

Washington Law Review

Volume 15 | Number 1

1-1-1940

Status of Picketing in Washington

Jack H. Jaffe

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Jack H. Jaffe, Comment, *Status of Picketing in Washington*, 15 Wash. L. Rev. & St. B.J. 47 (1940).
Available at: <https://digitalcommons.law.uw.edu/wlr/vol15/iss1/4>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

WASHINGTON LAW REVIEW

and

STATE BAR JOURNAL

Published Quarterly, in January, April, July and November of Each Year
by the Washington Law Review Association, at the Law School
of the University of Washington. Founded by John T.
Condon, First Dean of the Law School.

SUBSCRIPTION PRICE: \$1.20 PER ANNUM

SINGLE COPIES 50c

ALFRED HARSCH - - - - - *Editor-in-Chief*
R. H. NOTTELMANN - - - - - *Associate Editor*
JOHN W. RICHARDS - - - - - *Business Manager*

STUDENT EDITORIAL BOARD OF THE LAW SCHOOL

DONALD SIMPSON, *President*

MELVIN D. LURIE, *Vice-President*

JOHN M. DAVIS, *Note Editor*

KENNETH A. COX, *Comment Editor*

Jane S. Abernethy

Nona Fumerton

Harwood A. Bannister

Albert Hanan

Arthur T. Bateman

Jack H. Jaffe

William B. Bevis

Snyder Jed King

Vern Countryman

Earl K. Nansen

Harry M. Cross

Robert A. Purdue

Herbert J. Droker

Arthur S. Quigley

Ross Reid

The REVIEW wishes to call the attention of its readers to the SUPPLEMENTAL WASHINGTON ANNOTATIONS TO THE RESTATEMENT OF CONTRACTS recently completed by Professor W. L. Shattuck. For further information regarding this supplement, see announcement on the first advertising page of this issue.

COMMENT

STATUS OF PICKETING IN WASHINGTON

The history of the status of picketing in the eyes of the legislative and judicial bodies of our nation since the early part of this decade has been a vitally interesting one, mirroring the changes which have taken place in the social and economic outlook of the populace. It is the purpose of this article to present a brief survey of this history, giving particular emphasis to that which has transpired in the state of Washington.

The greatest individual event of this decade, so far as this particular field of law is concerned, was the passage by Congress in 1932 of the so-called Norris-LaGuardia Act.¹ This legislative enactment, a result of the growth of the labor movement's power and influence, provided for injunctions against picketing only in those cases in which certain facts existed, and provided for specific steps to be taken by the petitioner before the decree could be granted. Further, it contained a provision² which was directed at obviating the results of the judicial construction of the Clayton Act,³ as expressed in the famous case of *Duplex Printing Press Co. v. Deering*.⁴ This case had held that labor legislation aimed at protecting picketers in cases of "labor disputes" did not apply to those instances in which the plaintiff and defendant did not occupy the relationship of employer and employee. This, of course, cast dark shadows upon the horizon of labor, in that it left picketers whose object in picketing was unionization of the employees in an establishment at the mercy of the equity courts, if the picketers were not employees of the plaintiff. The *Duplex* case therefore constituted a serious deterrent to the process of organization of labor. Labor realized that, as a practical matter, a great deal depended on its right to picket employers as part of a unionization program, even if the employees didn't join in the dispute actively, because of the fact that the threat of losing his job in most cases would keep the employee from openly expressing his desire to affiliate with the organized groups. The labor movement therefore rejoiced in a victory when the Norris-LaGuardia Act was passed, specifically stating that the term "labor dispute" was not meant to be confined to instances of employer-employee relationships. Labor's hopes rose still further when various state legislatures adopted laws of a tenor similar to that of the federal act. The Washington legislature was quick to fall in line with this new attitude toward the increasingly exuberant labor group, passing an act closely akin to the federal law in 1933.⁵ In this act, as in the federal act, the right to enjoin picketing was removed from the jurisdiction of the equity courts except when certain elements of unlawfulness, inability to secure enforcement of rights by authorities, and attempts at arbitration were present, and after compliance with specified procedural requirements. Further, the term "labor dispute" was again given a definition clearly intended to be very liberal, the law stating that the term "labor dispute" was to include various named controversies "regardless of whether or not the disputants stand in the proximate relation of employer and employee."⁶

As was to be expected, it was but a short while until avenues of escape from the operation of such laws as those described above were sought by employers who now found themselves deprived of a hitherto readily obtainable and vitally effective weapon in the battle between capital and labor.

