court ruled that the federal law had preempted the field, and that the employer's only recourse would be the NLRB.

Until recently it was believed that states might have greater authority to award damages than to grant injunctions in this area. This belief was fostered by several cases which contained language supporting such a conclusion. However, in San Diego Unions v. Garmon, the Supreme

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Court recently held that such is not the case, that a state court cannot award damages in a situation where it could not grant an injunction. The Court distinguished the earlier cases, which had permitted state courts to award damages, on the ground that those cases involved violence and imminent threats to the public order, which were legitimate matters of state concern.

In discussing whether strikes, boycotts, and picketing are controlled by federal law, it is necessary to distinguish between three types of activity: (1) that which is protected by federal law; (2) that which is prohibited by federal law; and (3) that which is neither protected nor prohibited by federal law. For example, Section 7 of the NLRA provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." It is clear, therefore, that strikes, boycotts, and picketing are protected by federal law to some extent. For example, if an employer engaged in interstate commerce refused to grant a wage increase during negotiations with a union, and the union subsequently called a strike and peacefully picketed the employer, such activity would clearly be protected by federal law.

On the other hand, the NLRA prohibits various types of union activity. For example, Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a union to induce employees of any employer to engage in a strike where an object thereof is "forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . . ." Thus, if in the above-described situation, the picketing was extended to companies dealing with the company with which the union had the dispute, with the purpose of causing strikes at such companies, such picketing would be a violation of the NLRA.

Suppose, however, that the union put pressure on the company by calling intermittent and unannounced work stoppages. In such a case, the activity would not be a violation of the NLRA. On the other hand, such tactics are considered improper and therefore not within the protec-

\[^7\text{29 U.S.C.A. (1956) § 157.}\]  
tion of federal law.\textsuperscript{8a} Thus, the activity would be neither protected nor prohibited by federal law.

The Supreme Court decisions state rather clearly that when activity is either protected or prohibited by federal law, the states cannot regulate it. \textit{San Diego Unions v. Garmon}\textsuperscript{b} also states that when the NLRB has not determined the legality of conduct under federal law, and the conduct arguably falls within the compass of federal law, the states may not regulate the conduct. But, if it appears that the activity is neither protected nor prohibited by federal law, it is not clear whether the states may regulate it. One Supreme Court case suggests that they\textsuperscript{10} However, the following quotation from the \textit{Garmon} case shows that the issue is not yet settled:

"If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. * * *"\textsuperscript{11}

In the above discussion, it has been assumed that when the NLRA governs a situation, the NLRB, which enforces that law, will take jurisdiction over the matter. However, such an assumption is not always correct. The NLRB has formulated standards to govern its jurisdiction, and such standards fall short of encompassing all of the businesses which engage in or affect interstate commerce.\textsuperscript{12} This situation results from the NLRB's belief that its budget does not enable it to handle all of the cases which fall within its jurisdiction under the NLRA, and that therefore it must refuse to exercise jurisdiction over businesses which have only a slight effect on interstate commerce. Thus, there arose what was known as a "no-man's land" in which the states did not have jurisdiction and in which the NLRB refused to take jurisdiction. This phenomenon resulted from the decision in \textit{Guss v. Utah Labor Board.}\textsuperscript{13} A union

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\textsuperscript{8} \textit{Supra}, n. 6.

\textsuperscript{9} Auto Workers v. Wis. Board, \textit{supra}, n. 8a.

\textsuperscript{10} \textit{Supra}, n. 6, 245. In this case, at p. 245, n. 4, the Court also stated that Auto Workers v. Wis. Board, 336 U.S. 245 (1949), "has not been followed in later decisions, and is no longer of general application."

\textsuperscript{11} See 42 L.R.R.M. 96 (1959), 1 CCH \textit{Labor Law Reporter} ¶ 1610.

\textsuperscript{12} 353 U.S. 1 (1957).
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charged a small Utah company with engaging in activities that were unfair labor practices under both the NLRA and the Utah Labor Relations Act. The company's dealings outside of the state were very limited; and under its jurisdictional standards effective at that time, the NLRB refused to take jurisdiction over the company. When the NLRB refused to act upon the union's charges, the union filed the same charges with the Utah Labor Relations Board. The Utah Board found that it had jurisdiction and concluded on the merits that the company had engaged in unfair labor practices under the Utah Act. The Supreme Court of the United States held that the Utah Board did not have jurisdiction in the case since the company was engaged in interstate commerce to some extent. The Court felt that federal law had completely preempted the field even though the NLRB refused to exercise its jurisdiction.

The Guss case produced a paradoxical situation—the company was engaged in activities prohibited by both state and federal law, yet the NLRB did not take jurisdiction, and the states could not enforce the prohibitions. This situation has been remedied in two ways. First, in 1958 the NLRB revised its jurisdictional standards drastically to include many more businesses. Also, a recent amendment to the NLRA permits the states to exercise jurisdiction in cases where the NLRB has jurisdiction but declines to exercise it. Although the recent statute is not absolutely clear, its legislative history seems to indicate that the states may apply their own law, and need not follow federal law in such cases. Apparently, when the NLRB refuses to take jurisdiction over a business, the business is treated as if it did not engage in or affect interstate commerce. It is conceivable that this amendment could be interpreted to mean that states may take jurisdiction over such cases but that the applicable law is to be federal; however, such an interpretation seems unlikely.

In all of its preemption decisions the Supreme Court has recognized the right of the states to regulate violence.

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13a See supra, n. 12.


15 105 Cong. Rec. 14206, 14214, 14221. Such a conclusion is also supported by the fact that the Senate bill provided that state agencies could exercise jurisdiction over companies when the NLRB refused to exercise its jurisdiction, providing that such agencies applied federal law. This provision was eliminated by the conference committee. Conference Rep. 1147, U.S.C. Cong. & Ad. News (1959) 2503, 2509. See also, Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 261-262 (1959).
and threats of violence.\textsuperscript{16} Thus, there is no question that the states can enjoin fights, destruction of property, and other conduct of this type under the police powers of the state. It often becomes difficult, nevertheless, to decide whether a state may also prohibit peaceful activity which seems to be governed by federal law, when such activity has resulted in instances of violence. This problem usually arises in connection with picketing, where strikers and non-strikers often meet face to face and tempers grow short.

A recent Supreme Court case, \textit{Youngdahl v. Rainfair, Inc.},\textsuperscript{17} presents a good illustration of this problem. A company in a small community had just over a hundred employees, about one-third of whom engaged in a strike and picketing to compel the company to recognize a union. Various acts of violence and threats of violence resulted, such as puncturing automobile tires, threatening the plant manager, name-calling as the non-striking employees came to and left work, and breaking a window in the plant. The Court held that the state court could enjoin future violence or threats of violence, but that it could not prohibit picketing \textit{per se} since the pattern of violence was not so connected with the picketing that an injunction against violence would be ineffective if the picketing were permitted to continue.

