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PUBLIC LAW

LABOR LAW

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As in the past, this article connects chronologically with the previous Labor Law Surveys.¹ In addition to Florida decisions and the activities of the 1959 Florida Legislature, we have considered federal decisions and NLRB action where such appear to be of local impact.² Developments in the law of the individual employment contract have been reviewed where germane to the law of labor relations generally.

STATE v. FEDERAL JURISDICTION

Labor relations, as a branch of Florida substantive law, has been rapidly shrinking in dimensions. This is primarily due to the *Leedom*³ and *Sax*⁴ decisions, the effect of which has been to federally preempt⁵ a heretofore prolific field of Florida labor litigation, viz., that arising from the "hotel" cases.

Due to their importance, a discussion of these decisions would appear to be appropriate at this point.

The hotel labor disputes were discussed at some length in the two preceding Labor Law Surveys,⁶ and the reader is referred thereto⁷ for any necessary background information. It will be recalled that these

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1. 8 MIAMI L.Q. 246 (1954); 10 MIAMI L.Q. 208 (1956); 12 U. MIAMI L. REV. 344 (1958).

2. The period covered by this article extends, generally speaking, from August 2, 1957 through August 1, 1959, though a few later cases have been picked up for the sake of completeness. Specific cut-off volumes are as follows: 358 U.S.; 267 F.2d; 168 F. Supp.; 114 So.2d; 13 Fla. Supp.

3. See note 19 *infra*.

4. See note 16 *infra*.

5. See note 21 *infra*, and the related text.

6. 12 U. MIAMI L. REV. 344 (1958); 10 MIAMI L.Q. 208 (1956).

disputes arose from the energetic — and vigorously resisted — efforts of the Hotel and Restaurant Employees' Union, Local 255, to organize the employees of the "Gold Coast" hotels. The ensuing proceedings fell into two sharply-defined legal phases.

First, there was a series of injunction suits,⁸ brought in the state courts, by the owners of the various hotels to halt organizational picketing of their establishments. These suits were consolidated, either at trial or on appeal, and the hotel owners were uniformly successful in securing permanent injunctions, affirmed by the Supreme Court of Florida,⁹ against all picketing.

Second, the union made a concurrent effort to invoke NLRB jurisdiction over the controversy. Notwithstanding the inherently interstate character of the hotel industry,¹⁰ it had been a long-standing policy of the NLRB

7. In particular, 10 *MIAMI L.Q.* 347-348 (1956).

8. *Boca Raton Club v. Hotel Employees' Union, AFL*, 80 So.2d 680 (Fla. 1955), with which five other cases were consolidated, *subsequent opinion*, 83 So.2d 11 (Fla. 1955); *Sax Enterprises, Inc. v. Hotel Employees' Union, AFL*, 80 So.2d 602 (Fla. 1955).

9. *Hotel Employees' Union, AFL, v. Hotel Delmonico*, 93 So.2d 600 (Fla. 1957); *Hotel Employees' Union, AFL, v. Boca Raton Corp.*, 93 So.2d 600 (Fla. 1957); *Hotel Employees' Union, AFL, v. Sea Isle Hotel*, 93 So.2d 600 (Fla. 1957); *Hotel Employees' Union, AFL, v. Martinique Hotel*, 93 So.2d 599 (Fla. 1957); *Hotel Employees' Union, AFL, v. Casa Blanca Operating Co.*, 93 So.2d 599 (Fla. 1957); *Hotel Employees' Union, AFL, v. Allenberg*, 93 So.2d 599 (Fla. 1957); *Hotel Employees' Union, AFL, v. Levy*, 93 So.2d 598 (Fla. 1957); *Hotel Employees' Union, AFL, v. 2500 Collins Avenue Corp.*, 93 So.2d 598 (Fla. 1957); *Hotel Employees' Union, AFL, v. Monte Carlo*, 93 So.2d 597 (Fla. 1957); *Hotel Employees' Union, AFL, v. Biscayne Terrace Hotel*, 93 So.2d 597 (Fla. 1957); *Hotel Employees' Union, AFL, v. Cohen*, 93 So.2d 596 (Fla. 1957); *Hotel Employees' Union, AFL, v. Leevlans Corp.*, 93 So.2d 596 (Fla. 1957); *Hotel Employees' Union, AFL, v. A. H. S. Corp.*, 93 So.2d 596 (Fla. 1957); *Hotel Employees' Union, AFL, v. Stuyvesant Corp.*, 93 So.2d 595 (Fla. 1957); *Hotel Employees' Union, AFL, v. McAllister Hotel*, 93 So.2d 595 (Fla. 1957); *Hotel Employees' Union, AFL, v. Di Lido Hotel*, 93 So.2d 595 (Fla. 1957); *Hotel Employees' Union, AFL, v. Sax Enterprises, Inc.*, 93 So.2d 591 (Fla. 1957); *Hotel Employees' Union, AFL, v. Lansburgh*, 93 So.2d 591 (Fla. 1957); *Hotel Employees' Union, AFL, v. Levy*, 93 So.2d 583 (Fla. 1957); *Hotel Employees' Union, AFL, v. Sorrento Hotel*, 93 So.2d 580 (Fla. 1957).

