

COMMON CARRIERS AND PICKET LINES

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I. INTRODUCTION

Labor, in the continuing struggle for the advancement of its cause, has discovered that a picket line is a valuable coercive weapon when placed around the plant of an employer engaged in a labor dispute with his employees. In the beginning many employers succeeded in enjoining peaceful picketing. Today, peaceful picketing is generally held to be lawful¹ and employees of neutral employers may refuse to cross a legally established picket line.²

By inducing individual employees of neutral employers to refuse to cross a picket line, unions may lawfully inflict harm on an employer without violating state or federal law if the harm is merely incidental to a lawful strike conducted at the place where the primary employer does business.³ The neutral employer faced with the greatest loss as a result of its employees' refusal to cross picket lines is the common carrier. Not only does the carrier lose business, but in recent years actions for damages have been instituted by the employer engaged in the strike because of the carrier's refusal to furnish service.⁴ In two actions substantial recoveries were allowed.⁵

The carrier's refusal may be of either over-the-road service or of pick-up and delivery service. In this article we shall discuss only those instances in which the carrier's refusal of service relates to pick-up and delivery service and does not in effect result in a refusal to perform over-the-road service. Nor shall we discuss the so-called "hot

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1. Thornhill v. Alabama, 310 U.S. 88 (1940).

2. See note 53 *infra*.

3. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951); NLRB v. Local 145, Service Trade Chauffeurs, AFL, 191 F.2d 65 (2d Cir. 1951).

4. See, e.g., Meier & Pohlmann Furniture Co. v. Gibbons, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955); Montgomery Ward & Co. v. Northern Pacific Terminal Co., 128 F. Supp. 475 (D. Ore. 1953), *damages assessed*, 128 F. Supp. 520 (D. Ore. 1954).

5. Montgomery Ward & Co. v. Northern Pacific Terminal Co., 128 F. Supp. 520 (D. Ore. 1954) (actual and punitive damages awarded against 34 defendants in amounts varying from a minimum of \$250 actual and \$50 punitive damages to a maximum of \$6,500 actual and \$1,500 punitive damages); Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co., 215 F.2d 126 (8th Cir. 1954). In the latter case a lower court judgment in favor of the shipper was affirmed except as to the award of damages, for which a new trial was ordered. The lower court had allowed the shipper \$24,211.57 damages plus \$5,000 attorney's fees. Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry., 105 F. Supp. 794 (D. Minn. 1952). The court of appeals reversed the trial court because damages had been allowed for the carrier's failure to furnish ten cars which had not actually been ordered by the shipper. The court held that damages were awardable only for the carrier's failure to furnish the ten cars which the shipper had actually ordered. Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co., 215 F.2d 126, 137 (8th Cir. 1954).

cargo" or "unfair goods" clauses of union contracts as a justification for failure to furnish service. These clauses are not designed to induce employees to refuse to cross a picket line, but are for the purpose of justifying their refusal to handle merchandise of a struck employer before or after the goods have crossed the picket line. The purpose of this article is to discuss the rights and remedies of carriers and shippers when service is refused because employees decline to cross the picket line.

II. THE CARRIER'S DUTY

(A) *In General*

The determination of the carrier's duty has not been the subject of uniform decision, particularly when the performance of that duty has been interfered with by the existence of a picket line. When common carriers accept merchandise for shipment they are under a duty to haul it safely unless prevented by acts of God or enemies of the King.⁶ In *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*⁷ the court said that the duty of a common carrier to accept a shipment tendered to it was as absolute as its duty to haul safely, so that the existence of violence on a picket line at the shipper's place of business did not excuse the carrier from the performance of its duty. Fortunately, the rule stated in that case is not generally followed. Most cases hold that a carrier may be excused from handling freight because of strikes of the employees of the carrier, of the connecting carrier, or of the shipper, if the carrier exercised due diligence in endeavoring to afford service.⁸ The mere existence of a strike is not enough to invoke the rule; the carrier must also prove that the strike made necessary its refusal to furnish service.⁹

6. *Coggs v. Bernard*, 2 Raym. 909, 92 Eng. Rep. 107 (K.B. 1703). In the opinion, Chief Justice Holt said:

The law charges this person thus entrusted to carry goods, against all events but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves . . . and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point.

Id. at 918, 92 Eng. Rep. at 112. The statement was dictum in the case and did not become the law of England until the decision of *Forward v. Pittard*, 1 T.R. 28, 99 Eng. Rep. 953 (K.B. 1785).

7. 128 F. Supp. 475 (D. Ore. 1953). *Cf.* *Boyce v. Anderson*, 27 U.S. (2 Pet.) 150 (1829); 9 AM. JUR., *Carriers* § 662 (1937).

8. *Gage v. Arkansas Central R.R.*, 160 Ark. 402, 254 S.W. 665 (1923); *Illinois Central R.R. v. River & Rail Coal & Coke Co.*, 150 Ky. 489, 150 S.W. 641 (1912); *Murphy Hardware Co. v. Southern Ry.*, 150 N.C. 703, 64 S.E. 873 (1909). See 9 AM. JUR., *Carriers* § 360 (1937).

9. *Illinois Central R.R. v. River & Rail Coal & Coke Co.*, 150 Ky. 489, 150 S.W. 641 (1912).

To determine what the duty of a carrier is, it is necessary to consider the source of the duty. The obligation of carriers to furnish service is governed by statutes relating to their duties and their applicable tariffs. Railroad,¹⁰ air,¹¹ and water¹² carriers are required to furnish transportation on reasonable request. The act regulating motor carriers does not contain a similar provision. It requires "every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce."¹³ This language, when considered with the provision making it unlawful for motor carriers "to make, give, or cause any undue or unreasonable preference or advantage,"¹⁴ indicates a policy which would seem to require motor carriers to render service to all shippers on reasonable request, since the rendition of service at the request of one and the refusal at the request of another could result in "undue or unreasonable preference or advantage." The courts state that the Interstate Commerce Act is declaratory of the common law.¹⁵ Under the common law a common carrier was only required to transport merchandise provided for in its tariff. If the tariff provided that certain shipments would not be handled, the carrier did not violate its obligation to furnish service by refusing to accept such shipments.¹⁶

A tariff rule promulgated by a carrier and filed with the ICC has the force and effect of law until set aside as unreasonable.¹⁷ By such a rule a carrier may limit or qualify its duty to furnish service.¹⁸ For example, railroads, who have recently furnished pick-up and delivery service due to competition with motor carriers,¹⁹ could provide by tariff rule that they are not obligated to furnish such service to a company that is being picketed by its employees as a result of a labor dispute. Such a provision would be a bar to any action by a company against a carrier for failure to furnish the service unless the rule

10. 41 STAT. 475 (1920), 49 U.S.C. § 1(4) (1952).

