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The Changing Face of Federal Pre-Emption in Labor Relations

COMMENTS

THE CHANGING FACE OF FEDERAL PRE-EMPTION IN LABOR RELATIONS

I. INTRODUCTION

The experience of the American labor movement with the courts of our nation was, for many years, one of bitterness and frustration. Often disregarding traditional equitable concepts,[1] judges unhesitatingly issued injunctions to restrain concerted actions of workingmen.[2] The justification for these injunctions was often found in the notorious "illegal purpose" doctrine, which was simply "a judicial device by which courts were in a position to hold unlawful any conduct of labor unionists which was outwardly lawful but through which a union was attempting to achieve some end not judicially approved."[3]

Congressional recognition of this denial of justice resulted in the 1932 enactment of the Norris-LaGuardia Act.[4] This statute effectively limited the power of the federal courts to issue labor injunctions.[5] Nevertheless, with the exception of those few states which passed "little Norris-LaGuardia Acts," state courts remained free to pursue their traditional role in regard to labor injunctions.[6]

When Congress again entered the labor field, it did so by enacting the National Labor Relations Act (the Wagner Act), a comprehensive statute aimed at regulating the conduct of union-management relations in those industries which affect interstate commerce.[7] The legislative intent behind this statute was obviously to make federal law the guiding force for most labor relations matters in the United States.[8]

Since the state courts had traditionally regulated labor activities, however, questions soon arose as to what effect the National Labor Relations Act

1. C. Gregory, Labor and the Law 98 (2d rev. ed. 1961).

2. Id. at 102.

3. Id. at 50.

4. 29 U.S.C. § 101 (1964).

5. The Act withheld injunctive relief at the instance of a private party unless it could be shown that there was no adequate remedy at law and that there was the danger of either irreparable injury to property or the commission of unlawful acts. 29 U.S.C. § 107 (1964).

6. "Some thirty-three of the fifty states [in 1964] have no statutes which comprehensively regulate the use of the labor injunction. This group includes . . . the large industrial states of California, Illinois, Michigan, and Ohio." Aaron, Labor Injunctions in the State Courts—Part I: A Survey, 50 Va. L. Rev. 951, 953 (1964). N.Y. Labor Law § 807 is a good example of one of the state "little Norris-LaGuardia Acts."

7. 29 U.S.C. § 401 (1964).

8. See "Findings and declaration of policy" of the National Labor Relations Act, 29 U.S.C. § 151 (1964); 79 Cong. Rec. 2371-72 (1935) (statement of Senator Wagner on the National Labor Relations Bill).

(NLRA) would have on state jurisdiction.[9] Congress had not expressly foreclosed state jurisdiction in the Act. On the other hand, it was clear that a national labor policy could not be effectuated if it were continually to be subverted by varying and contradictory state rulings. Out of this conflict between the need for a uniform national policy and the traditional concern of the states in labor-management affairs, the United States Supreme Court has attempted to create a viable compromise. Unhappily, the desirable balance which the Court has attempted to achieve has only slowly evolved through a long line of confusing and often inconsistent decisions. Consequently, both courts and lawyers are, in many instances, still uncertain as to the proper forum for the resolution of many questions arising under the NLRA.[10]

II. The Pre-Emption Doctrine and Its Rationale

Briefly stated, the doctrine of federal pre-emption, as announced by the Supreme Court, asserts that Congress, by enacting the NLRA, has prescribed that the federal government has occupied the field of labor relations in industries of an interstate character and has, with certain exceptions, ousted state courts from jurisdiction.

Perhaps the most critical requisite for comprehending the development of the pre-emption doctrine is an understanding of the rationale which lay behind that doctrine. At the outset, it is essential to note the dual character of federal pre-emption. On the one hand are those situations in which the Court has ruled that federal control over labor relations may only be exercised through the primary jurisdiction of the National Labor Relations Board (NLRB), the administrative enforcement agency of the NLRA.[11] On the other hand are those situations in which the Court has decided that the Act has conferred jurisdiction upon the courts, both federal and state, for various limited purposes in connection with the national labor policy. So as best to effectuate that policy, it has been established that these courts must apply federal labor law, or at least consistent state law.[12]

While the decision by Congress to establish a national labor policy constitutes the basis for both the administrative and judicial varieties of federal pre-emption, the reasoning behind the creation of the NLRB extends far beyond general policies.[13] The result has been the complication of legal problems arising in regard to the "primary jurisdiction of the NLRB" species of pre-emption.

The "Findings and declaration of policy" in the NLRA itself states the basis of the federal pre-emption doctrine as follows:

9. The first major case to discuss federal-state relations in connection with the Act was Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

10. See, e.g., State ex rel. Utility Workers Local 349 v. Macelwane, 116 Ohio App. 183, 187 N.E.2d 901 (1961).

11. 29 U.S.C. § 153 (1964).

