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# Temporary Restraining Orders as Unconstitutional Prior Restraints on Mass Labor Picketing: *United Farm Workers v. Superior Court*, 14 Cal. 3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975)

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Note

# Temporary Restraining Orders As Unconstitutional Prior Restraints On Mass Labor Picketing

*United Farm Workers v. Superior Court*, 14 Cal. 3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975).

## I. INTRODUCTION

The temporary restraining order is an ex parte injunction, issued without notice or prior hearing. In *United Farm Workers v. Superior Court*,[1] the constitutionality of an ex parte temporary restraining order issued in an agricultural labor dispute was attacked under the first and fourteenth amendments to the federal Constitution and article I, section 2 of the California constitution[2] as a prior restraint on free speech. This case presented the issue of whether peaceful mass labor picketing is subject to ex parte injunctive restraint.

In *United Farm Workers*, the United Farm Workers of America, AFL-CIO, was engaged in mass picketing at the William Buak Fruit Company apple orchard. The fruit company filed a complaint alleging interference with ingress and egress to the orchard, inducement of fear of physical violence, and trespass for the purpose of coercing employees to cease work. Interference with the harvesting of the apple crop valued in excess of $500,000 was cited as the irreparable injury required for injunctive relief.[3]

1. 14 Cal. 3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975).
2. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST., art. I, § 2.
3. The adequacy test for injunctive relief requires that the injury threatened be irreparable, or as sometimes stated, that the legal remedy be inadequate. To prevail on a motion for a temporary restraining order, the movant must show (1) a substantial probability of success at trial and (2) immediate danger of irreparable injury. Nebraska Dep't of Roads v. Tiemann, 510 F.2d 446, 447 (8th Cir. 1975); Minnesota Bear-

Neither the labor union nor any of its individual members were given formal or informal notice of the request for the temporary restraining order.[4] The Superior Court of Santa Cruz County issued a temporary restraining order on September 30, 1974, which enjoined the labor union from entering the fruit company's property or physically obstructing persons or vehicles entering or leaving the property. The restraining order also "limited the number of pickets allowed at or near the fruit company property . . . and required the permissible number of pickets allowed . . . to be spaced at certain minimum intervals."[5] The temporary restraining order was replaced with a preliminary injunction[6] on October 17, 1974 after an adversary hearing. The issue was appealed to the California Supreme Court on a writ of prohibition[7] challenging whether the temporary restraining order could constitutionally be continued. The court found substantial free speech interests involved in picketing and held that the first and fourteenth amendments to the federal Constitution and article I, section 2 of the California constitution require notice and opportunity to be heard before the issuance of temporary restraining orders when substantial free speech interests are at stake.[8]

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ing Co. v. White Motor Corp., 470 F.2d 1323, 1326 (8th Cir. 1973); CAL. CIV. PRO. CODE § 527 (West Supp. 1976).

4. 14 Cal. 3d at 905-06, 537 P.2d at 1239, 122 Cal. Rptr. at 879.
5. *Id.* at 906 n.2, 537 P.2d at 1239 n.2, 122 Cal. Rptr. at 879 n.2.
6. A temporary restraining order is granted ex parte upon request to the court, is limited in time and self-dissolves at the expiration of the term fixed.

   A preliminary injunction is granted after a curtailed hearing at which the use of affidavits from both sides is common, and at which oral testimony is often taken. A preliminary injunction lasts only until a trial on the merits or earlier dissolution by the court. State *ex rel.* Beck v. Associate Discount Corp., 161 Neb. 410, 73 N.W.2d 673 (1955).

   A permanent injunction is granted after a full trial on the merits and is unlimited in duration. *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1055 (1965).
7. The defendant's use of a writ of prohibition avoided the general lack of appealability of temporary restraining orders. As a general rule, a temporary restraining order is not appealable because it is not a final decree. The writ of prohibition, however, is immune from the finality rule. Prohibition provides a useful method to collaterally attack the lower court's action. *Developments in the Law—Injunctions, supra* note 6, at 1060, 1077.
8. 14 Cal. 3d at 913, 537 P.2d at 1244, 122 Cal. Rptr. at 884. *But see* Hudgeons v. NLRB, 44 U.S.L.W. 4281 (U.S. Mar. 2, 1976), where the Court held that rights and liabilities of labor pickets are dependent exclusively upon the National Labor Relations Act because first amendment rights were not involved. Thus the only basis for relief in a case like *United Farm Workers* may be the free speech provisions of state constitutions.

