AFL-CIO LAWYERS COORDINATING COMMITTEE

UNION LAWYERS CONFERENCE

INJUNCTIONS IN LABOR DISPUTES
ISSUANCE, ENFORCEMENT, AND CONTEMPT

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NEW YORK CITY
APRIL 27-29, 2004

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INTRODUCTION

With the decline in the numbers of strikes in the past ten years, injunction litigation has declined significantly. However, growing numbers of unions and their allies in the faith and social justice community (ex. Jobs With Justice) have increasingly engaged in mass action tactics in labor disputes which again create a risk that more unions will increasingly face injunction proceedings.

The Labor Injunction has always been a heavy handed tool that stifled the efforts of unions to organize and to engage in collective action. There have been brief periods when officially stated public policy argued against judicial intervention in labor disputes, such as with the passage of the Norris LaGuardia Act.[1] However, the passage of the Taft Hartley Act with its "special consideration" given Section 10(l) injunctions coupled with the US Supreme Court decision in the *Boys Markets* have eroded Norris LaGuardia Act protections in the federal courts.

While this paper will discuss injunctions under state law and under the Railway Labor Act, it will principally address legal issues arising after the injunction is issued, in either state or federal court. (Contempt etc.)This will also include related issues, such as those arising under the First Amendment and those arising under related criminal proceedings. For a more complete discussion as to the issuance of injunctions and defenses against the issuance of injunctions, please see Mike Slutsky's excellent paper presented as part of this workshop.

[1] 29 USC Sect. 101 et seq.; see also, "Little Norris LaGuardia" Acts by a number of states.

I. INJUNCTIONS UNDER THE RAILWAY LABOR ACT

The Railway Labor Act involves a much different world than the world inhabited by most union side labor lawyers under the NLRA**.** The only purpose here is to give a broad outline for non- RLA lawyers as to the philosophy of the Railway Labor Act and how the public policy embodied in that Act provides the basis for injunctions in different situations.

Like the NLRA, the RLA was enacted in order to avoid interruptions to commerce. Detroit & T.S.L.R. Co. v. Transportation Union, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). That public interest and policy is violated when either a union or a carrier violates the status quo imposed on collective bargaining parties. The requirement to maintain the status quo not only prohibits unions from engaging in job actions, but also prevents "management from changing the rates of pay, rules or working conditions related to the dispute." Id. at 153.

Sections 2, First, Second and Seventh, and Sections 5 and 6 of the RLA prohibit a carrier from making a unilateral change in existing conditions, or taking any form of economic self-help, during the term of an existing agreement or while engaged in negotiations. The significance of this status quo obligation was emphasized by the Supreme Court in Detroit & T.S.L.R. Co., supra, 396 U.S. at 150:

> [S]ince disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

The status quo requirements are intended "to prevent rocking of the boat by either side until the procedures of the Railway Labor Act [are] exhausted . . . ." Manning v. American Airlines, Inc.,

329 F.2d 32, 35 (2d Cir. 1964), cert. denied, 379 U.S. 817 (1964). Issues such as these constitute major disputes under the RLA.

In contrast, the minor dispute category is predicated on §2, Sixth and §3, First (i) of the RLA, which set forth conference and compulsory arbitration procedures for a dispute arising "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1289-1290, 89 L.Ed. 1886 (1945).

Injunctions are available under the RLA as follows:

1. Injunctive relief is available to preserve the status quo in a major dispute under the RLA pending completion of the required bargaining and mediation procedures, without the customary showing of irreparable injury. Detroit &TLSR Co., supra, and United Airlines v. IAM, 243 F3d349, 362(7thCir.2001).

2. A "minor dispute" injunction is available to preserve the jurisdiction of the System Board of Adjustment (i.e. Arbitration) UTU v. Penn Central, 505 F2d. 542, 545 (3rd Cir.1974)

3. By way of example see National Ry.Conf. v. IAM, 830 F2d.741, 751 (7th Cir. 1987). There the Court enjoined a union's threatened strike over subcontracting of work, but conditioned the injunction on preservation of the status quo pending arbitration.

II. STATE COURT INJUNCTIONS

Because of the restrictions of the Norris La Guardia Act, employers historically have resorted to state court to seek inunctions for mass picketing, violence, and threats of violence, issues of traditional state concern and therefore not generally subject to preemption principles. Many states have enacted legislation to limit or define the liability of labor organizations under state law, sometimes called "Little Norris La Guardia Acts." See, California, C.L.P., § 1138; Pennsylvania Anti Injunction Act, 43 P.S. § 206(a) *et. seq.*[2]

For example the Pennsylvania Anti-Injunction Act embodies a strong public policy against intervention in labor disputes by state courts; Locust Club v. Hotel and Club Employees Union, Local No. 568, 155 A.2d 27 (Pa. 1959); and sets limits on the parameters for holding a union liable for alleged violations of an injunction. The following discussion illustrates principles from that Act, which are similar to statutes from other states. Moreover, even assuming your state does not have a "Little Norris LaGuardia" statute, many of the following strategies consist, in part, of general equitable and legal principles that have been used successfully in states without Little Norris LaGuardia statutes.

