

To: Labor/Community/Religious Coalition in Support of the  
Striking Newspaper Workers

From: Ellis Boal

Re: Government by Injunction

Date: December 3, 1995

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Michigan courts used to hold there was no such thing as peaceful picketing. All picketing was thought coercive. Today peaceful picketing is recognized and has constitutional protection.<sup>1</sup> But courts say sometimes it goes too far and they issue injunctions.

Violators are subject to civil or criminal contempt. The difference is that in civil contempt violators are said to hold the keys to the prison in their pockets. They can go free by ending their defiance.<sup>2</sup> Criminal contemnors are punished unconditionally.<sup>3</sup>

Though easy to state, the distinction is elusive in practice.<sup>4</sup> Moreover,

the contempt power also is "liable to abuse".... Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy "often strikes at the most vulnerable and human qualities of a judge's temperament" ... and its fusion of legislative, executive, and judicial power "summons forth ... the prospect of 'the most tyrannical licentiousness..'"<sup>5</sup>

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1 Book Tower Garage v UAW Local 415, 295 Mich 580, 295 NW2d 320 (1940).

2 In re Contempt of Dougherty, 429 Mich 81, 413 NW2d 392 (1987).

3 Sword v Sword, 399 Mich 367, 385-86, 249 NW2d 88 (1976).

4 Mineworkers v Bagwell, \_\_\_ US \_\_\_, 114 S Ct 2552, 2557-59, 146 LRRM 2641 (1994); Frankfurter & Greene, The Labor Injunction, MacMillan Co, New York, 1930, p 127.

5 Mineworkers v Bagwell, \_\_\_ US \_\_\_, 114 S Ct 2552, 2559, 146 LRRM 2641 (1994). See also Frankfurter & Greene, op cit,  
(continued...)

On October 24 the Coalition proposed to the striking unions "a consistent mass action strategy to win the strike." It observed:

We cannot allow the strike to be defeated by injunctions.... The United Auto Workers owes its existence to sit-down strikes in Flint, Detroit and elsewhere, and to mass picketing in defiance of injunctions.... The UMW, under John L. Lewis, won several strikes after ignoring injunctions. Civil rights marchers openly defied injunctions in the 1950s and 1960s in a successful effort to bring down the vicious Jim Crow laws.... Injunctions, fines and jail sentences have been applied against workers throughout the history of labor's struggles. But these punitive actions have been countered and defeated where sufficiently large number of workers have been mobilized. In this situation, we need to mobilize ... to prevail.

Under one conception of this strategy Coalition members -- non-striking unions and their members and the public -- would be the ones to defy the injunction and shut DNA down. They would do this in solidarity with the striking unions, and conceivably at their request. The idea is taken from an early post-war strike of the Mine, Mill, & Smelters that succeeded in the face of a Taft-Hartley injunction. The story was later dramatized in a movie.<sup>6</sup>

Would such action by Coalition members make the striking unions liable for contempt? Would the non-striking actors themselves be liable? The answers seem to be (1) probably not and (2) perhaps.

(1) Common law agency principles determine whether a union is liable for the acts of others.<sup>7</sup> If officers and members of the striking unions defied the injunction they and the unions could be liable,<sup>8</sup> though union members are not per se agents of

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5(...continued)  
pp 131-33, 200, 202, 205.

6 Salt of the Earth, Director Herbert Biberman, Producer Paul Jarrico, 1954, b/w, 94 min, MPI Home Video Release, Oak Forest, IL, 60452.

7 Consolidated Coal Co v Local 2216 UMWA, 779 F2d 1274, 121 LRRM 2156 (CA7, 1985).

8 But see Spallone v US, 493 US 265, 110 S Ct 625 (1990); 29 USC 411.

the union.<sup>9</sup> A union is not responsible for the mass action of its members in an unauthorized strike or for failure to use its best efforts to curtail one.<sup>10</sup>

Coalition members pose a different issue for union liability; they are not striking union members. The DC circuit held in June that persons acting solely in a spirit of labor solidarity with the Longshoremen's union in a labor dispute were not the union's legal agents. The solidarizing parties -- Japanese unions in this case -- operated under a different contract, and the Longshoremen had no right to control them. Right to control is an essential prerequisite of agency. Therefore the union was not responsible even though it overtly requested the acts of the Japanese in labor solidarity.<sup>11</sup>

The court disagreed with prior decisions of the NLRB and the eleventh circuit in the same case.<sup>12</sup>

Michigan law is not required to follow federal law, especially when the federal courts are split. But Michigan independently seems to agree with the DC circuit. In a 1987 UAW case the court of appeals said a union may be held responsible for the acts of its officers and members. But though the injunction applied to "persons acting in concert or participation with" the union, the court vacated a contempt fine against the union. It wasn't shown the officers were involved, or even that the injunction violators were union members. Violators were apparently just members of the community. The burden of proof was on the employer, the court noted, and the standard for civil contempt was a "clear and unequivocal" showing, more stringent than the usual preponderance standard in civil actions.<sup>13</sup>

The "clear proof" standard used by the federal courts in labor injunctions for showing participation does not apply to

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9 PMTA v Longshoremen's Local 1291, 909 F2d 754, 135 LRRM 2114 (CA3, 1990).

