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SOME ASPECTS OF THE PROBLEM OF FEDERALISM IN THE FIELD OF LABOR RELATIONS

The price of Federalism is conflict. This conflict arises in virtually every field of federal regulation and is not peculiar only to the field of labor relations. The respective areas in which the state and federal governments may act concurrently or exclusively is not always clear. The general rule is that if the federal government has preempted the field relating to or affecting interstate commerce, the power of the state to act no longer exists. An examination of some of the early cases in our constitutional history will show that the current problems in the field of labor relations are not new problems at all. These cases reveal that an affirmative grant to Congress of power to regulate interstate commerce, coupled with the federal supremacy clause, will enable Congress to close the door completely to state regulation. The problem then becomes one of determining whether or not Congress has clearly manifested an intention either to permit or to preclude state regulation.

In some cases, however, when Congress undertakes to regulate a field in which the states had been previously free to regulate, Congress manifests no clear intention as to the surviving line of demarcation between state and federal power to act.

The enactment of the National Labor Relations Act (Wagner Act),[1] and to an even greater extent, its amendment by the Labor Management Relations Act (Taft-Hartley),[2] both of which regulate labor relations in the field of interstate commerce, has given rise to serious questions as to whether, and to what extent, such labor relations are still subject to the regulatory powers of the states. The cases which have arisen during the history of the above acts are not in harmony on the question whether and to what extent a state can act in certain factual situations.

Among the leading controversies are the following:

(1) The authority of state courts to grant relief against secondary boycotts, jurisdictional strikes and coercive union picketing.
(2) The authority of state courts to enjoin peaceful picketing.
(3) The jurisdiction of state boards to entertain representation

1. 49 Stat. 449 (1935), 29 U.S.C. 151 *et. seq.* (1956), (hereafter referred to as Wagner Act or N.L.R.A.).
2. 61 Stat. 136 (1947), 29 U.S.C. 141 *et. seq.* (1956), (hereafter referred to as Taft-Hartley Act or L.M.R.A.).

and unfair labor practice cases affecting establishments within their borders whose operations affect interstate commerce.

(4) The propriety of the policies of the National Labor Relations Board (N.L.R.B.) in declining jurisdiction over small enterprises having a relatively slight impact upon interstate commerce.

(5) The power of a state legislature to prevent interruptions of public utility services by law providing for seizure or compulsory arbitration.

The purpose of this article is to present the leading decisions on some of the above conflicts which have arisen under the N.L.R.A. and L.M.R.A. Emphasis will be placed on recent cases which are in conflict as to whether a state has jurisdiction.

I. *The Basis of the Doctrine of Preemption*

The general doctrine of preemption developed under Article VI of the United States' Constitution, the supremacy clause, is that when Congress passes a law on a matter within its jurisdiction it "preempts the field" and deprives the states of jurisdiction regardless of whether the states' laws are in coincidence with, complementary to or in opposition to federal law.

The United States Supreme Court faced this issue for the first time in 1820.[3] In *Houston v. Moore,* the court repudiated what it described as the novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, the state may legislate upon any subject on which Congress has acted, provided the laws are not contradictory and repugnant to each other. The heart of the matter as this court saw it was that the Congressional legislation goes as far as the Congress "thought right." This was true even though important provisions have been omitted from an act, or that other provisions which were included might have been more extensive or more wisely drawn. Since Congress presumably did not intend to sanction such opposition, the will of Congress is ascertained as well by what the legislature has not declared, as by what they have expressed. This decision remains as the foundation of the doctrine of "preemption" or "occupation of the field" doctrine and has been approved through the years.[4]

However, as the national economy grew and more federal regulations were required, this presumption that Congress had preempted

3. Houston v. Moore, 5 Wheat. 1 (U.S. 1820).
4. Charleston and Carolina Railroad Co. v. Varnville Furniture Co., 237 U.S. 597 (1915).

the field did not settle all of the problems. Often, for example, Congress chose to regulate only a limited portion of a particular field. This caused perplexing questions of jurisdiction to arise. If Congress had not decided or even considered what substantive regulations would be appropriate in other portions of the field, there should be no reason for applying the presumption that by failing to regulate comprehensively, Congress intended to leave the balance entirely free from state control. The more reasonable assumption would be that Congress chose to regulate only partially, precisely because it felt that state regulation of the balance of the field was adequate and, therefore, federal regulation was not required.[5] In this area the familiar rule was laid down that the intent to supersede the exercise by the state of its police power is not to be inferred but must be clearly manifested.[6]

The Supreme Court has further stated, however, that Congress need make no express reference to the question of state law or jurisdiction, but the operation of state law and state agencies will be excluded by implication if the federal enactment indicates an intent to provide a uniform rule.[7]

A final facet of this brief outline of the doctrine of preemption remains. Assuming that Congress expressly or by implication preserved to the states the right to legislate in an area, nevertheless such legislation may not be applied if the state regulation in any way conflicts with or is inconsistent with the federal legislation.[8] This theory here again reflects a presumption that Congress did not intend to sanction state action in any field which stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[9]

In many of the decisions in which the United States Supreme Court has arrived at a solution to the vexing problems created by the division of governmental powers, the court has spoken about the Congressional intent to occupy the field and has made fine distinctions which at times border on the metaphysical.[10] Thus, it is clear that whenever Congress legislates in a new field previously occupied solely by the states, grave questions will arise as to the validity of state regulation, unless Congress makes its intention clear. Although the

5. Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946); South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938).
6. Kelly v. Washington, 302 U.S. 1 (1937).
7. Cooley v. Board of Wardens, 12 How. 299 (U.S. 1851).
8. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).
9. Hines v. Davidowitz, 312 U.S. 52 (1941).
10. Polish National Alliance v. N.L.R.B., 322 U.S. 643 (1943).

above principles of preemption won't settle any of these problems, their application to the field of labor relations should come as no surprise.