10. It will be recalled that the employees' union, in briefs filed to support its attempt to invoke NLRB jurisdiction, stated:

During the year ending September, 1954, the four county area including Miami and southeast Florida had 2,500,000 visitors, (the greatest number of whom were accommodated by the hotel industry) who spent 47,600,000 visitor days and \$513,000,000. Of this amount, \$376,000,000 was spent in Dade County (Miami-Miami Beach) alone. This represents one-third of all spending in this county. \$235,000,000 was spent in the Miami Beach area alone. This is equivalent to two and one-half times the spending of the residents of Miami Beach.

The hotel industry in Miami Beach has more than 30,000 units, employs approximately 12,000 people in all categories, and received for the year ending September, 1954, in excess of \$74,000,000 for hotel lodging from visitors from outside the state of Florida. These hotels also received in excess of \$27,000,000 for food from these visitors. Thus the hotel industry of Miami Beach received over \$100,000,000 in revenue from tourists moving in the chain of commerce. Bureau of Economic Research, University of Miami.

The tourist industry of Miami and Miami Beach represents the leading industry of the area and produces more than the income of the next two leading industries (*Miami Daily News* 3/16/1955 . . .). In 1949, when the tourist trade in the Greater Miami area was only \$243,000,000

to decline jurisdiction over hotel labor disputes generally.¹¹ During the Florida hotel disputes, the NLRB at each administrative level, up to and including the full Board, persisted in its adherence to this policy. The union thereupon filed a petition for declaratory judgment and for injunctive relief in the United States District Court, District of Columbia,¹² asserting that the board had violated its rights under the National Labor Relations Act¹³ and received another adverse ruling. On appeal, the Board's action was again upheld by the United States Court of Appeals, District of Columbia Circuit, in *Hotel Employees' Local No. 255 v. Leedom*,¹⁴ Fahy, J., dissenting. Judge Fahy's dissenting opinion, in retrospect, is of interest, particularly the following portion:¹⁵

It seems to me to be inconsistent with the terms of section 9(c) of the Labor Relations Act . . . for it to refuse to assume jurisdiction over any representation case involving any hotel There is no intimation in the Act that the public or employees or employers should be denied the benefits of the representation provisions simply because a hotel is involved. . . ."

Subsequently, in each of these two phases of the hotel disputes, the union has since emerged overwhelmingly triumphant.

As to the first phase, on consolidated writs of certiorari, the Supreme Court of the United States struck down the Florida injunctions, *Hotel Employees' Union, Local 255 v. Sax Enterprises, Inc.*¹⁶ The Court forcefully stated:¹⁷

The Florida courts were without jurisdiction to enjoin this organizational picketing whether it was activity protected by § 7 of the National Labor Relations Act, as amended . . . or prohibited by § 8(b)(4) of the Act. . . . This follows even though the National Labor Relations Board refused to take jurisdiction. . . .

as compared with \$376,000,000 in 1954, the income of the next leading industry (airline operations and repairs) was only \$105,000,000 and income from all manufacturing was only \$45,000,000; fruit and vegetable growing produced only \$13,700,000 in total income.

In addition, the hotel industry of Miami Beach is closely allied to all types of interstate transportation systems. During the year ending September, 1954, the airlines alone transported over 1,200,000 tourists to the Greater Miami area, the greatest number of these people being destined for accommodations in the hotels of the employer association herein.

. . . Eastern Airlines . . . transported over 25,000 persons and received revenue in excess of \$28,000,000, National Airlines transported in excess of 23,000 persons with revenue in excess of \$25,000,000. Delta Airlines (received) . . . in excess of a \$5,700,000 revenue. . . .

11. *Virgin Isles Hotel, Inc.*, 110 N.L.R.B. 558 (1954); *Hotel Ass'n of St. Louis*, 92 N.L.R.B. 1388 (1951); *White Sulphur Springs Co.*, 85 N.L.R.B. 1487 (1949).

12. *Hotel Employees' Local No. 255 v. Leedom*, 147 F. Supp. 306 (D.D.C. 1957).

13. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-197 (1958).

14. 249 F.2d 506 (D.C. Cir. 1957).

15. *Id.* at 507.

16. 358 U.S. 270 (1959).

17. *Id.* at 271.

The record does not disclose violence sufficient to give the State jurisdiction under *United Auto. A. & A. I. Workers v. Wisconsin Employment Relations Board*, 351 US 255. . . . In none of the twelve cases did the Florida trial courts make any finding of violence, and in some an affirmative finding of no violence was made. . . .

The other and seemingly more far-reaching¹⁸ phase, concerning NLRB jurisdiction over hotels generally, turned out equally well for the hotel employees' union. After the adverse ruling of the court of appeals, the union sought review, by certiorari, to the Supreme Court of the United States. The high Court reversed¹⁹ the court of appeals and handed down an opinion of unusual brevity. The opinion, quoted below in its entirety, is as follows:²⁰

We believe that dismissal of the representation petition on the sole ground of the Board's "long standing policy not to exercise jurisdiction over the hotel industry" as a class, is contrary to the principles expressed in *Office Employees International Union, Local No. 11 v. NLRB*. . . . The judgment is therefore reversed and the case remanded to the Court of Appeals for proceedings not inconsistent herewith.