11. 52 STAT. 993 (1938), 49 U.S.C. § 484 (1952).

12. 54 STAT. 934 (1940), 49 U.S.C. § 906 (1952).

13. 49 STAT. 558 (1935), 49 U.S.C. § 316(b) (1952).

14. 49 STAT. 558 (1935), 49 U.S.C. § 316(d) (1952).

15. See, e.g., *Lucking v. Detroit & Cleveland Navigation Co.*, 273 Fed. 577 (E.D. Mich. 1921).

16. *Chicago, R.I. & P.Ry. v. Lawton Refining Co.*, 253 Fed. 705 (8th Cir. 1918).

17. *Atlantic Coast Line R.R. v. Atlantic Bridge Co.*, 57 F.2d 654 (5th Cir. 1932); *Chicago Great Western R.R. v. Farmers' Shipping Ass'n*, 59 F.2d 657 (10th Cir. 1932).

18. *Davis v. Henderson*, 266 U.S. 92 (1924); *Davis v. Cornwell*, 264 U.S. 560 (1924) (carrier's agent promised to furnish cars on certain day, when tariff contained no provision that cars would be available on specified days; court held shipper could not recover on the contract because it imposed a greater obligation than the tariff, and would have given plaintiff preference over other shippers); *James v. Davis*, 280 Fed. 780 (8th Cir. 1922).

19. *Pick-up and Delivery in Official Territory*, 218 I.C.C. 441 (1936); see *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

was set aside as unreasonable by the ICC. Carriers have not placed such comprehensive provisions in their tariffs and as a result have been subjected to suits for refusing to furnish service. However, many tariffs do provide that pick-up and delivery service need not be furnished where *impracticable* because of any "strike, picketing or other labor disturbance;"²⁰ others provide that pick-up and delivery service will be rendered only where the platform, doorway, or other facility is directly accessible to highway vehicles.²¹

From the foregoing it is evident that the obligation of the carrier to furnish pick-up and delivery service may vary with its tariff as well as with the situation existing at the picketed premises. Furthermore, it may vary depending on whether a railroad or motor carrier is involved. A railroad often has a spur track which it owns or occupies by way of easement from the company involved in the labor dispute. Although the track extends beyond the picket line and into the plant, the carrier's employees are for practical purposes on the railroad's property and a refusal to cross the picket line by an employee in such a situation may not be justified.²² The same railroad in another instance may employ a cartage company or a drayman²³ to furnish pick-up and delivery service from its freight-house to the struck plant; the employees of such company or drayman may be privileged under the LMRA²⁴ to refuse to cross the picket line. All of these things bear on the carrier's obligation and make it necessary to discuss each case separately to see if uniform rules may be deduced therefrom.²⁵

20. *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955); *Consolidated Freight Lines, Inc. v. Dep't of Public Service*, 200 Wash. 659, 94 P.2d 484 (1939).

21. *Montgomery Ward & Co. v. Chicago, Milw., St. P. & P.R.R.*, 263 I.C.C. 257 (1947).

22. *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry.*, 105 F. Supp. 794 (D. Minn. 1952), *reversed on other grounds*, 215 F.2d 126 (8th Cir. 1954).

23. As the term is used here, a cartage company or drayman is one who performs terminal pick-up and delivery service for a railroad carrier under contract.

24. See text at note 53 *infra*.

25. It should be noted that in the cases which do not involve refusal to furnish service because of a picket line, the courts hold that the carrier is not always required to furnish service. In *The Galena & Chicago Union R.R. v. Rae*, 18 Ill. 488, 490 (1857), the rule was stated as follows:

If, by reason of the condition of the country, and the peculiar occasion—an unusual quantity of grain on the line for shipment, a want of means in the country of storing it, or other pressing cause—the company took grain from wagons, or from boats from Oregon, while grain remained in private warehouses for shipment, and, in so doing, acted in good faith, intending to afford the largest public accommodation, and not from motives of partiality or oppression, it has not thereby incurred legal liability. If the plaintiff below has, in consequence of an extraordinary occasion, or of the public necessities, and not from the wrong of the company, sustained a loss, he must be content that his loss is suffered for the public good.

In *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915), the Court stated the rule as follows:

Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the

Before entering upon a discussion of the direct issue, it is important to point out that the absolute duty rule announced by the court in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*²⁶ is at variance with the pronouncement of other courts, including the Supreme Court, upon the duty of the carrier. These latter cases have recognized that situations may develop which interfere with the carrier's performance of its duty and have excused the carrier from performance in such a situation. The reasons for the rule are stated in *Houston & Texas Central R.R. v. Mayes*.²⁷ In that case the Supreme Court of the United States struck down a Texas statute as being an undue burden on interstate commerce because it unduly limited the instances in which a railroad could be excused from furnishing service. The court said:

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.²⁸

The next logical step was to hold that strikes may also, under certain circumstances, relieve a carrier of its obligation to transport merchandise. In the light of the foregoing let us discuss the duty of the carrier to furnish pick-up and delivery service to a shipper or receiver whose place of business is being picketed.

(B) The Duty of Common Carriers to Cross Picket Lines

Although carriers are required to furnish service on reasonable request, all cases with the exception of *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*²⁹ hold that a request for carrier service is not reasonable if compliance with the request requires a carrier to subject its employees to physical injury in furnishing service when a strike exists, or if the carrier's employees or their families are subjected to retaliatory bodily harm in their personal life by the striking

carrier's line. But that is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that "if his coach be full" he was not liable for failing to transport more than he could carry. . . . The law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons.

26. 128 F. Supp. 520 (D. Ore. 1953).

27. 201 U.S. 321 (1906).

28. *Id.* at 331.

29. 128 F. Supp. 475 (D. Ore. 1953), *damages assessed*, 128 F. Supp. 520 (D. Ore. 1954).

employees.³⁰ The acts of Congress requiring the furnishing of service cannot be used as a club for the purpose of assisting the shipper in strike-breaking activities.

In *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*³¹ the court could have found that there was not a sufficient showing of violence to justify a refusal to cross a picket line. However, the court stated that proof of violence never justifies a carrier in refusing service.³² The court reached this result because it believed that the only excuses available to a carrier were acts of God or enemies of the King, neither category including strikes.³³ Before filing suit in the United States district court, Montgomery Ward filed a proceeding before the ICC to compel the carriers to furnish service. In *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*,³⁴ the ICC held that the carriers were not required to furnish service to Montgomery Ward and that the furnishing of service to others was not unlawful, discriminatory, or unduly prejudicial.

