

Picking at Scabs: Labor Rhetoric and Free Speech in the 1940's

Lindsley Armstrong Smith

University of Arkansas

“I believe that we have grown smug about civil rights in our country. Too few of us are willing every day and under all circumstances to embrace the premises of our democracy. We are too ready to say ‘I believe in picketing, but—’ or ‘Sure, every man has the right to speak as he pleases and vote as he pleases, but—’. I am exceedingly concerned that the ‘but’ has grown so large as to devour the right which it purports to qualify.”

Philip Murray, President
Congress of Industrial Organizations
October, 1946

The statements of C.I.O. President Philip Murray, above, address a compelling problem for the labor movement of the 1940s. On the one hand, the union worked to encourage workers to protect their rights of free speech, but on the other hand, workers had real concerns of keeping their jobs that the law permitted employers to hand over to replacement workers, known as “scabs” to labor sympathizers, if the employees left the work line and joined the picket line. “Scabs” would continue to work or accept work to replace striking workers. By filling jobs vacated by strikers, these strikebreakers were one of the biggest threats to weakening or breaking labor protests. Union leaders fought during the 1940s to educate workers about their First Amendment rights of speech, striking, picketing, and assembly in order to encourage them to protect their rights of free speech despite the high risk to individual worker livelihood when their jobs were replaced. Prior to and during the 1940s, state courts would regularly issue injunctions to stop strikes and picketing, which often placed trade unions in a duel battle with the government and employers. These injunctions to limit or stop picketing, as well as law supporting the employer’s ability to discharge striking workers, resulted in a loss of protection for worker’s civil rights and loss of strikers due to employee unwillingness to risk losing their jobs to replacement workers.

Hostilities from strikers resulted when a company employed replacement workers to work in the place of the striking workers. Employers would hire both temporary and permanent replacements, leaving picketing workers to strike jobless and left to be recalled to work only if a job was vacated by a replacement worker. Employers also knew to embrace and repeat the

successful argument of the threat of economic slowdown to win in legal and public forums against union actions, which worked to further quell the voices of workers. Furthermore, a revival of police brutality against workers exercising their rights of free speech added additional repression of worker speech. Philip Murray, foreward, *Your Civil Rights: A handbook for trade union members and organizers*, Legal Dept., CIO. However, replacement workers were not the only object of strikers' hostilities. The labor movement's hostilities against replacement workers, or "scabs", occurred as a result of a larger goal of unions to improve wages and acquire better working conditions. Replacement workers served as an interference in meeting these larger goals, because the success of unions existed in the ability to pressure employers to meet demands or risk a slowing or stopping of production. Replacement workers lessened the strength of such tactics, because employers used replacement workers to keep production going.

The decade of the 1940s was an important time for the development of law on union picketing and union organizing, with several cases heard by the United States Supreme Court during the 1940s to refine the rights and boundaries of picketing as it relates to labor issues. Although the United States Constitution does not specifically mention of the right to organize or right to strike, the First Amendment protects free speech, the freedom of assembly, and the right to petition the government for a redress of grievances. The U.S. Supreme Court clarified the delicate balance between employer rights and worker rights during the important decade of the 1940s. Wildcat strikes, general strikes, and mass worker assemblies that were not sanctioned by unions, particularly in 1945 and 1946, threatened corporate power as well as union power, making negotiation, productivity, and peace unpredictable.

Due to union education of workers, the 1940s was a decade of increased union desire for activism within the dictates of the law, which worked to drive legal force into the American labor movement. Unions fought for worker rights, and in the process of educating the workers about the law and legal actions, opened the door for incremental increases in workers' free speech rights. Of particular importance was the union's encouragement of peaceful picketing and peaceful dissemination of ideas, which allowed the union to inform the public about union causes and to work to protect workers' lives, quality of life for workers' families, and workers' rights. The ability of unions to harness support from the public assisted union growth and power during the 1940s. It was, therefore, important for unions to disseminate information to the public.

Little has been written about speech and assembly in the 1940s labor movement. Because this decade provides an important time period in labor history related to speech acts, this article provides insight into the period from the enactment of the National Labor Relations Act of 1935, which provided stronger protections for labor speech, to the end of the 1940s, after the Taft-Hartley Act limited the power of the growing labor movement. Specifically, this article addresses the important pre-1940 stage of union and employer tensions, union and non-union rhetoric and acts of the 1940s that drove force into the labor movement, and 1940s United States Supreme Court labor picketing cases.

I. Pre-1940 Influences on the 1940s Labor Movement

In 1912, Joe Hill wrote a satire of the famous Cassy Jones folk ballad, in which Hill accented the degrading act of scabs replacing strikers and the effect these scabs had on the workers' plight for acquiring better and safer work conditions. This satire, "Cassy Jones—The Union Scab," spoke of the action of the scab Casey who not only went "a' scabbing" for the railroad, but after his death he went "a' scabbing" in heaven, only to be knocked down the Golden Stairs by the Angels' Union No. 23 for the Devil to give Casey the job of shoveling sulphur for scabbing on the S.P. Line. Geoff Francis and Peter Hicks later borrowed inspiration from "Casey Jones, Union Scab," when writing the song "The Slimy Patrick's Scab," which attacked the tactless character of scabs, including the words, "There's vampire bats and sewer rats, there's pubic lice and crabs, But the lowest form of life on Earth is the slimy Patrick's scab." And in 1938, Earl Robinson wrote the song "Joe Hill" about the immortal life of Joe Hill, whose voice, as Robinson noted, would never die. Joe Hill was a Wobblie organizer who was executed in Utah after being framed for murder—Hill's last words were "Don't mourn, organize." Labor songs, such as those written by Hill provided great inspiration to labor by uniting workers and the public toward the workers' causes.

An important case leading into the labor movement of the 1940s was N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 2 L.R.R.M. 610 (1938), which addressed the problems associated with balancing an employee's right to strike without fear of discharge against the employer's rights run its business during a strike by hiring permanent replacement workers who replaced striking workers and were assured a job after the strike was over. In the Mackay case,

the U. S. Supreme Court found in favor of the employer's rights to employ the permanent replacement workers. The Court pronounced that employees who strike for economic reasons, including strikes due to the failure negotiating a contract after good-faith bargaining attempts, do so with the risk of losing their jobs to permanent replacement workers, leaving the striking employees who eventually abandon their strike merely with their names on a preferential hiring list if a job opening occurs in the future.

Encouraging union activism by workers who would risk loss of their jobs to replacement workers remained difficult. Union organizers had to work on ways to inform workers that unionism and activism, even in the threat of job loss to replacement workers, was a necessity to acquire better working conditions and wages. Union organizers stressed incentives, and effective wording of such incentives. While higher wages and better working conditions were clearly incentives to encourage action, union organizers appealed to workers with positive affirmation for action. Rather than inform workers that "conditions are very bad in your shop," the union used the argument of wage inequality across the nation and better wages for union workers; arguing, "Look what the fellows in the union doing the same work are getting." Jack Barbash, *The Practice of Unionism* (Harper & Brothers, Publishers: New York, 1956). But still, the threat to jobs (due largely to regular issuance of injunctions to quell voices of workers who would lose their jobs if joining the picket line) remained a real issue of worker concern, resulting in lack of motivation by workers to join unions and take action in support of union causes. These worker versus employer tensions continued as well throughout the 1940s.

The most important labor legislation prior to 1940 was the National Labor Relations Act (N.L.R.A.), or "Wagner Act," of 1935. This Act extended to most private sector employees "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." Prior to the Wagner Act, the labor movement was highly restricted in its ability to communicate, even communicating through peaceful picketing or communicate certain words—including government prohibitions on the use of the words "scab" and "unfair." Prior to 1935, unions and non-union workers attempted several tactics, including mass strikes and sit-ins, to get employers to seriously engage in negotiations for better wages and working conditions. The N.L.R.A. opened the door,

Communication Law Review

although slightly, to increased protection of speech, publication, and assembly that had been heavily restricted by state court injunctions and oppressive employers prior to the passing of the Act. However, despite the N.L.R.A., replacement workers remained legal and used by industrial corporations desiring to keep production going during strikes.

The N.L.R.A. created the unfair labor practice. Included in the five unfair labor practices identified in this new law was the unlawful discrimination against workers for engaging in mutual aid or protection. The N.L.R.A. also proclaimed as unlawful on-the-job discrimination or physical coercion, by unions or employers, of employees choosing to work and not engage in union activities or other organizational rights, such as the right to strike or picket. The NLRA protected the right of workers to strike or refuse to bargain with an employer's chosen representative, the right of employers to hire replacement workers to continue business, and the inability of employers to fire peaceful strikers. This Act opened the path for workers to increase picketing and dissemination of union literature; however, workers still remained in the position of risking the loss of their jobs if leaving the workplace to strike. Employer use of replacement workers and state enforcement of injunctions to stop picketing served to limit the force of the labor movement by limiting actions of workers desiring to enforce their civil rights to effect change.