In reaching this decision, the Court expressly distinguished an earlier case in which it had permitted a state court to enjoin all picketing because of the threat of violence. In \textit{Drivers Union v. Meadowmoor Co.},\textsuperscript{18} a labor dispute resulted in picketing accompanied by various forms of violence, such as smashing windows, exploding bombs in plants, wrecking trucks, and beatings. The state court reasoned, and the Supreme Court agreed, that the unusual amount of violence had created an atmosphere of fear and intimidation, and that further picketing, even though peaceful, would perpetuate this atmosphere. The Supreme Court did not frame the issue in the \textit{Meadowmoor} case as being whether federal law had preempted state law; rather, it asked whether the United States Constitution prevented a state court from enjoining picketing (a problem which is discussed below\textsuperscript{19}). Nevertheless, the issues in the \textit{Youngdahl} and \textit{Meadowmoor} cases are similar, and a comparison

\textsuperscript{17} 355 U.S. 131 (1957).
\textsuperscript{18} 312 U.S. 287 (1941).
\textsuperscript{19} See \textit{infra, infra}, ps. 236-238.
of the two cases is very helpful in understanding the Supreme Court view in this area.

In summary, the doctrine of preemption at the present time seems to have the following effect on the applicability of Maryland labor law to Maryland businesses: If a business does not engage in or affect interstate commerce, Maryland has jurisdiction over union activity concerning the business and may apply Maryland law. If the NLRB refuses to take jurisdiction over a business, Maryland has jurisdiction and probably may apply Maryland law. If the NLRB takes jurisdiction over a business, and the union activity is either prohibited or protected by federal law (or if the NLRB has not determined the status of the activity under federal law but it arguably is prohibited or protected), Maryland has no jurisdiction over such activity. If the NLRB takes jurisdiction over a business, and the union activity is neither prohibited nor protected by federal law, it is not settled whether Maryland has jurisdiction. In any situation involving violence or public disorder, Maryland may act to regulate such breaches of the peace.

PICKETING AS A CONSTITUTIONAL RIGHT

It is settled law that picketing is to some extent a means of expression and as such is protected by the free speech guarantee of the First Amendment as incorporated into the Fourteenth Amendment of the United States Constitution. It is also recognized that picketing is a form of coercion and thus is in a different category from other means of expression. The problem of reconciling the free speech aspect with the coercion aspect of picketing has proved very difficult. There is no question that violent types of picketing, such as mass picketing which blocks ingress and egress, or picketing accompanied by harm to persons or property, is not protected by the Constitution and may be regulated by the states.20 As discussed above, in some instances violence becomes so closely connected with picketing that even the peaceful aspects of the picketing may be prohibited.21 A problem also arises when picketing is conducted peacefully but the object of the picketing seems to conflict with the public policy of a state, so that the picketing appears to be a means of coercion for an illegal end. It can be argued that such picketing is no more protected

20 See Hotel Employees' Local v. Wis. Board, 315 U.S. 437 (1942); Drivers Union v. Meadowmoor Co., supra, n. 18.
21 See supra, ps. 234-236.
than verbal threats for the purpose of extortion. The main
problem has been how far the states can go in enforcing
their public policy as a means of regulating picketing.

Two of the early leading cases in this area are *Thornhill
v. Alabama* and *A.F. of L. v. Swing*. The *Thornhill*
case settles beyond doubt that peaceful picketing enjoys some
constitutional protection. In this case the Supreme Court
of the United States held unconstitutional an Alabama stat-
ute which prohibited all picketing for the purpose of in-
ducing persons not to trade or deal with a business. The
statute as interpreted was not limited to picketing with
an unlawful object or conducted in an unlawful manner.
In the *Swing* case the Court went farther than in the
*Thornhill* case by holding that a state court could not
enjoin peaceful organizational picketing. A union had tried
to organize the employees of a beauty parlor, and when
its efforts failed, the union picketed the shop. The Supreme
Court of Illinois had held that such picketing might be
enjoined since it was a violation of the common law policy
of the state for a union to picket when there was no dispute
between the company and its employees.

In a series of subsequent cases the United States
Supreme Court has withdrawn from the position enun-
ciated in the *Thornhill* and *Swing* cases, and apparently
has overruled the *Swing* case *sub silentio*. In *Giboney v.
Empire Storage Co.*, the Court held that a Missouri court
could enjoin a union, which was attempting to organize
peddlers, from picketing a wholesale dealer to force him
to agree to stop dealing with non-union peddlers. Under
the law of Missouri, such an agreement would have con-
stituted a conspiracy in restraint of trade in violation of
the state anti-trust laws. In *Building Service Union v.
Gazzam*, a union unsuccessfully attempted to organize
a small hotel, and the owner refused to sign a contract with
the union as the bargaining agent for his employees. When
the union began to picket the hotel in an attempt to gain
recognition, a state court enjoined the picketing on the
ground that the object of the picketing was in violation of
the state statute prohibiting employer coercion of em-
ployees in their choice of a bargaining representative. The
Supreme Court held that the injunction was valid.

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23 312 U.S. 321 (1941).
26 See also Hughes v. Superior Court, 339 U.S. 460 (1950); Teamsters
In a recent case, Teamsters Union v. Vogt., Inc.,\(^2\) a union unsuccessfully sought to organize the employees of a company operating a gravel pit in Wisconsin. The union began to picket the entrance of the company's place of business with signs reading that the men on the job were not affiliated with the A. F. of L. Drivers of several trucking companies refused to deliver to the company and thereby caused substantial damage to the company. The Wisconsin Supreme Court held that the picketing could be enjoined on the ground that the objective of the picketing was to coerce the employer to interfere with the right of its employees to join or refuse to join the union, which action by the employer would have been in violation of a Wisconsin statute. The United States Supreme Court held that the picketing could be enjoined without violating the Fourteenth Amendment. The opinion of the Court by Mr. Justice Frankfurter examines the history of the picketing cases and demonstrates that the Court has changed its viewpoint greatly since the earlier cases. While the Court did not overrule A. F. of L. v. Swing, the facts of the Vogt and Swing cases are substantially identical, and it would be difficult to discover a meaningful distinction between them.

The decisions regarding the constitutional right to picket have followed a serpentine course, and it is difficult to predict with certainty what the future holds. The present law seems to be that the Constitution prevents a state from prohibiting peaceful picketing \textit{per se},\(^5\) but does not prevent a state from prohibiting picketing for an objective which violates state policy even though such picketing is entirely peaceful.

MARYLAND LABOR LEGISLATION

The public policy of Maryland in regard to strikes, boycotts, and picketing is almost entirely a creation of the Maryland judiciary. While some of the other states have detailed labor legislation, the Maryland statutes regulating labor relations are very few and of limited importance. Many states have labor boards which exercise functions similar to those of the NLRB in the federal sphere. Although Maryland has a Commissioner of Labor, his authority is very limited. In general, his chief func-

\(^{27}\) 354 U.S. 284 (1957).
\(^{28}\) The Supreme Court recently relied solely on the Thornhill case in reversing \textit{per curiam} a Kansas decision; Chauffeurs Local Union 795 v. Newell, 356 U.S. 341 (1958).
tions are to seek mediation and arbitration of labor disputes which may result in strikes or lockouts, to investigate and publish a report on disputes when he has failed to secure mediation or arbitration, and to conduct elections for the selection of labor representatives when the parties consent to such an election. The only sanction available to him is to publish in newspapers his findings in labor disputes, which findings may designate the party at fault.\(^2\)

Such adverse publicity may be harmful to many businesses, but in general this sanction seems to have little effect. Thus, the Commissioner provides services when the parties desire them, but he has almost no authority to regulate labor disputes when the parties elect self-help.