II. *Conflicts Which Arose Under the Wagner Act*

Prior to 1937 when the Supreme Court sustained the constitutionality of the N.L.R.A.,[11] the assumption was that only the states had authority to regulate labor relations in manufacturing and mining industries, even though the products of these industries enter the channels of interstate commerce.[12]

The N.L.R.A. undertook to deal with the improper practices on the part of employers which deprived employees and unions of their rights. Since most of the state legislation was in the field of union unfair labor practices the question of jurisdiction of state courts rarely arose except in representation cases.

The power of the N.L.R.B. to prevent the unfair labor practices enumerated in section 8 of the N.L.R.A. was set forth in section 10(a) which stated that:

"The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practices (listed in section 8) affecting commerce. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."[13]

With the possible exception of the reference to "exclusive jurisdiction" of the N.L.R.B. in section 10(a) of the N.L.R.A. no guides to its construction were laid down by Congress. Furthermore the language in 10(a) was not intended by Congress to vest exclusive jurisdiction in the N.L.R.B. as against the labor boards of the states.

The leading cases which arose under the N.L.R.A. support the above conclusions. In one of these early cases, the Wisconsin Employment Relations Board found that the union had engaged in mass picketing, threatening employees, picketing their domiciles and obstructing factory entrances and the free use of the streets; this conduct was an unfair labor practice under the Wisconsin Act.[14] The Wisconsin board ordered the union to cease and desist from this conduct. The question before the United States Supreme Court was whether the enactment of the N.L.R.A. excluded regulation of such activity by the Wisconsin board. The Supreme Court affirmed saying:

11. N.L.R.B. v. Jones and Laughlin Steel Corporation, 301 U.S. 1 (1937).
12. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
13. 49 Stat. 449 (1935), 29 U.S.C. 160(a) (1956).
14. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

The federal act was not designed to preclude a state from enacting legislation limited to the prohibition of this type of activity. The committee reports on the federal act plainly indicate that it is not "a mere police court measure" and that authority of the several states may be exerted to control such conduct. Furthermore, this court has long insisted that "an intention of Congress to exclude states from exerting their police power must be clearly manifested." Congress has not made such employee conduct as is involved in this case subject to regulation by the federal board. If the order of the state board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. Since no such right is affected we conclude that this case is not basically different from the common situation where a state takes steps to prevent breaches of the peace in connection with labor disputes. We cannot say that the mere enactment of the N.L.R.A. without more excluded state regulation of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal act or that the status of any of them under the federal act was impaired. Indeed if the portions of the state act here invoked are invalid because they conflict with the federal act, then so long as the federal act is on the books it is difficult to see how any state could under any circumstance regulate picketing or disorder growing out of labor disputes of companies whose business affects interstate commerce. However, there can be no state action which impairs, dilutes, qualifies or subtracts from the rights guaranteed by the N.L.R.A.

One should note here, that the company in the above case was subject to the N.L.R.A. and also that the N.L.R.B. had not undertaken to exercise the jurisdiction which that act conferred on it.

In a later case,[15] however, the United States Supreme Court struck down a Florida statute which required business agents to obtain licenses as a condition precedent to representation of any employee group and also required the filing of certain information returns, in default of which the unions could be enjoined. The majority of the court felt that the police power of the state had to yield to the federal policy that employees should have a free and untrammeled choice in the selection of their bargaining agents.

Both of the above cases deal with the problem of what state laws are in conflict with the N.L.R.A. An implication from these two decisions is that state labor boards would have concurrent jurisdiction even over interstate businesses so long as the N.L.R.B. did not exer-

15. Hill v. Florida, 325 U.S. 740 (1945).

cise its jurisdiction and so long as the state law was not contrary to the N.L.R.A.

The next problem which should logically be considered is whether a state law which conformed to the N.L.R.A. might also be invalid. New York early passed a "baby Wagner Act" and reached the conclusion that where there was no conflict between the state and federal act, the exercise of jurisdiction by the state board was proper.[16]

In 1947, the United States Supreme Court in a leading decision seemed to destroy any doctrine of concurrent jurisdiction which existed.[17] This was the first case under the N.L.R.A. which called for invocation of the preemption presumption theory. The *Bethlehem Steel Company v. New York State Labor Relations Board* case arose as a result of state intervention in the matter of recognition of foremen's unions. In this case the board undertook to certify bargaining agents for units of supervisors. Congress had not itself decided at that time whether supervisors should constitute appropriate bargaining units, but it had delegated to the N.L.R.B. power to decide that question. Although at the time the state board originally acted the N.L.R.B. had been of the opinion that units composed of supervisors were inappropriate, by the time the case reached the United States Supreme Court, the national board's view had changed. Since then, there was no conflict between the order of the New York board and the policy of the N.L.R.B., the question presented was whether by delegating to the N.L.R.B. power to decide questions concerning representation involving supervisors, Congress had occupied that field to the exclusion of state authority.