To sum up, it will be seen that, pursuant to its apparently never-ending task of curtailing state jurisdiction through the now well-entrenched doctrine of federal preemption,²¹ the Supreme Court of the United States has again turned a heretofore local matter—the Florida hotel disputes—into a subject of national control.

While understandable impatience with the slow-moving processes of local government may very well have been an obvious precipitating force behind the Supreme Court rulings it is submitted that such far-reaching questions of federal jurisdiction should be decided squarely on

18. The resulting additional case-load imposed on the NLRB has necessitated a substantial increase in personnel, according to local sources.

19. *Hotel Employees' Local No. 255 v. Leedom*, 358 U.S. 999 (1958).

20. *Id.* at 100.

21. The effect of federal pre-emption has been, in many instances, to create a so-called "no-man's-land." This phase of pre-emption is discussed in Footnote 35, *infra*, and the related text. For background material on the theory of federal pre-emption, in and of itself, the reader is referred to the following law review discussions. Browne, *The Question of Pre-emption in Labor Injunctions*, 24 MO. L. REV. 166 (1959); Reynolds, *Federal Pre-emption and the Twilight Zone in Labor Disputes*, 27 J. B. ASS'N KAN. 157 (1958); Van de Water and Petrowitz, *Federal-State Jurisdiction and the Constitutional Framework in Industrial Relations*, 31 SO. CAL. L. REV. 111 (1958); Kneec, *Federal Supremacy in Labor-Management Relations*, 27 FORDHAM L. REV. 373 (1958); Nanet, *Federal Pre-emption, Free Speech and Right-to-Work Statutes*, 52 NW. U. L. REV. 143 (1957); Turnbull, *Federal-State Jurisdictional Problems*, 7 LAB. L. J. 5 (1956); Glushien, *Federal Pre-emption and Labor Relations*, 15 FED. B. J. 4 (1955); Comment, *Federal Limitations on State Jurisdiction over Labor-Management Relations*, 12 ARK. L. REV. 354 (1958); Comment, *Federal Pre-emption — A Comment*, 33 N.Y.U.L. REV. 691 (1958); Comment, *Labor Law — Interstate Commerce — Pre-emption*, 7 KAN. L. REV. 185 (1958); Note, *Federal Pre-emption and Labor Disputes*, 33 ST. JOHN'S L. REV. 78 (1958).

unshakeable constitutional grounds rather than on the pressures and expediency of the moment.

FLORIDA DECISIONS

*Albury v. Plumbers Local Union No. 519*²² aptly illustrates the propriety of the recent — if tardily-enacted — federal Labor Reform Act,²³ and the vicious result which can ensue in the absence of either appropriate federal control of certain labor practices or similar control at the state level. Even worse, as in the instant case, is a judicial indisposition to recognize clearly unlawful labor practices (on the part of both management and labor) and to meet the resulting legal issues squarely and without prevarication.

According to the allegations of his complaint, as excerpted in the court's opinion (which allegations nowhere appear to be disputed), the plaintiff, Albury, a non-union plumbing contractor, entered into an agreement with a general contractor, Porter-Wagor-Russell, Inc. to supply certain plumbing for the latter's housing project. Soon after Albury had begun work he received a letter from the general contractor informing him that the plumber's union (whose men were also working on part of the project) objected to the use of any non-union labor on the job, and that if Albury did not use union labor after a stated deadline, his contract would be terminated.

The contract between Albury and Porter-Wagor-Russell was in writing and contained *no requirement* that only union labor could be used in performing the work.

Albury thereupon filed his suit for injunctive relief against the union, the general contractor, and various other contractors, alleging a conspiracy among these defendants to prevent him from performing under his contract, and to force his employees to either join the union or lose their employment; further, that Porter-Wagor-Russell was intimidated into sending the letter to Albury, and that various work stoppages by union employees of other subcontractors had been made so as to prevent Albury's men from working.

The lower court denied the temporary injunction and dismissed all of the defendants except Porter-Wagor-Russell. Albury thereupon took an interlocutory appeal.

The District Court of Appeal, Third District, in a somewhat disappointing opinion (for reasons to be further elaborated), affirmed the chancellor's ruling on each of the points presented.

22. 100 So.2d 647 (Fla. App. 1958).

23. S. 1555, 86th Cong. 1st Sess. (1959).

As to the denial of the temporary injunction, the court applied the oft-invoked rule²⁴ that such matters are within the discretion of the chancellor. The court stated:²⁵

In considering the application for temporary injunctive relief against the appellee, Porter-Wagor-Russell, Inc., the chancellor below was called upon to exercise his discretion in determining *whether or not the allegations of the complaint were such as to warrant the issuance of the writ.*

This ruling, it should be noted, was in spite of the fact that the allegations of the complaint do not appear to be anywhere in dispute.

As to the second point concerning the dismissal of the five other defendants, the court stated that injunctive relief against the alleged conspiracy was not proper since Albury "has a remedy at law"²⁶ and could prosecute the offending parties under Chapter 447, Florida Statutes. The court failed to cite any specific section of Chapter 447. However, it appears that the only criminal provision in that chapter is § 447.14 which provides:

Penalties. Any person or labor organization who shall violate any of the provisions of this chapter shall, upon conviction thereof, be adjudged guilty of a misdemeanor and be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail for not to exceed six months, or by both such fine and imprisonment.