12. See, e.g., Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

13. See notes 16-25 infra and accompanying text.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . and promotes the flow of commerce . . . by encouraging . . . friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions. . . .[14]

Clearly then, the purpose of the Act was to safeguard the economic health of the nation by reducing industrial strife through the application of federal labor law. For the states to contradict and thus undo what Congress considered to be in the national interest would obviously be intolerable.[15]

A. *Pre-Emption and the NLRB*

Congress has, in several ways, indicated its desire for the NLRB to maintain exclusive, original jurisdiction for the enforcement of the Act. There was, first, the creation of a National Labor Relations Board,[16] a highly specialized administrative body which deals solely with the enforcement of the NLRA. The creation of such an agency led the Court in *Garner v. Teamsters Local 776*[17] to conclude: "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."[18] To allow the courts, state and federal, to maintain concurrent initial jurisdiction over the critical sections of the Act would be to invite the possibility of varying interpretations with the accompanying danger of misconstruing or even destroying the mandate of Congress.[19]

14. 29 U.S.C. § 151 (1964). The section continues: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions . . . when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

15. The power of Congress to regulate labor relations derives from the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8 states: "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States . . . ." The constitutionality of the NLRA was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

16. "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 . . . ." Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953); accord, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

17. 346 U.S. 485 (1953).

18. Id. at 490.

19. See Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I, 59 Colum. L. Rev. 6 (1959); Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963); Wellington, Labor and the Federal System, 26 U. Chi. L. Rev. 542 (1959).

In addition to creating the NLRB, the Act contains a number of provisions which are specifically reserved for court action,[20] thus making it clear that the sections not so reserved, are to be enforced solely through the auspices of the National Board. In *Amalgamated Ass'n of Street Employees Local 998 v. Wisconsin Employment Relations Board*,[21] the Supreme Court stated: "Congress knew full well that its labor legislation 'preempts the field that the act covers in so far as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative."[22]

The case of *Construction Local 438 v. Curry*[23] exemplifies the extent to which the Court will go in deference to the rationale of the pre-emption doctrine. In *Curry*, the Georgia Supreme Court had issued a temporary injunction against a union, in violation of the Supreme Court's earlier pre-emption rulings. The state court, however, challenged the Court's appellate jurisdiction as the former court had not issued a *final decree*, one of the prerequisites for appeal under 28 U.S.C. § 1257.[24] Nevertheless, in deference to the reasoning of the pre-emption doctrine the Court held:

> The policy of 28 U.S.C. § 1257 . . . does not prohibit our holding the decision of the Georgia Supreme Court to be a final judgement, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts.[25]

B. *Pre-Emption and the Courts*

The same fundamental principle of the desirability of a uniform national labor policy, which lay behind the rule of primary NLRB jurisdiction, accounts for the Court's requirement that a number of those areas of labor law which Congress has delegated to the courts for enforcement, be so enforced in accord with federal law.[26] The primary areas of judicial concern in the Act are found in section 301,[27] which provides for suits in cases of breach of the collective bar-

20. These sections of the NLRA are: § 301(a), 29 U.S.C. § 185(a) (1964) (providing for suits between an employer and a union in case of breach of contract); § 303(b), 29 U.S.C. § 187(b) (1964) (allowing for damage suits for violation of the Act's secondary boycott provisions); § 14(c), 29 U.S.C. § 164(c) (1964) (allowing state courts to assume jurisdiction when the NLRB declines the same).

21. 340 U.S. 383 (1951).

22. Id. at 397-98 (citation omitted).

23. 371 U.S. 542 (1963).

24. 28 U.S.C. § 1257 (1964) provides in part: "Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . . ."

25. 371 U.S. at 550.

26. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962); Teamsters Local 20 v. Morton, 377 U.S. 252, 259-61 (1964).

27. 29 U.S.C. § 185(a) (1964). The Court in Lucas stated: "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the

gaining agreement and section 303,[28] which allows suits for violation of the Act's secondary boycott provisions.

While the reasoning behind a policy of federal pre-emption appears sound, there are several significant arguments for preserving state court jurisdiction over certain areas of labor relations in industries affecting interstate commerce. Firstly, the state courts have traditionally ruled in this area.[29] Secondly, the states have the prime obligation under their welfare and police powers to maintain order and personal and property rights which are often threatened in the course of bitter labor disputes.[30] Finally, since the states as well as the federal government have a vital interest in the "commerce" which affects their own economic well-being, they have a legitimate concern with the encouragement of the peaceful settlement of labor disputes.

III. The Scope of Pre-Emption

A. *Decisional Law*

1. Early Exceptions to the Doctrine

In the first case which discussed the question of federal pre-emption,[31] the Supreme Court made it clear that the protection that the Act guaranteed workingmen under section 7[32] did not include the devices of mass picketing, threats or violence and that the states were free to exercise their police powers to control such situations.[33] Obviously, Congress, in fashioning a national labor policy, had not intended that the Act should sanction the use of illegal devices. Since such acts were beyond the scope of the NLRA, the states were free to use their traditional powers in maintaining the public peace. This early doctrine, which viewed violence and related tactics as falling outside the scope of the pre-emption doctrine, has been repeatedly affirmed by the Court,[34] even when partial

effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." 369 U.S. at 104 (citations omitted).