A. Issuance of State Court Injunctions. (A Checklist of Principles)

1. The Pennsylvania Anti Injunction Act forbids state courts from issuing restraining orders or temporary or permanent injunctions of activity in labor disputes except in certain limited circumstances constituting a "seizure" of the employer's premises, a seizure being defined as involving

[2] This includes California, Connecticut, Hawaii, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington, Wisconsin and Puerto Rico. Other states have adopted some of the language from Norris LaGuardia but omit certain aspects. These states include Arizona, Illinois, Kansas, New Mexico, and Wyoming. A discussion of the differences between the statutes is beyond the scope of this paper and the detailed references to the Pennsylvania statute and cases is intended to show common features of these statutes as well as arguments that can and have been successfully advanced even in the absence of such statutes.

mass picketing, threats of or actual violence to persons or property. 43 P.S. § 206(d)(d) Even then, the issuance of injunctions is still restrained by general equitable principles. 43 P.S. § 206(i)

2. Broad Definition of Labor Dispute: Union's picketing of a work place that did not employ union members was still a "labor dispute" within meaning of the Anti Injunction Act. Weis Markets, Inc. v. United Food & Commercial Workers, 632 A.2d 890 (Pa. 1993).

3. Isolated incidents of force or intimidation during a labor dispute do not trigger the exceptions of the Anti Injunction Act so as to allow for the issuance of an injunction. Giant Eagle Markets Co. v. United Food & Commercial Workers, 652 A.2d 1286 (Pa. 1995).

4. Activity, including picketing, that demonstrates a consistent pattern of harassing or intimidating customers or employees constitutes a "seizure" not protected under the Anti Injunction Act, and provides grounds for the issuance of an injunction against a Union. Id.

5. Customers and employees must be provided with free access to employer facility. Union action where ingress or egress is blocked or protestors swarm around customers is not protected by the Anti Injunction Act. Id.

6. Mass picketing is not protected by the Anti Injunction Act when it goes beyond its lawful function of informing the public that a strike is taking place and becomes a weapon to influence negotiations through harassment and intimidation. Id.

7. To obtain an injunction Employer must show that the police officers "charged with the duty of protecting complainant's property are unable to furnish adequate protection." 43 P.S. § 206(i)(f). (Rarely will a law enforcement official testify, under oath, that s/he can't do the job.)

8. The Anti Injunction Act has a requirement that when an injunction is issued out of a labor dispute, a mirror injunction shall issue against the complainant or employer enjoining acts of violence, threats of violence, intimidation, coercion, and the like. 43 P.S. § 206(n). Consider such a principle when you are in a situation where an injunction will be issued and you seek to negotiate a resolution that limits the union's exposure. Practically and politically this gives the Union something to hold over the employer.

9. "Upon denial by the court of any injunctive relief sought . . . the court **shall order**" the payment of costs and a reasonable counsel fee. 43 P.S. § 206(q)

10. The Anti Injunction Act still contains a provision dissolving the injunction if the employer hires scabs. 43 P.S. § 206(m). (Perhaps, this raises preemption issues.)

B. Defenses to Accusations of Violation of State Court Injunctions.[3] (A Further Checklist When You Are Really in Trouble)

1. Along with the Anti Injunction Act's effect on the court's ability to issue injunction—discussed below—the Act also limits a union's civil, equitable, and criminal liability.

[3] A more detailed discussion of civil and criminal contempt follows later in this paper.

2. Unions and union officers may not be held civilly or criminally liable except upon proof that members, agents or officers committed the actions subject to suit or criminal charge and they were performed with the participation, authorization, or ratification after the event, of the union. 43 P.S. § 206(h).[4]

3. Finding of a union's participation in illegal acts may be established by circumstantial evidence. Freeport Transp., Inc. v. Int'l Bhd. of Teamsters, 568 A.2d 151 (Pa. 1990), cert. denied, 498 U.S. 899, 111 S. Ct. 255, 112 L. Ed. 2d 213. Factors influencing determination include number of persons involved; position of participants in the organization; organization's awareness of acts; organizations ability to control acts.

4. If participation, authorization, or ratification is proven, damages are awarded only if they result from violent or otherwise unlawful conduct. Those resulting from lawful, peaceful picketing are not recoverable. Stryjewski v. Local Union No. 830, Brewery and Beer Distributor Drivers, 304 A.2d 463 (Pa. 1973).

5. Mere involvement of union officials in an action from which violence arises is insufficient to show liability. Gajkowski v. Int'l Bhd. of Teamsters, 548 A.2d 533 (Pa. 1988), cert. denied, 490 U.S. 1022, 109 S.Ct. 1748, 104 L.Ed.2d 185 (drunken union picketer shot an employer guard and two fellow union members; although the union clearly authorized the picketing, it did not create an atmosphere that reasonably led to shooting).