The N.L.R.A. guaranteed the right to organize and bargain collectively. The NLRA provided, in part:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The NLRA further provided, in Section 7 of that Act:

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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

The A.F.L. and trade unions, and particularly the newly-formed Committee for Industrial Organization, worked to inform workers of their rights provided in the new Act. In 1935, the controversial John L. Lewis, head of the United Mine Workers of America and a leader of the American Federation of Labor (A.F.L.), was, like other union leaders, disgruntled over the A.F.L. and ended his membership in that organization. That same year, Lewis and others formed the Committee for Industrial Organization (changed later to the “Congress of Industrial Organization”). The C.I.O. organized all workers, whether skilled or not, rather than organize workers by their trade. Lewis became president of the C.I.O., revitalized the labor movement, and was a strong influence in increasing C.I.O. membership to outnumber A.F.L. membership by the year 1937. The C.I.O. clarified the law related to the legal provisions of the N.L.R.A., informing the workers that it was unconstitutional for a state or a municipality to interfere with the right to form a union through leaflet distribution or engage in union activities, and if “an employer interferes with the exercise of these rights by his employee, he is violating the National Labor Relations Act.” *“Your Civil Rights: A Handbook for Trade Union Members and Organizers,”* Pamphlet No. 135, Legal Dept., C.I.O., at 19.

Prior to the passing of the N.L.R.A., state courts regularly restrained labor picketing by issuing injunctions against picketing. Although state injunctions were not alleviated after the passing of the Act, workers had a new weapon in the Act to assist them in gaining power, having their voice heard by employers, and increasing the dissemination of labor ideas to garner public support and public opinion. The enactment of the NLRA served as the workers’ most progressive labor legislation, establishing workers’ rights to organize and bargain collectively, while instituting the National Labor Relations Board to regulate the process of collective bargaining. Unions and workers became revitalized with the hope promised in the new Act. However, after the passing of the National Labor Relations Act, federal circuit court judges battled over the Act and the authority of the National Labor Relations Board’s enforcement of the Act’s protections, with some N.L.R.A. guarantees remaining contested or lessened by subsequent legislation and court decisions. See, Douglas James Feeney-Gallagher, *“The battle on the benches: The Wagner Act and the Federal Circuit Courts of Appeals, 1935—1942,”* Dissertation, State University of New York at Binghamton, AAT 9974754, ISBN 0-599-80265-0, 2000; Sefcovic Enid, *“Forming ‘workers’ rights’: The Discourse of the Wagner Act,”*

Dissertation, University of Georgia, AAT 9735564, ISBN 0-591-45274-X, 1997; Christopher Lawrence Tomlins, "*The State and the Unions: Federal Labor Relations Policy and the Organized Labor Movement in America, 1935-55*," Dissertation, The John Hopkins University, AAT 8106653, DAI-A 41/10, 1980. The Act did, however, inform Americans, even if impliedly, of the importance of labor organization, fair dealing in employment negotiations, and labor association rights. The Act also resulted in a strengthening of union organizations.

The N.L.R.A.'s establishment of collective bargaining as the main method of labor negotiations between employers and employees had a significant effect on the timing and use of picketing and striking, because union negotiations often became thwarted when rank-and-file spontaneous militant actions (usually with wildcat strikes) occurred, particularly when rank-and-file actions involved violence. What occurred was a struggle between the working class, capitalists, and the government, and within that struggle developed a vying for public opinion and attempts to define American values as fitting for the goals of the representative rhetoricians of each entity. The C.I.O. was an active force in the labor movement in the 1940s, surpassing the American Federation of Labor in both effectiveness and membership.

Subsequent to the Mackay decision and passing of the N.L.R.A., the United States Supreme Court further defined labor rights, with important First Amendment issues being addressed and with cases defining rights under the N.L.R.A. in the 1940s. The success of unions in acquiring a number of Supreme Court opinions decided in their favor were largely due to the organizational efforts of the unions at the end of the 1930s and during the 1940s to educate workers about their First Amendment rights.

The statutes and caselaw prior to 1940 had a large effect on how the labor movement shaped its actions and rhetoric of the 1940s. The strategic alternative employed by the labor movement in the 1940s focused on educating workers about their rights under the First Amendment to invoke federal law when state law, particularly with the regularity of injunctive restraint issued by state courts, limited the labor movement from expressing its views and acquiring bargaining power. The labor movement worked to push the First Amendment to the forefront of 1940s labor movement, particularly in the area of labor picketing.

II. Community, Equality, and Union Tactics of the 1940s

The Joe Hill mentality against scabs remained strong in the 1940s. However, the most important tool of unions during the 1940s was education, and such education was dependent on the exercise and acquisition of speech, the press, and assembly. Limits on speech, press, and assembly worked to quell the voices of workers and the perceived strength of labor issues. By educating workers about their First Amendment rights, unions supplied workers with the ability to defend their federal rights to local government authorities and to employers bent on stopping or limiting the expression of worker or union ideas. Additionally, speech, press, and assembly activity organized by unions and non-union laborers worked to create an “us and them” phenomenon, in which those who were for labor causes were honored loyalists and supported a class solidarity, but those acting against labor causes, particularly “scabs”, were chastised. With this approach, public resentment of scabs and oppressive employers increased, giving strength to the labor movement with the support of public opinion. Union education programs helped raise the status in the community of union members and sympathizers and helped workers understand and defend their rights, even at the threat of employer retaliation. Union education programs also helped curtail government and corporation tendencies in the 1940s to attach negative rhetoric to pro-union individuals and unions, such as linking unionization to un-American activity and attaching communist labels to the labor movement—tactics that were used to sway public opinion away from unions and the labor movement, whether or not the particular unions had Communist association.

The good unionist of the 1940s became known as one who recognized and respected the picket line, worked for and not against organized labor, was a union member and/or employs union labor, was active in civic affairs, and informed the public and other workers of the benefits organized labor while keeping internal union affairs and disputes from management and the public. Trade unions worked to organize labor’s rank and file to provide power in labor negotiations due to the union leaders ability to threaten to unleash or withhold worker protests as needed to meet demands. The inability of unions to control labor’s rank and file often dampened union efforts in bargaining. Trade union educational efforts worked to unite workers and encourage union-approved legal protests—dissemination of information that helped to limit individual or non-union worker acts that could easily derail positive outcomes in negotiations. Unions increased their power in the 1940s largely due to effective educational and organizational

efforts, with the assistance of N.L.R.A. provisions that supported the workers. John L. Lewis, leader of the C.I.O. from 1935 to 1940, was masterful at oratory and led several successful strikes in the 1940s. Lewis led over half a million mine workers on strike in 1943. Phillip Murray was elected president of the CIO in 1940, after Lewis stepped down as president. An important part of effective 1940s labor rhetoric was that provided by the C.I.O., which was led by Murray until his death in 1952.

Wildcat strikes, those initiated by rank and file laborers and occurring without notice and without the blessing of trade unions, also continued during the 1940s. Wildcat strikes would be initiated against collective bargaining agreements and trade union promises not to strike. Wildcat strikes typically occurred by workers who felt neglected by unions and would then bypass the union and other influential channels in order to protest change as an independent collective group. These non-union rank and file strikes often lacked the educational and planned focus of organized trade union official protest tactics. Wildcat strikes commonly went against the goals of unions that were working to negotiate within government channels or to compel business leaders to agree to terms or conditions of employment.

The influence of WWII also had an effect on workers, employers, unions, and labor issues in the 1940s. The effects of war increased profits for companies, while advancing oppressive working conditions for laborers. The unions' no-strike pledge and government limits on wages during the war also caused discontent in groups of workers, which encouraged wildcat strikes. George Lipsitz, *Rainbow at Midnight: Labor and Culture in the 1940s* (University of Illinois Press, 1994), 89. As George Lipsitz pointedly notes:

Union participation in administration and planning of production made sense to business only if the union leaders could restrain the rank and file and guarantee uninterrupted production. In principle, workers generally supported the no-strike pledge, but as a practical matter, they refused to allow it to interfere with their struggles. As the war dragged on, workers perceived themselves to be making a disproportionate share of the sacrifices, and they became bolder about defying the pledge In order to retain credibility with management and maintain their ability to win gains for workers through future bargaining, labor leaders frequently found themselves in opposition to their own rank and file. George Lipsitz, *Rainbow at Midnight*, 91.

Furthermore, wartime 1940's America was also a time of an increased number of women and African Americans in the labor force, which served as an impetus for hate speech acts by some white male laborers who perceived such laborers as threatening to their job security. However,

while African American protest movements provoked “hatred, anger, and violence from whites,” such protest for better living conditions and less exploitation also merged with issues raised by white workers. George Lipsitz, *Rainbow at Midnight*, 71. The Tactics of employers who sought to encourage insecurity in workers with the hope of encouraging a fear of job security often backfired, particularly with tactics that pitted oppressed groups against each other, which forced workers to stop working, band together, and start picketing and initiating strikes for better work conditions. Government intervention during the war to foster stability and production worked to protect large businesses, which further fueled worker hostilities and lamentations over poor working conditions and low wages.

Unions, wildcat strikers, and the public sympathetic to the union causes were not the only voices speaking out about labor working conditions. Songs of the worker’s plight, injustices in the workplaces, unionization, and poverty were prevalent in the 1940s, and with these songs came an increased public awareness and support for the labor movement. Folk music drove force into the labor movement of the 1940s as rock music did for the civil rights movement of the 1950s and 1960s. Woody Guthrie and the Almanac singers not only sang support for the working people, Guthrie encouraged organization of workers in columns in People’s World during 1939-40, with one article noting the importance of seeing *Grapes of Wrath*. Guthrie appealed to the public:

It says you got to get together and have some meetins, and stick together, and raise old billy hell till you get you’re job, and get your farm back, and you house and your chickens and your groceries and you clothes, and your money back. Go to see *Grapes of Wrath*, pardner, go to see it and don’t miss. You was the star in that picture. Go and see your own self and hear your own words and your own song.