In declaring that the order of the New York board was beyond its authority, the court might have rested the case on the ground that the construction given by the state board to its own statute created a conflict between the act and the federal law. Here, however, history provided the guide.[18] Mr. Justice Jackson speaking for the court said that because the duty of the employer to bargain with labor organizations was defined in the N.L.R.A., Congress had intended to preempt the field so far as making such a legal obligation, and therefore the states lacked any power to enforce the same obligation upon a business subject to the N.L.R.A.

The court used the following language with regard to the certification by the state board:

16. Davega-City Radio v. New York State Labor Relations Board, 281 N.Y. 13, 22 N.E. 2d 145 (1939).
17. Bethlehem Steel Co. v. New York State Labor Relations Board, 331 U.S. 767 (1946).
18. Houston v. Moore, 5 Wheat. 1 (U.S. 1820).

"The state argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employees are engaged and has asserted control of their labor relations in general. We do not believe this leaves room for the operation of the state authority asserted."

"The National and State Boards have made a commendable effort to avoid conflict in this overlapping state of the statutes. We find nothing in their obligations, however, which affects either the construction of the federal statute or the question of constitutional power insofar as they are involved in the case since the national board made no concession or delegation of power to deal with this subject. The election of the national board to decline jurisdiction in certain types of cases for budgetary or other reasons presents a different problem which we do not now decide."[19]

The above language and the reasoning of the court was so vague that interpretations of the decisions by the states were often diametrically opposed. There was some belief that the decision prohibited all state action in industries affecting commerce with respect to representation proceedings and unfair labor practices.[20] On the other hand, the Wisconsin view was that the concurrent jurisdiction of its state board was unchanged.[21]

In *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board,* a labor organization had filed a petition for certification with the N.L.R.B. while the negotiations were pending between management and labor for renegotiation of a contract. The union withdrew its petition from the national board before the latter had acted upon it and filed the petition for certification with the Wisconsin board. The Wisconsin act was different from the N.L.R.A. with respect to the procedure to be followed in determining the bargaining unit. The United States Supreme Court reversed the Wisconsin Supreme Court citing the *Bethlehem Steel Company* case saying:

We went on to point out that the national board had jurisdiction of the industry in which the particular employers were engaged and asserted control of their labor relations in general. Both the state and federal statutes had laid hold of the same relationship and had

19. Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 776 (1946).
20. Pittsburgh Railway Operators, 357 Pa. 379, 54 A. 2d 891 (1947).
21. La Crosse Telephone Corporation v. Wisconsin Employment Relations Board, 336 U.S. 18 (1947).

provided different standards for its regulation. Since the employers in question were subject to regulation by the N.L.R.B., we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the N.L.R.B. had not acted in the particular cases before us.

There was much speculation after the *Bethlehem Steel* and *La Crosse Telephone* cases as to just when the Supreme Court intended to bar state action. What this speculation overlooked was that the presumption of Congressional occupancy of the regulated field underlie the Supreme Court holdings in both cases. In a later case the Supreme Court made this underlying premise explicit when it referred to the N.L.R.A. as an instance in which Congress had acted so unequivocably as to make clear that it intends no regulation except its own.[22]

The serious problem not solved by any of the above cases is the result when the N.L.R.B. declines jurisdiction, then can the state board act in a manner which is consistent with the N.L.R.A. Although the Supreme Court in the *Bethlehem Steel* case[23] by way of dicta indicated that state boards might act where the N.L.R.B. has specifically delegated jurisdiction, or where budgetary, workload or other considerations prevent such actions, it is by no means clear that such delegation will be countenanced by the Supreme Court.

From the above cases, the law as it existed in 1947 when Congress passed the L.M.R.A. may be summarized as follows:

State legislatures still had power to restrict or forbid compulsory union membership agreements[24] and state courts still had jurisdiction to grant relief against such union misconduct as violence, threats, trespass and mass picketing. The states, however, were not free to confer on state agencies or state courts concurrent jurisdiction in the field of unfair labor practices by employers, nor to pass any legislation which interfered with the rights of employees to engage in peaceful concerted activities or the selection of bargaining representatives.

III. *Conflicts Which Arose Under the Taft-Hartley Act*

Unlike the N.L.R.A. in which Congress dealt only with the protection of the right of employees to organize and to engage in concerted activities for mutual aid or protection, the L.M.R.A. governs

22. Rice v. Sante Fe Elevator Corporation, 331 U.S. 218 (1947).
23. Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 776 (1946).
24. Algoma Plywood v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949).

the entire field of labor-management relations. The Congressional intent is best reflected in the preamble to the L.M.R.A. which declares "that it is the purpose and policy of the act to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[25]

In enacting the L.M.R.A., Congress took into account some of the problems of overlapping state and federal jurisdiction. The act expressly provided in section 14(b) that the states were still authorized to prevent any form of compulsory unionism. In section 14(a), the act expressly states that under no state law could supervisors be treated as employees for the purpose of any statute relating to collective bargaining. One of the most important sections of the act from the standpoint of the federalism problem is 10(a) which states:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any state or territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, 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 this Act or has received a construction inconsistent therewith."[26]

While there are other references to state action found in the act,[27] Congress was silent as to other matters on which conflicts with state law had arisen or were likely to arise.