The Maryland statute of most importance in this area is the Anti-Injunction Act,\(^3\) which is patterned after the federal Norris-La Guardia Act.\(^4\) This statute declares the policy of Maryland to be that employees should have full freedom to organize and to negotiate the terms and conditions of their employment through representatives of their own choosing.\(^5\) The purpose of the act is to place restrictions upon the power of courts of equity to grant injunctions in labor disputes. This purpose reflects the feeling in this country during the 1930's that courts of equity were unduly hampering the labor movement by enjoining necessary and proper union activities, especially by means of *ex parte* injunctions.\(^6\)

The act implements its purpose in two ways. First, it prevents a court from prohibiting, by means of a restraining order or a temporary or permanent injunction, *inter alia*, the following types of activity:

1. Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise or agreement to the contrary.
2. Becoming or remaining a member of any labor organization regardless of any promise to the contrary.
3. Giving publicity to the existence of, or the facts involved in, a labor dispute, whether by advertising, speaking, or picketing, so long as such activity is not coercive, violent, or otherwise unlawful.
4. Ceasing to patronize or employ any person.

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\(^3\) 8 Md. Code (1957) Art. 100, §§ 63-75.
(5) Assembling peaceably to do or to organize any of the above acts.
(6) Advising any person of the intention to do any of the above acts.
(7) Agreeing with other persons to do any of the above acts.
(8) Advising, urging or inducing without fraud, violence, or threat thereof, others to do the above acts.
(9) Doing in concert any or all of the above acts on the ground that the persons engaged therein constitute an unlawful combination or conspiracy.  

Second, the act sets forth specific procedural requirements which must be met before a court may issue a temporary or permanent injunction in a labor dispute. Preliminarily to the granting of an injunction, the court must hear the testimony of witnesses opposing the injunction, and make the following findings:
(1) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.
(2) That substantial and irreparable injury will follow.
(3) That greater injury will result from the denial of an injunction than will be inflicted by the granting of an injunction.
(4) That the activity in question is not protected from an injunction by another provision of the act.
(5) That the complainant has no adequate remedy at law.
(6) That the police have failed or are unable to furnish adequate protection to the complainant’s property.

However, the statute provides that a court may issue a temporary restraining order before a hearing is held if the complainant alleges that substantial and irreparable injury will be unavoidable. A court may issue such a restraining order only upon testimony or, in the discretion of the court, upon affidavits which would support a temporary injunction if a hearing were held. Before granting such a restraining order, the court must allow a reasonable time, but not less than forty-eight hours, for the parties sought to be restrained to show cause why the restraining order should not issue. Generally, the restraining order is effective for only five days. There is the further provision that no restraining order or injunction may issue unless the complainant has made every reasonable effort to settle the dispute either by negotiation or with the aid of any

8 MD. CODE (1957) Art. 100, § 65.
8 MD. CODE (1957) Art. 100, § 68.
available method of mediation or arbitration, unless delay
would cause irreparable injury. 36

As shown by the above description, one part of the Anti-
Injunction Act protects certain types of union activity
from a court injunction, while another part of the act sets
forth the procedure which must be followed before a court
may issue a labor injunction. Although these two parts do
not fit together as nicely as possible, the intent seems to be
that activities described in the first part of the act may
never be enjoined and that other activities resulting from
labor disputes may be enjoined, if at all, only after the
statutory procedures have been followed. In general, it
seems that the first part of the act is concerned with peace-
ful conduct while the second part presupposes the exist-
ence of violence.

The Anti-Injunction Act applies only to cases involving
"labor disputes," and its definition of such cases seems to
include almost every conceivable labor dispute:

"(a) What constitutes labor dispute. — A case
shall be held to involve or to grow out of a labor dis-
pute when the case involves persons who are engaged
in a single industry, trade or craft, or occupation; or
who are employees of one employer . . . or when the
case involves any conflicting or competing interest
in a 'labor dispute' * * *

"(c) Labor dispute defined. — The term 'labor dis-
pute' includes any controversy concerning terms or
conditions of employment, or concerning the associ-
ation or representations of person [sic] in negotiation,
fixing, maintaining, changing, or seeking to arrange
terms or conditions of employment, or concerning em-
ployment relations or any other controversy arising out
of the respective interests of employer or employee,
regardless of whether or not the stand disputants in the
proximate relation of employer or employee." 37

Nevertheless, the Maryland courts have held that the
act was not intended to apply in many situations appar-
ently covered by its language. The cases raising this ques-
tion are discussed below. 38

The following Maryland statute provides that not all
union activity is to be considered a criminal conspiracy:

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38 See infra, circa, ps. 250-258.
"An agreement or combination by two or more persons to do or procure to be done an act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act, committed by one person, would not be punishable as an offense; nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or any offense against any person or against property."

However, this statute, which originated in 1884, has not been relied on as an analogy in civil litigation and therefore seems of minor importance to our problem.

Another Maryland statute sets forth the usual prohibition of sit-down strikes. Violation thereof, by either the employees involved or by any union directing their actions, constitutes a criminal offense.

**EARLY LABOR PROBLEMS IN THE COURTS**

Since the labor law of Maryland is largely a result of judicial decisions, it seems appropriate to provide a brief background of the judicial approach to labor law in this country. When unionism was in its infancy, and employers challenged the right of unions to cause injury to businesses by means of strikes, boycotts, and picketing, the courts turned to the law of conspiracy, which seemed to apply to the collective harm involved. That law prohibited persons from acting in concert for an illegal or perhaps immoral aim. It also prohibited persons from using unlawful means to achieve a legitimate aim. From this background, the courts generally applied two tests in determining the legality of union activity: (1) Were the objectives lawful? (2) Were the means lawful? However, it was often difficult to apply such general tests to the variety of situations which developed. Violence was clearly unlawful, but what about peaceful picketing which had the effect of ruining a valuable business? Was it

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40 3 Md. Code (1957) Art. 27, § 552. At one time there was a Maryland statute regulating labor disputes involving public utilities; however, the statute expired by its own terms in 1957 and was not re-enacted. 8 Md. Code (1957) Art. 89, §§ 14-24.
41 For an excellent discussion of this subject, with special emphasis on Maryland law, see Lauchheimer, *The Labor Law of Maryland* (1919) 19-45.
42 See e.g., Hopkins v. Oxley Stake Co., 83 F. 912 (8th Cir. 1897); Central Metal Products Corporation v. O'Brien, 278 F. 827 (N.D. Ohio 1922); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); and Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).
lawful to strike Employer A, with whom the union had no dispute, to cause him to stop dealing with Employer B, with whom the union had a dispute, in an attempt to put pressure on Employer B?

Questions of this type — the ones posed represent only a few of the problems which arose — are not always susceptible of clear and obvious answers. For example, one question which arose early, and which sometimes still creates uncertainty today, is whether it is against public policy for a union to try to force employees of a company to join the union against their will by picketing the company, secondary pressure on the customers of the company, appeals to the public not to patronize the company, and the like. At first glance such an objective seems against the American tradition of freedom of choice, and many states, including Maryland today condemn tactics with such a purpose. However, unions which were struggling for a foothold in American industry claimed that it should be permissible for them to force unionization of a company. They argued that if Employer A was unionized, and Employer B, his direct competitor, was not, it would be impossible for the union employees of Employer A to enjoy wages and benefits much in excess of those given by Employer B. Employer A would not be able to afford labor costs much greater than those paid by his competitor, and in effect Employer B would be governing to a great extent the wages and benefits of the employees of Employer A. Therefore, they argued, a union should be permitted to force the employees of Employer B to join the union to protect the union members. The success of labor's position on this issue is shown by the fact that the NLRA, as interpreted by the NLRB and the courts, has never forbidden per se picketing with such an object.