[4] See Section 6 of the Norris LaGuardia Act, 29 USC § 106.

III. PROCEDURAL ISSUES ONCE THE INJUNCTION HAS ISSUED: DISSOLUTION, BONDS, AND APPEALS

This part is perhaps even drier than the rest of this paper. However, in many ways the technical requirements for dissolution and appeal of injunctions are crucial to the ultimate resolution of issues arising after injunctions have issued

A. Rule 65 of the Federal Rules of Civil Procedure

Rule 65(a) forbids the issuance of a Preliminary Injunction without notice to the other party. Rule 65(b) does allow the issuance of a TRO without notice, in order to avoid immediate irreparable injury. However, any such TRO automatically dissolves within ten (10) days unless extended for good cause. Moreover, Respondent may move on two days notice to dissolve a TRO issued without notice. Under Norris LaGuardia, however, TROs must be supported by findings of fact filed with the Clerk **before** the issuance of the TRO. 29 USC § 109.[5]

Rule 65(c) provides that "[n]o restraining order or preliminary injunction shall issue **except upon the giving of security by the applicant** . . . for the payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." If an injunction is ordered by the Court, but the bond is not posted by the Plaintiff, contempt proceedings can not proceed for violation of the underlying order. **If you are a Defendant and contempt proceedings are initiated, check to see whether and when the bond was posted.** If you have obtained the injunction, make sure you file the bond papers yourself. The surety company prepares bond papers upon payment of a premium, and often lets

[5] See your comparable state rules dealing with this. For example, in Pennsylvania an injunction granted without notice dissolves in five (5) days unless hearing on continuance is held within the five (5) day period. In any injunction involving First Amendment rights—whether issued with or without notice—the Court must hold a final hearing within three (3) days of demand by the defendant or the injunction is dissolved. Once a hearing is held on issues impacting First Amendment rights the Court has twenty-four (24) hours to issue a decree.

them sit on a desk before they get around to filing them with the Court. **There is no enforceable injunction in place until the bond is posted.** [6]

B. Rule 62(c) of the Federal Rules of Civil Procedure. (Appeals and Stays)

In any appeal taken from the grant or denial of a Preliminary Injunction or TRO, the Court has the discretion under this Rule to suspend, modify, restore, or grant an injunction during the appeal upon such terms as to bond as it considers proper for the security of the rights of the adverse party. Rule 62(g) allows appellate courts to do the same and to "make any order appropriate to preserve the status quo or effectiveness of the judgment subsequently to be entered." However, any party seeking a stay under Rule 62(c) or 62(g) has a heavy burden on four factors:

1) Substantial likelihood of success on the merits;

2) that the party will face irreparable harm without the stay;

3) that a stay will not substantially injure the other party;

4) a stay is consistent with the public interest.[7]

There is an extremely high standard of review of motions for emergency stays. The grant of an emergency motion to stay a trial court's issuance of an injunction "—is an exceptional response." Garcia-Mir v. Meese, 781 F2d.1450, 1453-1454 (11thCir.1986). Moreover, there are three particular types of stays that are disfavored. 1) Stays that afford the moving party substantially all the relief it might obtain after the appeal on the merits; 2) Stays that disturb the

[6] See your state court counterpart for this rule, such as Pennsylvania Rule of Civil Procedure Rule 1531.
[7] Hillton v. Braunskill, 481 US 770, 776, 95 Led.2d.724,107 S.Ct. 2113(1987)

status quo; and 3) Stays that are mandatory as opposed to being prohibitory. Prairie Band of Potawatomi Indians v. Pierce, 253 F3d. 1234, 1247 n.4 (10thCir.2001)

Appellate Court review of the issuance of injunctions is on an abuse of discretion standard. The Appellate Court will uphold findings of fact unless they are clearly erroneous. Legal conclusions are subject to broad review and will be reversed if incorrect.[8]

[8] Buchaanan v. United States Postal Service, 508 F2d. 259 (5th Cir. 1975).

IV. THE INJUNCTION HAS ISSUED: CIVIL AND CRIMINAL CONTEMPT PROCEEDINGS?[9]

When there are allegations of violations of, or refusal to comply with, the injunction an employer (or the NLRB and once in a while the Union) may file a Petition/Motion for Contempt, or a Court may make a finding of contempt *sua sponte*. Contempt requires a willful, deliberate disobedience of a Court Order. Because the contempt power is used most frequently to force compliance with the order of the court the court's remedy is usually that of civil contempt. More rarely, and in order to punish for past or continuing violations of the order, courts will use criminal contempt powers. Often, in their mishandling of proceedings that are characterized as civil contempt in form, courts will convert such proceedings into criminal contempt proceedings. (See, *Bagwell*, infra) Because many courts have trouble distinguishing properly between the two kinds of contempt,[10] be sure to pay close attention to procedural issues in order to maximize rights and options—it may save a client a great deal of money at the end of the day, even if the underlying facts are not terribly great. (See, *Bagwell discussion*, infra)

A. Civil Contempt: Purposes and Characteristics.

Judicial sanctions in civil contempt proceedings are available for one of two discreet purposes:

1. To coerce or obtain compliance with the underlying injunction that was issued for complainant's benefit, it is intended to force compliance with the injunction in the future whereas criminal contempt is intended to punish for past violations;

[9] The flip side is: How do we, in appropriate circumstances, pursue civil contempt proceedings?
[10] A seemingly innocuous question to many state court judges like "What kind of contempt proceeding is this?" often provides fertile ground.

