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LABOR AND SMALL BUSINESS — UNIFORMITY OR CONFUSION

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When this great country was attempting to work its way out of the throes of the depression, one of the devices used was the granting of federal recognition to concerted activities for the mutual aid and protection of the employees.[1] The labor movement at that time, rejoicing at this victory, may not have realized that it was also exposed to the vicissitudes of legislation.[2]

Prior to this recognition, with the exception of a few attempts to apply anti-trust and extortion laws, labor activities had been regulated almost exclusively by the states. The majority of the states attempted to mould labor problems to the framework of the common law. When Congress recognized the rights of collective bargaining, in enacting the Wagner Act, it was hardly anticipated that a Federal-State problem would emerge. Since Congress had recognized the right of labor to bargain collectively, labor saw in the recognition a chance to avoid suits in the state courts. Historically, the employers had favored the services of state courts for the reason that relief from unlawful union activities was effective and speedy, in the form of labor injunctions.[3]

It was a logical development for labor to contend that the Federal Acts, by giving recognition to concerted action, had ousted the states of jurisdiction. In the early days of the Act this argument or contention was usually reserved for removal cases. When an employer was besieged with a labor problem and applied to the state court for injunctive relief, as has been done frequently in the past, the union would move to have the case removed to the Federal Court. The main contention was that the Federal Act had pre-empted the field of labor relations as it affects commerce and thus had ousted the state courts of jurisdiction.[4] Thus, once the case was removed to the Fed-

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1 § 7 of NIRA, ch. 90, 48 Stat. 195 (1933). This section fell when the NIRA was declared unconstitutional in Schechter Poultry v. United States, 295 U.S. 495 (1935). The idea was expanded in 49 Stat. 449 (1936), 29 U.S.C. § 151 (1958) and 61 Stat. 34 (1947), 29 USC § 141 (1958).

2 As the pattern has emerged Congress has taken major action in the field of labor management at 12 year intervals.

3 Petro and Koretz, Labor Relations Law, 1953 Ann. Survey Am. L. 265, 266.

4 Assoc. Tel. Co. v. Communication Workers, 114 F. Supp. 334 (S.D. Cal. 1953); Castle and Cooke Terminals v. Local 137 ILWU, 110 F. Supp. 247 (D. Haw. 1953), Overton v. IBT, 115 F. Supp. 764 (W.D. Mich. 1953).

eral Courts, it would be dismissed because the Federal Courts could not enforce the proscription of the Federal Act in a private suit, or at least, its power to grant injunctive relief was statutorily limited to the granting of enforcement to orders of the NLRB.[5]

The unions had some measure of success with this theory, in fact over the years the concept of pre-emption has grown to such proportions that Congress has had to get into the area again. The much litigated case of the *San Diego Building Trades Council v. Garmon*,[6] has carried the concept of pre-emption to a new extreme, where some activities of labor are not amenable to common law tort law of the state. The *Garmon* case carried the trend of other cases[7] to exclude state courts in damages as well as injunctions.

It is the purpose of this paper to comment on the recent decision and the changes it has prompted in labor legislation.

The Garmon brothers operated a small retail business and were approached by the union to sign an agreement with it to retain in their employ only those workers who were already members of the union or who would apply for membership within thirty days. The Garmons refused to sign such agreement claiming that it would be violations of the Federal Labor Acts.[8] The Union began to picket the business. The company sued in the state court for injunction and damages for losses sustained as a result of the picketing. While this action was pending the employer began representation proceedings before the NLRB, but the Board declined jurisdiction on grounds that the amount of interstate commerce involved did not meet the Board's standards for taking jurisdiction. In view of the Board's refusal to take the case, the state courts felt that it had jurisdiction to act,[9] therefore issued the injunction and awarded damages. On

[5] Amazon Cotton Mill v. TWU, 167 F.2d 183 (4th Cir. 1948).

[6] 359 U.S. 236 (1959). The case has been in the courts for a number of years. For history of case see 273 P.2d 686 (Calif. Ct. App. 4th Dist. 1954); 45 Cal. 2d 657, 291 P.2d 1 (1955); 351 U.S. 923 (1956); 353 U.S. 26 (1957); 49 Cal. 2d 595, 320 P.2d 473 (1958).

[7] Garner v. Teamsters Union, 346 U.S. 485 (1953); Guss v. Utah Labor Board, 353 U.S. 1 (1957).

[8] Union agreement clauses are permissible under LMRA if union is collective bargaining agent—in this case it was not. State court constantly referred to this agreement as a closed shop agreement which was illegal under LMRA.

[9] The Board had announced a rule that retail stores should have annual direct imports of $1,000,000 or indirect imports of $2,000,000. The Garmons in previous years had sold materials, originating and manufactured outside of the State, of a value exceeding $250,000.