With this brief background of the history of labor relations, we now turn to the Maryland judicial decisions. In discussing them, it seems practical to divide the cases

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43 For an illustration of the problem of organizational picketing in recent years, see the discussion in Drivers, Chauffeurs, and Helpers Local 639, 119 N.L.R.B. 232, 239 (1957) (the Curtis Brothers case).


45 See infra, ps. 250-253, passim.

46 See the discussion in Drivers, Chauffeurs, and Helpers Local 639, 119 N.L.R.B. 232, 239 (1957) (the Curtis Brothers case). For the most recent congressional view on this subject, see § 8(b) (7) of the NLRA, added by Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. (Cum. Supp. 1959) § 158(b) (7).
into two classes — decisions of the Court of Appeals, and decisions of the circuit courts. Only the first class of decisions are controlling throughout the state, and since the circuit court cases often concern issues not yet determined by the decisions of the Court of Appeals, it will be helpful to have clearly in mind which court rendered the decision under discussion.

**DECISIONS OF THE MARYLAND COURT OF APPEALS**

The first important Court of Appeals case was *Lucke v. Clothing C't'rs' Assembly.* An employee was discharged by his employer at the insistence of a union because the employee was not a member of the union. The union had implied that it would induce members of the union to withhold their patronage, and possibly call a strike, if the employee was not discharged. The employee had applied for membership in the union, but had been rejected. The Court held that the employee had the right to sue the union for damages. It stated that although the union had the right to seek favorable conditions for its members, it did not have the right to interfere with the rights and privileges of non-union labor. The Court noticed the fact that the union had denied membership to the employee but said that this point was not crucial to its decision.

The age of the *Lucke* case — it was decided in 1893 — causes doubt as to whether the case still represents the public policy of Maryland. If it does, then any labor agreement which makes union membership a condition of employment may violate Maryland law, although such agreements are very common today. Perhaps the *Lucke* case may be interpreted to mean that a union may not force an employer to discharge a non-union employee, but that an employer may voluntarily agree to a contractual provision which would require such action. However, such a distinction would often be dubious, since the threat of economic force on the part of a union, either expressed or assumed, usually underlies such a provision.

The *Lucke* case was decided at a time when courts often held that while it was lawful for a union to use economic force to achieve immediate advantages for its members, such as a wage increase, it was unlawful for a union to use such force to achieve conditions which would only benefit the members indirectly, such as the complete

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47 77 Md. 396, 26 A. 505 (1893).
unionization of an industry. This view probably affected the Court's decision to some extent.

It is also possible to explain the case on the ground that the union's rejection of the employee's application for membership was a vital factor in the case even though the Court stated that it was not. Other states have held that it is contrary to their public policy for a union to demand the discharge of an employee, to whom it has denied membership, because he is not a union member. This view stems from the belief that it is unfair for a union to put an employee in such a helpless position.

A very important Court of Appeals case is *My Maryland Lodge v. Adt.* The company was engaged in the manufacture of machinery, especially machinery used by the brewing companies of Baltimore. The union demanded that the company grant to its employees a wage increase of ten percent. When the company refused, but offered to grant an increase of three percent, the union called a strike of the company's machinists. The union also told the company that if the demands of the employees were not met, the company would be placed on the union's unfair list, and the union would prevent any person from accepting employment with the company. Later the union attempted to force the company to meet its demand by establishing a boycott of the company's products, and by threatening to boycott any business which used the machinery of the company. Several customers which continued to use the company's machinery were also placed on the unfair list and made a part of the boycott. The company alleged that its business had dwindled from $18,000 a year to less than $3,500 as a consequence of the acts of the union.

The Court of Appeals held that it was proper to issue an injunction enjoining the union from continuing its boycott activities. In reaching this decision, the Court attempted to formulate a basic theory of lawful and unlawful union activity. It stated that the company was engaged in a lawful business and that the law protects the right of an employer to employ whom he pleases at prices which he and his employees can agree upon. Also, an employer has the further right to discharge his employees at the expiration of their term of service, or for violation of their contract. On the other hand, the employees have

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50 100 Md. 238, 59 A. 721 (1905).
a legal right to fix a price for their labor, and to refuse to work unless that price is obtained. They have that right both as individuals and in combination, and they may organize to improve their conditions and to secure better wages. They may even use persuasion to have others join their organization and may present their cause to the public in newspapers or circulars in a peaceful way, but with no attempt at coercion. If ruin to the employer results from their peaceful assertion of these rights, it is damage without a remedy; but the law does not permit either employer or employee to use or threaten to use force, violence, or coercive tactics.

Although it is clear that the Court of Appeals in the Adt case thought that the union activity as a whole amounted to unlawful coercion, it is uncertain whether the Court would not have condoned some of the activity standing by itself. The Court stated that the union had the right to present its cause to the public even though such action was intended to induce the public to cease using the products of the company and thus to exert economic pressure on the company. However, the Court also said that the union could not use coercion, which statement seems contrary to its prior assertion. This possible contradiction can probably be explained by the fact that the case involved economic pressure on neutral companies which were customers of the company involved in the dispute. Thus, the Court was probably condemning the boycott of the customers — a secondary boycott — and not the boycott of the company itself — a primary boycott. Such a position would be in accord with the general view of lawful and unlawful boycotts. A later Court of Appeals case confirms this conclusion by stating that the Court held in the Adt case that it was illegal for a union to boycott the customers of a company in order to put pressure on the company.\footnote{Blandford v. Duthie, 147 Md. 388, 128 A. 138 (1925).} \footnote{158 Md. 496, 148 A. 826 (1930).}

In Pocketbook Workers v. Orlove,\footnote{Pocketbook Workers v. Orlove, 158 Md. 496, 148 A. 826 (1930).} the Court of Appeals held that peaceful picketing for a lawful object was permissible, but that violent and coercive picketing was unlawful regardless of its purpose. Two companies had open shops and employed workers without regard to their membership in a union. A union, which was attempting to organize the employees of the firms, called a strike because of dissatisfaction over wages and working conditions and because of the refusal of the firms to deal with the
union. The employees who refused to work tried to persuade other employees not to report for work, and pickets wearing placards announcing the strike walked on the sidewalk in front of the shops. There was a dispute as to whether employees who refused to strike were threatened and whether there were other forms of violence. The Court of Appeals held that the strike and picketing were not enjoinable except insofar as there was violence. It reasoned that the employees had the right to organize a union, to quit work and strike, and to persuade others to join them. Such persuasion, so long as it was peaceful, could be carried on by pickets outside the places of employment. However, the Court also recognized that it was often difficult to draw a line between coercion and mere persuasion. It stated that many pickets might just by their numbers and crowding give occasion to some coercion.