28. 29 U.S.C. § 187 (1964). Teamsters Local 20 v. Morton, 377 U.S. 252, 259-61 (1964).

29. See C. Gregory, supra note 1, at chs. III-IV.

30. See C. Pritchett, The American Constitution 559 (1959).

31. Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

32. Section 7 of the NLRA provides in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1964).

33. Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749-50 (1942).

34. International Union, Local 232, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949); UAW v. Russell, 356 U.S. 634 (1958); Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

relief has been possible under the union unfair labor practices provision (section 8(b)) of the Act.[35]

The extent to which the Court was willing to push the exception for wrongful activities (at least in the early days of the doctrine) is seen in its decision in *International Union, Local 232, UAW v. Wisconsin Employment Relations Board*,[36] the "*Briggs-Stratton*" case. In this case serious doubt existed as to whether any actual violence had taken place.[37] The union, following a deadlock in negotiations, had engaged in a series of unannounced meetings in the factory during working hours. In a 5-4 decision, the Court found the tactics used had been "coercive" and concluded that "there was . . . evidence of considerable injury to property and intimidation of other employees by threats . . . ."[38] As a result, the Supreme Court upheld the right of the Supreme Court of Wisconsin to issue an injunction and ruled that in this, and similar cases, the "conduct is governable by the State or it is entirely ungoverned."[39]

It appears, however, that the facts of *Briggs-Stratton* did not warrant such an extreme conclusion. Although peaceful work stoppages are "coercive," so are many of the acts protected by section 7. In a vigorous dissenting opinion, Mr. Justice Murphy stated: "The National Board has repeatedly held that work stoppages of this nature are 'partial strikes' and 'concerted activities' within the meaning of § 7."[40] Whatever may be the present status of the partial strike,[41] it seems that at least at the time it was decided, the *Briggs-Stratton* case represented an undue extension of the illegal activity exception to the pre-emption doctrine.

2. Development of the Doctrine

In the early pre-emption cases, the Court ruled that peaceful concerted activities, such as choosing union representatives,[42] functioning as a union without local restrictions,[43] and striking for higher wages,[44] were all protected under section 7 of the NLRA and therefore could in no way be interfered with by state action. This protection would exist even though the strike involved a public utility and was thus of vital local interest.[45] The conclusion of the Court as to

35. UAW v. Russell, 356 U.S. 634 (1958); Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

36. 336 U.S. 245 (1949).

37. Id. at 269.

38. Id. at 253.

39. Id. at 254.

40. Id. at 270 (dissenting opinion).

41. Even under Briggs-Stratton the question is not conclusively settled. See id. at 255-56. See also NLRB v. Electrical Workers Local 1229, 346 U.S. 464, 474-75 (1953).

42. Hill v. Florida, 325 U.S. 538 (1945).

43. Id.

44. International Union, UAW v. O'Brien, 339 U.S. 454 (1950).

45. Amalgamated Ass'n Local 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).

all these activities was that, "Congress occupied this field and closed it to state regulation."[46]

In *Garner v. Teamsters Local 776*,[47] the doctrine was extended to prohibited as well as protected labor activities. There, an employer brought a state action to enjoin "stranger organizational" picketing. The Supreme Court of Pennsylvania declined jurisdiction in favor of the NLRB.[48] The United States Supreme Court affirmed, noting that the Act had specific provisions regulating such picketing[49] and that the Board had full powers to handle the petitioners' grievance.[50] In *Weber v. Anheuser-Busch Inc.*,[51] a group of employees engaged in concerted activity which, according to the company, constituted a union unfair labor practice. The NLRB refused so to rule, however, when the case was brought before it. The company then sought and obtained a state court injunction which was upheld by the Missouri Supreme Court. The United States Supreme Court reversed, Mr. Justice Frankfurter pointing out that if the action were not an unfair labor practice, it was perhaps "protected activity" under section 7.[52] In any case, the company had charged additional unfair practices after the initial Board determination, and the case thus came within the scope of the pre-emption doctrine, as announced in *Garner*.[53] In summarizing, the Court stated:

> [W]here the moving party itself alleges unfair labor practices, where the facts *reasonably* bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be *reasonably* deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the [Board].[54]

3. State Resistance to the Emerging Doctrine

The reaction of the state courts to the pre-emption doctrine ranged from hostility[55] to confusion and ignorance.[56] If the courts had to defer to the Board in cases in which it was "reasonably" ascertainable that the activity was either protected or prohibited, a good deal of room remained for state courts hostile

46. International Union, UAW v. O'Brien, 339 U.S. 454, 457 (1950).

47. 346 U.S. 485 (1953).