Indeed when the Board revised its jurisdictional limit upward (originally it had been lower than $1,000,000 direct and $2,000,000 indirect), it was generally thought that this would leave a larger area for state control.

See Dissenting Opinion in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957),

first hearing before the Supreme Court, the judgment as to the injunction was reversed on the grounds that the Federal Act had preempted the field. The second time before the Supreme Court the concept was applied to the damages, when the basis of the state court action was that the picketing constituted a tort under State law.[10]

This decision seems to have gone practically the whole distance in ousting the states of jurisdiction over labor activities in industry affecting commerce, unless the Board had ceded jurisdiction pursuant to Section 10(a) of the Act.[11] In the absence of such agreement the states would lack the power to furnish a remedy under their own law for non-violent tortious conduct which is not federally protected, but is federally prohibited.

The broad language of the majority opinion would place the small employer in a hiatus for judicial relief from any activity of the union which could be "arguably subject" to either Section 7 or Section 8 of the Act.

It is the Labor Board alone which has the power to determine that the activity complained of is "arguably subject" to the Act.[12] Until the Board has specifically shown, by rule or decision or strong

(a companion to the principal case on its first hearing before the Supreme Court) in which Justice Burton states: "The Board does not 'cede' jurisdiction when it declines to exercise its full jurisdiction; it merely allows the States to exercise their pre-existing authority." (18)

[10] The Union Placard read:

"A F of L Picket
Millman Union 2020
Teamster Union 36
Invites employees to join"

The State Court found that the picketing was not for the purpose of educating the workers and to persuade them to become members, (activity protected by § 7 of LMRA) but was for the sole purpose of putting pressure on customers and suppliers to prevent them from dealing with the firm until it had signed the agreement (activities prohibited by § 8(b) LMRA and state law).

[11] § 10(a) of the Taft-Hartley Act provides: "That the Board is empowered by agreement with any agency of any state or territory to cede to such agency jurisdiction over all cases in any industry (other than mining, manufacturing, communication and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of the Act, or has received a construction inconsistent therewith."

[12] 359 U.S. 236, 244-245. Mr. Justice Frankfurter stated: "At times it is not clear whether a particular activity is regulated by Section 7 or 8 or was perhaps outside both of these Sections. But Courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the NLRB. What is without the scope of this Court's authority cannot remain within a states' power and states' jurisdiction too, must yield to the exclusive primary competence of the Board (Citing other cases)." (Parenthetical material added.)

precedent that the activity is not within the Act, i.e., neither protected nor prohibited, the state courts are powerless to act.

The *Plumbers v. County of Door*[13] case demonstrates this most vividly. A municipal corporation of Wisconsin entered into a contract with several contractors to erect a new courthouse for Door County. One of the contractors, a successful bidder, hired nonunion labor. The Union, on facts parallel to the *Garmon* case, picketed the employer and the courthouse. In the action before the state court it was argued that the County of Door as a subdivision of the State government was expressly exempted from the Federal Act, thus State law was not pre-empted, therefore the state court could give effective relief. In an opinion by Mr. Justice Black, the Supreme Court, in reversing the State Court, said:

> "We do not, of course, attempt to decide whether the unions' conduct in dispute violates Section 8(b) 4, is protected by Section 7 or is covered by neither provisions of the labor Act. Those are questions for the Board to determine in a proper proceeding brought before it."

Thus it appears that until the Board has decided that the activity is not arguably subject to the Act, or is not protected and is not prohibited by the Act, both State and Federal Courts must "defer to the exclusive competence of the NLRB if the danger of conflict is to be averted."

This was the status of things when Congress decided to step into the labor picture again.[14] Although most of the authorities in the field of labor relations agree that the cases discussed above created an intolerable situation which could only lead to the frustration of the policy of the Labor Management legislation, there is some question, at least to the author, whether Section 701(a) and (b) is the best solution. Indeed, I suspect that this section may be productive of much mischief.

What the new Act accomplishes in this area can be summarized as follows:

(1) Board may decline jurisdiction over labor dispute by rule of decision or by published rules, but it cannot decline jurisdiction over any dispute over which the Board would have exercised control as of August 1, 1959.

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[13] Plumbers, etc. Local 298 AF of L v. County of Door, 359 U.S. 354 decided May 4, 1959.

[14] See § 701(a) Labor Management Reporting Disclosure Act of 1959.

(2) The cases rejected by the Board may be handled by the States.