The difference in the two cases is that the ICC applied the due diligence rule while the Oregon court applied the absolute duty rule. The Commission felt that due diligence was shown when the carriers proved that their employees would have struck if they had been compelled to cross the picket line. The evidence in both the court action and the ICC proceeding showed that various carriers at the beginning of the strike had dispatched drivers with merchandise consigned to Montgomery Ward. When the drivers saw the picket line they returned the shipments to the carriers' docks. Several carriers discharged drivers for refusing to cross the picket line. However, when the carrier unions threatened to strike the drivers were re-employed. Because one carrier had handled some of Montgomery Ward's goods, its operation was brought to a standstill by the establishment of a picket line around its dock and the refusal of its employees to work. At a meeting the Carriers' League decided not to handle any more merchandise of Montgomery Ward and thereafter the pickets were removed from the carrier's plant. The evidence showed that closed

30. *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954); *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955); In the Matter of Missouri Pacific R.R., 15 CCH LAB. CAS. ¶ 64,849 (E.D. Mo. 1948).

31. 128 F. Supp. 475 (D. Ore. 1953), *damages assessed*, 128 F. Supp. 520 (D. Ore. 1954). Although this case was not decided until 1953, the facts giving rise to the controversy occurred in 1940 and 1941, long prior to passage of the Taft-Hartley Act. If the controversy had arisen after the passage of that act, the court might have reached a different result on the ground that the carrier's employees need not cross a legally established picket line. 61 STAT. 141 (1947), 29 U.S.C. § 158 (b) (4) (1952).

32. *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, 505-06 (D. Ore. 1953).

33. *Ritchie v. Oregon Short Line R.R.*, 42 Idaho 193, 244 Pac. 580 (1926).

34. 42 M.C.C. 225 (1943).

shop contracts were in effect and that the area was highly unionized, the few carriers who had endeavored to hire non-union labor being warned that action would be taken by the union. Other factors brought out in the proceedings were that there was not sufficient trained non-union labor to replace the union employees; that if the carriers had hired non-union employees they would have violated the Wagner Act³⁵ because of the closed shop contracts; and that during the strike a union contract was adopted with the following clause:

It shall not be a violation of this agreement for an employee to refuse to go through a picket line established by a bona fide A. F. of L. Union. . . .³⁶

The carriers' tariff provided that they need not furnish pick-up and delivery service where impracticable to operate trucks or drays "on account of the condition of highways, roads, streets or alleys, or because of riots or strikes."³⁷ The complaint was dismissed by the ICC in the following language:

[W]e think it is sufficiently clear . . . that the defendants would have found it impossible to continue their operations with non-union labor, and we are of the opinion that it was not incumbent upon them to force the issue to the point of resorting to force and violence. Because of the comprehensive unionization of available labor and the existence of the closed-shop agreement, the defendants would have been confronted with strikes of their own labor if they had persisted in their attempts to serve the complainant, with the result that all of their operations would have been disrupted and probably brought to a standstill. The defendants were therefore faced with the choice, as they reasonably believed, of not serving the complainant and maintaining service to the general public, or of being compelled to discontinue all operations. Obviously, as between these defendants and the general public other than the complainant, the lack of service because of a general strike would have been caused by a strike in which the defendants were directly involved, and their position in defending suits for damages and proceedings before us similar to the instant proceedings, brought by other shippers, would have been more difficult, and their potential liability immeasurably magnified.

. . . .

We find that the defendants' failure to serve the complainant as herein described was proximately caused by a strike at complainant's plant, for which the defendants were not responsible, and that because of the said strike they were physically prevented from serving the complainant, and accordingly their conduct was within the limitations and conditions of the appli-

35. 49 STAT. 449 (1935).

36. *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225, 234 (1943).

37. *Id.* at 227.

cable tariff with respect to impractical operation, and not unlawful. The complaints will be dismissed.³⁸

The foregoing discussion presents the two views: the one announced by the court in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*³⁹ that the duty of the carrier to perform service is absolute, unless prevented by acts of God or public enemies; the other set out in *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*⁴⁰ and *Meier & Pohlmann Furniture Co. v. Gibbons*,⁴¹ that the carrier must perform its duty upon reasonable request by the shipper.

The rule stated in the *Montgomery Ward* case is built upon the false premise that the common law imposed an absolute duty on the carrier. The court confused the obligation of the carrier to *transport* safely goods entrusted to and accepted by it with the duty to *accept* shipments in the first instance. The cases cited in the footnotes to the opinion point up the court's confusion. In footnote thirteen the court stated:

At common law, the practice and customary dealing of the carrier set the limits of its obligation. A striking instance of this was the duty to accept goods tendered for carriage, "his wagon not being full." A modern parallel illustrative of current modes of procedure was an operating rule of the carrier limiting live-stock shipments to one train a week. . . . This limitation was approved by the Commission as reasonable. "It seems to me undeniable, that a carrier may select the particular line or description of business in which he engages . . ."⁴²

Obviously, if the duty to accept freight tendered for transportation is absolute, the carrier could not refuse because "his wagon was full," but would be required to secure another wagon. Likewise, the carrier could not refuse to accept livestock on any day except Wednesday. Nor could the carrier "select the particular line or description of business in which he engages." The cases cited by the court in various other footnotes furnish no authority for the court's ultimate conclusion imposing an absolute duty to accept. Nor is there to be found in such cases any prohibition against the carrier imposing reasonable limitations on its "holding out" to the public. The court relied on the cases of *Wabash R.R. v. Pierce*,⁴³ *Bruskas v. Railway Express Agency*,⁴⁴ and *North Pennsylvania R.R. v. Commercial Nat'l Bank*,⁴⁵ which indicated that the carrier's duty to receive, carry, and deliver goods was absolute. An analysis of the cases relied upon, however,

38. *Id.* at 233, 234, 237.

39. 128 F. Supp. 475 (D. Ore. 1953), *damages assessed*, 128 F. Supp. 520 (D. Ore. 1954).

40. 215 F.2d 126 (8th Cir. 1954).

41. LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

42. *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, 491 n.13 (D. Ore. 1953).

43. 192 U.S. 179 (1904).

44. 172 F.2d 915 (10th Cir. 1949).

45. 123 U.S. 727 (1887).

reveals that they are not applicable to the picket line situation which was before the court in the *Montgomery Ward* case. *Wabash R.R. v. Pierce*⁴⁶ involved the question of a carrier's duty to deliver when the shipper refused to reimburse the carrier for money it had advanced, on demand of the United States, to pay custom duties on goods consigned to the shipper. The Court held that the carrier had a lien upon the goods for such advance and was not under a duty to deliver until the custom charges were paid. *Bruskas v. Railway Express Agency*⁴⁷ involved a suit for damages against the carrier for having delivered fireworks to a boy thirteen years of age. *North Pennsylvania R.R. v. Commercial Nat'l Bank*⁴⁸ presented the question of the carrier's liability for failing to properly protect cargo already accepted for transportation. In these cases the courts, by way of dictum,⁴⁹ did refer to the common law duty of the carrier to accept and deliver goods tendered to them, but in none of the cases was the carrier's duty to accept an issue.