## II. THE COURT'S ANALYSIS

The court's analysis[9] began with an examination of two procedural defects of the ex parte proceeding: a shortage of factual and legal contentions, and the problem of drafting ex parte orders. In ex parte proceedings, only the complaining party's side of the story is available.[10] The Superior Court which issued the restraining order had only a verified complaint and three one-page affidavits signed by interested parties.[11] The purpose of the ex parte procedure is to preserve the status quo in cases where the subject matter is in imminent danger of destruction or removal or where giving prior notice to the defendant would result in the inability to provide any final relief at all.[12] The statutory scheme of sharply limited duration of ex parte orders is designed as a safeguard to restrict the possible adverse effects of orders granted without notice or opportunity to be heard.[13] Thus, the ex parte procedure subjects a defendant to injunctive restraint when he has heard nothing prior

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9. The question of mootness arises in all cases of temporary restraining orders. The order is of limited duration, lasting only ten days in California or 20 days if good cause is shown, and self-dissolves at the end of the time period or is replaced by a preliminary injunction after a hearing. Even though the order has expired, a court may find the case not moot if it believes that review will continually be defeated by short term orders. 14 Cal. 3d at 907, 537 P.2d at 1240, 122 Cal. Rptr. at 880, *quoting from* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). *See* Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1680-86 (1970). If ex parte restraining orders with a duration long enough to last through the harvesting of a grower's crop could easily be obtained there would be no way to test whether protected rights were being unconstitutionally infringed. Walker v. City of Birmingham, 388 U.S. 307 (1967). *But see In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

10. There does not seem to be any case law defining the applicable standards for judging the quality and character of an affidavit offered in support of a motion under [Federal Rule of Civil Procedure] 65(b). Since a temporary restraining order generally is sought on short notice, in a case of pressing need, and Rule 65(b) expressly permits its issuance on the presentation of a verified complaint, it probably is unsound to hold the affidavits to too rigorous a standard. . . . [T]he evidentiary quality of the affidavit must be sufficient to convince a court that there is immediate and great danger of irreparable injury that necessitates the temporary dispensing of some trappings of due process.

C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, Civil § 2952, 515-16 (1973).

11. 14 Cal. 3d at 908, 537 P.2d at 1241, 122 Cal. Rptr. at 881.

12. *Developments in the Law—Injunctions*, *supra* note 6, at 1060.

13. Carrol v. Commissioners of Princess Anne, 393 U.S. 175, 183 (1968).

to the serving of the order and of which he has had no opportunity to resist.[14]

To frame a temporary restraining order, the court must act quickly; the facts must be found fast.[15] Hindered by a lack of presentation by both sides, the resulting order may be vague or overbroad.

Vagueness exists when the delineation of the range of prohibited activity lacks particularity. Vagueness creates several problems. First, vague laws may not provide adequate warning. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[16] Second, as a corollary to the fair warning problem, the uncertain meanings of vague laws lead people to stay further away from the boundary of the forbidden conduct than if explicit standards were provided. Where a vague law abuts upon sensitive areas of basic first amendment freedoms, ". . . it operates to inhibit the exercise of those freedoms."[17] Third, because vague laws fail to provide explicit standards, those who apply vague laws must make basic policy decisions. If arbitrary and discriminatory application is to be prevented, then explicit standards must be provided.[18]

Breadth refers to the range of activity within the parameters of the order. Even if an order is clear and precise, it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected conduct as well as unprotected activity.[19] The vice of an overbroad law is not only the actual application, but the deterrent impact, or chilling effect, on protected conduct.[20] "The paradigm of a 'narrow' law is . . . one which focuses with specificity on harm-inducing features and circumstances of action which are only fortuitously related to expressive and associational features."[21] Because there is a lack of presentation by both sides which hinders drafting of orders in the narrowest terms that will accomplish the pin-pointed objective, ex parte restraining orders may sweep more broadly than necessary.

14. *Developments in the Law—Injunctions*, *supra* note 6, at 1060.
15. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION, 34-35 (1930).
16. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971).
17. Grayned v. City of Rockford, 408 U.S. 104, 109, *quoting from* Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).
18. 408 U.S. at 108-09.
19. 408 U.S. 104 (1972); *cf.* Broadrick v. Oklahoma, 413 U.S. 601 (1973).
20. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853-54 (1970).
21. *Id.* at 859.

## III. THE COURT'S OPINION

The court held that the restraining order affected first amendment rights in two respects: (1) by limiting the right of access to the migrant labor camp on the fruit company's property and (2) by limiting picketing.