Since under the L.M.R.A. the federal government for the first time entered seriously into the field of regulating strikes and other union activities, the cases became more numerous in which the ques-

25. 61 Stat. 136 (1947), 29 U.S.C. 141(b) (1956).
26. 61 Stat. 136 (1947), 29 U.S.C. 160(a) (1956). This provision has never been utilized as no state has ever conformed its own labor relations legislation to the L.M.R.A.
27. 61 Stat. 136 (1947), 29 U.S.C. 158(d), 163, 173 and 187 (1952).

tion of federal supremacy was raised. Under the L.M.R.A., there was more to support the theory that Congress had intended to occupy this field to the exclusion of the states than the doctrine of preemption.[28] First of all, the legislative history of the L.M.R.A. shows that Congress investigated, accepted and rejected certain proposals from one end to the other of the field of labor-management relations. From the prior decisions under the N.L.R.A., Congress knew full well that labor legislation preempts the field which the act covers insofar as commerce within the meaning of the act is concerned.[29] Congress devoted much time during the debate of the L.M.R.A. as to the extent to which its contemplated action should supersede state legislation. During debate on the measure in the House, the suggestion was made that the act should contain a provision which would preserve the constitutionality of the state laws in this field. This suggestion was abandoned when it was stated that to preserve "states rights" in this field would nullify much of the bill.[30]

Therefore, since Congress was aware of the preemption problem, it took care to reserve for state action only those areas in the L.M.R.A. which provide that state regulations could be operative.[31] Labor unions which were publicly denouncing the L.M.R.A. as a slave-labor law nevertheless seized upon its provisions as a possible means of avoiding the effects of all state restrictions by contending that the L.M.R.A. had preempted the entire field of regulation of unions.[32] Thus, in *Plankinton v. Wisconsin State Labor Board,* the United States Supreme Court invalidated an order of the Wisconsin board which directed an employer to reinstate a worker whom the union had blackballed and whose discharge had been brought about through union instigation.[33] This case stands for the proposition that states may not regulate in respect to rights guaranteed by Congress in section 7 of the L.M.R.A. *United Automobile Workers v. O'Brien*[34] involved an attempt to enforce a state law which required a state-supervised secret ballot vote as a condition precedent to a strike. The defendant union conducted a strike for a new contract for increased wages and improved working conditions without complying with the state law. This strike was found to be concerted activity

28. Houston v. Moore, 5 Wheat. 1 (U.S. 1820).
29. H. R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947).
30. 93 Cong. Rec. 3559 (1947); California v. Zook, 336 U.S. 725 (1949).
31. 93 Cong. Rec. 3453, 6519, 6532 (1947).
32. 61 Stat. 136 (1947), 29 U.S.C. 158(b) (1956).
33. Plankinton Packington Co. v. Wisconsin Employment Relations Board, 338 U.S. 753 (1949).
34. United Automobile Workers v. O'Brien, 339 U.S. 454 (1950).

within section 7 and was thus protected from interference by the state.

However, the concept also developed that states are free to treat under their own policies any concerted activities which are neither protected nor prohibited by the L.M.R.A.[35] In such a case, the United States Supreme Court held that the Wisconsin court was entitled to enjoin a program of "quickie" strikes which it described as a novel technique of bringing pressure to bear upon employers. It held that the objectives only and not the tactics of a strike bring it within the power of the N.L.R.A. This decision, by its distinction of motives from tactics, recognizes that when the motive of concerted activity is in issue, the matter is covered by the L.M.R.A., to the exclusion of state action.

Another area of conflict which developed was in the field of peaceful conduct, including picketing for organizational purposes.[36] A proposed section in the L.M.R.A. would have barred peaceful picketing in such broad terms as to include picketing by strangers or unions not representative of a majority of the employees. Such a proposal was debated and rejected.[37]

The next problem area deserving of consideration was the effect of the L.M.R.A. upon the power of state courts to restrain activities which were enumerated as unfair labor practices as distinguished from the cases discussed so far which have state action in conflict with or not covered by the act.

In this area, although the N.L.R.B. is authorized to obtain an injunction against picket line violence on the ground that it interferes with the right of employees to refrain from participating in concerted activity, the states remain free to prohibit and to punish such conduct to preserve the peace.[38] In areas other than violence, cases have held that the fact of Taft-Hartley's application to and prohibition of the acts alleged, is of itself sufficient to deny the applicability or relevance of state law covering the same act.[39] However, some cases also held that even though an act was an unfair labor practice under section 8 of the L.M.R.A., still the state court could grant re-

35. United Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1948).
36. Goodwin's Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E. 2d 697 (1951).
37. Section 12(a) of Representative Hartley's House bill, 93 Cong. Rec. 3558, 3586, 3736 (1947).
38. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); U.A.W. v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Erwin Mills Inc. v. Textile Worker's Union, 234 N.C. 321, 67 S.E. 2d 372 (1951).
39. Direct Transit Lines v. Teamster's Union, 199 F. 2d 89 (6th Cir. 1952).

lief on the theory that the alleged acts involved were a tort under state law.[40]

The above are only a few of the many cases which illustrate the nature of the conflicts and the manner in which the state courts reacted to them. In 1953, the United States Supreme Court handed down a famous decision which served to clear up some of these conflicts.[41] In *Joseph Garner v. Teamsters Local No. 776,* petitioners sought an injunction in the Pennsylvania State Court against certain picketing by the defendant union. Four of petitioner's twenty-four employees were members of the union, and petitioner had no objection to the rest becoming members. No controversy, strike or labor dispute was in progress. The picketing was orderly and peaceful, but other drivers refused to cross the picket line so that the petitioner's business was brought almost to a standstill. The Court granted the injunction on the ground that the purpose of the picketing was to coerce petitioner into compelling his employees to join the union, which violated the Pennsylvania Labor Relations Act.[42] The Supreme Court of Pennsylvania reversed the injunction stating:[43]

"In our opinion such provisions for a comprehensive remedy precluded any state action by way of a different or additional remedy for the correction of the identical grievance."