Woody Guthrie, People’s World, 1939-40, reprinted in Woody Sez, New York, NY, 1975, p. 133. In April of 1940, Guthrie recorded “Dust Bowl Refugee,” about a man wandering the highways with his family in search of work. In 1940-41, Guthrie wrote “Union Maid,” with the last verse written by Millard Lampell, which was a recurring song sung on the picket lines during the 1940s:

There once was a union maid, she never was afraid
Of goons and ginks and company finks and the deputy sheriffs who made the raid.

Communication Law Review

She went to the union hall when a meeting it was called,
And when the Legion boys come 'round
She always stood her ground.

CHORUS:

Oh, you can't scare me, I'm sticking to the union,
I'm sticking to the union, I'm sticking to the union.
Oh, you can't scare me, I'm sticking to the union,
I'm sticking to the union 'til the day I die.

This union maid was wise to the tricks of company spies,
She couldn't be fooled by a company stool, she'd always organize the
guys.
She always got her way when she struck for better pay.
She'd show her card to the National Guard
And this is what she'd say:

CHORUS

You gals who want to be free, just take a tip from me;
Get you a man who's a union man and join the ladies' auxiliary.
Married life ain't hard when you got a union card,
A union man has a happy life when he's got a union wife.

CHORUS

The Almanac Singers brought labor issues to the people in song, including the voice of protest. The Almanac Singers consisted of Woody Guthrie, Lee Hays, Millard Lampell, Pete Seeger, Bess Hawes, Arthur Stern, and Sis Cunningham.

Tom Glazer also sang of the needs of the working class. In the song "Citizen C.I.O.," Glazer created a dialogue format accenting union efforts to support the U.S.A. and fight battles of the workers. In his 1944 song, "A Dollar Ain't A Dollar Anymore," Glazer sang:

Now it you wanna learn a lesson; if you really wanna know,
If you wanna solve your problems by the score,
Fight your economic battles with the good old C.I.O
'Cause a dollar ain't a dollar anymore.

Tom Glazer, "A Dollar Ain't A Dollar Anymore," Asch Studios, New York, NY, Mar 11, 1944. When he served as Assistant Education Director for the Textile Workers Union in New York, Glazer conducted educational meetings during strikes and rallies. See

<http://www.fortunecity.com/tinpan/parton/2/friedland.html>. In 1950, Glazer made an album, “Eight New Songs for Labor,” for the C.I.O., which included the song “We Will Overcome.” Id. Many other songs and artists similarly swayed public opinion toward union causes. The effect of these musical artists was to increase the voice of labor and gain public acknowledgment and sympathy for the plight of workers through an effective medium outside of the workers themselves by individuals not tied to any particular international or local union.

Moreover, 1940s Hollywood played a role in shaping public opinion of the labor movement, particularly early 1940 films such as John Ford’s *Grapes of Wrath*. Prior to militant worker uprisings found in general strikes of 1945 and 1946, films represented workers as “unhappy, fatalistic, and self-destructive, but also as honest, creative, and mutually supportive. They depicted physical labor as dangerous, degrading, and alienating, but also as necessary, virtuous, and satisfying.” Lipsitz, *Rainbow at Midnight*, 279. After 1945, Hollywood portrayed workers in a less favorable light or avoided storylines related to post-war labor movements. However, with the Red Scare of the late 1940s, Hollywood stayed away from labor issues to avoid polarizing audiences afraid of Communism, and Hollywood was encouraged to avoid “scripts that portrayed capitalism in a negative light.” Id. Similarly, unions also worked to detach themselves from Communist unions and members. Hearings of the House Un-American Activities Committee from 1947 to 1954 was a great cause of concern in Hollywood, as well as a catalyst for lessening actors and directors’ freedom of expression and association. However, workers and labor issues, including messages of post-war class relations, were not ignored altogether during the mid to end of the 1940s. Perhaps the strongest media influence on worker issues involved the change in public perception of working women, from the important role of women workforces during WWII into a transition to housewife themes of the 1950s.

The most effective outlets for union negotiation and collective bargaining during the 1940s were the strike, the boycott, and the picket line. Jack Barbash, *The Practice of Unionism* (Harper & Brothers, Publishers: New York, 1956), at 213. The strike, the collective act of refusing to work, served as the union’s sanction in bargaining with employers to achieve equality if the union was in the position to exercise the choice between working or not working, and also served as the union’s last resort in contract negotiations. Id. at 213-214. Types of strikes consist of economic strikes; “unfair labor practice” strikes; the unpremeditated “quickie,” “wildcat,” or

“outlaw” strike to achieve quick results and dramatization of poor work conditions; the sympathetic strike; and the protest of government action or inaction strike. *Id.* at 214-221. Picketing served as an effective tool of the unions and employees seeking unionization. Picketing typically took the form of a few people walking back and forth in front of an employer’s business to elicit pressure on the employer and call public attention to the existing dispute between the employees and employer. Typical of 1940s picket lines was pressure from picketers to dissuade employees from entering the plant, or “crossing the picket line”, and encouraging union loyalty or be publicly chastised as a “scab.” Often, the purpose of a picket line was to shut down the business until demands were met. A picket line was also used to encourage employees to unionize, particularly when workers were afraid of joining the union due to fear of the employer retaliation or when the union was unable to get a majority of workers to join the union. Typical of a picket line was the existence of chanting, singing, slogans, and speeches to motivate the picketers and encourage unionization and disbursement of union literature to educate the public and employees. Picketing served as a medium for communicating the union’s message as a form of education and public awareness, uplifting the morale of workers, as well as acquiring power to encourage recruitment and pressure employers to deal with the union.

Tensions erupting on the picket line could easily lead to violence by picketers or violence against picketers. Sidney Garfield, an AFL Chemical Workers business agent, described a 1940 strike that he directed in Chicago, stating, in part:

. . . One group was posted right in front of the Company door and the other group down at the street car where the people who were coming to work got off. When this second bunch met anybody coming to the plant they just caught them right then and there and asked them, “Are you with us or against us?” and the answer was no and they were against us, Wham! There was fighting then and there and a lot of people were hurt. The group down in front of the door of the Company was the same way. . . . Sidney Garfield, in *The Practice of Unionism*, at 228.

“Scabs” held the most chastised and despised role in the picket line. Union members who crossed the picket line to work were considered equal to or a close second to “scabs.” “To the good union man, honoring a picket line—no matter whose—represents the most elementary expression of union solidarity, and the man who crosses another

union's picket line is only second to the scab as an object of scorn and as a transgressor of union morality." *The Practice of Unionism*, at 230.

The boycott was used by workers during the 1940s, typically in the form of picketing, for the purpose of pressuring action or inaction of employers acting against union causes (such as using non-union labor rather than union labor) by pressuring consumers not to buy the employer's product, pressuring other employers not to handle the product of the non-union employer, and pressuring individuals not to work for the non-union employer or handle the non-union employer's products. *Id.* at 221. The picket lines used in boycotts were usually located in front of the business of the employer whose action or inaction negatively affected a union cause. Primary boycotts involved pressure on the employer directly engaged in the labor dispute; whereas secondary boycotts involved pressure on employers not directly involved in a labor dispute, but whose action or inaction (such as buying from and selling the directly-offending employer's products) injured the labor efforts. *Id.* at 221. The law was much more restrictive with secondary boycotts, particularly after the passing of the 1947 Taft-Hartley law.

Unions were concerned with state and federal law and working to influence the law toward union causes and free speech and assembly rights to facilitate dissemination of union messages. Unions supported and urged legislation to increase union bargaining strength and opposed legislation that decreased such strength. Educating workers about the law helped assure that workers exercised their free speech and assembly rights in order to continue getting the union message disseminated, which, in turn, worked to increase the number of court cases decided in the union's favor when actions taken by union members within the law provided for the downfall of certain state and municipal laws seeking to limit workers' exercise of speech, publication, and assembly. It was important for the union to stress the need for legal actions by workers to effect change in the law in the workers' favor.

The necessity of high production decreased after the war, as did the availability of jobs. The end of WWII, with its resulting numbers of military men and women in the millions returning to find work, increased workers' insecurity of maintaining steady

employment. “On August 17, 1945, President [Harry S.] Truman saluted business and labor leaders for their efforts to secure industrial peace during the war, announcing that ‘a new industry-labor agreement to minimize interruptions of production by labor disputes during the reconversion period ahead of us is imperatively needed.’” Lipsitz, *Rainbow at Midnight*, 101. Despite this presidential pronouncement encouraging hope without a firm promise, labor protests continued. *Id.* In fact, during the twelve months after V-J Day during which industrial production decreased, more strikes occurred in America than in any comparable period. *Id.* Secretary of Labor L. B. Schwollenback spoke to the nation by radio broadcast about labor disputes, arguing:

This nation has adequate machinery available to peacefully settle any labor dispute. To advance any demand to the point of stopping production instead of using machinery available for peaceful settlement is not in the national interest and will not be supported by public opinion. We must place the interest of the whole Nation above the interest of any individual or any group. Lipsitz, *Rainbow at Midnight*, 114, citing *New York Times*, Oct. 4, 1945, 1, Oct. 11, 1945, 1.

In rebuttal to this argument, unions continued to proclaim that the workers’ oppression is a national issue of importance, and positive results for better working conditions would help the nation.