The court found a first amendment right of access "which belongs both to labor camp inhabitants and to union organizers or attorneys who seek to visit them."[22] The court, without discussion, relied upon cases holding that the occupants of a labor camp have a right to the free flow of information and visitors.[23] For the court, the fruit company's fifth amendment private property rights of the labor camp located on company property did not suspend the worker's first amendment guarantees of freedom of speech, religion and assembly.[24] The court found that cases involving picketing at shopping center malls[25] were not pertinent to this case, apparently because the union's organizational activity had a direct relation to the fruit orchard being picketed.[26]

In contrast, the dissenting opinion of Justice Clark argued that "the right to private property is protected against intrusion by one asserting his right to speech."[27] The dissenting opinion subordinated private property rights to the first amendment only in the limited situation where (1) the property[28] has assumed "to some significant degree the functional attributes of public property devoted to public use,"[29] (2) the thought to be communicated relates directly to the property[30] and (3) no reasonable alternative means is available by which the thought can be communicated.[31]

When must private property be opened to the free exercise of

22. 14 Cal. 3d at 910, 537 P.2d at 1242, 122 Cal. Rptr. at 882.
23. Peterson v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974); United Farm Workers v. Mel Finerman Co., 364 F. Supp. 326 (D. Colo. 1973); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972); Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971).
24. *See* cases cited note 23 *supra.*
25. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), *rev'd*, Hudgeons v. NLRB, 44 U.S.L.W. 4281 (U.S. Mar. 2, 1976); Marsh v. Alabama, 326 U.S. 501 (1946).
26. For the direct relation test see Lloyd Corp. v. Tanner, 407 U.S. 551, 565 (1972).
27. 14 Cal. 3d at 920, 1237 P.2d at 1249, 122 Cal. Rptr. at 889.
28. *See* cases cited note 25, *supra.*
29. Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972).
30. 407 U.S. at 564.
31. *Id.* at 567.

first amendment rights?[32] The test of assuming the functional attributes of public property of *Central Hardware* will not apply to the fruit company's orchard because there is no open-ended invitation to the public to use the orchard for any purpose.[33] Even if the property does serve some function traditionally served by public property, access need not be permitted where an alternative forum for the exercise of first amendment activity can be demonstrated and where the picketing bears no direct relation to the use to which the private property is being put.[34] Under *Central Hardware*, the owner of the labor camp located on private property cannot be subjected to the demands of the first and fourteenth amendments.

The court found that the tenants and occupants of migrant labor camps have a right to the free flow of information and visitors. The position of rightful occupants of land would appear to be greater than that of a pamphleteer exercising the right of the general public's access to shopping center malls. The "rights of ownership of the land . . . must bend to the countervailing rights of those persons rightfully living on his land."[35] Lodging employees on private property cannot provide immunity from the free flow of ideas and information.[36] The exclusion of a right of access to the labor camp would deprive the organizers of their only effective forum of communication[37] because there are no public streets on which first amendment activities could be carried out. *N.L.R.B. v. Babcock & Wilcox Co.*[38] held that union organizers who seek to solicit union membership may intrude on an employer's private property if no alternative means exist for communicating with employees. Where reasonable attempts by non-employees to communicate through usual channels with employees is ineffective because of the inaccessibility of employees, the right to exclude from property has been required to yield to the extent necessary to permit communication of information on the right to organize.[39] For migrant

32. Under the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970), the protection of union organizational activity does not extend to agricultural employees. *Id.* § 151(c). Thus, there was no statutory right of protection for the organizational picketing in the instant case.
33. 407 U.S. at 565.
34. *Id.* at 564, 566. *See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 127 (1972).
35. 331 F. Supp. at 623.
36. 478 F.2d at 83.
37. *Cf.* Lloyd Corp. v. Tanner, 407 U.S. at 567.
38. 351 U.S. 105 (1956).
39. *Id.* at 112. *But see* Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), where the Court held that the allowable intrusion on property rights is limited to that necessary to facilitate the employee's

workers located in a labor camp on company property, there seems to be no adequate forum except the labor camp itself.[40]

The California Supreme Court held that short of a trial, under the first and fourteenth amendments to the federal Constitution and article I, section 2 of the California constitution, labor picketing may be curtailed only after the defendant has had notice and opportunity to be heard, or when the plaintiff has made a reasonable and good faith effort to give notice.[41] The court invalidated the ex parte restraining order of the trial court which had limited the mass picketing to a specified number of pickets spaced at certain minimum intervals.[42]

First amendment protection is afforded labor picketing because "picketing involves expressive conduct within the protection of the First Amendment."[43] To the extent that free speech interests are present in peaceful picketing, then ex parte restraint without notice or opportunity to be heard constitutes an impermissible prior restraint upon first amendment freedoms. Where an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary as grounds for denying a motion for preliminary injunctive relief.[44]

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§ 157 (29 U.S.C. § 157) rights. 407 U.S. at 545. Thus, where agricultural workers have no rights under the N.L.R.A., there is no right to intrude on private property.