48. 373 Pa. 19, 94 A.2d 893 (1953).

49. Section 8(b), 29 U.S.C. § 158(b) (1964).

50. 346 U.S. at 488. See also section 10(a) of Act. "Prevention of unfair labor practices. Powers of Board generally." 29 U.S.C. § 160(a) (1964).

51. 348 U.S. 468 (1955).

52. Id. at 478-79.

53. Id.

54. Id. at 481 (emphasis added).

55. E.g., Pleasant Valley Packing Co. v. Talarico, 5 N.Y.2d 40, 152 N.E.2d 505, 177 N.Y.S.2d 473 (1958). See generally Hays, State Courts and Federal Pre-emption, 23 Mo. L. Rev. 373 (1958).

56. See Hays, supra note 55, at 378-79.

to the doctrine to assume jurisdiction.[57] These factors led one observer to conclude, as late as 1958, that "it would appear that in actuality we have not yet felt in the regulation of labor relations the full impact of the pre-emption doctrine."[58]

4. *Building Trades Council v. Garmon*

Much of the confusion and resistance over pre-emption that existed in the late 1950's and early 1960's[59] has largely disappeared[60] as a result of the Supreme Court's unambiguous statement as to the scope and limits of the pre-emption doctrine in the case of *San Diego Building Trades Council v. Garmon*,[61] which stands as its most complete statement of the pre-emption doctrine to date.

In *Garmon*, the unions involved picketed the employer for organizational and, for what the union claimed were, educational purposes. The California Supreme Court, in compliance with the pre-emption doctrine, dismissed a lower court injunction obtained by the employer but allowed the court to maintain jurisdiction for the purpose of awarding damages.[62]

Directly facing up to the problem of confusion over the pre-emption doctrine, the United States Supreme Court on appeal stated:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues.
>
> . . .
>
> When an activity is *arguably subject* to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [NLRB] . . . .[63]

The rationale behind the pre-emption doctrine, remarked the Court, precludes state action so long as the activity in question is even "potentially subject to federal regulation."[64]

Nevertheless, the Court reaffirmed its earlier decisions allowing state action in cases of violence. It added that local action would be allowed in those cases where the activity was of "merely peripheral" concern to the Act or where the

57. See, e.g., Trades Council v. Broome, 247 Miss. 458, 153 So. 2d 695 (1963), rev'd, 377 U.S. 129 (1964); Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E.2d 697 (1951); Baur v. Wepprecht, 16 Misc. 2d 847, 182 N.Y.S.2d 543 (Sup. Ct. 1958); State ex rel. Utility Workers Local 349 v. Macelwane, 116 Ohio App. 183, 187 N.E.2d 901 (1961).

58. Hays, supra note 55, at 382.

59. See Hays, The Supreme Court and Labor Law October Term, 1959, 60 Colum. L. Rev. 901, 904 (1960).

60. See, e.g., Beausoleil v. United Furniture Workers, 107 N.H. 437, 224 A.2d 585 (1966); State v. Milk Handlers Ass'n, 52 Misc. 2d 658, 276 N.Y.S.2d 803 (Sup. Ct. 1967); Day v. Division 1055, St. Ry. Employees, 238 Ore. 624, 389 P.2d 42 (1964), cert. denied, 379 U.S. 878 (1964).

61. 359 U.S. 236 (1959).

62. Id. at 239.

63. Id. at 244-45 (emphasis added).

64. Id. at 246.

conduct deeply affected local interests and Congress had not directed the Board to assume jurisdiction.[65]

In the future, therefore, state courts were put on notice that a case was beyond their jurisdiction even if it gave only slight indicia of being within the Board's authority. Thus, for example, state court jurisdiction has been disallowed in cases involving picketing by a union for recognitional purposes after the employer had already recognized another union,[66] and in an action by an employee against a union for malicious interference with his employment.[67]

The key problem which *Garmon* created arose from the language indicating that state action *could* be effective. The opinion seems to open the way for state jurisdiction in cases beyond those of violence and mass picketing in which the Court had traditionally allowed the local police powers to prevail.

B. *Statutes*

1. Special Problems Under Section 301

The decisions thus far examined have focused on the question of the primary jurisdiction of the NLRB. As already noted, however, the pre-emption doctrine has been extended to other sections of the Act in which the Board has no role. The most important of these is section 301, dealing with suits for violation of labor contracts. The statute reads in part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."[68] In a recent series of cases, the Supreme Court has decided that Congress had intended to allow state courts to adjudicate situations in which breaches of contract were involved,[69] but that in so doing, they must apply either federal labor law or consistent state law.[70] It is important to reiterate that the Supreme Court in its section 301 decisions has supported pre-emption on precisely the same grounds as lay behind the decisions regarding the primary jurisdiction of the NLRB in respect to a national labor policy.[71]