Emotional, political, and economic conditions relating to important labor issues that prompted the strike wave in 1945 also prompted a series of large local general strikes in 1946. Rank and file workers took action in their own hands and disregarded the law with militant action in 1945, actions that increased in 1946. The use of “scabs” by employers during rank and file militant walkouts presented increased violence. The legendary large general strikes of 1946 started as sympathy strikes to successfully garner the support of the public to effect change and turned into political conflicts that resulted in class unity of laborers and the community in several parts of the nation. The general strikes meant low production, and less profits, to industrial businesses. The general strikes meant a challenge to law and order to local and state government. The general strikes of the rank and file meant less orderly power for unions. Violence by militant rank-and-file protestors, as well as police violence and government action to break strikes, further fueled the flames of the general strikes of 1946. The militant non-union

worker uprisings occurred with little organization and planning, as otherwise desired by trade and international unions, and the militant uprisings often failed to consider the overall outlook of the time, including the post-war need for numerous jobs without the need for war-time production. Alternatively, it was the unions' desires to work within the constraints of the culture they were dealt during the post-war period to effect change incrementally and, for the most part, within the dictates of the law.

In 1946, the Congress of Industrial Organizations (C.I.O.) released the handbook "*Your Civil Rights*" to educate workers on the law and encourage legal, peaceful assembly to effect progressive change for working conditions. See "*Your Civil Rights: A Handbook for Trade Union Members and Organizers*," Congress of Industrial Organizations Pamphlet No, 135, Legal Dept., CIO. This pamphlet serves as an important piece of union history, written at a time when the government and industrial business leaders were threatened by the instability of peace and production, when government and industrial business leaders were becoming more aggressive in their rhetoric and action to use tenants of the necessity of peace and production as catalysts for suppressing union strikes and picketing, and when unions desired and required the protection of the First Amendment rights of speech and assembly to provide strength for the labor movement.

The purpose of the C.I.O. pamphlet, which took on the form of a handbook, was twofold: (1) to inform workers of their civil rights of free speech, free press, and the right of assembly; and (2) to be a handbook used during such action to inform employers and local law enforcement of the ability to act in the performance of these rights. The C.I.O.'s attempt to educate workers about their First Amendment rights also allowed the unions to strengthen union activity, while calming independent worker retaliation found in non-union violent worker activity that in effect negated negotiating power in unions. The pamphlet encouraged workers to use and protect their civil rights and discussed the laws that protect the workers, United States Supreme Court protections of civil rights, how the Wagner Act protects their rights, the right to picket, and provided locations of federal district attorneys so that picketers and union activists could invoke the protection of the federal government to enforce their fundamental rights. Further, the pamphlet discussed the freedom of speech and press, freedom of assembly, limitations on free speech or free assembly, the National Labor Relations Act, the criminal code, and statutes

awarding damages to persons deprived of their civil rights. This information paralleled information that was provided in union speeches and other literature used during the 1940s to inform workers of their rights, as well as inform of effective arguments to defend civil rights.

The C.I.O. encouraged workers to use their rights as well as informed of the limits of such rights in order to assure effective results by lawfully disseminating information and soliciting membership. The C.I.O. stressed that the struggle for retaining civil rights is never over, thus, rights should be exercised to keep their rights strong rather than vulnerable and powerless. *Id.* at 57-58. Furthermore, the C.I.O., at the lead of Phillip Murray, acknowledged the power of the United States Supreme Court in preserving rights, with increases in civil right protection becoming stronger due to President Franklin D. Roosevelt's judicial appointments. *Id.* at 58.

C.I.O. rhetoric of the 1940s encouraged workers to keep channels of communication open to organize and call meetings and distribute union literature. *Id.* at 11. The C.I.O. informed workers about the Bill of Rights, the Fourteenth Amendment, and specific provisions of statutory and case law, as well as providing warnings to workers to avoid mob violence. The C.I.O. informed of the criminal offense of mobs interfering with the right to organize or threatens injury to union members, as well as the illegality of government officials or employers interfering with the right to organize, distribute literature, solicit union membership, conduct door-to-door canvassing, speaking in public places about union issues, or call and hold union meetings. *Id.* at 20-21, 25. The C.I.O. warned workers and union members and officials that the right to free speech or free assembly is not absolute, but is limited when the real danger of violence exists. *Id.* at 56-57. It was the attempt of the C.I.O. to educate workers of the law in order to curb the use of rank and file violence that threatened the labor movement and effect change through legal channels and, thus, through incremental shifts in favor of labor in cases decided by the courts.

In Philip Murray's forward to this noteworthy C.I.O. pamphlet, Murray informed of the importance of employees knowing their rights and the importance of the pamphlet in providing the legal education needed to effectively enforce civil rights. Murray worked to change a movement that tended toward violence into a unified and productive organizational movement that employed legal principals to effect positive change. Murray stated:

There is a strong need today for a great crusade to make civil liberties a reality among our people. Those rights, which after all are the essence of our political system, must be brought to the people for whose use they were intended. They must be wrested from the law books and from the discussions of the learned societies and fused into the every day conduct of every day people. "*Your Civil Rights: A Handbook for Trade Union Members and Organizers*," Congress of Industrial Organizations Pamphlet No, 135, foreward by Philip Murray, Legal Dept., CIO, pp. 5-6.

Murray also encouraged workers to identify and fight enemy bigots who sought to suppress the liberties of the people.

The C.I.O. pamphlet noted the role law enforcement officers should play in protecting the exercise of civil liberties and avoiding interference, by action or inaction, with workers' civil rights, informing workers that if police officers violate their civil rights then they should demand to talk to the city attorney or higher government officials, including their federal district attorney. *Id.* at 9. The C.I.O. legal department encouraged intervention by the federal district attorney or U.S. Department of Justice to secure compliance by local officials and opined that the local government must recognize workers' rights to communicate the message of labor organization and labor issues.

The C.I.O. recognized the importance of U.S. Supreme Court decisions finding in favor of union causes. Unions and union leaders worked to educate workers how to use their constitutional rights and stay within the legal limits of the law while securing that the law moved closer in the direction of labor. The C.I.O. pamphlet to workers highlighted certain U.S. Supreme Court cases that encouraged worker speech actions. First, the C.I.O. focused on Supreme Court cases regarding the distribution of labor literature. One such case noted by the C.I.O. was Lovell v. City of Griffin, Georgia, 303 U.S. 444 (1938), in which the Court ruled that city ordinances that prohibit distribution of literature without permission from city authorities is unconstitutional as violative of the right to free speech. As for unconstitutional ordinances, the C.I.O. noted Schneider v. State of New Jersey, 308 U.S. 147 (1939), in which the Court rejected government arguments that ordinances limiting the distribution of literature were necessary to limit littering on the streets on the grounds that such ordinances limited freedom of speech and freedom of the press. The Court in Schneider noted that public streets are proper places for disseminating information and opinion. These United States Supreme Court cases were used as

labor precedent to build upon as well as encourage workers to act to protect their rights and acquire employer action on their demands.

The labor movement used the Schneider case to drive further force into the movement by justifying increased dissemination of information, even encouraging house-to-house visits. Labor leaders repeated the Court's pronouncement in Schneider that ordinances that impose prior censorship on political, social, or economic issues disseminated to citizens at their homes through the requirement of licenses to disseminate such literature is unconstitutional. The C.I.O. warned, however, of the case Martin v. City of Struthers, Ohio, 319 U.S. 141 (1943), in which the U.S. Supreme Court, while finding an ordinance invalid, limited door-to-door dissemination of information by providing that it was unlawful to ring the door bell when disseminating such information. "*Your Civil Rights*," at 35. The C.I.O. encouraged workers to continue door-to-door dissemination of labor information by informing workers and labor leaders to notice that "the law does not prohibit leaving a circular or other literature at the door; it simply prohibits calling the occupant of the home to the door by a door bell, knocker or otherwise." *Id.* at 35. The C.I.O. found the case of Thomas v. Collins, 323 U.S. 516 (1945), of particular importance in the 1940's labor movement. "*Your Civil Rights*," at 37. The Thomas case held it violative of rights of free speech and free assembly for governments to require registration with the government prior to speaking to union groups about unions and unionization.

The C.I.O. also informed workers that, under U.S. Supreme Court precedent of Jamison v. State of Texas, 318 U.S. 413 (1943), municipalities and states could not interfere with the dissemination of information if money is incidentally solicited. "*Your Civil Rights*," at 30-31. Also, in Hague v. CIO, 307 U.S. 496 (1939), the U.S. Supreme Court held that it was a privilege of United States citizens to assemble in public places to discuss labor matters. The Hague case also served as support for union arguments to continue dissemination of union information and solicitation of union membership, as well as support for the labor contention that the streets belong to the workers for lawful assembly.

Additionally, the C.I.O. informed workers and labor leaders of the importance of the N.L.R.A. to the labor movement. The C.I.O. pointed to the U.S. Supreme Court precedent that worked to protect worker's free speech and assembly rights in Republic Aviation Corporation v.

National Labor Relations Board, 324 U.S. 793 (1945). The C.I.O. noted that the Supreme Court in Republic upheld workers' rights to disseminate labor literature in company parking areas or on plant property on the worker's own time. "*Your Civil Rights*," at 41-43. The C.I.O. informed workers that the NLRA, in guaranteeing the right to organize and bargain collectively, gave them the right to distribute leaflets to organize unions, solicit union membership orally or in writing, canvass workers' homes to inform them of the union message, and call and hold union meetings. *Id.* at 18-19.

Picketing was a very important outlet for the 1940s labor movement, and the ability to picket under the law required education of workers and education of local law enforcement and employers about the free speech and assembly rights of labor representatives and picketing workers. In fact, the C.I.O. argued that picketing is free speech. "*Your Civil Rights*," at 51. The C.I.O. noted the importance of Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937) in setting the foundation of protected picketing, with one of the most important cases on picketing being Thornhill v. State of Alabama, 310 U.S. 88 (1940), in which the Supreme Court opined that a state statute criminalizing picketing for purposes of educating the public is violative of freedom of speech and the press.