The other (and generally accepted) view recognizes a limitation upon the carrier's duty where circumstances beyond its control interfere with its performance. Such circumstances may arise as a result of the following factors: violence on a picket line endangering the life and well-being of the carrier's employees; limitations in the carrier's tariff defining its "holding out" by means of an impracticable operations rule which provides that the carrier will not perform pick-up and delivery service under circumstances which render such service impracticable due to the inaccessibility of the shipper's or receiver's place of business; strikes, riots, and other causes affecting the carrier's ability to continue operations for other members of the public. The cases supporting this view recognize, at least to a limited extent, that due to social and economic changes a rule requiring a carrier to compel its employees to violate or cross a picket line may well bring down upon the carrier the full reprisal and power of the union representing the employees and result in the closing down of business. Typical of this view are two recent cases. In *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*⁵⁰ the Court of Appeals for the Eighth Circuit would have excused the carrier if it had established the existence of violence and threats thereof to its employees. In *Meier & Pohlmann Furniture Co. v. Gibbons*⁵¹ the court held that the existence of violence, the limitation on the carrier's "holding out" by tariff provision, and the possibility of the carrier's involvement in a strike of

46. 192 U.S. 179 (1904).

47. 172 F.2d 915 (10th Cir. 1949).

48. 123 U.S. 727 (1887).

49. *Wabash R.R. v. Pierce*, 192 U.S. 179, 187 (1904); *North Pennsylvania R.R. v. Commercial Nat'l Bank*, 123 U.S. 727, 733-34 (1887); *Bruskas v. Railway Express Agency*, 172 F.2d 915, 918 (10th Cir. 1949).

50. 215 F.2d 126 (8th Cir. 1954).

51. LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

its own employees was sufficient to excuse the carrier's non-performance of its duty to render pick-up and delivery service. This view appears to define accurately the duties of common carriers and reflects a reasonable rule in the light of the present social and economic situation. It should be noted, however, that there is nothing dogmatic in the prevailing view. The carrier is in the position of acting at its peril in determining what is a "reasonable" or an "unreasonable" request for service.⁵² Thus, each case must be viewed in the light of its own individual facts and circumstances.

In order to understand the cases, it is necessary to examine the difficulties which confront a carrier when its employees refuse to cross a picket line. The Labor Management Relations Act of 1947 went one step further than the Wagner Act and established by statutory enactment the right of a union employee, assisting his fellow union members in enforcing their legal rights against their employer, to refuse to cross certain picket lines. It provided:

It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . *Provided*, That nothing contained in this subsection . . . shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . .⁵³

If there was any question about the right of an employee to refuse to cross a legally established picket line, the above provision of the LMRA settled such question and the Supreme Court of the United States recognized this right in *NLRB v. Rockaway News Supply Co.*⁵⁴ Although the Court in that case upheld the right of an employer to discharge an employee for refusing to cross a picket line when the union contract so required, the Court nevertheless indicated that in a proper case an employee could refuse to cross a picket line when protected by an appropriate bargaining contract provision.⁵⁵ The LMRA does not permit the employees of the carrier to refuse to cross all picket lines, and of course the employees, notwithstanding the contractual provision, will not be justified in their refusal if the picketing is not legal. If the employees of a motor common carrier exercise the right given them under the LMRA, the carrier is faced with the problem of per-

52. *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954).

53. 61 STAT. 141 (1947), 29 U.S.C. 158(b) (4) (1952).

54. 345 U.S. 71 (1953).

55. *Id.* at 80.

forming its duty to furnish service under the Interstate Commerce Act while the shipper's place of business is being legally picketed. In *Local 89, General Drivers, AFL v. American Tobacco Co.*⁵⁶ and *Beck & Gregg Hardware Co. v. Cook*,⁵⁷ injunctive relief was sought to compel union employees of carriers to cross picket lines and furnish service to the picketed employer. The highest courts of Kentucky and Georgia, respectively, affirmed the granting of injunctive relief and held the picket line clauses in the bargaining contracts invalid because they conflicted with the duties of the common carrier's employees. *General Drivers* was reversed by the United States Supreme Court in a per curiam opinion,⁵⁸ apparently on the ground that "unfair labor practices" might be involved and that by applying the doctrine of pre-emption the remedy, if any, was before the NLRB. Thus, it would seem that the question of the applicability of the picket line provisions of the LMRA to common carriers, other than railroads, was put at rest.

It is noteworthy that while the LMRA was enacted in 1947, Part II of the Interstate Commerce Act,⁵⁹ being a re-enactment of the Motor Carriers Act of 1935, was passed in 1940, seven years prior to LMRA. Since the LMRA made no exception or exclusion from its terms, obligations, or rights in the case of motor carriers or their employees, it must be presumed that Congress intended the rights, duties, and benefits of the LMRA to extend to the employees of motor common carriers.⁶⁰

56. 258 S.W.2d 903 (Ky. 1953). In recent years the NLRB has been confronted with the validity of hot cargo clauses in union contracts. In these cases it was contended that the clauses were illegal and that the action of the neutral employer's employees in refusing to handle cargo on the basis of the union contract was an unfair labor practice. Originally, such clauses were upheld. *Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952); *Madden v. Local 442, Teamsters Union, AFL*, 114 F. Supp. 932 (W.D. Wis. 1953); *Local 135, Teamsters Union, AFL*, 105 N.L.R.A. 740 (1953). In *Madden v. Local 442, Teamsters Union, AFL*, *supra*, the shipper brought out-bound freight to the terminal and the carrier employees refused to handle it. However, the shipper did pick up in-bound freight at the carrier's dock. The court refused to issue an injunction sought by the NLRB, thereby upholding the hot cargo clause. In *Local 554, Teamsters Union, AFL*, 35 L.R.R.M. 1281 (1954), two NLRB members voted to hold the hot cargo clause void and two voted to hold it valid. Chairman Farmer, the fifth member of the board, found that the union had violated the secondary boycott ban of the NLRA, but he did not find the hot cargo clause invalid. The violation was the act of the union in inducing the employees of the secondary employers not to handle "unfair" goods after their employers had given express instructions that the goods were to be handled.

57. 210 Ga. 608, 82 S.E.2d 4 (1954).

58. 75 Sup. Ct. 569 (1955).

59. 54 STAT. 919 (1940), 49 U.S.C. § 301 (1952).

60. *But see* *Local 89, General Drivers, AFL v. American Tobacco Co.*, 258 S.W.2d 903 (Ky. 1953). In *Anderson v. Bigelow*, 130 F.2d 460 (9th Cir. 1942), *cert. denied*, 317 U.S. 690 (1942), the court said that motor carrier employees were subject to the Railway Labor Act when the motor carrier was owned by a railroad and the employees were performing service incidental to rail service.