In a series of three cases the Court of Appeals discussed the problem of the secondary strike—a strike or a threat to strike Employer A in an attempt to exert pressure on Employer B. In the first case, Blandford v. Duthie, a union had attempted in vain for many years to get a company which did roofing work of various kinds for general contractors, to employ only union men. In order to injure the company economically, the union threatened to strike general contractors who used the company and, in fact, did strike one general contractor, who after a few weeks was forced to rescind its contract with the company. The Court upheld an injunction enjoining such conduct by the union. It stated that this case was not simply one of union men exercising their right to refuse to work on a job on which non-union men were employed. Nothing showed that the employees of the struck general contractor objected to working on the job; rather, the union called the strike itself. Such action was unlawful because there was no dispute between the general contractor and its employees, and thus no justification for interference with the contract between the general contractor and the company. It is interesting to note that the Court expressly recognized the right of the union men to refuse to work with non-union men of their own volition, but condemned the union’s part in instigating the strike. Such a view accords with the policy of the NLRA which makes

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63 In the language of labor law this type of activity is usually referred to as a secondary boycott even though there is no “boycott” in the normal sense. However, for purposes of clarity of thinking this article will use the term “secondary strike” to describe such activity.

64 Supra, n. 51.
it an unfair labor practice for a union to induce employees
to strike in various situations, but which does not prohibit
employees from stopping work on their own initiative.\footnote{See, e.g., United Steelworkers of America, 123 N.L.R.B. 20 (1959).}

The rationale of the \textit{Blandford} case was followed in
\textit{Bricklayers' Etc. Union v. Ruff}.\footnote{160 Md. 483, 154 A. 52 (1931).} A company engaged
in the business of stonemasonry entered into a written con-
tact with a general contractor to do all of the stone-
masonry work connected with the erection of a church.
The company began the work and employed only union
labor; however, the general contractor employed non-
union labor, and the union ordered all of the union men
working for the company to quit work so long as the
general contractor continued to employ non-union men.
When the company was unable to finish the work, the
general contractor cancelled the contract and employed
others to finish the work at the risk and expense of the
company. The Court of Appeals held that the union was
liable to the company for causing a breach of the contract
with the general contractor which resulted in substantial
damages. The Court stated that if the non-union men had
been working for the company, it would have been proper
for the union men to refuse to work on the same job with
the non-union men, and thus force the company to grant
all work to union men. In such case, the dispute would
have been directly with the party against whom the strike
was ordered. But here, injury was inflicted upon an inno-
cent party in order to compel it to coerce the general con-
tractor. The company had no power to coerce the general
contractor into employing only union men, and even if it
had such power, it had the undoubted right to elect not
to do so. Organized labor's right of coercion and compul-
sion was thus judicially limited to strikes against those
employers directly involved in a trade dispute.

A later decision involving the same parties as the last
case confused this area considerably. \textit{Ruff & Sons v. Brick-
layers' Union}\footnote{163 Md. 687, 194 A. 752 (1933).} arose out of the union's maneuver to avoid
the effect of the earlier decision against it. It changed its
constitution to provide that no member of the union could
work for a subcontractor who took a contract from a gen-
eral contractor employing non-union labor. The union then
advised the company that no members of the union would
work for the company if it continued to enter into con-
tracts with non-union general contractors. The Court of
Appeals held that the action of the union was not enjoin-
able, since the facts in this case were different from those in the earlier Ruff case. In the former case, a strike was called not to discipline the company with whom there was no controversy, but to induce a breach of the contract between the company and a general contractor in an effort to compel the latter to discontinue the employment of non-union labor. In this case, there was no existing contract, so the company would not be injured by the refusal of its employees to work. Nor was there a third party involved in the controversy, which involved only the company and the union.

The reasoning of the Court in this case seems contrary to its position in the earlier secondary-strike cases, and the attempt to distinguish the earlier cases is perplexing. It seems to be mere verbiage to say that in the earlier Ruff case the controversy was with the general contractor but that in the present case the controversy was with the company itself. The facts in the two cases are identical in substance. In both cases the union would not allow union men employed by the company to work with non-union men employed by the general contractor. In both cases the only purpose of the union action was to force the general contractor to use union labor - the company was already using union labor and its employment practices apparently were acceptable to the union. The Court also mentioned the fact that in the earlier Ruff case there was a contract in existence while in the later case there was not. However, it is not clear why this difference should be important.

By analogy to tort law, it may be a tort to force a person to breach his contract with another; but it also may be a tort to interfere with an advantageous relationship not yet consummated by a contract. As far as the harm to a company is concerned, it may be far more harmful to be threatened with loss of all future contracts with non-union companies than to be faced with the breach of one contract already in existence.

A possible way to support the Court's distinction in these cases is to say that the earlier cases involved actual strikes while the later case involved only a threat to strike. The Court might have believed that a court of equity should not intervene until something more than mere threats has occurred. In Lucke v. Clothing C't'rs' Assembly, the union had also merely threatened to strike or boycott the employer, but the employer had taken the

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58 See Restatement, Torts (1939) 49, § 766.
59 77 Md. 396, 26 A. 505 (1893). See supra, ps. 244-245.
further step of discharging the employee who was the object of the union’s attack. Therefore, the harm intended by the union’s threats actually occurred, and perhaps this distinction explains why the Court allowed damages in the Lucke case but refused an injunction in the second Ruff case. On the other hand, courts of equity have often enjoined threatened harm, and on final analysis it seems that these cases are fundamentally irreconcilable.

DECISIONS OF THE MARYLAND CIRCUIT COURTS

Several reported Maryland circuit court decisions in this area date from after the passage of the Maryland Anti-Injunction Act and therefore are affected by the Act. As discussed more fully above, this act completely prevents Maryland courts from enjoining some types of union activity and requires detailed procedural steps before any union activity may be enjoined. However, the act applies only to cases involving labor disputes, and the chief issue in these circuit court cases was whether they involved a labor dispute as defined in the statute. If they did not, then the statutory restrictions on the equity power of the courts would not apply, and the courts could deal with the union activity involved on general equitable principles.

In deciding whether a labor dispute was involved, the Maryland circuit courts, like many other state courts interpreting similar anti-injunction acts of their respective states, used the means and objectives test which had existed prior to the passage of the act. If the type of union activity in question, or the objective of such activity, was prohibited by prior judicial decisions or by the public policy of the state, then no labor dispute was involved and the statute did not apply. By adopting such a flexible view, the Maryland courts were able to remove many cases from the seemingly broad statutory definition of a labor dispute when the courts believed that such cases were not intended to fall under the act.

Wischhusen v. Griffin involved a tavern which had several coin-operated machines. The owner of a music machine employed two non-union employees to service this

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60 See, e.g., Clark v. Todd, 192 Md. 487, 64 A. 2d 547 (1949).  
62 See supra, ps. 239-241.  
64 See supra, ps. 242-243.  
65 23 CCH Labor Cases ¶ 67,683 (Cir. Ct. No. 2 of Baltimore, 1953).
machine and other machines owned by him. The owner of two pinball machines personally serviced these machines and other machines owned by him. A union was attempting to organize the owners and operators of coin machines and their employees in Maryland and the District of Columbia. The union attempted to get the owner of the pinball machines to sign a contract governing his services, and it tried to get the owner of the music machine to sign a contract governing the services of his employees, as well as himself, even though the employees had specifically stated that they did not want to be represented by the union. When both men refused to sign the contracts, or to join the union, the union started to picket the tavern with signs asking patrons not to use the machines because they were not serviced by members of the union. Most of the patrons belonged to some union, and as a result of the picketing, some patrons refused to enter the tavern, although the exact loss of business could not be ascertained. The court held that the picketing was enjoinable on several grounds. First, the picketing was an attempt to bring pressure upon the owners of the machines by forcing the tavern owner to stop dealing with them and therefore constituted an unlawful secondary boycott. It was also held to be unlawful as an attempt to bring pressure upon a self-employer to force him to join a union. Further, picketing to compel an employer to force his employees to be represented by a union against the employees' will violated the Maryland Anti-Injunction Act in that the union was attempting to deny the employees involved the right to be represented by representatives of their own choice. Thus, there was no legitimate labor dispute and the provisions of the Anti-Injunction Act did not apply.