40. Because the labor camp is the residence of the migrant workers, reasonable limits may be imposed upon organizational activity there, under the general rule for residential picketing. Velez v. Amenta, 370 F. Supp. at 1257 (D. Conn. 1974); United Farm Workers v. Mel Finerman Co., 364 F. Supp. at 329 (D. Colo. 1973); Peterson v. Talisman Sugar Corp., 478 F.2d at 83 (5th Cir. 1973).
41. 14 Cal. 3d at 912, 537 P.2d at 1243, 122 Cal. Rptr. at 883. The court continued to recognize an exception where violence is present in the dispute. *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).
42. Neither the number of pickets allowed, the spacing intervals nor the formula used by the trial court is set out in the opinion. For a statutory definition of mass picketing, see NEB. REV. STAT. §28-814.02 (Reissue 1975) (two pickets within fifty feet of any entrance or within fifty feet of any other picket).
43. Police Dep't v. Mosley, 408 U.S. 92, 99 (1972). *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Hughes v. Superior Court, 339 U.S. 460 (1950); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215 (1974).
44. A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) (any delay in the exercise of first amendment rights constitutes irreparable injury); Henry v. Greenville Airport Comm'n, 284 F.2d 631 (4th Cir. 1960) (no discretion to deny relief when clearly established

Although labor picketing involves expressive conduct within the first amendment, it constitutes more than "pure speech."[45] This is so because ". . . it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it subject of restrictive regulation."[46] Where picketing involves more than publicity, competing state interests allow the state to enjoin peaceful picketing aimed at preventing the effectuation of public policy.[47]

*United Farm Workers* held that notice and a hearing are required prior to enjoining mass picketing down to a numbers and distance formula as utilized by the trial court. Because picketing is more than pure speech, it seems theoretically possible to enjoin those aspects of picketing which constitute more than pure speech. Picketing maintained in the form of massing of persons resulting in coercion by the mere force of numbers has been held not to be within the constitutional guarantee of free speech and assemblage.[48] If the courts can enjoin picketing in mass, then the court can reduce or dissolve the mass by limiting the number of pickets.[49] To the extent that the aspects of picketing which constitute more than free speech are divisible from the free speech aspects of picketing, then mass picketing may be enjoined down to a numbers and distance limitation to restrain the non-speech aspects such as violence, physical coercion and intimidation. Review by the courts of picketing that involves more than an expression of ideas is a

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that plaintiff is being denied a constitutional right); Glenwal Dev. Corp. v. Schmidt, 336 F. Supp. 1079 (D. P.R. 1972) (no need to exhaust administrative remedies in order to seek injunctive relief from violation of constitutional right); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970) (deprivation of first amendment rights constitutes irreparable and immediate injury); Brass v. Hoberman, 295 F. Supp. 358 (S.D.N.Y. 1968).

45. American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215 (1974); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942).
46. Bakery Drivers Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring).
47. 354 U.S. at 293.
48. Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); United States Elec. Motors, Inc., v. United Elec. Workers Local 1421, 166 P.2d 921 (Super. Ct. Cal.; Los Angeles County 1946).
49. Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). For an example of a statutory limitation on mass picketing, see NEB. REV. STAT. § 28-814.02 (Reissue 1975).

review of the balance struck by a state between picketing involving more than publicity and the competing interests of state policy.[50] When effective channels of communication remain open under a numbers and distance formula used to prevent violence and assure reasonable access, ex parte restraint of mass picketing would not be a prior restraint upon the free speech aspects of picketing because the expressive element will not have been suppressed.[51] The result in *United Farm Workers* seems wrong when viewed with an eye to the fact that non-speech aspects of mass picketing may be enjoined without restraining free speech.[52]