The LMRA is not applicable to railway employees.⁶¹ They are covered by the Railway Labor Act which does not contain any provision granting employees the right to refuse to cross a picket line.⁶² Accordingly, a railroad may be able to discipline its employees for refusing to cross a picket line, while a motor carrier may not be in such a position.⁶³ In *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*⁶⁴ the railroad carrier contended that the LMRA provision permitting an employee to refuse to cross a picket line was a defense to the shipper's action for damages for failure to furnish cars. The court pointed out that the provision probably did not apply to railroads, but stated that even if it were applicable it did not relieve the carrier of its obligation to attempt to furnish service. However, if the section were applicable to railroads, the court should have refused recovery if the evidence showed that the carrier had dispatched cars to the struck plant and the men had refused to cross the picket line, and that the carrier could not employ non-union labor to cross the picket line without becoming involved in a strike of its own employees, and that a strike of the carrier's employees would have resulted had the carrier provided service to the struck plant.⁶⁵ These factors were not shown to exist in *Minneapolis & St. L. Ry.* and accordingly the court may have been justified in concluding that the carriers did not use diligence in endeavoring to serve the struck plant.

Having considered some of the facts that appear in each of the cases, we will now more fully discuss the above cases, as well as other cases, to show wherein they differ. In the *Minneapolis & St. L. Ry.* case⁶⁶ the action was against a railroad for damages because of its re-

However, although the motor carrier was owned by the railroad, if it were operated separately, then the employees would not be under the Railway Labor Act. Since the case was decided prior to the LMRA of 1947, it was undoubtedly known to Congress, and Congress must have intended to place those common carriers under the Railway Labor Act rather than the LMRA.

61. 61 STAT. 136 (1947), 29 U.S.C. § 152(2) (1952) provides that "employees" does not include anyone subject to the Railway Labor Act.

62. 44 STAT. 577 (1926), 45 U.S.C. §§ 151-88 (1952). Common carriers by air are also subject to the Railway Labor Act. 49 STAT. 1189 (1936), 45 U.S.C. § 181 (1952).

63. *Cf.* In the Matter of Missouri Pacific R.R., 15 CCH LAB. CAS. ¶ 64, 849 (E.D. Mo. 1948).

64. 215 F.2d 126 (8th Cir. 1954).

65. *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

66. 215 F.2d 126 (8th Cir. 1954). In that case the tariff of the railroad provided that orders must be given for any cars desired. The trial court had allowed damages for ten cars which were ordered and ten additional cars which were needed but never actually ordered. In holding defendant liable the trial court said the plaintiff was not required to do a useless act and order cars when it knew that they would not be delivered. The court of appeals reversed the ruling of the trial court and held that the useless act principle was not applicable to carrier tariffs and that the carrier could only be held liable for cars actually ordered. If

fusal to furnish ten rail cars as requested by the shipper. The railroad had a spur track which served the shipper's loading platform; the picket line extended across the track so that the picketing employees were trespassing on railroad property. The shipper had previously obtained a mandatory injunction requiring the railroad to furnish service. The railroad employees were not members of the international union involved in the strike and there was no showing that the railroad would have been involved in a labor dispute with its employees had it endeavored to require them to cross the picket line. There was also no showing that the railroad tariff contained an impracticable operations rule. Under such circumstances the court concluded that the railroad was required to furnish service, and because it had failed to do so it was liable in damages. The court recognized that the carrier's liability must be determined by its tariff.⁶⁷ The defendant attempted to excuse its failure to furnish service because of the asserted fear of its employees as a result of threats of violence. Although the court of appeals was required to follow the trial court's determination of fact that such fears were unfounded, the appellate court indicated that if the trial court had found sufficient evidence of the employees' fears of violence it would not have set aside a finding excusing the railroad of the duty to furnish service.

In *Consolidated Freight Lines, Inc. v. Dep't of Public Service*⁶⁸ proceedings were instituted by a shipper before the Washington Department of Public Service to compel motor carriers to furnish pick-up and delivery service. The shipper was engaged in a labor dispute and a picket line had been placed around its plant. As a defense the carriers attempted to prove that the impracticable operations clause of their tariff applied. The evidence did not disclose any violence or threats of violence but did show that the Teamsters Union had threatened to call a strike if the carriers either required their employees to cross the picket line or discharged them for failure to do so. During the strike other companies did cross the picket line in question. The Supreme Court of Washington held that the impracticable operations clause

a carrier should endeavor to embargo a shipper because of the existence of a picket line, the court might well hold that under such circumstances the useless act doctrine should be applied and the carrier would be held liable for shipments not actually ordered. Furthermore, the question whether embargoes are discriminatory may be raised by shippers both in court and ICC proceedings. *United States v. Metropolitan Lumber Co.*, 254 Fed. 335 (D.N.J. 1918); *Baltimore Chamber of Commerce v. Baltimore & O.R.R.*, 45 I.C.C. 40 (1917). By an embargo a carrier may succeed in compelling the shipper to apply to the ICC to have the embargo declared unreasonable before the shipper would be entitled to maintain an action for damages. See *United States v. Metropolitan Lumber Co.*, *supra*. The embargo regulations for motor carriers are contained in 49 C.F.R. §§ 220.1-223 (1949).

67. *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126, 136 (8th Cir. 1954).

68. 200 Wash. 659, 94 P.2d 484 (1939).

referred only to conditions on the picket line which made it impracticable for trucks to pass and did not refer to conditions elsewhere which might involve the carrier in a strike. This case was decided, however, prior to the LMRA of 1947. If the court would have had before it the provisions of the LMRA,⁶⁹ permitting employees to refuse to cross a legally established picket line, the result might well have been different. Furthermore, *Consolidated Freight Lines, Inc. v. Dep't of Public Service* is not in accord with the decisions of the ICC in *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*⁷⁰ and of the United States district court in *Meier & Pohlmann Furniture Co. v. Gibbons*.⁷¹ In the latter two cases the impracticable operations clause was construed to be applicable where the carrier might have become involved in labor difficulties and unable to serve the general public, although it was not physically impossible for the carrier to cross the picket line.