2. To compensate the complainant for losses sustained. This can include attorney fees, court costs, enforcement expenses, damages for lost revenues or property damage.

International Union, UMWA v. Bagwell, 521 US 821, 114 S.Ct. 2552, 129 LEd. 2d.642 (1994); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797 (1911); Schnabel Associates v. Building & Construction Trades, 487 A2d. 1327, 1338 (Pa. Super. 1985).

Civil contempt sanctions are intended primarily for the benefit of a private party, not as punishment, and not to vindicate the authority of the Court.[11] Civil contempt sanctions are remedial, conditional, and prospective.

The principal due process requirements of a civil contempt proceeding are notice and an opportunity to be heard. This means that the Respondent in a civil contempt proceeding must know what conditions are required for remission of sanctions and must have an opportunity to present evidence and legal argument on all issues.

However, be extremely careful here. **A civil contempt proceeding can be an extremely quick way for an employer to pursue a damage action without following the normal court procedures**. There have been cases where unions and their lawyers walk into a civil contempt hearing without having conducted or been accorded discovery, and at the end of the day came out facing a damage verdict in the amount of several hundred thousand dollars. If there is a claim for damages, attorney's fees, and costs during a civil contempt proceeding, conduct immediate discovery on all such allegations. Furthermore, as a matter of due process ("Notice and Opportunity to Be Heard") stay the civil contempt proceedings or minimally move to bifurcate issues of damages until discovery is complete.

[11] Never underestimate the ability of a judge who is very angry his/her order has been violated to lose track of this.

Procedurally, while the states vary on the precise stages of a civil contempt proceeding, there are essentially three:[12]

1. The issuance of the original order;
2. Following disobedience of the order by the Respondent, the Court issues a conditional order that:
    a. finds Respondent in civil contempt of Court;
    b. establishes a specified penalty that will be imposed unless the contempt is purged by compliance with the original Court order.
3. Imposition of the threatened penalty if Respondent continues in violation of the Court order. That could include incarceration (in which one holds the keys to the jailhouse door) or monetary penalties.

B. Criminal Contempt: Purposes and Characteristics.

Criminal contempt is unconditional and, like any criminal proceeding, is specifically intended to punish for noncompliance. Many courts, in their haste to vindicate their authority, will convert civil contempt proceedings into criminal contempt proceedings. A criminal contempt adjudication can result in a fine and/or jail time, even after the underlying order has been complied with. A Court Order directing the payment of a fine to a Governmental entity is an indication it is a criminal contempt proceeding.[13]

[12] For example, Pennsylvania often defines the steps as: 1) Rule to Show Cause why Respondent should not be held in contempt; 2) Answer and Hearing; 3) Rule absolute; 4) Hearing on the Contempt Citation; and 5) adjudication of contempt. See Schnabel, supra.

[13] See, Bagwell, Gompers, and Schnabel; see also; Pabst Brewing Co. v. Brewery Workers Local Union 77, 555 F2d. 146 at 150 (7th Cir. 1977) (finding that the fine for a violation of a *Boys Markets* injunction was criminal rather than civil where it was payable to the United States and was for punishment).

Criminal contempt proceedings require **some** of the constitutional safeguards that apply in criminal trials.

1. Respondent/Defendant is presumed innocent and can not be compelled to testify against him/herself.

2. A finding of criminal contempt requires proof beyond a reasonable doubt. In close cases, especially if you are able to invoke a right to trial by jury, this can make all the difference.

3. Rule 42 of the Federal Rules of Criminal Procedure requires notice "containing the essential facts constituting the charged criminal contempt and describe it as such".[14] Many states have similar requirements. See e.g., 42 Pa. C.S.A. § 4136.

4. There is a right to a jury trial in many situations and in many states in a criminal contempt proceeding. However, although 18 U.S.C. § 3692 provides a right to a jury trial "in all cases of contempt" involving the issuance of injunctions in all cases arising out of "a labor dispute," it apparently does not really mean what it says. It does not apply to contempt proceedings for violations of injunctions issued under Section 301 LMRA nor those initiated by the NLRB in regard to secondary boycotts.[15] However, a jury trial was found to be necessary in state court contempt proceedings in Bagwell, infra, where the Court imposed 52

[14] U.S. v. Barnett, 376 U.S. 681(1964)
[15] Madden v. Grain Elevator Flour and Feed Mill Workers, 334 F2d. 1014 (7thCir.1964), cert. denied, 379 US 967 (1965); Pabst Brewing Co., supra.; but see, Pittsburgh Des Moines Steel v. USWA, 633 F2d. 302, 310-311 (3rd Cir. 1980).

million dollars in fines for alleged widespread violations of a state court injunction during the 1989 UMWA Pittston strike.