It is clear that unions drove force into the labor movement of the 1940s by focusing on the importance of educating workers of their rights. This approach led to increased local government protection of and employer observance of free speech and assembly rights guaranteed by federal law, which, in turn, provided unions with the ability to strengthen their numbers and force to further assure the civil rights and better working conditions of employees. The C.I.O.'s voice was certainly not the only voice encouraging worker action. Additionally, the American Federation of Labor, individual trade unions, and organizations such as the Women's Trade Union League worked to encourage union membership and activism. Both the A.F.L. and C.I.O. had educational departments. The primary function of these organizations was to encourage motivation in workers to join and invoke the union to organize action to protect and secure a better life and safer work conditions to lessen the threat of employer retaliation. Union organizers equally sought to persuade employers of the importance of human relations in the workplace. Once the union organizers were able to persuade leading employees to join the union and union causes, it was easier to then persuade larger numbers of workers to climb on the

bandwagon. Barbash, *The Practice of Unionism*, at 13. At the end of the 1940s, the A.F.L., C.I.O., United Mine Workers, and unaffiliated railroad brotherhoods join with world free labor movements to create the International Confederation of Free Trade Unions.

The efforts to educate workers proved successful to build strength into the labor movement by allowing the law to work for the movement, particularly with the large lobby of industrial corporations encouraging alternative laws. However, the end of WWII and the 1946 general strikes encouraged capitalist actions in support of government restraint of labor's growing power. Republican victory in the congressional election of 1946 helped put these employer desires into action. By the end of the 1940s, union power was seen as a force to be reckoned with. "Robert Taft, the leading Republican in Congress and a contender for his party's nomination for president in 1948, expressly sought the chair of the Senate Committee on Labor and Public Welfare to help write major revisions in the nation's labor law." Lipsitz, *Rainbow at Midnight*, 158. The Labor-Management Relations Act of 1947, known as the Taft-Hartley Act sponsored by Senator Robert Taft and Representative Fred Hartley, passed over the veto of President Truman. The Taft-Hartley Act amended the 1935 National Labor Relations Act and nullified parts of the Norris-LaGuardia Act of 1932. The Taft-Hartley Act expanded the National Labor Relations Board, while it limited the power and speech of organized workers—requiring unions to affirm that its leaders were not Communists, placing jurisdictional limits on striking, prohibiting mandatory union membership, and prohibiting violence, political campaign contributions by unions, closed shops, secondary boycotts, and wildcat strikes. The Taft-Hartley law limited the speech rights of workers, unionists, and union sympathizers. The Taft-Hartley Act did increase union leader's negotiating powers and ability for union leaders to have worker actions occur with the blessing of unions during collective bargaining, largely due to the Act's prohibition of spontaneous and unpredictable rank-and-file actions, as seen in 1945 and 1946, that usually were not given the blessing of union leaders. As George Lipsitz rightly notes:

Senator Taft's legislation also created a new era for labor's rank and file. The general strikers of 1946 manifested the first stirrings of a new politics of incipient class formation, but they also represented the last expression of some traditional forms of struggle. The drift toward centralized union power, evident in the tensions between strikers and union leaders in 1946, accelerated decisively after the bill became law. Powerful international unions suppressed dissent and imposed longer contracts covering wider areas, while prohibitions on mass picketing,

sympathy strikes, and secondary boycotts worked to isolate the rank and file from community support. Lipsitz, *Rainbow at Midnight*, 177.

For several reasons, including union education and the passing of the Taft-Hartley Act, union membership grew to unprecedented high numbers in the late 1940s. What would be otherwise seen as speech acts protected by the First Amendment became squelched by 1947 if such speech acts involved a labor dispute. The effect was that speech on labor issues received less protection than speech on other issues. After the passing of the Taft-Hartley Act, labor speech became that which was largely in the hands of labor leaders and collective bargaining representatives. Yet, as additional limits on labor speech, the Act also gave employers the right to be exempted from bargaining with unions.

III. U.S. Supreme Court Labor Speech Cases of the 1940s

State court injunctions were prevalent prior to the 1940s to limit or stop boycotts, pickets, strikes, and other speech acts. However, some state courts of the 1940s determined that an injunction to restrain peaceful picketing violates constitutional guaranties. In 1938, the Supreme Court held that freedom of speech may not be abridged by the state court on the contention that carrying the banner was preceded by violent acts, or even if acts of violence occurred, if such violence occurred because of irresponsible and unauthorized third persons. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The courts can apply constitutional guaranties of freedom of speech to preclude state courts from enjoining labor picketing and carrying banners of public information about a labor controversy, as done in Zerbst; however, the First Amendment was not typically the focal point of picketing cases and the United States Supreme Court. While the Supreme Court initially advanced First Amendment protections in picketing cases in the early 1940s, the Court, with lower courts following suit, eventually removed the First Amendment almost entirely from the equation in labor cases by the end of the 1940s.

It was the case of Thornhill v. Alabama, 310 U.S. 88 (1940), that began to move the law in the direction of the workers over employers. The early 1940s opened the door for peaceful picketers to increase the flow of communication about labor issues through the exercise of a constitutionally-protected right of free speech; limited, however, by the state's right to secure safety and peace in the community. In Thornhill v. Alabama, the United States Supreme Court determined that an Alabama statute was violative of freedom of speech that made it unlawful for

any person "without a just cause or legal excuse," to go near or "loiter" at any place of business, for the purpose or intent of influencing or inducing other persons not to buy from or be employed at a business, or "picket" a place of business for the purpose of impeding, interfering with, or injuring such business. The Alabama courts construed the statute to forbid the publicizing of facts of labor disputes, written or oral, in the vicinity of a business. Under the facts of the case, Thornhill was convicted of loitering and picketing, and the statute was challenged as violative of freedom of speech and the press. The United States Supreme Court determined that the statute results in a continuous and pervasive restraint of all freedom of discussion reasonably regarded as within the statute's purview, freedom of speech and the press embraces the liberty to discuss matters of public concern without restraint or fear of punishment, and information about a labor dispute involves facts within the area of free discussion guaranteed by the First Amendment of the U. S. Constitution. Thornhill v. Alabama, 310 U.S. at 101-102. Although workers had great hope for the future of the labor movement after the Thornhill decision, Justice Felix Frankfurter's decisions and influence on the U.S. Supreme Court worked to limit or narrow the implications of Thornhill by stressing the economic focal point of labor picketing more than an activity of First Amendment protection.

Also in 1940, the U.S. Supreme Court decided the case of Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) Apex Hosiery involved facts in which members of a labor union desiring to unionize a hosiery factory, in which only eight members were employees of the company, took possession of the hosiery plant and held a protracted sit-down strike, in which violence erupted, locks on all gates and entrances of the plant were changed with strikers having the only keys, machinery was damaged or destroyed into the thousands of dollars, and business was suspended. During the approximately three-month union occupancy of the plant, the union supplied food, blankets, cots, and other supplies to strikers. The strikers refused the employer's requests to remove and ship completed merchandise to fill orders, and the employer brought suit for damages under the Sherman Anti-Trust Act. The U. S. Supreme Court in Apex Hosiery held that no conspiracy in "restraint of trade or commerce among the several States" existed within the meaning of the Sherman Anti-Trust Act, and therefore, the District Court was without jurisdiction to give judgment for the employer's damages.

The Supreme Court in Apex Hosiery questioned the extent to which Congress exerted power under the Sherman Act and determined that restraints not within the Act that are achieved

by peaceful means are not brought within the Act merely because, without other differences, they are attained by violence. The Court found that the mere fact that strikes or agreements not to work, entered into by laborers to compel employers to yield to demands, may restrict the power of employers to compete does not bring the agreement within the condemnation of the Sherman Act, since the Sherman Act is inapplicable in cases in which local strikes, although conducted by means illegal under local law, prevented interstate shipment, but in which it was not shown that the restrictions on shipments had operated to or were intended to restrain commercial competition in a substantial way. *Apex Hosiery*, 310 U.S. at 508. The Court opined that the Sherman Act was not aimed at policing interstate movement of goods, and the facts of the case showed no intent to affect the price of the hosiery in the market, but the goal of the strikers was to compel the employer to agree to union demands, and the consequence was the indirect prevention of products into interstate commerce. Thus, the Sherman Act was determined inapplicable to this case, in which the union's intent was on unionization and strengthening a bargaining position of the union rather than control of the market or eliminating business competition.

In *Carlson v. California*, 310 U.S. 106 (1940), the U.S. Supreme Court reversed a conviction and sentence under an anti-picketing ordinance under precedent of *Thornhill v. Alabama*. The ordinance made it unlawful to carry or display any banner in the vicinity of a place of business for the purpose of influencing, or attempting to influence, any person to stop from entering, refrain from buying goods, or working in the establishment.

In 1941, the U.S. Supreme Court decided the First Amendment case *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941). In this case, in a decision written by Justice Felix Frankfurter, the Supreme Court reviewed a decree by the Illinois Supreme Court that directed a permanent injunction against acts of violence and picketing by a labor union. Witnesses testified to over fifty violent incidents, including window-smashing, bombs dropped in stores, wrecking of trucks, and injuries from beatings, with over a dozen of the occurrences identifying union members as the wrongdoers. The U.S. Supreme Court affirmed the state Court finding of coercive effect of past violence, and pronounced that picketing that is peaceful may be coercive when set in a background of violence, past violence can exist even when future picketing is wholly peaceful, and a background of violence may be

attached to an organization that may not be attributable to initiating such violence. Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. at 294-296.