In *Meier & Pohlmann Furniture Co. v. Gibbons* it was alleged that the defendant carriers and the defendant unions, having negotiated an industry-wide contract with a picket line clause, had conspired to deny service to the plaintiff in violation of the Interstate Commerce Act. The shipper also claimed that the refusal of the carriers to perform pick-up and delivery service rendered the carriers liable for damages. The facts showed that defendant's plant was struck in February, 1952, and that thereafter a picket line was established in front of said plant; that plaintiff had recruited a new working force and was in operation late in the summer of 1952; that the picket line remained and that the carriers had refused to furnish pick-up and delivery service, except in a few isolated instances. The evidence also showed both threats of violence and actual violence during the strike. The carriers' tariffs contained the impracticable operations provision, and the union contracts contained the picket line clause. The court distinguished this case on the grounds, among others, that the defendant carriers did make some effort to compel their employees to cross the picket line, that there was proven violence, and further, that there was proof that a carrier's discharge of an employee who had refused to cross the line had resulted in a strike. The court concluded that in the light of the facts "the proof failed to sustain any charge of wrongdoing for which the defendants are liable in damages."⁷²

In *Montgomery Ward & Co. v. Chicago, Milw., St. P. & P.R.R.*,⁷³ carriers, whose tariff provided that pick-up and delivery service would be rendered where the platform, doorway, or other facility was directly accessible to highway vehicles, failed to render service to com-

69. 61 STAT. 140 (1947), 29 U.S.C. § 158(b) (4) (1952).

70. 42 M.C.C. 225 (1943).

71. LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

72. *Id.* at 2636.

73. 268 I.C.C. 257 (1947).

plainant because of the existence of a picket line. The evidence did not show any violence or threat of violence on the picket line. However, the carriers had closed shop contracts so that if they had employed non-union men to cross the picket line or if they had disciplined employees for failure to cross the line, the result would have been a stoppage of defendants' service to the public. The defendants did send two trucks to the plant but the drivers did not cross the line because the pickets warned the drivers to turn back. The ICC held that this was a sufficient showing of diligence on the part of defendants and that the shipper's facilities were not accessible for service.

A limitation on the above rule is set forth in *Montgomery Ward & Co. v. Santa Fe Trail Transp. Co.*⁷⁴ wherein the ICC granted relief to a complainant on the basis of the carrier's refusal to furnish service because of the existence of a picket line. It was held that a carrier was not relieved of its obligation to furnish service under the impracticable operations clause in its tariff if there was no strike and if there was no labor dispute between the shipper and its employees or between the carriers and their employees. The picket line in the case was established because complainant had transferred its business from one local drayage company to another and was an attempt to coerce the shipper to again use the services of the former drayage carrier.

III. REMEDIES

(A) Actions for Damages

If a carrier fails to furnish a shipper service upon reasonable request, the shipper has a right to sue for damages in either the state or federal courts.⁷⁵ Likewise, if a carrier refuses to require its employees to cross a picket line and furnish pick-up and delivery service, the shipper may bring an action for damages in which recovery will of course depend on the particular circumstances of the case.⁷⁶

The carrier may, as a defense, introduce evidence to show that it was excused from serving the shipper in question. For instance, the carrier may claim that a tariff rule excuses it from furnishing service and that the shipper must first resort to his administrative remedy before

74. 42 M.C.C. 212 (1943).

75. 24 STAT. 387 (1887), 49 U.S.C. § 22 (1952), which provides that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. . . ." *Midland Valley R.R. v. Barkley*, 276 U.S. 482 (1928); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Galveston, H. & S.R. Ry. v. Wallace*, 223 U.S. 481 (1912); *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954); *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

76. *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954); *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

the ICC to determine the reasonableness of the tariff rule before action may be maintained in the state or federal court. For example, let us examine a typical tariff rule which reads as follows:

Nothing shall require the carrier to perform pick-up or delivery service at any location from or to which it is impracticable to operate a vehicle because of: (1) the condition of the roads, streets, driveways, alleys or approaches thereto, (2) inadequate loading or unloading facilities, (3) any riot, strike, picketing or other labor disturbance.⁷⁷

If the shipper challenging the validity of the carrier's excuse concedes that the rule is reasonable and valid but contends that the carrier has unjustly applied the rule to him, then there remains no question for administrative decision alone and the courts have jurisdiction to determine whether the rule was applied discriminately.⁷⁸

It is generally said that there are two forms of discrimination under the various transportation acts. One form occurs in promulgating an unreasonable and prejudicial rule, rate, or practice; the other form of discrimination consists of unfairly or prejudicially enforcing an otherwise fair and non-discriminatory rule, rate, or practice. In a suit where the published rule, rate, or practice itself is attacked as unfair, an issue is presented which calls for the exercise of the administrative power of the ICC, and under the doctrine of pre-emption, the courts have no jurisdiction to determine such issue until administrative remedies have been exhausted. However, if a carrier's rule, rate, or practice is found, or admitted to be, fair and reasonable on its face, but has allegedly been unfairly applied so as to discriminate unreasonably and prejudicially against the shipper, there is no administrative question involved. Such a case involves merely a judicial question of fact whether the carrier has violated the law to the plaintiff's damage and the issue may be decided by suit in a court of law.⁷⁹

(B) Proceedings before the Interstate Commerce Commission

While Parts 1 and 2 of the Interstate Commerce Act⁸⁰ contain liberal provisions for the filing of complaints by shippers with the Commission, including the allegation of the failure of the carriers to perform their duty, the remedies before the Commission hold little attraction to a shipper or consignee who is unable to receive service because of the picket line at his place of business. This is because of the fact that, except in limited cases not here applicable, the Commission

77. *Meier & Pohlmann Furniture Co. v. Gibbons*, LAB. REL. REP. (35 L.R.R.M. 2627, 2630) (E.D. Mo. Jan. 10, 1955).

78. *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915).

79. See *Midland Valley R.R. v. Barkley*, 276 U.S. 482 (1928); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915).

80. 24 STAT. 379 (1887), 49 U.S.C. §§ 9, 13 (1952); 49 STAT. 543 (1935), 49 U.S.C. § 316(e) (1952).

can afford no monetary relief by awarding damages,⁸¹ nor can the orders of the Commission requiring the carrier to perform its duty substitute for the speedy injunctive relief which could be issued by the courts.⁸² Furthermore, the Commission may well take the position that, because of the LMRA and the Norris-LaGuardia Act, it should not grant an order which would involve a carrier in a labor dispute with its employees.⁸³

(C) Injunctive Relief

1. The Federal Court

A shipper who is unable to obtain pick-up and delivery service because of a strike may seek an injunction compelling the carrier to furnish service. In addition, a carrier desiring to furnish pick-up and delivery service may endeavor to procure an injunction to compel its employees to cross the picket line. When these proceedings are instituted in federal courts the named defendants usually will argue that the Norris-LaGuardia Act⁸⁴ bars such injunctive relief. That act provides that a federal court does not have jurisdiction to grant an injunction against the giving of "publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."⁸⁵ The effect of this provision has been to deny a shipper or another carrier, seeking to do business with carriers, the right to obtain an injunction requiring the carriers to furnish service when the company's plant or place of business is being picketed.