C. Bagwell: Extreme Facts Illustrate Basic Principles.

During the 1989 UMWA strike against the Pittston Coal Company a Virginia State Court issued an injunction against the UMWA. It later found the union in contempt of Court for several hundred alleged violations of the injunction. In contempt hearings the Court imposed over 64 million dollars in fines against the union, later reduced to 52 million dollars, ordering that most of the monies be paid to state and local governments. The state court refused to vacate the fines even after the underlying strike was settled between the Union and the Company. This case gave the Supreme Court the opportunity to consider "whether contempt fines leveled against a union are coercive civil fines, or are criminal fines that constitutionally could be imposed only through a jury trial." United Mine Workers v. Bagwell, 512 U.S. 821, 823, 114 S.Ct. 2552, 2555 129 L.Ed.2d 642 (1994).

In relevant part, the Court found as follows:

1. Criminal contempt proceedings require the protections of the Constitution and summary adjudications of indirect criminal contempt are not permitted.[16]
2. Serious criminal contempt involving imprisonment of more than six (6) months evokes the right to a jury trial.
3. Civil contempt proceedings do not implicate the right to a jury trial.

[16] Indirect criminal contempt is for actions committed out of the presence of the Court. Direct criminal contempt is for those actions committed in the presence of the Court, say, for example, an inappropriate comment to a judge or a deliberate defiance of a judge's order while in the presence of the judge.

4. A fine is for civil contempt only if the contemnor has the opportunity to purge, i.e. to comply with the underlying order.

5. Serious contempt fines of 52 million dollars constituted criminal contempt that could only be imposed through a trial by jury.

6. Courts may impose non-compensatory petty fines for contempt without conducting a jury trial. Note: "petty" fine can still be very steep for our clients, and especially for Local Unions. While the Court left that question for another day, the Court in Bagwell noted, in footnote 5, that a $10,000 fine does not trigger a right to a jury trial.

D. Agency Issues in Defending Against Contempt Allegations

Often, union members engage in conduct, sometimes authorized and sometimes not, which forms the basis for employer contempt actions against unions. Historically, claims of damage during the course of contempt proceedings are used to further attack unions. These claims of damage often include requests for attorney fees, court costs, property damage, and lost revenues stemming from the alleged contemptuous activity. To prevent the use of such tactics, many jurisdictions have adopted legislation that defines the limits of union liability and provides guidelines by which union liability is determined.

Under federal law, the language limiting agency liability is found in 29 U.S.C. § 106 in the Norris-LaGuardia Act. 29 U.S.C. § 106, enacted in 1931, limits the criminal and civil liability of labor organizations to activity that is proven to have occurred with the authorization or participation of the union leadership or by ratification by the leadership after it occurred.

However, in cases arising under Section 301, LMRA, the Courts have found that agency is to be analyzed with resort to the common law rules of agency. 29 USC § 185(b)(e).

1. Unions are generally held responsible, however, for organized mass action by their members. United States v. United Mine Workers of America, 77 F.Supp. 563 (DC DC 1948), aff'd 177 F.2d 29 (CA DC 1949), cert. denied, 338 U.S. 871 (1949).

2. Such liability applies to the foreseeable consequences of mass actions but not unplanned violence unless clear proof of the union's participation, authorization, or ratification can be demonstrated. Kayser-Roth Corp. v. Textile Workers Union, 479 F.2d 524 (6th Cir. 1973), cert. denied 414 US 976 (1973). Gajkowski, supra.

3. The Supreme Court has held that the liability of unions for damages caused by strikes that breach collective bargaining agreements must be determined through the application of common law agency analysis because such actions fall under § 301 of the LMRA. Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979); see also, Coronado Coal v. United Mine Workers of America, 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963 (1925). In order to be liable, union must be shown to have instigated, participated in, supported, ratified, or encouraged the activity.

4. In damages arising from contempt of court adjudications, unions may not be assessed damages that arise from purely legal activity, i.e. vendors refuse to cross a legal picket line.

5. Under Rule 65(d) of the Federal Rules of Criminal Procedure nonparties can be held in violation of an injunction if the nonparty had notice of the injunction and is "in active concert or participation" with the Union already enjoined; that issue being a factual issue for the Court.[17]

E. Appeal of Contempt Adjudications.

The general rule is that only final orders are subject to the appellate jurisdiction of the Courts of Appeals. 28 USC § 1292. Criminal contempt fines and penalties may be appealed as soon as imposed; there remains nothing more for the Court to do.