Despite the Supreme Court determining that the circumstances of record in Milk Wagon demonstrated that the State did not transgress its constitutional power, the Court pronounced that it was in fact reaffirming the Thornhill and Carlson decisions, in which violence was not present in picketing, and proclaimed that the “[r]ight to free speech in the future cannot be forfeited because of disassociated acts of past violence. Nor may peaceful picketing be enjoined merely because it may provoke violence in others.” *Id.* at 296-297. The Court stated:

Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently.

Justice Hugo Black dissented in Milk Wagon, arguing that although the state can enjoin violence, the injunction was so sweeping that it denied constitutional rights of expression of views on matters of public concern, two conflicting methods of milk distribution that concerns dairies, employees, retail outlets, and milk consumers. *Id.* at 300-304. Further, Justice Black contended that in effect the decision of the majority and state Court permitted persuasion on one side of a public controversy, *Id.* at 305, the evidence does not support a finding of imminent danger to justify abridgment of free speech rights since the picketing was at all times peaceful, and the picketing occurred eight months after evidence of violence on the part of union members, *Id.* at 313-315, and violence proven of only a few men does not justify the sweeping injunction over six thousand other members of the union, *Id.* at 316.

In United States v. Hutchenson, 312 U.S. 219 (1941), the U.S. Supreme Court decided whether peaceful activities by a union in controversy with a rival union (United Brotherhood of Carpenters and Joiners of America and the International Association of Machinists, both affiliated with the American Federation of Labor) over jobs violated the Sherman Act read in conjunction with the Clayton Act and Norris-LaGuardia Act. In this case, union carpenters,

whose demand was rejected by the employer, refused to work for the brewing company and attempted to persuade members of other unions to refuse to work by picketing the brewer's premises, displaying signs, and encouraging union members and friends not to buy or use the brewer's product. The Supreme Court held that these actions were protected from prosecution under the Sherman Act by the Clayton Act and construed in light of Congress's broad definition of a "labor dispute" in the Norris-LaGuardia Act. The Court pointed out that the Norris-LaGuardia Act removed the fetters on trade union activities by further narrowing the circumstances under which federal courts could grant injunctions in labor disputes.

The U.S. Supreme Court in U.S. v. Hutchinson determined that the acts being charged against the union workers in the case are protected by section 20 of the Clayton Act. That section of the Clayton Act provided that the employees could refuse to work; peacefully attempt to get members of other unions to refuse to work; picket with signs indicating employer unfairness comes within the Act's words "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working;" and persuade union members and friends to not purchase or use Anheuser-Busch products. The Court determined that these activities are covered under the Act's language: "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do." Clayton Act, sec. 20. Thus, the Supreme Court found the union's actions lawful conduct, unless the Act could not be invoked because outsiders of the dispute also participated in the conduct. Justice Stone's concurring opinion added the First Amendment issue that the publication of notice of employer unfairness unaccompanied by violence and request for the public not to patronize the company is an exercise of the right of free speech under Thornhill v. Alabama, 310 U.S. 88.

In American Federation of Labor v. Swing, 312 U.S. 321 (1941), in the lead opinion written by Justice Frankfurter, the U. S. Supreme Court determined that the freedom of discussion was infringed by the State's limit of peaceful picketing of a beauty shop by a labor union when there is no immediate employer-employee dispute. The facts of the case involve a union that unsuccessfully tried to unionize Swing's beauty parlor, with picketing of the parlor which followed. The beauty parlor sought to enjoin interference caused by the picketing and the state's appellate court found that there was no dispute between the employer and immediate

employees, placards used by the picketers were libelous, and there existed acts of violence, with the state court issuing a permanent injunction. The Supreme Court, therefore, considered whether there can be no peaceful picketing or peaceful persuasion in relation to a labor dispute unless the employer's own employees are in controversy with the employer. The Supreme Court opined that such a ban on free speech violates the guarantee of freedom of speech, because free speech cannot be denied to workers in a dispute with an employer when the workers are not employees of the employer when such communication about the facts of a dispute are protected as concerning economic interests in which the workers sought public opinion protected in Thornhill.

Also in 1941, the U.S. Supreme Court, in Bridges v. California, 314 U.S. 252 (1941), in the lead opinion written by Justice Hugo Black, reviewed a letter by a prominent labor leader to the Secretary of Labor threatening a strike if a lower-court decision were not reversed, a letter that was released to the public at a time when public interest in a labor controversy was at its height. The Supreme Court, noting the importance of labor issues to public concern, determined that the "clear and present danger" cases indicate that punishable utterances must be of a sort where a substantive evil is likely to result that is extremely serious and highly imminent. The Court opined that the "inherent tendency" or "reasonable tendency" of the out-of-court publication to cause disrespect for the judiciary or interfere with the orderly administration of justice in the pending case was not sufficient to establish punishable contempt, even when the information in the letter threatened a strike. *Id.* at 272.

In a lead opinion by Justice Murphy, the Supreme Court in National Labor Relations Board v. Virginia Electric & Power Co., 314 U.S. 469 (1941), opined that the N.L.R.A. does not prohibit an employer's speech to his/her employees on labor policies, and the Board can look to the content of the speech, in this case a bulletin, to determine if the employer restrained, interfered with, and coerced his/her employees. *Id.* at 476-477. The Court noted the past hostility shown by the employer to labor organizations and the employer's posting of a bulletin "appealing to employees to bargain with the Company directly without the intervention of an 'outside' unions, and thereby coerced its employees." *Id.* at 472. The employees requested better wages and working conditions, so the company told the employees to select representatives to attend meetings in which company officials would speak on the Wagner Act. *Id.* at 473. The company led the employees into the hope of an inside union, while a supervisor

“warned employees that they would be discharged for ‘messing with the CIO.’” *Id.* at 474. The employees joined the inside union, and after contract negotiations were begun with the company and a contract was reached, and some employees were fired for not joining the inside union or for being a member of an outside union. *Id.* at 475. The Court determined that the National Labor Relations Board lacked clarity as whether the employer engaged in unfair labor practices of coercion based on the utterances alone, rather than after a review of the utterances in the context of their background, and reversed and remanded the for a clear determination in light of this opinion. *Id.* 478-479.

In 1942, the Supreme Court, in a lead opinion written by Justice Frankfurter, upheld as constitutional a state law that permitted peaceful picketing, but forbid violence by strikers when picketing, holding that the state law did not impair free speech rights. *Hotel & Restaurant Employees International Alliance v. Wisconsin Employment Relations Board*, 315 U.S. 437 (1942). This case involved various unions representing hotel and restaurant employees and a strike by employees that resulted after unsuccessful negotiations of a labor contract. Picketers of the employer’s premises forcibly stopped goods from being delivered to a hotel, a union official assaulted a non-striking employee, other outbreaks of violence erupted, and the police were used to maintain the peace. *Id.* At 438. The Supreme Court was reiterating its precedent that while peaceful picketing of an employer’s premises is a protected speech act, violent acts are not constitutionally protected.

Justice Felix Frankfurter delivered the lead opinion of the U.S. Supreme Court in *Carpenters & Joiners Union of America, Local No. 213 v. Ritter’s Cafe*, 315 U.S. 722 (1942). This case represents an important move of the Supreme Court in the 1940s picketing cases, with Justice Frankfurter being instrumental in moving labor cases away from a focus of protecting picketers’ freedom of speech and toward the right of states to regulate speech under their police power. In this case, the Court held that freedom of speech was not infringed by a state court enjoining, under violation of the state antitrust law, union carpenters and painters from picketed a restaurant of an owner who contracted with a nonunion contractor employing nonunion workers to build a separate building for the restaurant owner located over a mile away from the restaurant being picketed. While picketing the restaurant, union picketers called restaurant employees out on strike, and union truck drivers refused to cross the picket line to deliver supplies to the restaurant. *Id.* at 723. The Court pointed out that “[t]he task of mediating between these

competing interests has, until recently, been left largely to judicial lawmaking, and not to legislation.” Id. at 725. The Court moved away from a focus of the picketers’ protection of free speech to a question of whether the imposed state regulations to protect the community denied liberty. Id. at 726. The Court distinguished the action of the picketers in this case from other picketing cases as one of picketing a location wholly separate from the location at the heart of the conflict. To the picketers, the heart of the conflict was with the individual who contracted with the non-union contractor, but to the Court, the location, not the individual being picketed, was the location of the dispute. The Court stated, “[n]or are we confronted here with a limitation upon speech in circumstances where there exists an “interdependence of economic interest of all engaged in the same industry” Id. at 727, citing American Federation of Labor v. Swing, 312 U.S. at 326.

The decision in Carpenters & Joiners Union focused on the fact that the restaurant was not directly involved in the labor dispute. Id. at 727. By doing this, the Court removed the right of picketers to picket the action of the restaurant owner who contracted with a non-union contractor. The Court stated, “As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute.” Id. at 727-728. The Court found no constitutional violation in the State of Texas drawing the line where it did as to picketing location. Justice Hugo Black wrote a dissenting opinion, arguing that the picketing was peaceful and truthful, the state law limits the union’s information, and the “purpose of the injunction was to frustrate the union's objective of conveying information to that part of the public which came near the respondent's place of business,” Id. at 729-732. Justice Reed, also dissenting pointed out that the Court’s majority opinion provides states with the power to bar picketing workers who are not part of the industry being picketed, while withdrawing federal constitutional First Amendment protection for workers outside an industry to communicate their side of a labor controversy through picketing. Id. at 738-39. The Supreme Court, guided by Justice Frankfurter, demonstrated judicial back-stepping from the implications of Thornhill that otherwise appeared hopeful for the labor movement.

In Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942), the U.S. Supreme

Court reviewed a state court determination that mass picketing under the facts of this case was unlawful because it hindered and prevented the pursuit of lawful work and employment by employees who desired to work, obstructed the free use of streets and sidewalks around the factory, threatened bodily injury and property damage to employees desiring to continue working, and involved picketing of homes of employees who chose to continue working. The U.S. Supreme Court held that it was not unconstitutional or repugnant to the provisions of the N.L.R.A. for the Wisconsin Employment Relation Board, pursuant to the Wisconsin Employment Peace Act, to order the union to cease and desist from mass picketing the employer's factory, threatening personal injury or property damage for workers desiring to work, obstructing the entrance and exits of the employer's factory, obstructing streets and public roads by the factory, and picketing homes of employees. *Id.* at 745-48. In this case, union workers picketed for three months, while the company continued operations, causing friction between striking employees and working employees. The Supreme Court concluded that this case is unrelated to the rule articulated in Thornhill and is not different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes, and it had also not been shown that any employee was deprived of rights that were protected or granted by the N.L.R.A.

In Bakery & Pastry Drivers & Helpers Local 802, International Brotherhood of Teamsters v. Wohl, 315 U.S. 769 (1942), the Supreme Court, in a lead opinion written by Justice Jackson, held that a state injunction against peaceful picketing of businesses and truthful statements by union members about a union grievance was an unconstitutional violation of the right of free speech. *Id.* at 772-75. The Court went on to state that the right of free speech does not depend, under the facts of this case, on whether or not a labor dispute, as defined under state statute, is involved. *Id.* at 774. In this case, union truck drivers who distributed baked goods for peddlers, who buy baked goods from bakeries and sell them to retailers. The peddlers decided to no longer employ union drivers upon expiration of their contracts, but would permit the drivers to buy trucks for nominal amounts to distribute their baked. The union encouraged the baked-goods peddlers to join the union, informed the peddlers that union drivers work only six days a week and encouraged the hiring of unemployed union relief drivers for the seventh day, a proposal the peddlers refused. The union picketed bakeries that sold products to the peddlers, displaying signs bearing the peddlers' names (Platzman and Wohl):

A bakery route driver works seven days a week. We ask employment for a union relief man for one day. Help us spread employment and maintain a union wage, hours, and conditions. Bakery and Pastry Drivers and Helpers Local 802, I.B. of T. Affiliated with A.F.L.

A union member spoke with a few customers of one of the peddlers, informing them of the union's cause. The trial court noted that there was no proof of violence, disorder, customers turned away from the picketed bakeries because of the picketing, or proof of monetary loss to the two peddlers; however, the trial court issued injunctions to restrain union picketing of the bakeries that sold the peddlers baked goods and to restrain the union and its agents from picketing businesses of the peddlers' customers. The Supreme Court, in pronouncing its decision, stated that "one need not be in a 'labor dispute,' as defined by state law, to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." *Id.* at 774. The Supreme Court further determined:

We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive, and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But, so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated, and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue.

Id. at 775. Upon such determination, the Supreme Court reversed the lower-court decision.

In the case of Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943), in a lead opinion by Justice Frankfurter, the Supreme Court determined that, under the facts of this case, the state court's broad injunction against union picketing of businesses infringed the union member's constitutional right to free speech, because the right to peaceful picketing cannot be taken away when, during the picketing, isolated incidents of abuse, which do not amount to

violence, occur. *Id.* at 295-296. The facts generally involve a labor union picketing a cafeteria, run solely by its owners without other employees, in an attempt to organize it. During the picketing, the union informed the public, in a peaceful manner of one person parading by the cafeteria at a time, that indicated that the cafeteria owners were unfair to organized labor, the cafeteria served bad food, and customers patronizing the cafeteria were aiding the cause of Fascism. *Id.* at 294. A different picket informed customers of the cafeteria that a strike was in progress; however, there existed an issue of union members insulting customers who were entering the cafeteria. The trial court found that there was no “labor dispute” under the state companion statute to the Norris-LaGuardia Act, and enjoined the union from picketing at or near the cafeterias. *Id.* at 295-96. The Supreme Court noted that the question of whether the picketing was peaceful was not made an issue. The Supreme Court did, however, take into account the use of the “loose language” of “unfair” or “fascist,” which the Court determined “is not to falsify facts.” *Id.* at 296.

The U.S. Supreme Court in Cafeteria Employees Union v. Angelos found no constitutional right in communicating unquestionably false information, but stated that in this case there was no attempt by the state “to restrict conduct justifiably found to be an abusive exercise of the right to picket,” but instead we have a prohibition that transgresses state power, as exercised by its courts, because “a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way.” *Id.* at 295-96, citing A.F. of L. v. Swing, 312 U.S. at 326. The Court determined that the right to picket cannot be taken away “merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing.” *Id.* at 296.

Thomas v. Collins, 323 U.S. 516 (1945), concerned a state statute that required labor organizers to register with and acquire an organizer’s card from a state official prior to soliciting union members, a labor organizer (president of the United Automobile, Aircraft and Agricultural Implements Workers and a vice-president of the C.I.O.) was restraining under the statute. After consulting his attorneys, the organizer spoke to employees and urged them to join the union at a time when he was still restrained under the statute because he regarded the state law as a restraint upon free speech and assembly, and the organizer was fined and imprisoned for contempt under the state statute. The U. S. Supreme Court, in a lead opinion by Justice Rutledge, reversed the lower court case,

holding that the statute imposed a previous restraint on the rights of free speech and assembly. *Id.* at 532. The Court pointed out the legal tension of determining where an individual's freedom ends and the state's power begins. *Id.* at 529. The Court opined that First Amendment rights, even in regard to business or economic activity, can be justified only by a showing of clear and present danger to the public welfare. *Id.* at 530-531.

Republic Aviation Corp. v. National Labor Relations Board No. 226, 324 U.S. 793 (1945), was a case in which the Supreme Court determined that a company rule against solicitation was an unfair labor practice against the National Labor Relations Act as used to fire an employee for distributing union membership application cards during his lunch periods. The Supreme Court pointed out the impending tension between the right of self-organization and the employer's right to maintain discipline in their establishments, which, the Court opined, "are both essential elements in a balanced society." *Id.* at 797-98. The Supreme Court further determined that it was an unfair labor practice for the employer to discharge employees for wearing union steward buttons in the plant during a time when a majority of employees had not yet designated a collective bargaining representative and determined *Id.* at 795-803.

In 1947, The Labor Management Relations Act (or "Taft-Hartley Act") amended the N.L.R.A. of 1935, an amendment encouraged by employers who believed that the N.L.R.A. was too pro-labor. The Taft-Hartley Act was the further move, following labor-limiting trends of the Supreme Court, particularly by Justice Frankfurter, to quell the power and voices of the labor movement. The Taft-Hartley Act moved the focus closer to labor union acts of unfair labor practices, to the right of employers to campaign against labor organization, and established states' right to enact "right to work" laws that would abolish requirements to pay union dues by all represented employees. The law moved closer to the protection of economic interests and restricted the power acquired by unions since enactment of the N.L.R.A. The Taft-Hartley Act, in addition to resulting state laws and state court injunctions, increased the difficulty of labor organization, and "provisions of Taft-Hartley permit and have encouraged employers to be more openly hostile to union organization of their employees." Jack Barbash, *The Practice of Unionism* (Harper & Brothers, Publishers: New York, 1956). U.S. Supreme Court case law after 1947 reflects such difficulty.

Lincoln Federal Labor Union et al. v. Northwestern Iron & Metal Co. et al., 335 U.S. 525; 69 S. Ct. 251 (1949), pertained to the validity of the "Right-to-Work Amendment" to the Nebraska Constitution. An employer and certain officers and agents of certain labor unions were convicted in a North Carolina state court for violation of state law after entering into a "closed-shop agreement." The Supreme Court, in the lead opinion by Justice Black, affirmed the judgment of validity of the statute. In this case, a North Carolina statute and Nebraska constitutional amendment provided that no one be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization, and prohibited employers from entering into contracts or agreements obligating themselves to exclude persons from employment because they are or are not labor union members. The Supreme Court determined that the state Right-to-Work law did not violate the right to free speech, peaceable assembly and petition, the contract clause, or equal protection and due process clauses of the Federal Constitution.

In American Federation of Labor et al. v. American Sash & Door Co. et al., 335 U.S. 538; 69 S. Ct. 258 (1949), in a lead opinion by Justice Black, the U.S. Supreme Court reviewed an Arizona constitutional amendment which provided that no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, and prohibited any one to enter into any agreement that excluded any person from employment or continuation of employment because of non-membership in a labor organization. In a suit by certain labor unions against enforcement of this "Right-to-Work Amendment" to the Arizona Constitution, an Arizona trial court dismissed the complaint on the ground that the amendment did not violate the Constitution of the United States. The Supreme Court affirmed that determination, based on the determination that the amendment did not deny union workers freedom of speech, assembly or petition, impair the obligation of their contracts, deprive them of due process of law, or deny them equal protection of the laws.