The confusion which followed the pre-emption cases dealing with the role of the NLRB has been similarly visited upon the section 301 cases. In *Sinclair Refining Co. v. Atkinson*,[72] the Supreme Court decided that a breach of contract suit constitutes a "labor dispute" within the meaning of section 13 of the Norris-LaGuardia Act. Therefore, federal courts, in their adjudication of section 301 cases, could not issue restraining orders to prevent strikes in viola-

65. Id. at 243-44.
66. Dooley v. Anton, 8 N.Y.2d 91, 168 N.E.2d 356, 202 N.Y.S.2d 273 (1960).
67. Beausoleil v. United Furniture Workers, 107 N.H. 437, 224 A.2d 585 (1966).
68. 29 U.S.C. § 185(a) (1964).
69. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
70. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 102 (1962).
71. See id. at 103-04.
72. 370 U.S. 195 (1962).

tion of a no-strike clause in labor agreements.[73] This holding, however, did not apply to actions in the state courts, which were outside the scope of the 1932 Act. The result has been, as the dissent in *Atkinson* predicted,[74] a battle over forums, with the unions seeking to remove to federal courts and the employers attempting to keep contract cases under state jurisdiction.[75] As to this question of removal, the federal courts have been split.[76]

2. Additional Statutory Provisions Affecting Pre-emption

Since the passage of the original NLRA, there have been a series of amendments which have served to limit the scope of pre-emption. The reason for one important statutory change is to be found in the Supreme Court's decision in *Guss v. Utah Labor Relations Board*,[77] a case decided two years before, and affirmed by *Garmon*.[78]

While the pre-emption doctrine often requires state courts to defer to the NLRB, the Board has continually rejected certain cases because of budgetary considerations, work load, etc. *Guss* was just such a case. Thus, while the case was one typically reserved for Board jurisdiction, the agency declined to hear it. The Supreme Court noted that under the 1947 amendments to the Act, the Board may, in certain instances, grant jurisdiction to the states by way of a special "cession agreement."[79] Since Utah had failed to enter into such a "cession agreement" with the NLRB[80] and this was the exclusive manner by

73. Id. at 203.

74. Id. at 226-27.

75. See Comment, Enjoining Violations of the No-Strike Clause, 14 U.C.L.A. L. Rev. 1130 (1967).

76. Compare American Dredging Co. v. Local 25, Operating Engineers, 338 F.2d 837 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965) (action could not be removed to the federal courts), with Avco Corp. v. Lodge No. 735, IAM, 376 F.2d 337 (6th Cir. 1967), cert. granted, 389 U.S. 819 (1967) (action could and should be removed to the federal courts). The Supreme Court, in hearing the Avco case, will hopefuly settle the matter in the current term. In addition, there have been proposals in Congress to nullify the Atkinson decision by amending the Norris-LaGuardia Act. See 113 Cong. Rec. 13530 (daily ed. Sept. 25, 1967).

77. 353 U.S. 1 (1957).

78. 359 U.S. at 246.

79. 353 U.S. at 6-7. Provision for the cession agreement is found in Section 10(a) of the Act. It states: "[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 subchapter or has received a construction inconsistent therewith." 29 U.S.C. § 160(a) (1964).

80. As of 1959, "No state (had) been able to meet the requirements of the proviso, as interpreted by the NLRB." Meltzer, supra note 19, at 56. See also Senator Dirksen's remarks as to the sparsity of state labor relations agencies capable of assuming jurisdiction in 105 Cong. Rec. 6413 (1959).

which the Board could defer to the states, the Supreme Court concluded that the state could not hear the case despite the refusal of the NLRB to assert jurisdiction.[81] Thus, the pre-emption doctrine had suddenly spawned the spectre of a "no-man's land" in which jurisdiction was declined by the Board and the state court or agency was precluded from accepting jurisdiction. The only exceptions appeared to be those few cases in which violence was involved or in which a business was entirely intrastate so as not to affect "commerce." While the result in *Guss* was obviously undesirable, it was clearly dictated by existing legislation and policies.[82]

After extended debate over the effects of *Guss*,[83] Congress enacted section 701(a)[84] as part of the amendments contained in the 1959 Labor-Management Reporting and Disclosure Act. This section provided that the Board could decline jurisdiction over any labor dispute which did not *substantially* affect interstate commerce. However, the Board's discretion in this area was limited by the proviso that it could not decline jurisdiction if it would not have declined the same under the standards prevailing upon August 1, 1959.[85] Thus, for example, a small non-retail manufacturer doing $50,000 worth of business, either directly or indirectly, and employing perhaps only a few workers, would, under the standards, come within the jurisdiction of the NLRB.

This statute has undoubtedly closed the unwelcome "no-man's land" opened by the pre-emption cases. Section 701(a) will be an important limitation on the pre-emption doctrine if it is interpreted to mean that the state rather than federal substantive law is to be used by state courts in assuming cases declined by the NLRB. While it has been argued that the use of inconsistent state law would deny workers involved in "commerce" of their federally granted rights,[86] it appears that the contrary position is, at the present, more widely accepted.[87]

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81. 353 U.S. at 9-10.