The court goes on to cite three cases²⁷ to bolster its position, an examination of which shows that they have naught in common save dicta to the effect that "equity will not enjoin a crime."

An evaluation of the *Albury* decision fairly compels one to the conclusion that it is, indeed, an unfortunate one. Is it not a mockery of Florida's "right-to-work law"²⁸ when workers, such as Albury's, may be subjected to court-sanctioned coercion of the type practiced here? Is it properly within the province of an appellate court to label as "discretionary" the denial of an injunction by the chancellor below when the record shows no disputed facts, and when such facts so clearly call for injunctive relief?²⁹

24. The Florida cases so holding are numerous indeed. A few leading examples are *Stirling Music Co. v. Feilbach*, 100 So.2d 75 (Fla. App. 1958); *Watson v. Cochrane*, 150 Fla. 733, 8 So.2d 664 (1942); *Paramount Enterprises v. Mitchell*, 104 Fla. 407, 140 So. 328 (1932); *Suwannee & S. P. R. Co. v. West Coast Ry. Co.*, 50 Fla. 609, 39 So. 538 (1905); *Swepton v. Call*, 13 Fla. 337 (1869).

25. 100 So.2d at 648.

26. *Id.* at 649.

27. *Polk v. Polk*, 41 So.2d 150 (Fla. 1949); *Lansky v. State ex rel. Gibbs*, 143 Fla. 301, 199 So. 46 (1940); *Pompano Horse Club, Inc. v. State ex rel. Bryan*, 93 Fla. 415, 111 So. 801 (1927).

28. FLA. CONST. Decl. of Rights § 12.

29. There can be no question that the allegations, if proved, would constitute unlawful conduct, namely, conspiracy and secondary boycott activities. It is, of course, well-established that, even if the matter were one concerning or affecting interstate commerce, neither the Norris-LaGuardia Act nor the National Labor Relations Act

Moreover, it is a well-established principle of Florida law that, while equity will not enjoin a crime,³⁰ the mere fact that an act is a crime will not per se preclude equitable relief.³¹ And it is an equally well-established principle that an injunction will lie to restrain third persons from such interference with the performance of a contract.³²

It is submitted that the *Albury* situation would not long be tolerated were the matter before a federal forum — ordinarily regarded as far more hospitable to labor than are state courts.³³

Finally, it should be noted that the court's suggested recourse to the criminal provisions of Chapter 447 would surely prove of little benefit to the plaintiff in view of the severe drubbing this chapter received when constitutionally construed by the Supreme Court of the United States.³⁴

One of the two Florida cases illustrating the so-called "no-man's land"³⁵ where neither federal nor state jurisdiction may be invoked (a subject of

would deprive a state court of its power to issue injunctions against such unlawful conduct. See *Mayer Bros. Poultry Farm v. Meltzer*, 247 App. Div. 169, 80 N.Y.S.2d 874 (1948); *Southern Bus Lines v. Street Elec. Ry. & Motor Coach Employees*, 295 Miss. 354, 38 So.2d 765 (1945).

30. This seems to be a fairly general rule in most jurisdictions. See *McGuire v. Amrein*, 101 F. Supp. 414 (1951); *Knighton v. Knighton*, 252 Ala. 520, 41 So.2d 172 (1949); *Portage Township v. Full Salvation Union*, 318 Mich. 693, 29 N.W.2d 297, appeal dismissed, 333 U.S. 851 (1948); *Missouri Veterinary Medical Ass'n v. Glisan*, 230 S.W.2d 169 (Mo. App. 1950).

31. It is ironic to note that in two of the three cases cited by the court, namely the *Pompano Horse* case and the *Lansky* case, the activities enjoined were criminal and that the issuance of such injunction was affirmed by the Supreme Court of Florida in both instances.

As a matter of fact, the number of cases which hold that criminal activities will not preclude an injunction are so numerous that little purpose would be served in attempting to list them here. A concise summation may be found in 28 AM. JUR., *Injunctions*, § 157 (1959) wherein it is stated:

"... the mere fact that an act sought to be enjoined is punishable under criminal laws will not preclude either the state or an individual from evoking the jurisdiction of equity for the purpose of securing an injunction whenever other facts afford a basis for the exercise of equitable jurisdiction on recognized grounds."

32. See the clear-cut decisions of the Supreme Court of Florida in *Dade Enterprises v. Wometco Theatres*, 119 Fla. 170, 160 So. 209 (1935) and *Anderson v. Tower Amusement Co.*, 118 Fla. 437, 159 So. 82 (1935), vacated (due to changed circumstances), 118 Fla. 895, 160 So. 523 (1935).

33. Witness the energetic efforts of the Hotel Employees' Union to invoke NLRB jurisdiction (with its right of recourse to the federal courts) over Florida's hotels.

34. *Hill v. Florida*, 325 U.S. 538 (1945), reversing *Hill v. State*, 155 Fla. 245, 19 So.2d 857 (1944).