It is apparent that the new Act, at the least, gives the states a hand in the labor field, where the *Garmon* case has held that they had none, but how much of a hand it gives is still undetermined and unknown. The language of the new Act sets only the minimum standard for the acceptance of jurisdiction. The Board cannot raise its dollar value standard of jurisdiction from that of August 1, 1959, but there seems to be nothing that would prevent the Board from reducing the dollar value standard. The Board, if budgetary consideration would permit, could increase its jurisdiction to the full extent of that given by Congress, but if this is impossible, then the states may accept the cases declined by the Board.

It may well be that the Congress thought that this section would have either of two possible results, namely:

(a) That the states realizing that they now have a part to play in the area of labor management relations which have some effect on commerce, will enact legislation which would create state machinery which would provide means for effectuating the policy of the NLRA as amended, or

(b) That the Labor Board, realizing that a segment of commerce would be exposed to a hodge-podge of state regulations, and varied state court equity decrees, would be compelled to exercise the full statutory jurisdiction and accept every case.[15]

If the latter is the true purpose of this section, then considered in the light of the Board's present case load[16] and its long delay in processing the cases, this result may lead to administrative chaos.

Suppose because of budgetary and other considerations the Board does not exercise its full statutory authority. The question then arises upon whom rests the power to make the initial determination as to

[15] See Senate Labor Committee's Report No. 187, 86th Congress, 1st Session. The Committee in discussing this section as originally proposed indicated that it desired the result. This also seems to be the import of the discussion between Senator Kennedy and Senator Carroll. Senate Rep. 9-3-59 p. 16416, ff.

Even though the Supreme Court has held that the Board may decline to bring unfair labor practice action, it had not decided that the Board may decline jurisdiction in a representation proceeding. Office Employees v. NLRB, 353 U.S. 313 (1957) and Hotel Employees v. Leedom, 358 U.S. 99 (1958). These cases did not reach the question of Board authority to decline jurisdiction, but merely found that to refuse a whole industry as a class was to exercise its discretion in an arbitrary and unreasonable manner.

[16] Under present jurisdictional standards the Board processed about 13,000 cases a year and its present time lag for disposing of cases is about two years.

whether the Board will accept jurisdiction. In *Carolina Supplies and Cement Company,*[17] the Board noted the amount of time and personnel required to conduct the examination necessary to determine inflow and outflow figures for the purpose of jurisdiction. If the Board is to continue to make this determination, then it is possible for the Board to devote much of its time and personnel examining inflow and outflow figures, direct and indirect, only to have this effort productive of nothing other than a declination of jurisdiction.

In such an instance the parties could then start in the state courts or state boards. This is a lot of wasted motion adding nothing to the cause of industrial peace. On the other hand, if the states are to make the initial determination, by what standards are the states to be guided in a particular case where the employer contends that the Board could not take jurisdiction under its announced rules and the Union contends that it could take jurisdiction? Further, what dollar volume is to be considered—the dollar volume at the time the cause of action arose, which may be within the Board's announced rule, or the dollar volume at the time of the suit, which because of the effect of activity complained of, may be below the Board's standards? It would appear to be an unusually harsh rule to require an employer whose business is increasing to be held answerable, at the time of action, for the conduct or activity done at the time he was not amenable to the act, or conversely to compel an employer whose business is declining, to comply with a nonexistent duty to bargain in the future.

The new Act also permits the Board to decline jurisdiction over "any class or category of employers" by decision or rule. The language of the *Garmon* case taken in conjunction with Section 9(c)(1) and (2) of Taft-Hartley Act, may require a prior resort to the NLRB for a determination of the question of whether the conduct complained of is "arguably subject" to the protection or prohibition of the Federal Act.

Section 9(c) requires the Board to process representation suits, where a question of representation exists. In the two cases[18] which have been before the Supreme Court in which the Board declined jurisdiction even though there existed a representation question, the court reversed the Board and directed the Board to consider the representation petition.[19] It would appear that in a particular case involving an employer in a certain class or category, the Board may

[17] 122 N.L.R.B. 17, 43 L.R.R.M. 1060 (1958).

[18] Office Employees v. NLRB, and Hotel Employees v. Leedom, note 15 supra.

[19] The Board has now announced that it will exercise jurisdiction over hotels that do a gross annual business of $500,000.00. It still declines jurisdiction over residential hotels in which 75% of the guests reside by the month.

still have to make a prior decision on the conduct complained of, before the state court could come in and grant relief.[20]

The jurisdictional standards set by the Board are limitations on the Board proceedings rather than on the factual situation. This is best illustrated by looking at a concrete, though hypothetical fact situation.