82. Much of the discussion in Guss dwells upon these policies. Id. at 8-10.

83. See 105 Cong. Rec. 6413, 6428, 6433, 6542-43, 6546 (1959); 104 Cong. Rec. 11102 (1958).

84. 29 U.S.C. § 164(c) (1964). This section is included as section 14(c) of the NLRA.

85. The standards prevailing as of August 1, 1959 were based upon varying monetary levels depending upon the industry involved as follows: 1. Non-Retail: $50,000 outflow or inflow, direct or indirect; 2. Office Buildings: Gross revenue of $100,000 of which $25,000 or more is derived from organizations which meet any of the new standards; 3. Retail Concerns: $50,000 gross volume of business; 4. Public Utilities: $250,000 gross volume; 5. Transit Systems: $250,000 gross volume; 6. Newspapers and Communications Systems: Radio, Television, Telegraph and Telephone: $100,000 gross volume. Newspapers: $200,000 gross volume. National Labor Relations Board Statement of October 2, 1958, in R. Smith & L. Merrifield, Labor Relations Law 679-80 (rev. ed. 1960).

86. See Papps, Section 701 and the State Courts: What Law To Be Applied? 48 Geo. L.J. 316 (1959).

87. The legislative history of § 701(c) indicates that an amendment offered by Senator Prouty to have only federal law apply in the states was defeated in the conference committee. H.R. Rep. No. 1147, 86th Cong. 1st Sess. 25 (1959). But see Papps, supra note 86. There has apparently been little adjudication directly on this issue. The best direct discus-

The enactment of section 303(b)[88] further restricted the doctrine of pre-emption by allowing federal courts to award damages for violations of the Act's secondary boycott provisions. However, this section has been interpreted as merely depriving the NLRB of primary jurisdiction. The Supreme Court in *Teamsters Union v. Morton*[89] ruled that the provision must be enforced in accordance with the federal labor law. Citing the most important pre-emption cases, the Court stated:

> If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted section 303, the inevitable result would be . . . to upset the balance of power between labor and management expressed in our national labor policy.[90]

The other important provision in the Act which has affected the pre-emption doctrine is section 14(b),[91] which gives a state the right to restrict union security provisions in labor agreements negotiated within the state. As a result, the Supreme Court has concluded that the states have exclusive control over this area of labor relations and that their substantive law is applicable.[92] The Court has been careful to point out, however, that picketing *to obtain* a certain type of security clause is within the federal domain,[93] and that the "state power, recognized by 14(b), begins *only with actual negotiation and execution of the type of agreement described by section 14(b).*"[94]

IV. Recent Judicial Restrictions on the Pre-Emption Doctrine

Several recent Supreme Court decisions have also limited the doctrine of federal pre-emption. These cases, *Machinists v. Gonzales*,[95] *Linn v. Local 114, Plant Guard Workers*[96] and *Vaca v. Sipes*,[97] each share certain common elements. In each case, the Court found the *possibility* that the activity in question was either protected or prohibited by the Act. In each, the Court felt that the Board's relief in the situation would be inadequate and that the state remedies had traditionally ruled in the area. And in each, it was found that the facts brought the case within the exception to the pre-emption rule as set forth in decisions such as *United Construction Workers v. Laburnum Corp.*[98] and *Garmon.*

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sion found was in Kempf v. Carpenters Local 1273, 229 Ore. 337, 342, 367 P.2d 436, 439 (1961), which reviewed the legislative history and accordingly found that state law should apply. See also Kelley v. Kramer, 30 Misc. 2d 713, 217 N.Y.S.2d 698 (Sup. Ct. 1961).

88. 29 U.S.C. § 187(b) (1964).
89. 377 U.S. 252 (1964).
90. Id. at 259-60.
91. 29 U.S.C. § 164(b) (1964).
92. Local 1625, Retail Clerks Assoc. v. Schermerhorn, 375 U.S. 96 (1963).
93. Id. at 105.
94. Id.
95. 356 U.S. 617 (1958).
96. 383 U.S. 53 (1966).
97. 386 U.S. 171 (1967).
98. 347 U.S. 656 (1954).