International Union, U.A.W.A., A.F. of L, Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) involved deadlocked negotiations between a union and employer, upon which employees engaged in work stoppages during working hours, rather than strikes or pickets, without employer warning in order to have union meetings with the intent of putting pressure on the employer. The union employees engaged in twenty-seven work stoppages between November 1945, during which time the union

employees did not make specific demands or seek concessions from the employer to end the spontaneous work stoppages. *Id.* at 249. The Wisconsin Employment Relations Board issued an order prohibiting such organized interference with production, a decision that was affirmed by the Wisconsin Supreme Court. The U.S. Supreme Court, in a lead opinion by Justice Jackson, affirmed the lower court's decision and held that it was within the state's power to prohibit such coercive activity by the union employees, and the statute, as applied, did not infringe free speech and assembly rights. The Court, citing Labor Board v. Jones & Laughlin Steel Corporation, stated:

The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the Labor Relations Act. International Union v. W.E.R.B. at 259, citing Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33.

The Court pointed out that the right to strike contemplates a lawful strike—"the exercise of the unquestioned right to quit work." International Union v. W.E.R.B. 336 U.S. at 259; citing Labor Board v. Fansteel Metallurgical Corporation, 306 U.S. 240. The Court reviewed the Labor Management Amendments, noting that the Amendments' purpose was to "outlaw strikes when undertaken to enforce what the Act calls unfair labor practices, an end which would be defeated if we sustain the Union's claim in this respect." International Union v. W.E.R.B., 336 U.S. at 262. Because the Supreme Court determined that the unannounced work stoppages was not forbidden or permitted by Federal statute, "the state police power was not superseded by congressional act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. *Id.* at 264-265, citing Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 and Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767.

Justices Douglas, upon which Justices Black and Rutledge concurred, dissented from the majority opinion in International Union v. W.E.R.B., arguing that the "strike was legal under the Wagner Act in 1945 and 1946, and its legality was not affected by the Labor Management Act of 1947. International Union v. W.E.R.B., 336 U.S. at 265. Upon this contention, these dissenting

judges contended that the majority decision permits strikes to be undermined by state action, and, thus, [t]he federal policy thus becomes a formula of empty words.” Id. Justice Murphy also filed a dissenting opinion, upon which Justice Rutledge concurred, arguing that the Court “now makes intermittent work stoppages the equivalent of mutiny, contract-breaking, and the sit-down strike.” Id. at 269. Justice Murphy argued that the National Labor Relations Board “has repeatedly held that work stoppages of this nature are ‘partial strikes’ and ‘concerted activities.’” Id.

Giboney et al. v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684 (1949), pertained to the constitutional power of a state to apply its anti-trade-restraint law to labor union activities. A state trial court enjoined officers and members of a labor union from peacefully picketing non-union ice peddlers’ businesses in order to force an agreement to restrain trade with non-union members. The injunction was supported under a state statute declaring it unlawful for any person to enter into any combinations in restraint of trade or competition in the purchase or sale of any article or thing. The Supreme Court, in a lead opinion by Justice Black, affirmed that decision, noting that the right of free speech does not preclude an injunction against peaceful picketing by a union for the purpose of coercing a wholesale distributor to agree to stop selling to non-union ice peddlers. This case not only worked to further limit the strength of the labor movement’s voice, it, in effect, reversed the Thornhill decision and the labor movement’s hope for greater speech protection pledged in Thornhill and under the N.L.R.A.

The case of Cole et al. v. Arkansas, 338 U.S. 345, 70 S. Ct. 172 (1949), involved a state statute that made it unlawful for any person acting in concert with others to assemble at or near a labor dispute to--by the use of force, violence, or threat of the use of force or violence--to prevent or attempt to prevent another from engaging in a lawful vocation. Strikers were convicted in state courts under the state statute for using threats and force to intimidate employees who were willing to work, with violence resulting in a death. The Supreme Court, in a lead opinion by Justice Jackson, affirmed the convictions, determining that the statute, as applied, did not authorize conviction for mere presence in an assemblage, and, in consideration of this, the statute was not invalid for indefiniteness or infringing on rights of free speech and assembly.

The facts in Maryland Drydock Co. v. National Labor Relations Board, 183 F.2d 538 (1950), involved a union that distributed its official newspaper The Maryland Drydocking in the 1940s at the at the gate of their company without any company objection. Four years after the

initial dissemination of the newspaper, when union employees were organized for collective bargaining, the employees published an article in The Maryland Drydocket that attacked a newly-formed supervisors association by calling it a “scab” association, and another section of the newspaper stated that the company’s president was popularly known as “Goosie.” *Id.* at 539-40. This copy of the newspaper was distributed without objection. Thereafter, another article in The Maryland Drydocket stated that the company president would not be called “Goosie” because “he was more like a vulture. *Id.* at 539-40. During this period of time, the company still did not object to the distribution of the newspaper on the company’s premises. Approximately ten days after that last publication, the newspaper contained articles that further lampooned the company president with verse; however, when union representatives were dispersing this edition of the newspaper at the company’s gate, the union representatives were ordered off the premises by a guard who stated that the company had forbidden the distribution of union literature on its property. *Id.* at 540. Thereafter, when another attempt to distribute an edition of the newspaper occurred at the company gates, an edition that called for someone to submit music for the verse lampooning the company president for use as the union’s official theme song, the union representatives were again ordered off the premises of the company. *Id.* at 540.

The Supreme Court in Maryland Drydocket pointed out that no evidence existed that the company had a rule forbidding distribution of union literature on its property, and no evidence existed as to the company previously attempting to prohibit distribution of the union’s literature. In determining the question of whether the company could be held guilty of unfair labor practice for forbidding the distribution on its premises of, what the Court called, “scurrilous and defamatory literature” that “has a necessary tendency to disrupt discipline in the plant,” the Court held that no unfair labor practice under such facts existed. The Court stated, “The company must maintain order and discipline in its plant; and we see no reason why it may not forbid the circulation on its premises of defamatory and insulting statements which reasonably tend to destroy such discipline, for it is well settled that the employer is not to be held guilty of an unfair labor practice because of action reasonably taken to protect his property or preserve discipline against the unlawful conduct of employees.” *Id.* at 540. Moreover, the Court opined:

The right of the company to prohibit the distribution of insulting and defamatory literature must necessarily depend upon the character of the literature itself and the effect which it might normally be expected to

produce, not upon ex post facto proof of the results which actually flowed from its distribution.

Freedom of speech nowhere means freedom to publish libelous and defamatory matter and nowhere does it mean freedom to wantonly lampoon or insult anyone.

Id. at 541-42. The Court added, “no censorship is involved in holding that the employer may forbid the distribution on his premises of statements which are defamatory and insulting and which tend to disrupt discipline.” Id. at 542.

CONCLUSION

Freedom of speech for labor movement members gained strength in the 1940s; however, deterrents to free speech continued to exist in the form of federal and state court alignment of picketing to economic issues rather than to First Amendment issues. An additional deterrent to workers’ free speech existed in the legal right of employers to hire replacement workers to substitute for workers who joined a labor strike, which fueled the fear in workers who were caught between the need for employment and risk of being labeled “scabs” versus the desire to exercise speak out and become active in the labor movement. Unions worked to address these fears by rhetorically attaching “ultimate terms” in the form of devil terms, such as “scabs” in reference to replacement workers and “unfair” or “oppressive” in reference to employers who failed to meet union demands. At the same time, union attempts to unionize workers increased another fear, the threat to one’s livelihood if workers protested. Union efforts to attach God terms to unions and unionization helped to persuade workers about the positive act of becoming union members and the importance of unity for the attainment of better wages and working conditions. See Richard M Weaver, *The Ethics of Rhetoric*, (Chicago: Henry Regnery Company, 1953). The unions’ rhetoric persuaded workers to join the bandwagon, more easily acquired after first garnering support of leading and influential employees, and use their civil rights, particularly First Amendment rights, as citizens to fight for their rights as employees.

Through careful and strategic education about the law and civil rights in the 1940s, the unions were able to garner support for the labor movement and effect some positive change in the law to provide increased freedom of speech, press, and assembly for workers. Post-enactment of the NLRA was an important time for the development of law on union picketing,

with significant cases heard by the United States Supreme Court to refine the rights and boundaries of picketing as it relates to labor issues. The 1940s was a time of increased union activism within the dictates of the law, which drove force into the American labor movement.

The U.S. Supreme Court decided cases that both helped increase the speech power of the labor movement, as well as quell the voices of the labor movement. In the year 1940, the U.S. Supreme Court characterized peaceful labor picketing as a protected First Amendment right. The Supreme Court often reiterated the importance of peaceful labor actions and avoidance of violence, noted the importance of labor issues to public concern, and determined that peaceful picketing of an employer's business by non-employers was protected speech when the communication about the facts of a dispute are protected under Thornhill. The Court continued protection of free speech rights in labor disputes, however, gradually the Court analyzed labor speech cases under a more economic than First Amendment perspective, eventually opening the door for increased state power to regulate labor speech. The Supreme Court determined that peaceful picketing does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute, it was not unconstitutional to order a union to cease and desist from mass picketing from the employer's factory when there existed a threat to personal injury or property, and peaceful picketing with truthful statements by individuals involved or not involved in a labor dispute are constitutionally protected. In 1947, the Taft-Hartley Act increased the difficulty of workers to picket and assemble, and the Supreme Court affirmed states' rights to enact Right-to-Work laws, which the Court determined did not violate the rights of free speech, peaceable assembly, or petition.

Unions supplied workers with the tools to defend their First Amendment rights by informing workers of their rights and encouraging workers to use or lose such rights. Of particular importance to unions in the 1940s was increasing negotiation power by increasing membership, and increasing membership by distributing union literature. Union education programs and public outreach by union-sympathetic entertainers helped raise the status of unions and the workers' plight to acquire public support, which resulted in increasing union membership. Clearly, communication and knowledge of First Amendment freedoms served as the driving force of the labor movement in the 1940s, which helped unions gain and regain respect, large numbers of members, and garner public support.