A civil contempt order may not be appealed before sanctions are imposed and before it is reduced to judgment. U.S. Steel Corporation vs. Fraternal Association of Steel Haulers, 601 F.2d. 1269 (3rd Cir.1979), Schnabel Associates, supra.

Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, the district court maintains jurisdiction to maintain the status quo and enforce its orders while the appeal is pending.

[17] Marshall v. Blasters Local 29, 30 Fed.R.Serv.2d.866 (S.D.N.Y.1980).

V. FIRST AMENDMENT CONSIDERATIONS.

While an injunction may have issued, and you may be facing contempt proceedings or even Section 8(b)(4) proceedings from the NLRB, unions to this point still have First Amendment rights.[18] Such rights should be utilized in the face of such legal threats.

Governments hold title to parks, streets, and sidewalks. Those "—have immemorially been in trust for the use of the public and , time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions". "Parks, streets, and sidewalks belong to the people as "privileges, immunities, rights, and liberties." Hague v. CIO, 307 US 496,514-516(1939)

In Thornhill v. Alabama, 310 US 88(1940) the Court declared unconstitutional a law prohibiting loitering and picketing, noting that "streets are natural and proper places for the dissemination of information and opinion". Also see the companion case, Carlson v. People of State of California, 310 US 106(1940).

Local permit ordinances set out procedures for obtaining permits for use of public streets, parks, and sidewalks. Be creative in situations and seek to obtain permits for mass, peaceful demonstrations under the First Amendment where injunctions or NLRB 8(b)(4) proceedings normally would raise obstacles. For example, SEIU Building Services has obtained permits from Cities for peaceful mass actions in situations where the Company and the NLRB have stated that without the issuance of such permits they would have proceeded under Section 8(b)(4)[19]

[18] There is more than a little sarcasm in this statement. There is a tension between the protections of the First Amendment and restrictions contained in Section 8(b)(4) which has been commented on in many Court decisions. That tension was not satisfactorily resolved by the Supreme Court in DeBartolo (485 US 568(1988). Moreover current NLRB thinking on such issues (the rat, petitions to regulatory agencies etc) threatens to further erode First Amendment protections of unions and their members.

[19] There is increasing amounts of First Amendment litigation concerning permit issues in many states. Should that arise in the course of your work, contact the state ACLU. This office also has substantial pleadings available if such issues do arise.

VI. CRIMINAL PROCEEDINGS

Criminal contempt proceedings raise criminal law issues rarely encountered by union labor lawyers in injunction actions. However, more frequently there are mass arrests or individual arrests in connection with injunction proceedings that do not result in criminal contempt proceedings but result instead in prosecution under state criminal statutes such as Disorderly Conduct, Trespass, Obstruction of Highways, and Criminal Mischief. Some of these are planned, involving non-violent civil disobedience, yet some of these are unplanned as well.

A full discussion of such issues is beyond the scope of this paper but there are some basic things we can do that can minimize an individual's entanglement as well as a union's potential liability for acts of its members:

1. Have a criminal lawyer available to handle such situations.
2. A Union particularly active in such matters should have a separate legal defense fund available to provide monies for bail, fines, and attorney fees. A sample Legal Defense Fund Document can be provided. [20]
3. For individuals doing civil disobedience and/or who know that they will be risking arrest in advance, it is helpful to meet before and to answer questions, or minimally to provide a Question and Answer Form that will answer most anticipated questions people face in arrest situations. (Attached as Appendix A is a sample Question and Answer Form that can be adapted for various jurisdictions.)

[20] Care should be taken here in regard to agency issues. A union should be directly involved in such a legal defense fund only when it has directly endorsed the underlying activity the Fund is providing monies for, involving peaceful activities. If the underlying actions resulting in criminal charges were not authorized by the union, and involve acts of violence and/or property damage, legal defense fund monies from a Fund set up by and directly tied to the Union should not be used. See, Carbon Fuel, supra.

4. Remember that such situations involve a dynamic that is different that the normal criminal case for two reasons. [21]

   a. First, in most jurisdictions first time offenders will be eligible for some sort of pretrial diversion program that leads to the dismissal of charges and expungement of the arrest record. These often involve payment of Court costs and community service, that often the union can take the initiative in arranging. For example, this could include voter registration, work on health care issues etc.

   b. Second, if large numbers are arrested most Courts do not have the ability or inclination to conduct full trials on minor arrests arising out of labor disputes. That will give you a fair amount of flexibility in reaching an acceptable resolution.

[21] A discussion of strike misconduct/reinstatement issues is beyond the scope of the paper but should be carefully considered even when peaceful civil disobedience is engaged in.

CONCLUSION

In an era of increasing conservatism in the Courts and at the NLRB it is crucial we are prepared to defend our clients creatively when they engage in mass actions and other creative strategies. In any such situation, where possible, meet with the clients early on in any such campaigns to point out where legal pitfalls might arise and to minimize any potential legal entanglements.