In *Gonzales*, which was decided prior to *Garmon*, the petitioner sued his union in a state court for illegal expulsion under the union constitution, claiming a breach of contract and seeking restoration of membership and damages, including damages for mental suffering. The plaintiff had been denied use of the union's hiring hall because of his expulsion and, as a result, could not obtain employment. The Court concluded that the suit probably contained sufficient elements to constitute an unfair labor practice under section 8(b)(2)[99] of the NLRA.[100] However, the Court reasoned that the *crux* of the action was the breach of contract claim and that the "possibility of conflict with federal policy [was] . . . remote."[101] In support of its position, the Court relied on *Laburnum*, which had held that a tort action would lie in a state court despite the concurrent jurisdiction of the NLRB. The extension of this reasoning to a breach of contract suit was but a short step, especially in view of the states' traditional interest in, and the NLRA's relative lack of concern with internal union affairs.[102] Finally, the Court noted that while the Board could award back pay, it could not award damages for mental suffering or restore the plaintiff to membership in the union.[103]

The Court's reasoning in *Vaca v. Sipes* was similar to that in *Gonzales*. However, the *Vaca* case also raised serious questions regarding the relationship between section 301 of the Act and the pre-emption doctrine. In *Vaca*, an employee sued his union for failing to carry a personal grievance to arbitration. This, in effect, amounted to a charge that the union had breached its duty of fair representation. Such a breach had recently been declared an unfair labor practice by the NLRB.[104] Despite these facts, the Court infused section 301 issues into the suit and found the pre-emption doctrine inapplicable in the circumstances.[105] It has been established that an individual employee may sue his employer in the courts under section 301.[106] It is also clear that where there is a breach of contract by an employer which also constitutes an unfair labor practice, the section 301 court action is not pre-empted by the NLRB.[107] The Court's unusual application of section 301 to this *employee-union* dispute is based on the

99. Section 8(b)(2) reads in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees . . . ." 29 U.S.C. § 158(b)(2) (1964).

100. 356 U.S. at 619.

101. Id. at 621.

102. Id. at 620, 621. Congress of course, did subsequently express its deep interest in internal union affairs with the passage of the Labor-Management Reporting and Disclosure Act of 1959.

103. Id. at 621.

104. Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), enforced, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967). Miranda Fuel Co., 140 N.L.R.B. 181 (1962).

105. 386 U.S. at 186-87.

106. Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962).

107. Id. at 197.

fact that there are certain instances in which the union will violate its duty of fair representation and the employer will breach the collective agreement at one and the same time. In such circumstances, the Court reasoned, the employee may be without a proper remedy because of the judicial requirement that an employee must first attempt to exhaust his contract remedies (through the grievance procedure) before resort to the courts under section 301 will be allowed.[108] The Court concluded, therefore, that an employee should be allowed to sue his employer under section 301, even though he has failed to exhaust his administrative remedies, but only if he can also prove the breach of the union's duty of fair representation.[109] The *Vaca* Court concluded that a court, having obtained jurisdiction under these circumstances and faced with the task of determining the wrongdoing of *both* employer and union, should be allowed to provide remedies against both, even though the employer and union are sued separately.[110]

While the affording of a judicial remedy against both the union and the employer may appear logical, the entire process as outlined by the Court's decision seems clearly at odds with both the pre-emption doctrine and the stated purpose of section 301. That section speaks only of suits between an employer and a union for a breach of contract.[111] Whatever the employer may have done to the plaintiff in *Vaca* is entirely irrelevant to the question of the union's wrongdoing. *Vaca* was simply a suit between an employee and his union for breach of the duty of fair representation. That breach is considered today an unfair labor practice, and as such, both the Act and a long line of decisions hold that it must be adjudicated by the Board and not by the courts.[112]

Moreover, the employee would not be left without remedies if the pre-emption doctrine were applied.[113] He could proceed against his union via the NLRB, if it should at any time be guilty of a breach of the duty of fair representation. He may in addition proceed against his employer for breach of the collective bargaining agreement.[114] That the suits may arise out of a single set of facts is immaterial. The union and the employer have entirely separate obligations under the circumstances of the *Vaca* case, and the National Labor Relations Act has clearly recognized this by providing for entirely separate means of legal redress in cases of breach of the respective obligations.

In addition to the section 301 issue, the *Vaca* Court attempted to justify its

108. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 651-52 (1965).

109. 386 U.S. at 186.

110. Id. at 187.

111. The statute reads in relevant part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185(a) (1964).

112. See, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Garner v. Teamsters Local 776, 346 U.S. 485 (1953).

113. See Mr. Justice Fortas' concurring opinion, 386 U.S. at 200-01.

114. See note 106 supra and accompanying text. The employee must of course satisfy the requirements set out in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) in such an action; see note 108 supra and accompanying text.

refusal to employ the pre-emption doctrine by noting that the duty of fair representation was one of traditional court concern.[115] Moreover, the Court implied that fair representation questions come within the exceptions to the pre-emption doctrine.[116] Finally, the Court expressed fears of an inadequate Board remedy, which may at times arise in connection with such breaches by a union.[117]

The section 301 issue aside, the conclusions of the Court in *Vaca* and *Gonzales* on these other issues seem questionable. As to the argument that the courts have traditionally been concerned with internal union affairs and the duty of fair representation, it is to be noted that the courts were traditionally concerned with *all* phases of labor relations until they were superseded by the NLRB by command of the National Labor Relations Act. The possibility of an inadequate Board remedy is equally irrelevant. So long as the Board has been given jurisdiction under the Act for a particular case, the fact that it may not be able to provide a satisfactory remedy is a defect which the legislature and not the courts must rectify.