The first point mentioned by the court was clearly supported by the Court of Appeals decisions discussed above which prohibit secondary pressure. The second point — that it was unlawful to force a self-employer to join a union — is not directly supported by any decision of the Court of Appeals. However, it seems basic to the general view of labor relations in this country that unions, which serve to represent employees in their relations with employers, have no right to represent employers against their will. Since 1947 it has been an unfair labor practice under the NLRA for a union to induce a strike to force an employer or a self-employed person to join any labor or-

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*See supra, pp. 247-248, passim.*
In 1959 the act was amended to prohibit a union from threatening, coercing, or restraining any person to achieve such an objective. Thus the amendment seems to make unlawful in the federal sphere the kind of activity involved in the Wischhusen case. The third point — that it was unlawful to force an employer to interfere with his employees' choice of a bargaining representative — also has no support in a Court of Appeals decision, but seems to accord with Maryland policy as set forth in the Anti-Injunction Act. The act declares the policy of the state to be that:

"... it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing ... and that he shall be free from interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization. ..."

It would be clearly violative of this policy for an employer, on his own initiative, to interfere with his employees' selection of a bargaining representative, and it seems equally violative for a union to force an employer to do so.

The third principle of the Wischhusen case — that it is unlawful for a union to seek to represent employees against their will — was followed in a later case which also was decided in Baltimore. In Goldstein v. Bartenders Union, Local No. 36, five of the eighteen or nineteen employees of a tavern joined a union. Representatives of the union told the owner of the tavern that the union represented a majority of his employees. The owner asked to see the names of the members and stated that if the union did represent a majority, he would negotiate a contract with it. The union refused on the ground that the owner might discriminate against the union members and started to picket in front of and in the rear of the tavern. Several days later, five employees who had joined the union returned to work and stated that they did not want the union to represent them. However, the picket line continued. After finding that the business did not so affect interstate commerce as to fall under the NLRA, the court held that an injunction should issue. It stated that the

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69 MD. CODE (1957) Art. 100, § 63.
70 33 CCH Labor Cases ¶ 71,020 (Cir. Ct. No. 2 of Baltimore, 1957).
Maryland Anti-Injunction Act applies only if there is a labor dispute, and that under the facts of the case, there was no labor dispute since the purpose of the picketing—to require the employer to recognize the union although the union did not represent his employees—violated the public policy of the state.

It is important to note that the two cases just discussed both represented situations in which a union sought recognition as the bargaining representative of employees who had renounced the union. In *Cox Distributing Co. v. Highway Truck Drivers, Local 107*, the position of the union was stronger. Eight of the nine truck drivers of a company became members of the union, which requested the company to recognize it as the bargaining representative of the drivers. The company refused, and the eight union drivers went on strike. They also picketed the company with the help of two union organizers and other unidentified persons. The company replaced the eight drivers and leased two tractor-trailer units to deliver its products to its customers. During the strike and picketing, various acts of violence were performed by unknown persons. The court held that the peaceful union activity could not be enjoined. It stated that a strike and picketing for recognition was clearly a labor dispute within the meaning of the Maryland Anti-Injunction Act and that therefore no injunction could issue unless the court found that the police had failed or were unable to furnish adequate protection, and that notice of hearing had been given to all known persons against whom relief was sought. In the instant case, failure of police protection was not alleged and notice of hearing was not given. Because of such procedural defects, an injunction would have been improper. The court also discussed the rule set forth in the Supreme Court cases, that while a state court is not preempted from enjoining violence connected with picketing, it may not enjoin peaceful picketing itself unless the picketing is so enmeshed with the violence and the threat of violence that the two activities are inseparable. It held that in this case the violence was separable from the peaceful picketing and thus that all picketing could not be enjoined.

Although there are only a few reported Maryland cases dealing with recognitional picketing, the three cases just discussed, and *Pocketbook Workers v. Orlove* in the Court of Appeals, present a pattern, although a sketchy one. The

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71 See supra, ps. 234-236.
72 158 Md. 406, 148 A. 826 (1930).
Wischhusen and Goldstein cases hold that it is against the public policy of Maryland for a union to force a company to recognize it as the representative of the company's employees when all of the employees have rejected the union. On the other hand, the Cox case holds that it is not against the policy of the state for a union which represents a majority of a company's employees to picket for recognition. Thus far the Maryland decisions accord with the principles of the NLRA, which basically provide for a system of majority rule in representation cases. In the Orlove case the Court of Appeals condoned picketing for recognition by a union which represented some of the employees of a company without questioning whether the union represented a majority of the employees. Thus, while the Court necessarily held that recognitional picketing was not unlawful per se, it did not consider the question whether a union engaging in such picketing must have the support of a majority of the employees whom the union seeks to represent. In fact, there does not seem to be any Maryland case which decides the legality of recognitional picketing by a union which has the support of some, but not a majority, of the employees of a company. In deciding such a question, a court may reach different results depending upon whether the union wants to represent all of the employees of the company, the employees of certain departments, or only those employees who support the union. In any event, this problem, which has proved very troublesome in federal law, remains open in Maryland law.

One other Maryland case should be mentioned, even though the opinion was apparently given orally and contains no citation of authority. In Standard Wholesale Phosphate and Acid Works v. CIO, the company refused to sign a contract containing a closed-shop provision. The union called a strike, in which only a small part of the employees participated, and established a picket line at the entrance to the company. Another company, a neutral party, suffered because it shared the same entrance, and union men, such as truck drivers, often would not cross the picket line to reach the company. Also, a ship which unloaded behind the picket line was struck by another union, apparently in sympathy for the strikers. The court held that the picketing was lawful since it was peaceful and that the sympathetic strike was also lawful since it was

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Daily Record, Dec. 1, 1939 (Cir. Ct. No. 2 of Baltimore, 1939).
only an application of the principle that union men will not work behind a picket line. This case is interesting because it raises difficult problems regarding the legality of two different types of union pressure on neutral employers. First, the refusal of union men to cross the picket line affected two companies at the same location, one involved in the labor dispute and the other neutral. To the lawyer practicing federal labor law such a situation raises familiar, although difficult, questions of common situs picketing. Such picketing must meet very specific standards to be legal under federal law — such as clear indication of the company involved in the dispute and minimization of the effects of the picketing on other companies.76 This case, however, appears to permit such picketing without restriction. Second, the sympathetic strike brings to mind the secondary strike cases in the Court of Appeals.77 This case differs from those cases in that here two unions were involved, whereas in the Court of Appeals cases the union which called the strike at the neutral company was also the union involved at the primary company. It is not clear whether this difference should be important. However, the court assumed that the sympathetic strike was proper without discussion of the Court of Appeals cases.