The courts found that there were two bases relied on by those who sought injunctions against picketers in spite of the newly passed laws.

¹47 STAT. 70 (1932), 29 U. S. C. § 101-115 (1934).

²*Id.* § 113c.

³38 STAT. 738 (1914), 29 U. S. C. § 52 (1934).

⁴254 U. S. 443 (1921).

⁵Wash. Laws Ex. Sess. 1933, c. 7.

⁶Wash. Laws Ex. Sess. 1933, c. 7, § 13.

The first of these was the old *Duplex* case approach, namely, the assertion that the term "labor dispute" excluded conflicts in which the disputants did not occupy the employer-employee relationship. For the courts to uphold such claims would, of course, take the teeth out of the new laws so far as protection to labor organizations seeking to unionize was concerned, since it would revive the interpretation which had been such a thorn in the side of labor, and which was the very interpretation which the terms of the more recent laws had obviously been intended to render ineffective.⁷

In 1935 the Washington court was presented with this question in the case of *Safeway Stores v. Retail Clerks' Union*,⁸ and proceeded to prick the balloon of hope which had been labor's since 1933 by holding that the 1933 Act was inapplicable to non-employee picketers, the term "labor dispute" not having been intended to include this type of conflict. It should be noted that in *United Electric Coal Co. v. Rice*⁹ and *Lauf v. Shinner*,¹⁰ handed down in 1935 and 1936, respectively, the position of the Washington court was supported by lower federal court decisions. However, the great majority of state and federal decisions involving this question, particularly the most recent decisions, have not recognized the *Duplex* case interpretation of "labor dispute" accepted by the Washington court.¹¹ It is interesting to find that the earlier lower court's decision in *Lauf v. Shinner* was reversed in 1938 by the United States Supreme Court,¹² the new decision placing the inclusive interpretation upon the term, as did *New Negro Alliance v. Sanitary Grocery Co.*¹³ in the same year. In the *New Negro Alliance* case the court really went much farther than the Washington court would have had to go in the *Safeway* case to have found a dispute, the factual situation in the former having been one in which an association of colored persons requested a grocery store company to adopt a policy of hiring negro clerks in its stores, and when the request was refused, the association picketed the grocery company. The United States Supreme Court held in that case that a labor dispute did exist. To so hold is to place upon the term a much broader interpretation than would have been necessary in the *Safeway* case, in which, at least,

⁷*New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938); *American Furniture Co. v. I. B. of T. C. & H. of A. General Local No. 200 of Milwaukee*, 222 Wis. 338, 268 N. W. 250 (1936). See Mason, *The Limits as to Effective Federal Control of the Employer-Employee Relationship* (1936) 84 U. OF PA. L. REV. 277.

⁸184 Wash. 322, 51 P. (2d) 372 (1935), (1936) 11 WASH. L. REV. 53.

⁹80 F. (2d) 1 (C. C. A. 7th, 1935).

¹⁰82 F. (2d) 68 (C. C. A. 7th, 1936).