35. See *Petro*, *Federal Pre-emption — A Comment*, 33 N.Y.U.L. Rev. 691 (1958); *Bernstein*, *Complement or Conflict: Federal State Jurisdiction in Labor-Management Relations*, 3 How. L. J. 191 (1957); *Shenkin*, *State Power Where N.L.R.B. Refuses to Assert Jurisdiction*, 8 LAB. L. J. 155 (1957); *Tobriner and Grodin*, *Taft-Hartley Pre-emption in the Area of N.L.R.B. in Action*, 44 CALIF. L. REV. 663 (1956); *Comment*, *Pre-emption and Non-Regulation — the "No-Man's-Land" of Labor Relations*, 18 Md. L. Rev. 50 (1958); *Note*, 2 VILL. L. REV. 570 (1957); *Note*, 56 MICH. L. REV. 133 (1957); *Note*, 1957 UNIV. OF ILL. L.F. 145 (1957); *Note*, 45 CALIF. L. REV. 216 (1957); *Note*, 104 U. PA. L. REV. 1001 (1956); *Note*, 65 YALE L. J. 86 (1955).

recent corrective federal legislation)³⁶ is *Amalgamated Clothing Workers of America v. Donald S. La Vigne, Inc.*³⁷

The litigation began as an injunction suit against picketing of the employer's premises. The lower court entered a temporary injunction, denied the defendant union's motion to dismiss the complaint and an interlocutory appeal was taken by the union.

Prior to the institution of these proceedings, the employer had requested the National Labor Relations Board to conduct a certification election, but for some reason, which is not apparent from the opinion, the Board did not act and the employer thereupon filed his injunction suit.

The crux of the matter was concisely stated by the Court:³⁸

The primary question raised on this appeal is whether or not, under these circumstances, a state court has jurisdiction to enjoin peaceful and non-mass picketing designed to require the employer to recognize the union as the bargaining representative, where the employer is admittedly engaged in interstate commerce. *We conclude that the question should be answered in the negative.* [Emphasis added.]

The remainder of the opinion is devoted to a review of the authorities pro and con, and there seems little question as to the correctness of this decision under the then existing state of the law. The Supreme Court of the United States bluntly recognized the existence of this "no-man's land" in *Guss v. Utah L.R.B.*³⁹ wherein the Court said:⁴⁰

We are told by appellee that to deny the state jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. . . . We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land.

A vigorously contested labor dispute which precipitated such a wealth of collateral legal issues and sub-issues that the principal matters at issue were initially buried is *International Hod Carriers Union v. Heftler Construction Company*.⁴¹ Eventually the case emerged as yet another Florida "no-man's land" decision.

The dispute arose at one of the contractor's housing projects. The contractor sought injunctive relief alleging that the union was conducting an illegal strike and boycott against the project to force the contractor not to do business with a non-union supplier of concrete.

36. S. 1555, 86th Cong., 1st Sess. § 701 (1959).

37. 111 So.2d 462 (Fla. App. 1958).

38. *Id.* at 463.

39. 353 U.S. 1 (1957).

40. *Id.* at 10.

41. 112 So.2d 848 (Fla. 1959).

The lower court, after a hearing and the disposition of various preliminary motions, entered a temporary injunction against the union's activities which injunction was upheld on interlocutory appeal.⁴²

Issues were then joined as to the principal matters in controversy. The union contended, among other things, that the circuit court lacked jurisdiction of the dispute in that the matter was wholly within the jurisdiction of the National Labor Relations Board due to the interstate nature of the contractor's business. This jurisdictional question quickly became the main bone of contention, voluminous documentary evidence being tendered by the union in support of its position.

The lower court concluded that the contractor was *not* engaged in interstate commerce, and entered a final decree, permanently enjoining the union from striking or boycotting the project. The court further ruled that the contractor was entitled to recover compensatory and exemplary damages from the union. The union thereupon appealed *directly to the Supreme Court of Florida*.

It was at this point that the fat really went into the fire as to any judicial determination of the principles of labor law basically at issue, since a serious jurisdictional question immediately arose. That is to say, should the union have appealed *directly* to the Supreme Court of Florida or should it have, instead, sought review by the appropriate district court of appeal?

It was the union's position, in taking the direct appeal, that the Supreme Court of Florida had jurisdiction pursuant to Rule 2.1(a)(5)(a), Florida Appellate Rules, which provides for direct appeal to the Supreme Court from:

. . . final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or Federal Constitution. . . .

The Supreme Court, in a carefully written opinion, reviewed the applicable law at some length, and conveniently set forth the four procedural prerequisites⁴³ for review by the Supreme Court of Florida

42. *International Hod Carriers Union v. Heftler Constr. Co.*, 103 So.2d 884 (Fla. App. 1958).

43. These are:

1. The constitutional question must have been raised at the first opportunity,
2. The constitutional provision claimed to have been violated must have been designated specifically either by explicit reference to the article and section or by quotation of the provision.
3. The facts showing the violation must have been stated, and
4. The constitutional question must have been preserved throughout for review. This requirement contemplates adequate coverage of the constitutional question in the appellate briefs.

under the above-quoted section. The essence of the court's opinion is tersely summed up as follows:⁴⁴

By his final decree the chancellor held the appellee was not engaged in interstate commerce and that there was no showing that the appellee or the strike or boycott had any impact or effect upon interstate commerce. This finding of fact rendered it unnecessary for the chancellor to construe or interpret a constitutional provision. (Emphasis added.)