**Unionization of Government Agencies in Maryland**

Thus far the cases discussed have dealt with union activity directed against private employers. One series of Maryland cases, which may have far-reaching consequences in the future, deals with the attempt of a union to organize and bargain for the employees of a government agency.

During the early 1940's there was a history of labor troubles among the street-cleaning and trash-and-garbage collection employees of the Department of Public Works of Baltimore City. Frequent work stoppages, which threatened to paralyze the important services of the Department, resulted from the attempt of a union to gain recognition as the representative of these employees. Finally the Department recognized the union and signed several collective bargaining agreements with it. The cases now under discussion dealt with the legality of these agreements.

76 See, e.g., Piezonki v. National Labor Relations Board, 219 F. 2d 879 (4th Cir. 1955); Sailors' Union of the Pacific (the Moore Dry Dock case), 92 N.L.R.B. 547 (1950).

77 See supra, ps. 247-250, passim.
Mugford v. Mayor and City Council of Baltimore\textsuperscript{78} involved a taxpayer's suit that was filed to enjoin the enforcement of one of these contracts, which provided for union recognition, hours of work, rates of pay, overtime and holiday pay, vacations, sick pay, seniority rules, a grievance procedure, and arbitration. The contract expressly provided that there would be no strike under any circumstances. In holding that the contract was illegal, the court distinguished between public and private employment on the ground that public officers, who are not governed by a profit motive, do not have the same incentive to exploit employees. It also stated that public officers do not have the same freedom of action which private employers enjoy, since their authority derives from public law and may not be delegated to others. Governmental authority may not discriminate in favor of union labor, and the right to hire non-union labor, to fire union members, and to hear and consider the grievances of all employees must be preserved. Also, there must be no strikes against the government. On the other hand, the court said that every agreement between a labor union and municipal officers is not unlawful since no law forbids city employees to join an association, nor denies to such an association the privilege of fair hearing in the matter of working conditions and terms of employment.

Having decided that the agreement was illegal, the court next had to decide whether it had the power to grant an injunction in face of the Maryland Anti-Injunction Act. It held that it did have such power since the act was not intended to apply to public officials.

While this case was pending, the city and the union entered into a new agreement, which was similarly attacked in a taxpayer's suit as being unlawful. The new case was also entitled Mugford v. Mayor and City Council of Baltimore.\textsuperscript{79} The agreement provided that the Department of Public Works recognized the union as the bargaining representative for the employees of the Department and that the Department would not recognize or deal with any other union as regards such employees. The court held that this provision was unlawful in that it established the union in a preferential position expressly denied to any other organization, and that such preferences are forbidden in the public service. It said that the contract would not have been objectionable if it merely had given

\textsuperscript{78} 8 CCH Labor Cases § 62,137 (Cir. Ct. No. 2 of Baltimore, 1944).

\textsuperscript{79} 9 CCH Labor Cases § 62,424 (Cir. Ct. No. 2 of Baltimore, 1944).
the union the right to act as bargaining representative for its members employed in the Department, saving to the other employees of the Department the right to deal with the Department on their own behalf either singly or collectively. The court also stated, however, that the provisions for holidays, vacations, sick leave, overtime pay, and the deduction of union dues on a voluntary basis were lawful.

In its decree the court enjoined the city from carrying out the agreement and from collecting union dues unless the collection and remittance of such dues was on a purely voluntary basis terminable by any employee at any time. Neither the city nor the union appealed from this decree; however, the taxpayer appealed on the ground that the part of the injunction permitting voluntary deduction of dues was unlawful. The Court of Appeals held that if the city made dues deductions at the request of the union, even though the deductions were terminable by the employees, the arrangement would be objectionable as a delegation of governmental power and as a preference to the union. However, if a city employee voluntarily requested the deduction of union dues, reserving to himself the right to discontinue such payments in the future, such an arrangement would be lawful if the city consented to it, but it could not be imposed without the city's consent.

Although the Court of Appeals was not asked to review the remainder of the decree, it nevertheless did so to some extent. It stated that insofar as matters such as hours, wages, or working conditions of city employees are covered by the provisions of the City Charter, those provisions are controlling. To the extent that they are left to the discretion of any city agency, the city authorities cannot delegate or abdicate their continuing discretion. However, employees may designate a representative or spokesman to present grievances. The court also mentioned that a municipality cannot discriminate in favor of members of a labor union, and that a citizen who is not a member of a union cannot, by that fact alone, be barred from a position in the public service.

At first glance the series of Mugford cases does not seem too important since it is a fairly well-established principle in this country that union activity directed against government agencies should be restricted in some

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80 Mugford v. City of Baltimore, 185 Md. 266, 44 A. 2d 745 (1945).
manner. However, these cases may have an influence outside of the area of government agencies. First, the Court of Appeals apparently concurred in the view of the lower court that the Anti-Injunction Act did not apply to public bodies, and that therefore an injunction was permissible. Otherwise the Court would not have taken the trouble to define the scope of the injunction in regard to the deduction of union dues. Thus the Court of Appeals seems to recognize that the broad statutory definition of a case involving a labor dispute is subject to exceptions when required by the public policy of the state. Such a principle would be relevant in any labor injunction case, not only in those involving government agencies.

Second, it is arguable that these cases stand for the proposition that it is against the public policy of Maryland for a union to attempt to force its wishes on employers who have some of the characteristics of a public body. The scope of the "public body" concept may possibly be extended to include organizations which are not strictly government agencies but which perform governmental functions, such as hospitals which include among their patients indigent persons referred by the state or one of its subdivisions. Also, as regards non-profit hospitals serving the general public, it would seem that such institutions serve the general welfare without regard to profit in a manner akin to a government agency, and that therefore the rationale of the Mugford cases may apply equally to them. At the present time, however, it is impossible to predict with any certainty how the Maryland law will develop in this area.

PICKETING IN A SHOPPING CENTER

In recent years the growth of shopping centers has created difficult questions regarding the right of a union to picket. The basic problem has been whether the owners of shopping centers may lawfully prohibit picketing on their private property. There is very little authority on this

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83 For a discussion of the question of union activity affecting hospitals, see Zachary and Strauss, The Non-profit Hospital and the Union, 9 Buffalo L. Rev. 255 (1960).
point at the present time, and one of the few reported cases was decided in 1959 by the Criminal Court of Baltimore City. In State v. Williams, a union business agent was charged with criminal trespass for picketing on the walkways of a Baltimore shopping center outside of a store with which the union had a dispute. Although the picketing was peaceful and did not interfere with customers in the shopping center, it was conducted in disregard of a posted sign prohibiting any type of solicitation, including picketing. The business agent was convicted before a police magistrate but was found not guilty on appeal to the Criminal Court.