¹¹*Cinderella Theater Co., Inc. v. Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich. 1934); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d, 1934); *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*, 8 F. Supp. 209 (D. N. J. 1934); *Schuster v. International Assn. of Machinists*, 293 Ill. App. 177, 12 N. E. (2d) 50 (1937); *Dehan v. Hotel & Restaurant Employees' Local*, 159 So. 637 (La. App. 1935); *Lichterman v. Laundry & Dry Cleaning Drivers Union*, 204 Minn. 75, 282 N. W. 689 (1938); *Wallace Co. v. International Assn. of Mechanics*, 155 Ore. 652, 63 P. (2d) 1090 (1936); *American Furniture Co. v. I. B. of T. C. & H. of A. General Local No. 200 of Milwaukee*, 222 Wis. 338, 268 N. W. 250 (1936); *Senn v. Tile Layers' Protective Union*, 222 Wis. 383, 268 N. W. 270 (1936).

¹²303 U. S. 323 (1938).

¹³303 U. S. 552 (1938).

the ultimate purpose of the picketing organization, a labor union, may theoretically be said to have been the improvement of wages, hours, and working conditions of the plaintiff's employees. The Washington court, in adopting this method of avoiding the operation of the new type of labor legislation in cases of this nature, is following a definite minority view. It appears that in so holding, the court has overridden the clearly expressed legislative intent, as embodied in the words "regardless of whether or not the disputants stand in the proximate relation of employer and employee".¹⁴ Although it is obvious that a literal interpretation of the law may afford an opportunity for unconscionable activities to take place in some instances, it is submitted that it is not within the province of the court to substitute its views in such matters in the face of a clearly expressed legislative intent. If changes in statutory wording are desired, it is for the legislature to make those changes.

A second line of attack upon the recent laws has been the constitutional approach, with claims of unconstitutionality being presented before many courts. In 1936 the Washington court found itself confronted with such a claim in the case of *Blanchard v. Golden Age Brewery*,¹⁵ and with three judges dissenting, held three sections¹⁶ of the 1933 Act unconstitutional, basing its view upon the existence of an inherent right in the court of equity to issue injunctions in labor disputes. In this case, it may be noted, a labor dispute within the meaning of the act was found to exist, employees of the defendant being involved. The court said that the removal of jurisdiction over such cases, except in the face of certain facts and after following a certain procedure, was an unwarranted interference with equity's rights as guaranteed by the state constitution,¹⁷ which provides: "The superior court shall have original jurisdiction in all cases in equity . . . Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus . . ." Without entering into a discussion of the constitutional question involved, it should be pointed out that there were vigorous dissents on this point, and that by holding as it did, the Washington court held *contra* to all the other state courts in which the question had arisen and from the federal courts wherein the constitutionality of such statutes had been questioned. The unconstitutionality attacks against these laws have been based on three principal grounds, namely, (1) a violation of the due process clause,¹⁸ (2) a denial of equal protection of the law,¹⁹ and

¹⁴Wash. Laws Ex. Sess. 1933, c. 7, § 13.

¹⁵188 Wash. 396, 63 P. (2d) 397 (1936).

¹⁶Wash. Laws Ex. Sess. 1933, c. 7, §§ 7, 8, 9.

¹⁷WASH. CONST. art. IV, § 6.

¹⁸*Fenske Bros. v. Upholsterers' International Union*, 358 Ill. 239, 193 N. E. 112 (1934); *Schuster v. International Ass'n of Machinists*, 293 Ill. App. 177, 12 N. E. (2d) 50 (1937); *Scofes v. Helmar*, 205 Ind. 596, 187 N. E. 662 (1933); *Local Union No. 26 v. Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937); *Bayonne Textile Corp. v. American Fed. of Silk Workers*, 116 N. J. Eq. 146, 172 Atl. 551, 92 A. L. R. 1464 (1934).

¹⁹*Schuster v. International Ass'n of Machinists*, 293 Ill. App. 177, 12 N. E. (2d) 50 (1937); *Local Union No. 26 v. Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937); *Wallace Co. v. International Ass'n of Mechanics*, 155 Ore. 652, 63 P. (2d) 1090 (1936); *American Furniture Co. v. I. B. of T. C. & H. of A. General Local No. 200 of Milwaukee*, 222 Wis. 338, 268 N. W. 250 (1936).