The inevitable conclusion, of course, was that the Supreme Court was without jurisdiction to entertain the appeal and that it must be remanded to the District Court of Appeal, Third District.

As this article goes to press, the district court's decision has just come down.⁴⁵

The principal point involved on the appeal again concerned whether or not Heftler's activities were such as to affect interstate commerce. The lower court ruled that they were not. This finding was reversed by the Third District on the grounds that the contractor purchased some \$302,000.00 worth of out-of-state goods for its project and that, in the words of the court:⁴⁶

These purchases cannot be characterized as so trifling that the doctrine *di minimus non curat lex* applies.

It is significant that the court recognized, in its opinion,⁴⁷ that as far as the National Labor Relations Board is concerned, a minimum of \$500,000.00 of out-of-state purchases by the employer are required before it will entertain jurisdiction.

Possibly the *La Vigne* and the *Heftler* cases will reappear after the new Labor Reform Act⁴⁸ becomes effective.⁴⁹

*National Airlines, Inc. v. Metcalf*⁵⁰ presents an unusual Florida interpretation of the Railway Labor Act⁵¹ as it applies to airlines and their employees. National Airlines, by whom Metcalf was employed, had entered into a collective bargaining agreement with the Airline Agents Association International, in which it was provided that grievances would be referred to a "System Board of Adjustment." Such a board is composed of labor and management representatives, and is sanctioned by specific provisions of the Railway Labor Act.⁵²

44. 112 So.2d at 852.

45. *International Hod Carriers Union v. Heftler Constr. Co.*, #59-356, District Court of Appeal, Third District, Florida, November 9, 1959.

46. *Id.* at page 3.

47. *Id.* at page 3.

48. See note 23 *supra*.

49. The no-man's-land provisions of the Act became effective on November 13, 1959.

50. 114 So.2d 229 (Fla. App. 1959).

51. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-188 (1958).

52. See notes 55 and 56 *infra*, and the related text.

Due to a suspension of the airline's operations during August of 1956, Metcalf was laid off for a period of ten days. Metcalf took the position that such lay-off constituted a lockout in violation of the collective bargaining agreement. The matter was brought before the System Board of Adjustment which rendered an opinion and an award of two days pay in favor of Metcalf.

The airline thereupon brought suit in the circuit court challenging the decision and award on various grounds. The lower court dismissed the complaint and the airline appealed. The district court of appeal narrowed the matters at issue to one key question:⁵³

Does a state court have jurisdiction to review the award of an airline system board of adjustment?

In arriving at its conclusion that the state courts do have such jurisdiction, the court analyzed the applicable provisions of the Railway Labor Act at some length.

First of all, it must be kept in mind that interstate airline employee-management relations are governed by the Railway Labor Act,⁵⁴ rather than by Taft-Hartley. While the two acts have much in common, their differences in certain areas, such as in matters of mediation, are quite profound. Section 153 of the Act, the controlling provision construed in the *Metcalf* case, is divided into two sections, usually referred to as "Section 153 First"⁵⁵ and "Section 153 Second."⁵⁶ Section 153 First

53. 114 So.2d at 231.

54. The propriety of this arrangement is questioned by the court, citing *McIntyre. The Railway Labor Act—A Misfit for the Airlines*, 19 J. AIR L. & COM. 274 (1952).

55. There is hereby established a Board to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act (June 21, 1934), and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act (§§ 151a, 152 of this title).

(b) The carriers, acting each through its boards of directors or its receiver or an officer or officers designated for that purpose by such board, trustee or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division of which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

56. Second. Establishment of system, group, or regional boards by voluntary agreement. Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

establishes the National Railroad Adjustment Board, a joint board composed of members of labor and management, with distinct administrative adjustment powers conferred by the Act.⁵⁷ As a practical matter, Section 153 First has present-day application only to railroad employees.

It will be seen that Section 153 Second permits individual carriers (railroad or airline) and their employees to establish by *voluntary* agreement a board with similar powers to the national board for the adjustment of grievances. Other sections of the act⁵⁸ are framed in such a way as to make such voluntarily-formed boards the *exclusive* administrative forum for adjusting disputes arising under collective bargaining agreements between airlines and their employees. Unlike the National Railroad Adjustment Board, however, there is no procedure set forth for judicial review⁵⁹ of the decisions of such voluntary adjustment boards under Section 153 Second.

As far as the propriety of judicial review by state courts of such board decisions, the court stated:⁶⁰

However, the agreement to arbitrate these disputes and be bound by the award does not preclude a review of procedural due process and jurisdictional limitations.

As far as the jurisdiction of the state court itself is concerned the court made the following decisive comments:⁶¹

In the absence of any specific grant of jurisdiction to the federal courts to enforce awards of airlines system boards of adjustment, it would appear that the federal courts lack such jurisdiction.

and,⁶²

Although this contract was executed pursuant to federal law, the complaint did not seek a construction of the statute but an interpretation of the rights growing out of the contract. As such no federal question was presented.