*Southeastern Motor Lines, Inc. v. Hoover Truck Co.*⁸⁶ is the first case in which the problem arose. The union was seeking to organize plaintiff's employees and to force plaintiff to sign a closed shop agreement. Pickets were placed around plaintiff's plant; as a result em-

81. 49 STAT. 543 (1935), 49 U.S.C. § 316(e) (1952), which authorizes complaints against motor carriers, does not contain a provision for reparation. Although reparation can be secured against a railroad for failure to furnish cars, 24 STAT. 379 (1887), 49 U.S.C. § 9 (1952), after entry of the award it is necessary to file proceedings in the United States district court if the award is not complied with in the time specified. 24 STAT. 379 (1887), 49 U.S.C. § 16(2) (1952). The carrier may endeavor to show in the district court that the refusal to furnish service was not a violation of the act, and that the only effect of the order of the Commission is to make a prima facie case which may be rebutted by the carrier. *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Willamette Iron & Steel Works v. Baltimore & O.R.R.*, 25 F.2d 521 (D. Ore. 1927). Furthermore, the carrier is entitled to a jury trial. 24 STAT. 379 (1887), 49 U.S.C. § 16(2) (1952); *Western New York & P.R.R. v. Penn Refining Co.*, 137 Fed. 343 (3d Cir. 1905), *aff'd*, 208 U.S. 208 (1908).

82. See notes 76-81 *supra*; notes 90-91 *infra*. See *Montgomery Ward & Co. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225 (1943). The refusal to serve in this case started December 12, 1940, and a decision was not reached by the ICG until May 10, 1943.

83. *Cf. Montgomery Ward & Co. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225 (1943).

84. 47 STAT. 70 (1932), 29 U.S.C. § 101 (1952).

85. 47 STAT. 71 (1932), 29 U.S.C. § 104(e) (1952).

86. 34 F. Supp. 390 (M.D. Tenn. 1940).

ployees of other carriers refused to cross the picket line and to handle interchange of freight with plaintiff. Most of the companies named as defendants had closed shop contracts with the unions which provided that their employees should not be required to cross picket lines. There was no violence. Plaintiff brought this action to compel the motor common carriers and their employees, some of whom were joined as defendants, to handle freight. An injunction was denied on the ground that the case involved a labor dispute and came within the provisions of Norris-LaGuardia. The Court pointed out that if the defendants were compelled to serve plaintiff their employees would be forced to breach their contracts.⁸⁷

In *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*⁸⁸ injunctive relief was sought by plaintiff, a motor carrier, against certain other motor carriers, freight forwarders, and cartage contractors. The evidence showed that plaintiff was involved in a strike and that a picket line was placed around its place of business. Defendants had contracts with various unions which provided that their employees should not be required to handle freight moving to and from an employer declared to be "unfair" and that such employees should not be required to cross picket lines of a striking union. Defendants refused plaintiff service because of the above provisions. The evidence showed that defendants would have been involved in a strike if they had not adhered to the contractual provisions. The court denied plaintiff a temporary injunction on the ground that it was involved in a labor dispute. The court held that the Motor Carriers Act,⁸⁹ which places on a common carrier of freight in interstate commerce certain duties and responsibilities, did not enlarge the jurisdiction of the United States courts beyond the limits of the Norris-LaGuardia Act. It was also held that a "labor dispute" as used in the Norris-LaGuardia Act was not necessarily confined to employer and employee, but was broader in scope and encompassed the disturbance of the relationship between defendants and their employees which, if not stopped, would have culminated in a strike.

Lee Way was followed in *East Texas Motor Freight Lines v. Local 568, Teamsters Union, AFL*.⁹⁰ The effect of *Lee Way* was sought to be avoided by joining the unions and their officers as parties defendant in addition to the carriers and by charging that the unions and

87. *Id.* at 392.

88. 126 F.2d 931 (10th Cir. 1942). In the suit for damages by the shipper against the carrier in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953), the court indicated that the Norris-LaGuardia Act was not applicable because the carriers were not engaged in a labor dispute with their employees and held that the carriers should have procured a mandatory injunction to require their employees to cross the picket line.

89. 49 STAT. 543-67 (1935), 49 U.S.C. §§ 301-27 (1952).

90. 168 F.2d 10 (5th Cir. 1947).

carriers were engaged in a conspiracy. A picket line clause was contained in the contract similar to that involved in *Lee Way*. The plaintiff relied on *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*,⁹¹ where the Supreme Court held that a combination of labor unions, employers, and manufacturers to restrain marketing of goods was in violation of the Sherman Anti-Trust Act. The court, without an extended discussion, said that the *Allen Bradley* case differed from the facts in the *East Texas* case and that the doctrine laid down in *Lee Way* was applicable.

In *Meier & Pohlmann Furniture Co. v. Gibbons*⁹² the plaintiff sought a temporary injunction against the union, its officers, and certain rail and motor carriers to compel the carriers to furnish service to plaintiff. To substantiate its grounds for injunctive relief plaintiff alleged that defendants had conspired and agreed to discriminate against plaintiff by refusing to handle its shipping requests. Plaintiff's theory was based on the *Allen Bradley* case. The evidence showed that plaintiff's plant was being picketed by members of the same international union to which the motor carrier employees belonged. The court refused to grant plaintiff a temporary injunction and distinguished *Allen Bradley*, which involved a combination to eliminate and prevent all competition by controlling prices and markets, while in *Meier & Pohlmann* the joint action of the carriers was based on a labor contract negotiated on behalf of the motor carriers which contained a clause that the employees need not cross picket lines. The contract in *Meier & Pohlmann* had terminated a strike and had been negotiated long prior to the company's labor difficulties. Furthermore, in *Allen Bradley* the employers stood to profit by the combination. In *Meier & Pohlmann* the motor carriers could not have profited but would have had a "dead loss" because plaintiff could have used competing rail service.

In *Overton Co. v. Teamsters Union, AFL*⁹³ a federal district court in Michigan held that courts have no jurisdiction to grant an injunction when it is sought on the grounds of violation of a non-labor statute—in this case a state anti-conspiracy act—where the effect would be to interfere by judicial process with a labor dispute. The basis of the court's holding was that the basic issue involved the existence of an unfair labor practice. The determination of this question was committed by Congress to the NLRB, thereby pre-empting the field.

Injunctive relief may be sought by shippers against railroads or by railroads against a picketing union. Injunctive relief may be granted

91. 325 U.S. 797 (1945).

92. *Meier & Pohlmann Furniture Co. v. Gibbons*, 113 F. Supp. 409 (E.D. Mo. 1953). For further disposition of the case, see LAB. REL. REP. (35 L.R.R.M. 2627) (E.D. Mo. Jan. 10, 1955).