(3) an unwarranted denial of equity's fundamental right to deal with this type of subject matter by injunction.²⁰ It will be noted that in every instance cited the constitutionality of these statutes, whether identical to or very similar to our own statute, has been given the approval of the courts, whether state or federal, and that as of this date our court has been the only one holding to the contrary.

Thus in the first two decisions arising under the 1933 law, the Washington court very decisively emasculated the recent enactment by the use of two effective methods, using both means to negative what appears to have been the express intention of the legislative enactment. But subsequent cases show that the attitude of the Washington court toward picketing has been modified in certain respects since the *Safeway* and *Blanchard* decisions.

The year after the *Blanchard* case had been decided another decision of the court with regard to the right of an employer to enjoin picketing was made in the case of *Kimbel v. Lumber and Saw Mill Workers' Union*.²¹ In this case the defendant union was attempting to unionize the plaintiff's employees, several of whom already belonged to defendant union. The pickets were employees of plaintiff, though they remained at a considerable distance from plaintiff's place of business. No mention at all was made of the 1933 Act, the court's refusal to enjoin being based chiefly on the reasonable nature of defendant's demands and the fact that the peaceful picketing was being done at a reasonable distance. A reading of the case might have led one to believe that the court was no longer going to consider the 1933 Act as operative in these situations.

However, two years later the Washington court was again confronted with a situation much like that found in the earlier *Safeway* case. In *Adams v. Building Service Employees' Union*²² the court again found an outside union seeking to organize the workers in the petitioner's place of business, using pickets to lend strength to the battle. The opinion of the court in that case was both puzzling and interesting. The *Blanchard* case was cited to show the unconstitutionality of parts of the 1933 Act dealing with limitations upon the court's injunctive powers in "labor disputes", and the court then went on to cite the *Safeway* case to show that there was no labor dispute, and that the 1933 Act was for that reason inapplicable to the case. The decision leaves one in doubt as to whether the court regarded the law as still operative or not, since the citation of the *Safeway* case was certainly of no value if the law itself was of no validity.

Several months later the court handed down another opinion in a

²⁰*Cinderella Theater Co. v. Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich. 1934); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d, 1934); *In re Cleveland & S. Brewing Co.*, 11 F. Supp. 198 (N. D. Ohio 1935); *Fenske Bros. v. Upholsterers' International Union*, 358 Ill. 239, 193 N. E. 112 (1934); *Local Union No. 26 v. Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937); *Dehan v. Hotel & Restaurant Employees' Local*, 159 So. 637 (La. App. 1935); *Aberdeen Rest. Corp. v. Gottfried*, 158 Misc. 785, 285 N. Y. Supp. 832 (Sup. Ct. 1935); *Wallace Co. v. International Ass'n of Mechanics*, 155 Ore. 652, 63 P. (2d) 1090 (1936); *American Furniture Co. v. I. B. of T. C. & H. of A. General Local No. 200 of Milwaukee*, 222 Wis. 338, 268 N. W. 250 (1936).

²¹189 Wash. 416, 65 P. (2d) 1066 (1937).

²²197 Wash. 242, 84 P. (2d) 1021 (1938).

very similar factual situation, *Fornili v. Auto Mechanics' Union*.²³ In this opinion the court regarded the situation in which the picketing is done by an outside union as being governed by *stare decisis*, under the rule of the *Safeway* case and the recent *Adams* case. In this case a vigorous dissent pointed out the way in which our court is at variance with the other courts of the country in its interpretation of the meaning of "labor dispute".

Shortly thereafter the court handed down its decision in the case of *United Union Brewing Co. v. Dave Beck*.²⁴ This, too, was a case involving activities by an outside union, including picketing, and once more the term "labor dispute" was held to exclude that type of relationship, the court citing the *Safeway* case, the *Adams* case, and the *Fornili* case to support this position.