The court concluded by reversing the ruling of the lower court and remanding the cause thereto for a judicial determination of the points raised by the plaintiff.

It will be interesting to see whether further appellate proceedings in the *Metcalf* case will be sought, since an examination of the reported decisions reveals a seemingly confused division of authority as to the power of state courts to review.

57. This is due to the exclusionary language of section 153 of the Railway Labor Act.

58. 49 Stat. 1189 (1936), as amended, 45 U.S.C. § 184 (1958).

59. Judicial review of Board action under section 153 is implemented by the sub-sections (p) and (q).

60. 114 So.2d 232.

61. *Ibid.*

62. *Ibid.*

FLORIDA
LEGISLATIVE ACTIVITY

The 1959 Florida Legislature was relatively quiet with respect to labor matters.

The only noteworthy piece of legislation is the new Migrant Labor Camp Act providing for the licensing and regulation of camps for migratory laborers.

The act is relatively short. After defining migrant labor camps and setting forth the procedure for their licensing, the act provides that the State Board of Health shall:⁶³

Make, promulgate and repeal such rules and regulations as it may determine to be necessary to protect the health and safety of persons living in migrant labor camps. . . .

In other words, the board regulations rather than the act itself forms the basis of the substantive law by which such camps will be governed. Since these regulations do not appear anywhere in reported form, we have set forth their text in the adjoining footnote.⁶⁴

FLORIDA MEDIATION
AND CONCILIATION SERVICE

It will be recalled that the 1957 legislature established a state-authorized mediation and conciliation service.⁶⁵ This was explained and discussed in the previous Labor Law Survey.⁶⁶ Since its inception the service has been the subject of a significant opinion by the Attorney General concerning the privileged nature of notices of dispute filed pursuant to the Act. The opinion appears in the adjoining footnote.^{66a}

63. Fla. Laws, ch. 59-476 (1959).

64. Florida State Board of Health Regulations, Florida State Sanitary Code, ch. 25 *Camps* (1959).

65. FLA. STAT. § 448.06 (1957).

66. 12 U. MIAMI L. REV. 366 (1958).

66a. Question:

Are notices of dispute which are filed with the Florida Mediation and Conciliation Service in accordance with the requirements of the National Labor Relations Act within the meaning of privileged matter contemplated by § 4 of ch. 57-306, (§ 448.06(4), F.S.)?

Chapter 57-306, Laws of Florida, (§ 448.06, F.S.), created a voluntary mediation and conciliation service, the object of which is "the prevention and amicable settlement of labor problems." It was designed to provide a state mediation service to either work alone or in conjunction with the National Labor-Management Relations Act, 1947 (29 U.S.C.A §§ 141 et seq). The state act is predicated upon the principle that the federal act recognizes and sanctions cooperation with state and local mediation services. The state law must not, however, be inconsistent with the provisions of the federal act (State ex rel State Board of Mediation v. Pigg, 1951, 244 S.W.2d 75, 362 Mo. 798). Both acts deal with an area that is evidently capable of harmonious concurrent and coordinate jurisdiction. Indeed, the labor-management relations act itself admonishes the federal service "to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties." (29 U.S.C.A. § 173). In the same regard the federal act, in § 10(a)

FEDERAL DECISIONS

There appears to have been little federal activity of local interest, other than that arising from the hotel disputes, previously discussed.

In the previous survey *National Labor Relations Board v. Duval Jewelry Co.*⁶⁷ was discussed at some length as a case of interest concerning both the authority of the National Labor Relations Board to issue subpoenas and the procedural methods of revocation of such subpoenas.

The *Duval* case has since acquired added importance due to the fact that the court of appeals decision was later reversed, on certiorari, by the Supreme Court of the United States.

thereof, provides that the National Labor Relations Board may cede jurisdiction to a state agency if the state agency conforms to national policy, and the state statute creating such agency has not received a construction which is inconsistent with the provisions of the federal act (29 U.S.C.A. § 160(a)).

Applicable to the question presented herein is the provision of the federal act to the effect that one of the conditions precedent to the termination or modification of a collective bargaining contract is that the party desiring such termination or modification:

Notifies the Federal Mediation and Conciliation Service within 30 days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time (29 U.S.C.A. § 158(d)(3)).

Although the regulations adopted by the National Labor Relations Board provide that "all files, reports, letters, memoranda, minutes, documents or other papers" relating to activities of the labor-management relations act shall be privileged or confidential, notices of dispute are exempted from such classification, and are made available to interested parties (29 C.F.R. §§ 1401.1, et seq.). Since jurisdiction of the national or state mediation service is predicated upon the required notice of dispute, this exemption is necessary, otherwise one of the parties to a dispute would have to assume, without definite proof, that the other party properly filed the required notice.