The court, of course, was referring to the remedies provided by the L.M.R.A. Affirming the United States Supreme Court said:[44]

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening

40. Art Steel Co. v. Velazquez, 110 N.Y.S. 2d 793 (1952).
41. Joseph Garner v. Teamster's Local No. 776, 346 U.S. 485 (1953).
42. Pa. Stat. Ann. Tit. 43, 211 (1954).
43. 373 Pa. 19, 94 A. 2d 893 (1953).
44. Joseph Garner v. Teamster's Local No. 776, 346 U.S. 485, 489 (1953).

in such cases, except by way of review or on application of the federal board, precludes state courts from doing so.

The court further declared:[45]

"Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. Nothing suggests that the activity enjoined threatened a probably breach of the states' peace as would call for extraordinary police measures by state or city authority."

Labor unions hailed this decision as emancipating them from having to try their cases in state courts. However, the *Garner* case by no means settled the problems of conflicts. The important problem not answered by the Supreme Court is the power of the state to act when the N.L.R.B. has declined jurisdiction. Recent cases dealing with this problem will be discussed in a later section. Until this problem is settled by the Supreme Court there will continue to exist that unoccupied no man's land in the field of labor relations which occurs when the N.L.R.B. declines jurisdiction and the state refuses to assert jurisdiction on the theory that the L.M.R.A. has preempted the field.

Shortly after the *Garner* case, the United States Supreme Court affirmed a decision of the Virginia Supreme Court of Appeals which indicated that the Supreme Court had adopted a more moderate position on the question of state jurisdiction.[46] In *United Construction Workers v. Laburnum Construction Corporation,* plaintiff, a building contractor who was admittedly operating in interstate commerce, had a mutually satisfactory agreement with an A.F.L. union. Another union by violent conduct intimidated the employees of the plaintiff until they quit their jobs, thus causing the plaintiff to default on his contract and suffer heavy losses. The plaintiff recovered in a common-law tort action against the union in a state court. The United States Supreme Court pointed out that Congress had not provided any substitute for the traditional state court procedure for money damages for injuries caused by tortious conduct.[47]

Another leading case presented the question, in view of the fact that exclusive jurisdiction over the subject matter was in the N.L.R.B., could the federal court, on application of the N.L.R.B., enjoin petitioners from enforcing an injunction already obtained from the state

45. Joseph Garner v. Teamster's Local No. 776, 346 U.S. 485, 487 (1953).
46. United Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656 (1954).
47. See Hall v. Walters, 226 S.C. 430, 85 S.E. 2d 729 (1955).

court.[48] In the state court,[49] petitioner had obtained a restraining order restraining defendant union from peacefully picketing pursuant to a labor dispute between the parties. An unfair labor practice charge having been filed with the N.L.R.B., the purpose of the restraining order was to maintain the status quo pending the outcome of the complaint.

The United States District Court for the Southern District of California granted a preliminary injunction which restrained the employer from enforcing the injunction. The United States Court of Appeals for the Ninth Circuit affirmed the preliminary injunction saying:

"The boycott of the product of Service's bakers to restrain their opposition to and compel their unionization is prohibited by section 8(b)(1) of the Taft-Hartley Act. We think Congress has preempted this function to the National Labor Relations Board and that the state court is without jurisdiction to issue an injunction."[50]

The United States Supreme Court affirmed.[51]

In summary, the main effects of the above cases are, first, the federal government has preempted the field insofar as unfair labor practices involving interstate commerce are concerned, thus state courts and state agencies have no jurisdiction over such cases; second, the state court may properly take jurisdiction and enjoin any picketing connected with violence; third, individuals may bring a tort action in a state court for damages caused by some act which was also an unfair labor practice; fourth, N.L.R.B. can protect its jurisdiction by federal court injunction. The unanswered question is whether a state court can act when the N.L.R.B. declines jurisdiction in the area where it clearly has the power to exercise jurisdiction.

The *Garner* decision removed all doubt from the long standing principle that absent violence, there can be no state control of labor disputes falling within the scope of national labor legislation. The next point of investigation is the effect of this decision on state action thereafter.

IV. *Cases Since the Garner Case Which Hold That a State Cannot Assert Jurisdiction*

In *Building Trades Council v. Kinard Construction Company,* the United States Supreme Court reversed a judgment by the Supreme Court of Alabama which had granted injunctive relief against picket-

48. Capital Service Inc. v. N.L.R.B., 347 U.S. 501 (1954).
49. See 204 F. 2d 848, 850 (9th Cir. 1953).
50. *Id.* at 851.
51. Capital Service Inc. v. N.L.R.B., 347 U.S. 501 (1954).

ing which was an unfair labor practice.[52] The Supreme Court held that it was unnecessary to decide whether the state court would have jurisdiction to grant relief in such case if the N.L.R.B. should decline to exercise its jurisdiction, since there was no clear showing that application for relief had been made or that it would have been futile to make such application.