It is interesting to note that in neither of the last two cases discussed above was there any mention of the unconstitutionality of the 1933 Act, as decreed in the *Blanchard* case. In both of them the opinions were based upon the inapplicability of the 1933 Act, due to the absence of labor disputes. Since the portions of the act which had been declared unconstitutional were those which contained the "teeth" of the act, without which the act would be little more than an expression of policy, one may well wonder over finding opinions which refer to the act as a valid and subsisting part of the state's statutory law, in spite of a former declaration to the effect that the law's most important parts were unconstitutional. An act rendered void by being declared unconstitutional cannot be revived by judicial decision.

Within but a few weeks after the *United Union Brewing Co.* case, the Washington court handed down another decision which is of decided importance in attempting to ascertain the exact status of picketing in this state. In the case of *Yakima v. Gorham*²⁵ a municipality had passed an ordinance making picketing unlawful, except by employees who had been employed three months or more at the place of business picketed, and who had been so employed within sixty days of the period in which the acts referred to were done. The appellant was a picket who had been carrying a "sandwich sign" pronouncing the employer unfair to organized labor, and although a member of a union whose members had been discharged for their membership, he was not and had never been an employee of the picketed employer. The appellant alleged the unconstitutionality of the ordinance under which he was arrested, and a divided court upheld his contention. In this decision the majority opinion, written by a dissenting judge in the "labor dispute" definition cases, left no doubt as to the legality of peaceful picketing *per se* in this state. The opinion expressly overrules the previous cases which had declared peaceful picketing illegal under all circumstances,²⁶ or which had considered it legal only under arbitrary spatial limita-

²³100 Wash. Dec. 240, 93 P. (2d) 422 (1939).

²⁴100 Wash. Dec. 412, 93 P. (2d) 772 (1939).

²⁵100 Wash. Dec. 494, 94 P. (2d) 180 (1939).

²⁶*Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069 (1905), 4 L. R. A. (N.S.) 302 (1906); *St. Germain v. Bakery & Confectionery Workers' Union No. 9*, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F 824 (1917); *Baasch v. Cooks' Union Local No. 33*, 99 Wash. 378, 169 Pac. 843 (1918); *Danz v. American Federation of Musicians*, 133 Wash. 186, 233 Pac. 630 (1925).

tions.²⁷ The change in position from the attitude of our court shown in the cases cited²⁸ is based upon an expression of policy by our legislature in the 1933 Act, and the opinion cites numerous cases from many jurisdictions to support this position under an act such as ours. The case is particularly interesting in another respect as well, since the appellant here was not an employee of the picketed employer, yet an ordinance prohibiting him from picketing was declared unconstitutional.

By way of summary, we find the following positions to be the governing ones in this state as of this date: 1. The 1933 Act is not applicable to cases in which picketing is done by non-employees. 2. The 1933 Act is unconstitutional insofar as it interferes with equity jurisdiction. 3. Peaceful picketing *per se* is legal, even if by a non-employee.

We may imply, however, that our court may be relaxing its position in the matter of nullifying the effectiveness of the 1933 Act, since the opinion in the case of *Yakima v. Gorham* indicates that the non-employee picketer does have a right to picket, and it is possible that when the next injunction case involving non-employee picketers presents itself to the court, it will fall into line with other jurisdictions, and will include non-employee cases within the term "labor dispute". Furthermore, the way in which the declaration of unconstitutionality laid down in the *Blanchard* case has been ignored in the recent cases would lead one to believe that our court has decided to overlook its former opinion, and that the 1933 Act is to be enforced when the court is confronted with factual situations to which the court feels the act was intended to apply.

JACK H. JAFFE.

²⁷*Adams v. Local No. 400 Cooks' & Waiters' & Waitresses' Union of Spokane*, 124 Wash. 564, 215 Pac. 19 (1923) (100-foot limit); *Sterling Chain Theaters, Inc. v. Central Labor Council of Seattle*, 155 Wash. 217, 283 Pac. 1081 (1930) (re-established 100-foot limit).

²⁸Comment (1930) 5 WASH. L. REV. 126 gives an excellent summary of litigation and legislation in this field up to 1930 in this state.