APPENDIX A

April 2004

COMMON QUESTIONS ON BEING ARRESTED IN PEACEFUL DEMONSTRATIONS, WHILE LEAFLETING, AND/OR FROM DOING CIVIL DISOBEDIENCE

INTRODUCTION

This is not a detailed discussion but is meant to only highlight the most common questions that arise in peaceful demonstrations or while organizing where the possibility of arrest exists in Pennsylvania. It is not a substitute for personal legal advice tailored to specific facts of a specific arrest.

1. Where can I pass out leaflets?

You can pass out leaflets in public spaces that are considered public property. The most common example is sidewalks and public parks. You have no legal right to pass out leaflets on private property, like stores and shopping malls, even if open to the public. There are several exceptions to this rule. If owners of private property let one group solicit they have to let all groups solicit. Some owners of private property, for purposes of the law, acquire a public character, for example public authorities such as stadium authorities. There is a very large open question about the increasing tendency of large private interests to "privatize" public spaces to ban free speech activity. Examples include, several casinos in Las Vegas and the Mormon Church in Salt Lake City. Potential issues arising in this area include PPG Plaza in downtown Pittsburgh which the building owners contend is private.

2. Do we need a permit to demonstrate, and if so, do we have to pay for it?

You need a permit if you are demonstrating in a public park or if you will be marching in the street. Other than a nominal administrative or processing fee it is probably unconstitutional to charge a permit fee, with the ACLU we have obtained an injunction declaring the City Permit ordinance unconstitutional and blocking the City from charging costs when permits are issued. You do not need a permit if you are marching on the sidewalk or simply gathering in a small demonstration on the sidewalk. In those situations, to avoid misunderstandings and unintended conflict with the police we suggest that the local police station be notified as a courtesy.

You probably need a permit for a sound system if you want to use one. It is an open question if you need a permit for a bullhorn. Legally we do not believe you do. However, the police often claim you do but we are usually able to work that out.

3. What are examples of activities I might be arrested for and those that I might not be arrested

for?

a. Leafleting in public areas: Generally you will not get arrested for this unless you stray onto private property and ignore warnings to get off private property.

b. Peaceful Demonstration (Rally speakers etc.): Generally you do not risk arrest so long as sidewalks and public access areas are not being blocked. In those situations someone should be designated to be a contact with the police in case there are problems.

c. Civil Disobedience: (Blocking sidewalks, streets, refusing to leave private areas etc.) Generally, you are warned and given an opportunity to leave. This is not always the case and you could get arrested for this.

d. Marching in Streets Without a Permit: If police want to push it you can be arrested for this.

e. Arguing with Police: Police may overreact but it is a losing proposition to argue with them on the street. You often end up being charged with resisting arrest or assault on a police officer. Note, even if the police officer's arrest of you is illegal, and even if his force is excessive, you do not have the right to resist the arrest or defend yourself.

4. Have the police and Courts been more restrictive in the wake of 9/11?

Actually that began in the wake of the anti-globalization demonstrations in Seattle in 1999.September 11 and the "Patriot Act" passed shortly thereafter only accelerated these trends. Since that time we have witnessed the following:

a. More aggressive police tactics in major demonstrations (Philadelphia, D.C., Miami etc.)

b. The designation of "free speech areas", or pens where demonstrators are directed and herded into.

c. Arrests for conduct that in the past would not have led to arrests.

d. More serious charges for conduct that in the past would only have led to minor citations.

e. Increased surveillance of activist groups.

5. What could I get arrested for in demonstrations?

a. The most common charges stemming from arrests in peaceful demonstrations are Disorderly Conduct, Obstructing Traffic, or Trespass, all summary offenses carrying maximum fines of $300 and maximum jail sentences of 90 days in jail. This can be heard and adjudicated by a magistrate, usually involving one hearing. It is rare for anyone to receive a jail sentence on these charges.

b. The most common misdemeanor charges include more serious levels of Disorderly Conduct and Trespass as well as Obstructing Administration of Law and Failure of Disorderly Persons to Disperse. This can only be adjudicated in regular criminal court, usually involving several hearings, where the right to a jury trial exists.

c. If you demonstrate at federal buildings, and particularly at military bases, you could face federal charges, which are often more serious.

d. CAUTION: Avoid confrontations with police officers. If arrested, do not resist or struggle. Altercations with police officers can lead to Resisting Arrest (Misdemeanor) or Aggravated Assault (Felony) charges. This is where a danger of jail time arises.