The court based its decision generally on two grounds: (1) Because the shopping center had been opened to the public, the constitutional and statutory right to picket took precedence over the normal rights of the owners of private property; (2) Federal law regarding picketing had preempted the jurisdiction of the state court. On the first point, the court recognized the constitutional right to picket and cited Thornhill v. Alabama, discussed above. It next cited federal cases which contained language to the effect that in some instances the rights of an employer as to his property must yield to the rights of employees under federal statutes. The court stated that the controlling case was Marsh v. Alabama, where the United States Supreme Court held that it was unconstitutional for a state to convict a person for distributing religious literature on the streets and sidewalks of a town in which all of the property, including the streets and sidewalks, was owned by a private corporation. The court emphasized the

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84 See Nahas v. Local 905, Retail Clerks, 144 Cal. App. 2d 808, 301 P. 2d 932, rehearing den. 144 Cal. App. 2d 820, 302 P. 2d 829 (2d Dist. 1956) (decided on the ground that the picketing was not a trespass as regarded the plaintiff, who was only a lessee); People v. Mazo, 38 CCH Labor Cases ¶ 65,835 (Cir. Ct. Ill., 1959); Hearn Dep't Stores v. Livingston, 25 CCH Labor Cases ¶ 67,654 (N.Y. Sup. Ct., 1953) (picketing by employees who had an easement to use a private street); People v. Barisi, 15 CCH Labor Cases ¶ 64,890 (N.Y.C. Mag. Ct., 1948); Freeman v. Retail Clerks Union Local No. 1207, 38 CCH Labor Cases ¶ 66,087 (Sup. Ct. Wash., 1959). But cf. Spohrer v. Cohen, 3 Misc. 2d 248, 149 N.Y.S. 2d 493 (Sup. Ct. 1956) (involving a farmers market). See also, Note, Shopping Centers and Labor Relations Law, 10 Stan. L. Rev. 694 (1958).
85 37 CCH Labor Cases ¶ 65,708 (Crim. Ct. of Baltimore, 1959), noted 73 Harv. L. Rev. 1216 (1960).
86 310 U.S. 88 (1940).
87 See supra, circa, ps. 237-238.
Supreme Court's language in the *Marsh* case that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." The purpose of this language in the *Marsh* case was to show that the company town was in effect indistinguishable from a municipal corporation and consequently was bound by the restrictions of the Fourteenth Amendment regarding freedom of religion and speech. Thus it is possible to distinguish a shopping center case from the *Marsh* case on the ground that a shopping center is not comparable to a municipal corporation and is therefore not as limited in its actions. On the other hand, the *Marsh* case does support to some extent the court's view that when property is opened to the public, the property rights of the owner are more limited than in the usual case.

On the second point, the court noted the line of Supreme Court cases, discussed above, holding that a state court may not regulate union activity which is either protected or prohibited by federal law unless violence is involved. The court pointed out that one case indicates that a union may have a federal right to picket in a shopping center. In *Marshall Field & Co. v. National Labor Relations Bd.*, the Seventh Circuit held that under the NLRA a company could not prohibit solicitation by non-employee union organizers on a private street which was owned by the company and which bisected the main store of the company at street level. It is possible to distinguish this case from a case involving a shopping center. In the *Williams* case it was argued to the court that since the union's dispute was not with the owner of the shopping center but with one of the lessees, the owner had no duty under federal law to permit union activity on its property. However, the court stated that such a view would nullify the union's federal rights and added that the owner might be found to have been acting as an agent of the lessee. The agency question is certainly a difficult one, especially in view of the close economic relationship which exists between lessor and lessee in a shopping center as a result of the prevalence of percentage leases. The *Marshall Field* case is also distinguishable on the ground that picketing in a shopping center

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90 Ibid., 505-506.
91 See supra, pp. 231-236.
92 200 F. 2d 375 (7th Cir. 1952).
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is far more disruptive of business than is solicitation of individual employees on a private street.

The court, however, concluded that it did not have to decide whether the picketing actually enjoyed federal protection, for under the recent Supreme Court decision in San Diego Unions v. Garmon, a state court is preempted whenever it is doubtful whether activity is so protected and the NLRB has not passed on the issue. Although the ramifications of the Garmon case are not yet completely clear, the court's cautious attitude is understandable considering the tenor of the Garmon opinion.

As shown by the previous discussion, the issues raised by picketing in a shopping center are extremely close. Several other courts have decided cases similar to the Williams case in the same manner as the Maryland court. Nevertheless, until these issues are determined by the Maryland Court of Appeals, or at least until the federal law questions are determined by the NLRB or the federal courts, the legality of picketing in a shopping center will remain an open question.

CONCLUSION

As shown by the cases discussed above, the Maryland judicial decisions provide only the outlines of a law of strikes, boycotts, and picketing. Combined with the sparsity of state legislation in this area, this situation poses a difficult problem for the Maryland labor lawyer. The problem is made even more complicated by the fact that the latest Court of Appeals decision concerning private employers dates from 1933. It is difficult to predict whether the Court of Appeals would follow these decisions today since labor law in general has undergone various changes in policy through the years in accordance with the changes in the labor movement. The infant raised by Samuel Gompers and Eugene V. Debs has grown into the giant guided by George Meany, Walter Reuther, and many others.
The Court of Appeals itself recognized that the judicial view of union activity may vary according to the times, when it stated:

"The main question, heretofore stated, requires a decision as to the powers of organized labor to compel or coerce action for the benefit of its members. Courts, in deciding cases involving this question, recognizing the possible far-reaching effect of any rule or principle enunciated, should and do approach the question with caution, and have generally refrained from doing more than deciding the case upon its peculiar facts, leaving each succeeding case to be determined in like manner, and giving effect to the development of the law as illustrated by the decisions, and also permitting the court to take cognizance of general conditions as they may exist at the time of the decision; thus enabling the courts to maintain an even balance between the rights of workmen, either individually or in combination, and equal rights guaranteed to all individuals under the law. The line of demarcation where one man's rights, natural or legal, may end, because in conflict with the exercise of some right by others, is shadowy, and is not the subject of definition by any general rule."

Taking the course of the federal labor law as an illustration of the change in labor law over the years, the federal courts during the early part of this century were very restrictive of the rights of labor, and even questioned its right to form unions in face of the Sherman Anti-Trust Act.\(^9\) The Clayton Anti-Trust Act of 1914\(^9\) ended this specific problem by expressly sanctioning the right of labor to organize. Nevertheless, the courts continued to hamper the activities of unions by means of injunctions issued under a strict view of the means and objectives test.\(^9\) Again in 1933 Congress limited the power of the judiciary by enacting the Norris-La Guardia Act,\(^10\) which greatly restricted the jurisdiction of the federal courts to grant labor injunctions. In 1935 the NLRA gave employees the

\(^{9}\) Ruff & Sons v. Bricklayers Union, 160 Md. 483, 492-93, 154 A. 52, 56 (1931).
\(^{9}\) See e.g., United States v. Debs, 64 F. 724 (C.C.N.D. Ill., 1894), aff'd on other grounds, 158 U.S. 564 (1895).
right to organize, to bargain collectively, and to act in concert for their welfare; at the same time, Congress made it an unfair labor practice for an employer to interfere with this right. The effect of this series of statutes was to give the labor movement federal encouragement. However, labor became guilty of various excesses as it became more powerful, and in 1947 the Taft-Hartley Act made many union practices unlawful. The most recent federal legislation has again restricted the actions of unions in regard to both union members and employers.

This brief description of the course of federal labor law shows that because of the various changes in national sentiment toward labor through the years, the Court of Appeals will probably have to re-examine its former labor decisions when and if the occasion arises. It may take a more restrictive view of union activity, a less restrictive view, or it may decide to affirm its former view. In any event, the Maryland labor lawyer will be forced to cope with the uncertainty of the state's labor law until the legislature or the Court of Appeals provides some clarification.

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