Perhaps even more than *Gonzales* and *Vaca*, the *Linn* case seems destined to have a profound effect upon the pre-emption doctrine. *Linn* was an action in tort for libel. The plaintiff, a member of management in a firm caught in an organizational campaign, claimed to have been libeled by union literature and brought suit under a state libel law. The Supreme Court ruled that the state remedy was applicable by virtue of the exception to the pre-emption doctrine enunciated in *Garmon*, whereby state law could apply if "the activity was a merely peripheral concern of the [Act] . . . ." or where the regulated activity was deeply rooted in local feelings, *provided congressional direction was not to the contrary.*[118] The *Linn* Court reasoned that malicious libel, as such, was neither protected nor prohibited under the Act and was therefore of only "peripheral concern."[119] In addition, the Court cited language in *Laburnum*, which indicated that state action for tortious activities would be permitted where Congress had not dealt with the problem in the Act.[120] The Court, as in *Gonzales* and *Vaca*, emphasized the traditional concern of the states in the activities involved, and the lack of remedy provided by the Board.[121] While the Court's dependency on the *Laburnum* case in *Gonzales* is understandable, it is totally inexplicable in *Linn* since the *Garmon* Court had expressly limited the *Laburnum* rule to cases involving violence and threats.[122]

115. 386 U.S. at 181-82.
116. Id. at 180-81.
117. Id. at 182-83.
118. 359 U.S. at 243-44.
119. 383 U.S. at 61-63.
120. Id. at 61-62.
121. Id. at 63-64.
122. The Court in Garmon stated: "We recognize that the opinion in [Laburnum] found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e., 'intimidation and threats of violence.' " 359 U.S. at 247-48; Linn v. Local 114, Plant Guard Workers, 337 F.2d 68, 71 (1964), rev'd, 383 U.S. 53 (1966). See also Wellington, supra note 19, at 552.

As was carefully pointed out by the dissents in *Gonzales* and *Linn*[123] and the concurring opinion in *Vaca*,[124] the facts of each case brought it squarely within the tests of pre-emption established in *Weber* and *Garmon*. Indeed, in both *Gonzales*[125] and *Vaca*,[126] the Court admitted the possibility of unfair labor practices but nevertheless denied primary NLRB jurisdiction. How such a conclusion can conform to the holding in *Weber* that primary NLRB jurisdiction is to prevail where an activity is *reasonably* protected or prohibited, or with that in *Garmon* to the same effect when the activity is even *arguably subject* to section 7 or section 8, remains unclear.

The decision by the Court in the *Linn* case is unsound since it allows the introduction of irrelevant issues into the organizational process protected by section 7 of the Act. In direct contradiction to the rationale of the entire pre-emption doctrine, it has opened the way for state courts to become indirectly involved in a labor controversy where they have no business. The effect of this ruling on labor relations can be only disruptive. The orderly, well-established procedures of the Board for handling recognitional disputes may now be strained by threats and counter-threats of subsidiary defamation suits as a result of the free flow of language which typically accompanies organizing campaigns. Equally important is the danger that the decision may be extended to other tortious acts which may attach to normal labor relations activities.[127]

V. Conclusion

The Supreme Court, in the *Gonzales*, *Vaca*, and *Linn* decisions, has violated the fundamental principles upon which the pre-emption doctrine is based. It has denied exclusive, primary jurisdiction to the NLRB in cases in which it was more than "arguably" the right of the Board to maintain such jurisdiction. It has allowed subsidiary interests to enter the field of labor relations when it was given no power to do so by Congress. It has allowed for duplication of remedies which the Board, with its centralized administration, was supposed to avoid. It has opened the way for non-expert adjudication in a field which cries out for expertise. In short, these decisions have created a breach in the national labor policy which may result in extensive damage.[128] Finally, these decisions have rekindled the confusion as to the powers of state courts under the NLRA, which had been largely laid to rest following the *Garmon* case.

123. See 356 U.S. at 626-27; 383 U.S. at 68-69. It is conceded by all that a personal libel may be redressed in the state courts. The libel involved in Linn, however, bore directly on and was indeed "part of the fabric" of the recognitional dispute. Id. at 70, 74.

124. 386 U.S. at 201.

125. 356 U.S. at 619.

126. 386 U.S. at 177-78.

127. See Food Employees Local 590 v. Logan Valley Plaza Inc., 425 Pa. 382, 227 A.2d 874, cert. granted, 389 U.S. 911 (1967).

128. The Court in Linn conceded that its decision there may produce just such a result. It stated: "We believe that under the rules laid down here [libels] can be appropriately redressed without curtailment of state libel remedies beyond the actual needs of national labor policy. However, if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding." 383 U.S. at 67.