In a later case, the Supreme Court of Alabama found that the state court was without jurisdiction to enjoin picketing which amounted to unfair labor practices absent violence.[53] Where a labor dispute affects interstate commerce, the Alabama court held that the L.M.R.A. vests exclusive jurisdiction to regulate such disputes in the N.L.R.B.

In the *Anheuser-Busch* case,[54] the United States Supreme Court held that the state courts of Missouri were without authority to enjoin strike action which resulted from an interunion dispute and which, according to employer's state court complaint violated both the state's secondary boycott laws and sections of the L.M.R.A.; the complaint also alleged that the acts were in conflict with state laws against conspiracies in restraint of trade. Before filing the state court complaint, the employer had filed unfair labor practice charges under section 8(b)(4)(D) of the L.M.R.A. The N.L.R.B. found, however, that no jurisdictional dispute existed within the meaning of that section of the L.M.R.A. According to the United States Supreme Court, the Missouri court could not, under these circumstances, predicate the exercise of their powers on the assumption that the N.L.R.B. had ruled that there was no unfair labor practice under the L.M.R.A. The court pointed out that all the N.L.R.B. determined was that there was no violation of section 8(b)(4)(d) which was the only unfair labor practice charged. This determination, in the court's view, could not be construed as a holding that there was also no violation of sections 8(b)(4)(a) and (b) such as the employer had alleged in the complaint filed in the state court. Moreover, the court said, even if it had been clear that no violation of any of the L.M.R.A.'s unfair labor practice provisions was involved, the state court was nevertheless not free to issue an injunction. The court observed that a finding that the conduct was outside the prohibitions of section 8 of the L.M.R.A. left undetermined the further question whether the conduct came within the protection of section 7[55] as a concerted activity for the purpose of mutual aid or protection. The

52. Building Trades Council v. Kinard Construction Co., 346 U.S. 933 (1954).
53. Montgomery Building and Construction Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 So. 2d 112 (1951).
54. Weber v. Anheuser-Busch Inc. 348 U.S. 468 (1955).
55. 61 Stat. 136 (1947), 29 U.S.C. 157 (1956).

court also rejected the contention that the Missouri courts injunction was proper because it vindicated a state law which was not concerned with labor relations. The court made it clear that under the rules of the *Garner* and *Capital Service* cases, the exact category of public policy violated by the conduct enjoined is not a decisive factor. The court said that controlling and therefore superseding federal power cannot be curtailed by the state even though the ground of intervention be different from that on which federal supremacy has been exercised. Seemingly this prenumbral area can be rendered progressively clear only by the course of litigation.

As a result of the above decision, the conclusion must be that the L.M.R.A. precludes a state from enjoining strikes, boycotts or picketing on the ground that the objective is unlawful in the sense that the union or employees are not justified in injuring the employer's business for such a purpose.

Referring to its ruling in the *Anheuser-Busch* case, the United States Supreme Court in *General Driver's Local No. 89 v. American Tobacco Company,*[56] likewise held that an injunction issued by a Kentucky court against certain picketing activities was an invasion of an area reserved to federal authority by the L.M.R.A. The state court injunction here had the effect of requiring members of the picketing union, who were employed by certain common and contract carriers, to cross a picket line established by their union at the premises of one of the carriers and the picketing union expressly permitted the carrier's drivers to respect picket lines of their union. The Supreme Court held that the law of Kentucky which requires common carriers to serve the public without discrimination afforded no basis for the invasion of the federally preempted field.

In a recent case, the Supreme Court of Washington denied the plaintiff injunctive relief against peaceful picketing in a state court.[57] None of relator's eighty-two employees was a member of any of the defendant unions. The purpose of the picketing was for the purpose of forcing the employer to compel his employees to join one of the picketing unions. The state supreme court held that the N.L.R.B. has exclusive jurisdiction to prevent such picketing since it was an unfair labor practice under the L.M.R.A. The court further held that the fact that none of the employees were members of the unions as in the *Garner* case was immaterial because the N.L.R.B. is em-

56. General Drivers Local No. 89 v. American Tobacco Co., 348 U.S. 978 (1955).
57. Stoddard-Wendle Motor Co. v. Automotive Machinists Lodge, 295 P. 2d 305 (Wash. 1956).

powered to prevent any unfair labor practice affecting commerce.[58]

In a recent case,[59] the California Supreme Court affirmed the ruling of a lower court in refusing to grant an injunction against defendant union in an action brought under the California Jurisdictional Strike Act.[60] In refusing to grant the injunction, the trial court refused to follow an earlier California decision[61] in view of the subsequent holdings of the United States Supreme Court.[62] The trial court adopted the view that in labor matters, where the employer is engaged in interstate commerce, state courts do not have jurisdiction to issue injunctions except in the exercise of the police power of the state. The court further quoted with approval the following language of a case which was unpopular prior to the *Garner* case:[63]

"A state court has no jurisdiction to enjoin, at the instance of an employer engaged in interstate commerce, the picketing of the employer's premises, delaying the construction of an oil terminal, where the picketing was conducted for one of the following purposes: coercing the employer to sign closed shop contracts with the defendant unions; coercing the employees to become members of these unions, even though the employees voted in an election conducted by the federal board, against joining the unions involved; inducing the employees of another employer (not involved in the litigation) to engage in a concerted refusal to perform services in the course of their employment at the plaintiff employer's oil terminal for the purpose of forcing again other employers (likewise not involved in the litigation) to engage in a concerted refusal to perform services in the course of their employment at the plaintiff employer's oil terminal for the purpose of forcing again other employers (likewise not involved in the present litigation) to recognize the defendant unions as the representatives of their employees, even, though such unions have not been certified by the federal board."