10 Southern Ohio Coal Co v UMWA, 551 F2d 695, 94 LRRM 2609 (CA6, 1977), cert denied 434 US 876 (1977); Carbon Fuel Co v UMWA, 444 US 212, 100 S Ct 410 (1979).

11 Longshoremen, ILA v NLRB, 56 F3d 205, 149 LRRM 2449 (CADC, 1995); Restatement (Second) of Agency § 14, comment b.

12 Dowd v ILA, 975 F2d 779, 141 LRRM 2489 (CA11, 1992); Longshoremen (Coastal Stevedoring Co), 313 NLRB # 53, 144 LRRM 1273 (1993).

13 Acorn Building Components v UAW Local 2194, 164 Mich App 358, 416 NW2d 442 (1987).

state courts.<sup>14</sup> But in an early case from the UP, the Michigan supreme court refused an injunction against the city trades and labor council, a forerunner of sorts to today's metro AFL-CIO's. The council had intervened in the dispute and met with the company. The striking union had used violence, and members of the council were in the crowd during some of the incidents. But there was no proof the council -- as distinguished from the union -- itself advised, ordered, directed, or incited the unlawful acts.<sup>15</sup>

Most Coalition members have no relation to the striking newspaper unions other than a feeling of solidarity. Accordingly their acts should not be chargeable to the striking unions.

(2) The injunction enjoins people acting "in concert" with the striking unions. In Michigan someone not a party to an injunction can be held for contempt if there is a relation of "privity" of the alleged contemnor and someone or something which is a party, e.g. a striking union.<sup>16</sup> Privity is usually thought of as a mutual or successive relation to the same right of property.<sup>17</sup>

If the court ruled on all the arguments the Coalition could have made in opposing the injunction, that could be a factor. Whether this plus solidarity amounts to privity would be an interesting argument. Orders of this breadth or greater were the occasion for denunciations of "government by injunction" in the platforms of the major political parties early in this century.<sup>18</sup>

If Coalition members were held in privity, there is still no presumption they knew of the injunction. The prosecutor must establish knowledge. In the absence of personal service, proof would entail a showing such as that the injunction has had wide publicity, it was posted, and the member was in an area where it

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14 29 USC 106.

15 Escanaba Mfg Co v Trades and Labor Council, 160 Mich 656, 125 NW 709 (1910).

16 Michigan v Powers, 97 Mich App 166, 293 NW2d 752 (1980); cf Great Lakes Greyhound Lines v UAW, 341 Mich 290, 67 NW2d 105 (1954).

17 Black's Law Dictionary, 4th Revised Edition, 1968, p 1361.

18 Frankfurter & Greene, op cit, pp 1, 83-84, 86-89, 112, 123-26, 200; 15 ALR 387; 7 ALR4 893.

was communicated.<sup>19</sup> At present the injunction has not been posted at the Sterling Heights south gate, even though it says it can be served by posting there.

If charged with criminal contempt, Coalition members would have the right to remain silent and a reasonable doubt standard.<sup>20</sup> Since contempt is a petty offense in Michigan, with the statutory maximum being 30 days and \$250, there would be no right to a jury trial.<sup>21</sup> If found in violation a Coalition member could be ordered to pay any damages DNA or a scab<sup>22</sup> sustained as a result of the violation.<sup>23</sup> This could include attorney fees.<sup>24</sup>

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19 Cross Co v UAW Local 155, 377 Mich 202, 139 NW2d 694 (19-66); Great Lakes Greyhound Lines v UAW, 341 Mich 290, 67 NW2d 105 (1954).

20 Acorn Building Components v UAW Local 2194, 164 Mich App 358, 416 NW2d 442 (1987).

21 MCLA 600.1715; People v Goodman, 17 Mich App 175, 169 NW2d 120 (1969); Frankfurter & Greene, op cit, pp 56, 107, 128-30, 190-98, 225-26. Cf Mineworkers v Bagwell, \_\_\_ US \_\_\_, 114 S Ct 2552, 146 LRRM 2641 (1994); In re Contempt of Dougherty, 429 Mich 81, 91-92 n 14, 112 n 21, 413 NW2d 392 (1987).

22 MCLA 600.1721, 1968 practice commentary.

23 MCLA 600.1721; In Re Contempt of Rochlin, 186 Mich App 639, 465 NW2d 388 (1990).

24 Homestead Development Co v Holly Township, 178 Mich App 239, 443 NW2d 385 (1989).