93. 32 L.R.R.M. 2614 (W.D. Mich. 1953).

in a case involving a railroad where the same relief would not be granted in a case involving a motor carrier, since the motor carrier is covered by the LMRA while the railroad is under the Railway Labor Act.⁹⁴ Furthermore, in railroad cases a fundamental distinction exists in that the right-of-way leading into the plant often belongs to the railroad, and when pickets cross over the right-of-way they are trespassers on the railroad's property and the Norris-LaGuardia Act is not applicable.⁹⁵ In *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry.*⁹⁶ a shipper brought suit against a railroad to compel performance of service, and in *Erie R.R. v. Local 1286, International Longshoremen's Ass'n*⁹⁷ the railroad sought to prevent the union from maintaining a picket line across its tracks which led into a plant involved in a labor dispute with the union. In both cases injunctive relief was granted because there was no labor dispute between the parties and thus Norris-LaGuardia did not apply. In the *Pacific Gamble Robinson Co.* case the court pointed out that since the railroad employees were not members of the striking union they were not required to recognize the picket line. In the *Erie* case the court said that Erie was merely endeavoring to enjoin the union from interfering with its employees' performance of their duties.

2. The State Court

In *Local 89, General Drivers, AFL v. American Tobacco Co.*⁹⁸ plaintiff, a shipper who was engaged in a labor dispute, instituted an action to enjoin certain picketing and to compel drivers who were members of the same union picketing plaintiff's plant to cross the picket line and to perform pick-up and delivery service. The Court of Appeals of Kentucky held that the failure of the drivers to cross the picket line was a violation of the common, statutory, and constitutional law of Kentucky, and that injunctive relief was proper. Defendants had contended that the LMRA was controlling because an unfair labor practice might be involved and therefore the court would not have jurisdiction. The court rejected this, stating that the LMRA was

94. 49 STAT. 450 (1935), 29 U.S.C. 152(2) (1952).

95. *Louisville & N.R.R. v. Local 432, International Woodworkers, CIO*, 104 F. Supp. 748 (1952); *Illinois Cent. R.R. v. Local 568, Teamsters Union, AFL*, 90 F. Supp. 640 (W.D. La. 1950).

96. 83 F. Supp. 860 (D. Minn. 1949). 25 STAT. 862 (1889), 49 U.S.C. § 23 (1952), provides for the issuance of a writ of mandamus by the United States district court on complaint by a shipper that the common carrier does not move the shipper's interstate traffic "at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper. . . ." This section is from Part 1 of the Interstate Commerce Act and applies to railroads, but not motor carriers. We find no cases where a strike-bound shipper endeavored to obtain service by mandamus, nor do we believe that relief would be granted by mandamus.

97. 117 F. Supp. 157 (W.D.N.Y. 1953).

98. 258 S.W.2d 903 (Ky. 1953); *accord*, *Beck & Gregg Hardware Co. v. Cook*, 210 Ga. 608, 82 S.E.2d 4 (1954).

designed for the purpose of outlawing secondary boycotts and that such was not at issue in the case; rather, the court held that the issue was the carrier's refusal, in violation of Kentucky law, to transport merchandise. This case was the latest of several in which injunctive relief has been sought by shippers against both unions and carriers.⁹⁹ In prior decisions various state supreme courts permitted injunctions on the theory that the refusal to cross the picket line was a conspiracy in restraint of trade.¹⁰⁰

The Supreme Court of the United States, however, granted certiorari in *General Drivers* and in a memorandum opinion¹⁰¹ reversed the judgment of the Court of Appeals of Kentucky on the ground that an unfair labor practice may have been involved and that the remedy was before the NLRB. *General Drivers* was decided several days after the Supreme Court handed down its decision in *Weber v. Anheuser-Busch, Inc.*¹⁰² In *Anheuser-Busch*, which involved a jurisdictional dispute between two unions, the employer sought and obtained injunctive relief in the state court on the theory that the actions of the union were in restraint of trade in violation of Missouri law. On certiorari to the Supreme Court of the United States it was held that the union conduct in question may have been in violation of federal law and that resort had to be made to the NLRB. The *Anheuser-Busch* case did not decide the question of whether Anheuser-Busch would have been entitled to injunctive relief if the NLRB held that an unfair labor practice was not involved.¹⁰³ It may therefore be possible for a shipper to obtain a state court injunction if such relief is sought after a determination by the NLRB that the refusal of the employees of the carrier to cross the picket line did not constitute an unfair labor practice. However, it would seem that if the NLRB upheld the employees' refusal to cross the picket line, state court relief should not be granted.

(D) Remedies before the National Labor Relations Board

A struck shipper may endeavor to obtain relief by filing with the NLRB an unfair labor practice charge against the union whose members refuse to cross the picket line. If the shipper is upheld in its unfair labor charge it may apply to the appropriate court of appeals for enforcement of the NLRB's order.¹⁰⁴ Furthermore, if the general

99. *Burlington Transp. Co. v. Hathaway*, 234 Iowa 135, 12 N.W.2d 167 (1943); *Turner v. Zanes*, 206 S.W.2d 144 (Tex. Civ. App. 1947).

100. *Ibid.*

101. 75 Sup. Ct. 569 (1955).

102. 75 Sup. Ct. 480 (1955).

103. For a discussion of the implications of the *Anheuser-Busch* case, see 1955 WASH. U.L.Q. 183.

104. 61 STAT. 140 (1947), 29 U.S.C. §§ 158, 160(b), (160(e)) (1952).

counsel of the NLRB determines that a secondary boycott may be involved, the regional director of the Board may apply to the appropriate United States district court for an injunction.¹⁰⁵

CONCLUSION

It has not been our purpose herein to suggest any rules of law or conduct, nor have we attempted to suggest any remedy or remedies which are, or should be, available to interested parties or their counsel. Rather, we have attempted to present the legal aspects of what we believe to be a new problem, which will become increasingly important with the passage of time.

While conclusions at this time, in view of the uncertain state of the law may be considered foolhardy, we do submit that the rule of reason as announced by the courts in the *Minneapolis* and *Meier & Pohlmann* cases appears to be the more sound legal approach to the problem in view of the realities of the times. True, this rule of reason may, from the standpoint of the carrier, leave much to be desired by placing it in the position of acting at its peril in each instance in which the problem arises. However, this situation is no different from that presented in almost every legal problem.

As to the rule of absolute duty announced by the court in the *Montgomery Ward & Co.* case, it would appear to bind the carrier to a more stringent obligation than should be required in the light of the social and economic order, and of existing legislation. Should such rule become the accepted law, it is believed that changes in the statutory law will be necessary, either to relieve the carrier of the duty of performance under particular circumstances, or to afford remedies to the carrier and the shipper which are not now available to either.

105. 61 STAT. 149 (1947), 29 U.S.C. § 160(1) (1952). See *Madden v. Local 442, Teamsters Union, AFL*, 114 F. Supp. 932 (W.D. Wis. 1953).