The second basis for the court's decision that the ex parte restraining order could not stand turned on the fact that the request was for a temporary restraining order—a purely interlocutory decree which is not final and does not determine the suit.[53] To grant a restraining order at this stage of the proceedings would affect only one party to the action—the picketers who are being restrained.[54] Granting a restraining order gives the fruit grower tremendous leverage in the contest. By the time of the hearing to replace the temporary restraining order with a preliminary injunction, the fruit crop already would be harvested. In essence, granting the temporary restraining order had the effect of giving the fruit grower all the relief which could be obtained by a final decree.[55]

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50. American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215 (1974); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957).
51. Cameron v. Johnson, 390 U.S. 611 (1968); *cf.* Davis v. Francois, 395 F.2d 730 (5th Cir. 1968) (invalidating a Louisiana anti-picketing ordinance); Medrano v. Allee, 347 F. Supp. 605 (S.D. Tex. 1972) (invalidating a Texas mass-picketing statute for overbreadth and vagueness), *rev'd in part*, 416 U.S. 802 (1974).
52. The restraining order must be narrowly drawn and must satisfy the requirements of due process. Chrysler Credit Corp. v. Waegele, 29 Cal. App. 3d 681, 105 Cal. Rptr. 914 (Ct. App. 1st Dist. 1972). The court construed CAL. CIV. PRO. CODE § 527 (West Supp. 1976) so as to narrow the scope of the statute to a "situation requiring special protection to a state or creditor interest." 29 Cal. App. 3d at 686, 687, 105 Cal. Rptr. at 916.
53. California State Univ. v. NCAA, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (Ct. App. 1st Dist. 1975).
54. The injunction cannot preserve the so-called *status quo* . . . . The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted.

F. FRANKFURTER & N. GREENE, *supra* note 15, at 201 (1930).
55. Major v. Sowers, 297 F. Supp. 664 (E.D. La. 1969); Knuppel v. Adams, 12 Ill. App. 3d 708, 298 N.E.2d 767 (1973); City of Monmouth v. Payes,

## IV. UNRESOLVED ISSUES

Notice and opportunity to be heard now are required in all California cases where substantial free speech interests are at stake, unless shown that it was not reasonably possible to notify the opposing counsel and to provide an opportunity to be heard.[56] But little guidance is given by the court as to what type of notice and hearing are constitutionally adequate. The court declined to state any specific procedural steps which would satisfy minimal procedural due process in all cases.

The purpose of the holding that notice is required must rest upon the notion that proceedings without notice are inherently suspect. Failure to give notice offends our traditional ideas of fair play when notice can be given easily and quickly. Since notice implies the right to be heard, what type of hearing is required? A hearing requires trial of an issue or issues of fact. Trial of issues of fact necessitate opportunity for both sides to present evidence and an opportunity for both sides to argue the effect of the evidence to the court.[57] How far does *United Farm Workers* require the court to proceed? Of course, informal notice and a hastily arranged hearing must be preferred to no notice at all.[58] The form of notice most reasonably calculated to give actual notice must be employed.[59] To the extent that the procedure of ex parte restraining orders is unavailable when substantial free speech interests are at stake, then the procedure followed in granting temporary

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39 Ill. App. 2d 32, 188 N.E.2d 48 (1963). *Contra*, United States v. Atlantic Richfield Co., 297 F. Supp. 1060 (S.D.N.Y. 1969), *aff'd per curiam sub nom.* Bartlett v. United States, 401 U.S. 986 (1971).

56. 14 Cal. 3d at 914, 537 P.2d at 1245, 122 Cal. Rptr. at 885. *See* FED. R. CIV. P. 65(b). "The amended subdivision [65(b)] continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant." Proposed Rules of Civil Procedure, 39 F.R.D. 69, 125 (1966) (Advisory Committee's Note).

57. Sims v. Greene, 161 F.2d 87 (3d Cir. 1947).

58. Goss v. Lopez, 419 U.S. 565 (1975); Granny Goose Foods, Inc. v. Teamsters Local 70, 415 U.S. 423 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

> Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done.
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> . . . The subdivision [Rule 65(b)] is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

39 F.R.D. at 124-25.

59. 339 U.S. at 314-15.

injunctions seems like the next logical alternative. That procedure is notice and affidavits presented by both sides. If the allegations are conflicting, oral testimony ought to be heard; otherwise, the trier of fact is left in the position of preferring one affidavit over another. The emphasis, whatever the procedure to be worked out, after *United Farm Workers* should be to afford both sides a fair opportunity to present their side prior to the issuance of injunctive relief.

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