Suppose a labor union approaches an employer for recognition as the exclusive bargaining agent. The union claims that the majority of the workers are sympathetic and will join the union. The company refuses to deal with the union, claiming that the state has a "right to work" law. At this time the company volume of business is below the standard set by the Board. The union begins to picket the employer. The company discharges all the known union sympathizers from its employment, and applies to the state court for relief. The state does not have a labor code as such, so under its common law rules the court awards damages and also issues an injunction against "stranger picketing." Now suppose the Board, as it may well do, revises its jurisdictional standards so as to include the business of the company. Can the union now petition the Board on the grounds that the company's business was always of such nature as to affect commerce and that the Federal Act was always applicable and therefore, there should be a citation for unfair labor practices, and reinstatement of the employees wrongfully discharged?[21] It would seem that the Union should be successful in this type of action, because Section 701 of the LMRDA which gave the state courts power to act was only a limitation on the Board proceedings, not a limitation on the fact situation. Now since the limitation on the proceedings is removed

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20 Meltzer, The Supreme Court, Congress and State Jurisdiction over Labor Relations, 59 Colum. L. Rev. 6 (1959).

21 It seems that even § 14(b) of Taft-Hartley Act would be of little or no aid in that this section only prohibits the making of union shop agreements under the Federal Act when the agreement would be illegal under state law. Here the objectives of the union would be protected by the Taft-Hartley Act, except for limitation of jurisdictional standards. Further, as long as the picketing remained peaceful and the business had some effect on interstate commerce, although not enough to warrant NLRB action, stranger picketing could not be enjoined by the state.

See Teamster Union v. Voight, 354 U.S. 284, 294, 295 (1957) where majority held: "the mere fact that there is picketing does not automatically justify its restraint without an investigation into its conduct and purposes. State courts no more than state legislatures can enact blanket prohibitions against picketing."

Although the Voight case involved intra-state business and state law against picketing to coerce the employer to put pressure on his employees to join a union, the United States Supreme Court expressly recognized the declared congressional policy to the same effect. Thus, it appears now where Congressional policy is involved, both State and Federal courts must defer to the Board.

the Board should be free to act under the Federal law which was technically applicable all the time.

Even if this obstacle is overcome, the question of what law is applicable is still a very formidable problem. The California court in the two *Garmon* cases tried both federal and state law. First, it applied the federal law because the business had some effect on commerce and was within the statutory jurisdiction of the Board and therefore should be entitled to the uniformity of treatment which the federal law afforded. Next the California court applied state law; as discussed above the court rejected on appeal. If Section 701 of the new act permits the courts of the states to apply their own law, then the employer and employees of these marginal industries are subjected to a hodge-podge of inadequate state rules.[22]

Although the *Garner, Guss, Garmon* line of decisions created an intolerable situation as far as labor-management relations are concerned, it is doubtful whether the 1959 Act has done more than substitute a new set of difficulties for an old set of difficulties.

It may be suggested that the 1959 legislation, like the legislation of 1947, was enacted in a climate which was not conducive to wholly objective considerations. The congressional disclosure of racketeering in the labor movement and the possibility that the "no man's land" of the three "G" cases provided a fertile field for such activities, may have created a desire for providing an immediate forum to which employers or unions may appeal for relief. But the time may now be at hand for Congress to take a long, clear, objective look at the entire field of labor management relations, rather than to continue to react to certain known evils with piecemeal legislation every twelve years.

Certainly labor management relations and industrial peace are too important in this day of speed and modern technology for even these marginal industries to be left to the devices of state courts dealing with common law tools which were not designed for the job to be done. We must recognize that industrial relations are a specialized field which require specialized and expert handling. This problem of Federal-State control and jurisdiction may be resolved more equitably by the creation of a United States Labor Court organized somewhat along the lines of the United States Tax Court. The Labor Court could be organized in divisions with each division sitting in various sections of the country.

[22] Thirty-eight of fifty states have no labor relations administrative agency. In these states the Superior Courts and Courts of Common Pleas would have to handle these labor disputes with the tools of the common law. Since the common law did not guarantee any labor rights as such, the results are, at best, unpredictable.

Labor problems affecting commerce, where Boards have declined jurisdiction and irreparable harm is threatened, could be carried to the Labor Court where both labor and management would have assurances of some uniformity of application of Federal law.

The Labor Court could also relieve the Federal Circuit Courts of the limitations of mere enforcement of Labor Board decrees. Although this proposal would add another step to the Federal Judicial process, it is felt that the certainty of uniform application of Federal Law to this vital area is preferable to the possibility of small business being exposed to the uncertainty of 50 different state laws, and the possibility of still being subject to Federal litigation.

The 1959 Act, Section 701(b) apparently recognized the necessity or desirability for such legislation, in that it provided for delegation of Board duties to three or more members as well as delegation to regional directors. But the author feels that the creation of a Labor Court would be more efficient and could perform in a larger and wider area in the labor-management field.