A review of the above cases would lead to the conclusion that since the *Garner* decision, the function of states in labor-management situations has been limited to areas where there is a breach or a threatened breach of the peace. These functions referred to are those other than the ones specifically authorized by the L.M.R.A. such as the state "right to work" laws.

58. 61 Stat. 136 (1947), 29 U.S.C. 160 (1956).
59. Breidut Co. v. Sheet Metal Workers, 294 P. 2d 93 (Cal. 1955).
60. CAL. LAB. CODE 1115-1120.
61. Sommer v. Metal Trades Council, 40 Cal. 2d 392, 254 P. 2d 559 (1955).
62. Joseph Garner v. Teamster's Local No. 776, 346 U.S. 485 (1953); Weber v. Anheuser-Busch Inc., 348 U.S. 468 (1955).
63. Pocahontas Terminal Corp. v. Portland Building and Construction Trade Council, 93 F. Supp. 217 (S.D. Me. 1950).

V. *Cases Since the Garner Case Which Hold That a State Can Act*

Where a state has authority under its police power to restrain violent conduct which is also an unfair labor practice under the L.M.R.A., it is immaterial whether the state exercises that authority through its courts or through an administrative agency, such as a state labor relations board.[64] Cases referred to previously as being illustrative of state power to act in this area will not be discussed herein again.

The United States Supreme Court has held that a state may enjoin peaceful picketing when one of its substantial purposes is in conflict with a state "right to work" statute, the policy of which is that the right of persons to work shall not be denied or abridged on account of nonmembership in a labor union.[65] However, the picketing must be carried on with at least one of its substantial purposes in conflict with the declared state policy authorized in section 14(b).[66]

Where a union excluded an employee from membership and caused him loss of employment under a union-shop contract in an industry affecting interstate commerce, it has been held that a state court could not grant him injunctive relief, but that it could award him damages.[67] The court said that although the back-pay award available from the N.L.R.B. is equivalent to the common-law damages available in a court action, it can be granted by the N.L.R.B. only as a supplement to and in aid of the preventive remedies of the N.L.R.B., and therefore the employee may enforce his common-law remedy in a state court. The court also noted that the state court could not interfere with the jurisdiction of the N.L.R.B., since the employee had abandoned his rights before the N.L.R.B. by failing to file and maintain charges within the six-month period allowed by the L.M.R.A. statute of limitations;[68] therefore the N.L.R.B. could grant no remedy with respect to that past conduct on the basis of any new charge which the employee might file.

64. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954); U.A.W. v. Wisconsin Employment Relations Board, U.S. , 100 L. ed. 666 (1956); Clover Fork Coal Co. v. N.L.R.B., 97 F. 2d 331 (6th Cir. 1938). An act which does not affect interstate commerce is within the jurisdiction of the state court.

65. American Federation of Labor v. Graham, 345 U.S. 191 (1952); Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1948).

66. Gulf Shipside Storage Corp. v. Moore, 71 So. 2d 236 (La. 1955). Held that the Louisiana court was without jurisdiction to enjoin picketing in violation of the Louisiana right to work law since the picketing was an unfair labor practice under the L.M.R.A.

67. International Sound Technicians v. Superior Court of Los Angeles County, 30 Labor Cases 69, 987 (1956).

68. 61 Stat. 136 (1947), 29 U.S.C. 160(b) (1956).

In *Amalgamated Clothing Workers v. Richman Brothers,*[69] the United States District Court for Northern Ohio had denied a union's request to enjoin an employer with which it had a dispute from seeking state court relief against picketing activities. The union asserted that the employer's complaint in effect alleged a violation of the L.M.R.A., therefore the Ohio state court could not assert jurisdiction. The district court held itself without jurisdiction to grant relief because of the provisions of section 2283 of title 28 of the United States Code which prohibits federal injunctions against state court proceedings. The exceptions to the prohibition, according to the district court, did not apply. This decision was affirmed by a divided United States Supreme Court. The majority of that court took the position that 28 U.S.C., section 2283, precludes federal courts from granting the request of a private party to enjoin an attempt to secure relief through state proceedings even though the labor activity in question is outside state authority.[70]

The most serious question still unanswered by the United States Supreme Court is whether a state court can act so as to fill the jurisdictional gaps created when the N.L.R.B. exercises its discretion to refuse jurisdiction.[71] There is a conflict in authority between the states.[72] A thorough review of these cases would be time consuming and valueless. Rather, it is thought that a review of a recent California case[73] which is typical of the problems raised in this area would be more practicable.