6. If there is a risk I may get arrested, are there things I should be aware of?

a. Do not get arrested if you are not a U.S. Citizen, it may impact your immigration status and harm your chances of obtaining Lawful Permanent Resident status or citizenship. A conviction for more serious offenses ("Aggravated Felonies" or crimes of "Moral Turpitude", which both have very broad definitions) could subject you to deportation from the United States

b. If you are on probation or parole, you are required to report any arrest to your probation or parole officer. An arrest can be considered a violation of probation or parole.

c. If you do not live in the Pittsburgh area, you should understand the Court hearings are not scheduled at your convenience, and you will be required to return to Pittsburgh for Court hearings.

d. Do not carry weapons of any kind, even a pocket knife. You inadvertently could find yourself facing a weapons charge.

e. If you take medication, do not assume you will have access to it while in custody waiting to be released on bail.

f. To avoid problems getting released on bail, carry a picture ID, preferably a Pennsylvania license.

g. If you are a minor, your case may be handled separately from others in Juvenile Court, and you might not be released until a parent or guardian comes to pick you up.

h. If you are claustrophobic do not place yourself in danger of arrest. It could be several hours to one or two days before you are released, and you will spend much of that time in confined and small places.

7. Will the police warn me prior to arresting me?

Probably. In most situations, warnings are first given by private security and then the

police, and indeed some charges require a warning by the police. This is particularly true when the incident involves a simple trespass or perhaps leafleting on what might or might not be private property. However, warnings are not always given, and sometimes when given are not heard by everyone.

8. What will happen when I am arrested?

a. Summary Offense: If you are arrested for a summary offense, you will be given a Citation on site by a police officer or at one of the police stations. Then you will have (coordinated through the Union or the organization you are working with) to fill out a form on the Citation, entering a plea of not guilty and requesting a hearing. In this situation, you will be in custody only a short time or not at all.

b. Misdemeanor or Felony: If arrested for a misdemeanor or a felony, you will go through a processing procedure at the County Jail and Municipal Courts Building. You will be interviewed by the bail agency, photographed, and fingerprinted. You will then be taken before a magistrate who will set a date for a Preliminary Hearing (usually within 7 to 10 days) and will set bail. If you are from the area and have no prior record, you should be released without having to post bail. Please note that the processing before you are released on bail will take many hours, and could take as long as one to two days. At the Preliminary Hearing, the magistrate will decide if there is sufficient evidence to hold the case for regular criminal court involving several hearings and potentially a jury trial.

9. What will be the result of the criminal charges?

It depends on the factual circumstances, and each circumstance is unique. However, in over 1,000 arrests in Western Pennsylvania and Ohio involving peaceful demonstrations, leafleting, and civil disobedience, in the last 10 years, no one has been sentenced to jail except for some persons who, on principle, refused to pay a fine. We do remain concerned over the increasing tendency of the authorities to react more harshly in demonstration situations.1 There have been more felony charges in the last few years. Those have mostly been against anti-war and anti-globalization protestors, and to this point, not against union demonstrators.

10. What else should I be aware of? **(**Affinity Groups and Training**)**

If you are going to a demonstration where there is a risk of arrest, or if you are engaging in civil disobedience, it is helpful if you do it with an affinity group and/or persons who can do support work for those who get arrested, including getting the names of people arrested to

1 Decisions often need to be made in the course of legal proceedings, the principal one often being whether to proceed to trial on the original charges filed or to accept a plea bargain to reduced charges. While it is encouraged, that people act as a group as much as possible, that decision is a decision each individual needs to make, with the advice of lawyers, the decision depending upon individual facts of the case and each individual's circumstances.

lawyers and legal observers. If you have never been arrested before in a demonstration, it is strongly encouraged that you participate in a civil disobedience training session before you place yourself in a position where there is a possibility of arrest. That tends to minimize confrontations with the police that may dilute the message of the demonstration, and tends to minimize legal entanglements.

11. Can legal observers be helpful?

Legal observers can be helpful witnesses and help keep track of who was arrested and who may have been injured in the course of an arrest. Legal observers need to understand that they should not put themselves in risk of arrest. Legal observers also need to understand that they are often targeted for arrest by the police.

12. Do I have to answer questions asked by police after I am arrested and will the police tell me what I am being charged with?

While sometimes police will tell you the charges at the time of arrest you usually will not know for several hours what the exact charge is. You have no obligation to answer police questions at the time of the arrest. Generally, police will not read you "Miranda warnings" at the time of your arrest, and that failure only becomes important when the police case against you depends on a statement you made after you were in police custody. Miranda warnings are generally read to you by the Magistrate at the time of your Preliminary Arraignment, when bail is also set, and a date for a Preliminary Hearing is set.

13. How is bail set and what will happen if a refuse to give my name and address?

If you are arrested for a felony or misdemeanor you will be interviewed by a Court employee on background information (name, address, phone number, references etc.) for purposes of setting bail. It is best if you have picture identification and it is best if that is Pennsylvania identification. If you fail to give the person background information bail will not be set. Sometimes persons engage in bail solidarity and refuse to give that information, including refusing to give their name. People should understand the consequences of doing that, with some exceptions you generally will not be released on bail without giving that information.2

2 Sometimes individuals have used bail solidarity in an attempt to clog up the system and force the release of persons and the dismissal of charges. Generally that only has a chance of working when hundreds of people are arrested and the system has no room to put everyone. It partially worked in Seattle in 1999 and did not work in Philadelphia in 2000. The system can easily absorb several dozen demonstration arrests.