The provisions of the state act which is applicable to the question presented herein is § 4 thereof, and reads as follows:

No employee of the mediation and conciliation service, or any other person authorized by the Governor to engage in the performance of duties prescribed by this Act, shall be compelled to disclose to any administrative or judicial tribunal any information relating to or acquired from private employers, employees, or their representatives *in the course of official conciliation and mediation activities* under the provisions of this Act, nor shall any reports, minutes, written communications or other documents or copies of documents, and the above-named employees pertaining to such private information be subject to subpoena; and all reports, minutes, written communications, oral conversations, other documents or copies of documents, and the above-named employees, and any other *information obtained directly or indirectly in the performance of this service of mediation or conciliation* shall be deemed privileged matter and subject to the complete immunities thereby. (Emphasis supplied.)

The foregoing quoted language of the state act, particularly the italicized portion, implies a legislative determination that notices of dispute are not within the contemplation of privileged matter. Support for such implication is the fact that such notices are not matters properly within the "course of official conciliation and mediation activities" nor are they "information obtained directly or indirectly in the performance of this service of mediation." Further support for this inescapable conclusion are the above discussed provisions, and policies, of the federal act, which must, of necessity, be considered in any discussion or interpretation of the function of the state act. [1957] Op. Atty. Gen. 057-361 (Fla. 1957).

67. 141 F.Supp. 860 (S.D. Fla. 1956).

It will be recalled that the case arose when six subpoenas, five of which were subpoenas duces tecum, the other a subpoena ad testificandum, were issued to implement a National Labor Relations Board hearing, and motions were then made before the Board by the subpoenaed parties to revoke the subpoenas. The Board declined to act on the motions prior to a ruling as to their propriety before the hearing officer. This officer subsequently denied the motions, but the moving parties did not then seek review before the Board.

The Board thereupon instituted proceedings for enforcement in the district court which quashed the subpoenas, holding them unreasonable and, further ruled that since the Board was not a "party," it was not entitled to have subpoenas issued.

On appeal to the court of appeals⁶⁸ the district court was reversed as to the subpoena ad testificandum, but was upheld, on different grounds, as to the subpoenas duces tecum. Specifically the court held that since the act provides a procedure for appeal to the Board, which was not followed, the court action was premature. For the same reason, the court held that the action of the hearing officer, in attempting to rule on the propriety of the subpoenas, was "a nullity."

Certiorari was granted⁶⁹ by the Supreme Court of the United States due to a conflict between the seventh and ninth circuits.

The Court reversed⁷⁰ the judgment of the court of appeals holding that the hearing officer was properly qualified to entertain and rule upon motions to revoke subpoenas. Needless to say, it was necessary for the Court to perform a few gyrations in statutory construction to justify its result in the face of the express wording of the applicable statutes⁷¹ and regulations⁷² which hardly could be more clearly to the contrary.

68. 243 F.2d 427 (5th Cir. 1957).

69. 355 U.S. 809 (1957).

70. 357 U.S. 1 (1958).

71. See 49 Stat. 455 (1935), as amended, 29 U.S.C. § 161 (1958) the pertinent portion of which reads as follows:

The Board or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application . . . any district court . . . shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Also, 49 Stat. 455 (1935), as amended, 29 U.S.C. § 161(1) (1958):

Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production

The significant portions of the Court's opinion are as follows:⁷³

No matter how strict or stubborn the statutory requirement may be, the law does not "preclude practical administrative procedure in obtaining the aid of assistance in the department."

and,⁷⁴

As we have seen, hearings on these representation cases "may be conducted by an officer or employee of the regional office." Certainly preliminary rulings on subpoena questions are as much in the purview of a hearing officer as his rulings on evidence and the myriad of questions daily presented to him.

It is submitted that this type of reasoning might very readily be applied to destroy virtually any statutory limitation, no matter how meticulously phrased. Further, that while the result in the *Duval* decision may be a sensible one, its achievement would seem to fall more squarely within the function and duty of the legislature than of the judiciary.

A sequel to the *Duval* decision appears in a late opinion⁷⁵ where the court of appeals, pursuant to the Supreme Court ruling, remanded the matter to the district court for enforcement of the subpoenas "in a manner considered by the District Court not to be unduly burdensome or oppressive."⁷⁶

is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. . . .

72. See 29 C.F.R. § 102.58(c) (1949), Applications for Subpoenas, provides: . . . applications for subpoenas may be filed in writing by any party with the regional director if made prior to hearing, or with the hearing officer, if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person subpoenaed, if he does not intend to comply with the subpoena, shall, within 5 days after the date of the service of the subpoena, petition in writing to revoke the subpoena . . . the regional director or the hearing officer as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required. . . .

Also, see 29 C.F.R. § 102.57(c) (1949):

Unless expressly authorized by these rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record.

73. 355 U.S. 7 (1957).

74. *Id.* at 8.

75. *NLRB v. Duval Jewelry Co.*, 257 F.2d 672 (5th Cir. 1958).

76. *Id.* at 673.

CONCLUSION

As was noted at the beginning of this article, the trend in Florida at the present time is toward a weakening of state jurisdiction in the field of labor law, mainly due to federal preemption.

Whether this trend will continue appears to be an open question. While federal preemption will undoubtedly continue to "gobble up" matters presently of local concern, the industrial growth of Florida may very well, in the foreseeable future, generate sufficient local problems to create an independent body of Florida labor law. The establishment of a State Labor Board, as in other states, to assist the mediation and conciliation service may prove a constructive step.