In *Garmon v. San Diego Building Trades Council* defendant unions picketed plaintiff and dissuaded customers of the plaintiff company from purchasing supplies in order to force the plaintiff to sign a closed shop contract. Previously the N.L.R.B. had refused to hold a representation election because the plaintiff's interstate commerce was insufficient to meet the N.L.R.B.'s discretionary standards. The California Supreme Court affirmed a decision of the lower court which had held that when the N.L.R.B. refuses jurisdiction over a representation election between parties who are in interstate commerce, the state court may assume jurisdiction and apply the L.M.R.A. to an issue of unfair labor practices between the parties. The United

69. Amalgamated Clothing Workers of America et. al. v. Richman Brothers, 348 U. S. 511 (1955).
70. Capital Service Inc. v. N.L.R.B., 347 U.S. 501 (1954).
71. Haselton Drug Stores v. N.L.R.B., 187 F. 2d 418 (8th Cir. 1951).
72. As to State Court not having jurisdiction see: Wisconsin Employment Relations Board v. Teamsters Local 200, 66 N.W. 2d 318 (Wis. 1954).
As to State Court having jurisdiction see: Your Food Stores of Sante Fe v. Retail Clerks Local 1564, 124 F. Supp. 697 (D.C. N.M. 1954).
73. Garmon v. San Diego Building Trades Council, 291 P. 2d 1 (Cal. 1955).

States Supreme Court has this decision before it at the present time.

The Utah Supreme Court recently held that if the N.L.R.B. declines jurisdiction then the state board has the power to entertain an unfair labor practice proceeding under the state labor act.[74] The theory of the Utah court was that since the N.L.R.B. had declined jurisdiction, the employer's operations were predominantly local in character and that it would not effectuate the policy[75] of the L.M.R.A. for the N.L.R.B. to exercise jurisdiction.

Another case which is before the United States Supreme Court during the fall 1956 term is an Arkansas decision in which the state Supreme Court held that the State could enjoin picketing which was conducted in a manner unlawful under state law.[76] The court so held even though unfair labor practice proceedings were pending before the N.L.R.B. Here, however, the picketing was accompanied by acts of intimidation, threats, abuse, insults, destruction of property and breaches of the peace. Therefore, even though a charge was pending before the N.L.R.B., undoubtedly the United States Supreme Court will uphold the state court's action in view of the surrounding circumstances.

In a pending case, the United States Supreme Court is faced with an interesting decision of the Ohio Supreme Court which affirmed a trial court decision that an injunction against picketing was within the jurisdiction of the state court.[77] Here the business of the picketed employer did not meet the N.L.R.B.'s standards. The theory of the Ohio court was that the picketing was contrary to state public policy[78] and therefore subject to injunctive restraint where the picketing was conducted by a minority union for the purpose of compelling recognition by the employer.

If the actions which the various state courts have taken are affirmed by the United States Supreme Court, a great step will have been taken toward eliminating that area in which there is a wrong without a legal remedy.

VI. *Conclusions*

From this discussion of cases, one is able to ascertain easily that the federal government has preempted the field of labor relations in the area covered by the L.M.R.A. This theory of occupation of a

74. Guss Manufacturing Co. v. Utah Labor Relations Board, 296 P. 2d 733 (Utah 1956).
75. 61 Stat. 136 (1947), 29 U.S.C. 160(c) (1956).
76. Youngdahl v. Rainfar Inc., 288 S.W. 2d 589 (Ark. 1955).
77. Amalgamated Meat Cutters v. Fairlawn Meats Inc., 164 Ohio St. 285, 130 N.E. 2d 237 (1955).
78. Building Service Employees Union v. Gazzam, 339 U.S. 532 (1954).

field by the federal government is not a problem peculiar to the field of labor relations, but dates back from the early constitutional history of the United States. Even though Congress has preempted the field of labor relations, a state may act through its labor board or courts to enjoin acts of violence. Of course, if the business is expressly excluded by the L.M.R.A., the state may act without reference to federal preemption.

The crucial problem which needs solution is the elimination of the jurisdictional vacuum which is created by the N.L.R.B.'s jurisdictional yardsticks. The present method of solving this problem involves disturbing and expensive uncertainties during the lengthy process. These disturbing uncertainties are further complicated by the fact that the hallmark of an administrative body such as the N.L.R.B. is discretion. The N.L.R.B. may at its discretion change its jurisdictional standards and its policies as to what best effectuates the policy of the act. Furthermore the N.L.R.B., the United States Supreme Court and the Circuit Court of Appeals have been known to trim their sails to the prevailing political wind, thereby adding to the uncertainty which exists when a problem is being decided on a case by case basis.

One solution to this problem which has been proposed is to increase the size and budget of the N.L.R.B. and thereby let it handle all labor problems affecting interstate commerce. The objection to this solution is that it would be subject to the criticism of being just another example of the creeping carpet of federal bureaucracy. It was to escape this very criticism that the new board in 1953 changed the jurisdictional standards. However, it seems that the field of labor relations is one in which one of the paramount objectives should be uniform regulation by the federal government. It is incongruous that an act whose purpose was to provide a uniform code for labor-management relations would create areas in which wrongs could not be remedied. In this area, the L.M.R.A. is operating to encourage rather than discourage industrial strife.

Only Congress can solve this dilemma. A suggested solution is that the size of the N.L.R.B. be increased as indicated above and the L.M.R.A. be amended to permit a state to act when jurisdiction is declined by the N.L.R.B. because the flexible jurisdictional standards are not met. In this manner, means would be available for legal remedies to wrongs and essential uniformity would be preserved.

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