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## STATE COURTS AND FEDERAL PREEMPTION\*

PAUL R. HAYS\*\*

"The Labor Management Relations Act," said Mr. Justice Jackson, speaking for the Court in *Garner v. Teamsters Union*,<sup>1</sup> ". . . leaves much to the states, though Congress has refrained from telling us how much."<sup>2</sup> And in *Machinists Ass'n v. Gonzales*,<sup>3</sup> Mr. Justice Frankfurter said for the Court:

The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation.<sup>4</sup>

Congress has continued to refrain. The *Garner* case itself and the decisions of the Supreme Court both before and after *Garner*, while they have done much to elucidate theory, have also produced in a number of instances answers of a Delphic nature which raised more questions than they settled.

We know that state courts do not have the power to enjoin activities which are protected by the National Labor Relations Act. We know that they have no power to enjoin activities which that act defines as unfair labor practices. *Garner* told us in addition, and this was perhaps its most basic proposition, that, since Congress "confided primary inter-

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1. 346 U.S. 485 (1953).
2. *Id.* at 488.
3. 356 U.S. 617 (1958).
4. *Id.* at 619.

pretation and application"<sup>5</sup> of the act to the National Labor Relations Board, it is that Board, and not the courts, which is to decide whether an activity is protected or prohibited.

The scheme thus presented is fairly simple, at least in theory and logic. Labor activities fall into three categories under the act. They are either protected or prohibited or neither. And the Board is supposed to decide into which of these categories any particular activity falls. But in the *Garner* case itself the Court promptly shattered its own logical structure. There are, it said, some "instances of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either [are] 'governable by the state or [are] entirely ungoverned,'"<sup>6</sup> and it cited for the proposition its decision in the *Briggs-Stratton*<sup>7</sup> case, in which it had in fact been held that a state court was empowered to decide in which of the three categories a particular activity was properly classified, and, finding that it was neither protected nor prohibited, to enjoin it.

The logical difficulty presented by *Garner* was compounded by the opinion in *Weber v. Anheuser-Busch*.<sup>8</sup> For in the *Weber* case, not only did the Court state, incorrectly, that the holding of the *Garner* case was that a state may not enjoin "conduct which has been made an 'unfair labor practice' under the federal statutes,"<sup>9</sup> but it went on to say:

(1) that the ground of the *Briggs-Stratton* case was that such conduct [as appeared in that case] was neither prohibited nor protected by the Taft-Hartley Act and was thus open to state control";<sup>10</sup>

(2) that "we would have a different case" if the Board, instead of ruling that there was no violation of the section charged, had ruled that no unfair labor practice had been committed, although even in such a case "it would not necessarily follow that the State was free to issue its injunction";<sup>11</sup> and

(3) that "[w]e realize that it is not easy for a state court to decide, merely on the basis of a complaint and answer, whether the subject matter is the concern exclusively of the federal

5. 346 U.S. at 490.

6. *Id.* at 488.

7. Local 232, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

8. 348 U.S. 468 (1955).

9. *Id.* at 475.

10. *Id.* at 477.

11. *Id.* at 478.

Board and withdrawn from the State. This is particularly true in a case like this where the rulings of the Board are not wholly consistent on the meaning of the sections outlawing 'unfair labor practices', and where the area of free 'concerted activities' has not been clearly bounded. But where 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 tribunal which Congress has selected for determining such issues in the first instance."<sup>12</sup>

All of this is extraordinarily confusing, and seems to say, in spite of the clear words of *Garner*, that every state court has to set itself up as a National Labor Relations Board and decide whether any activity before it is protected, prohibited or neither. (In fact its task would be more difficult than that of the Board, because the Board, having decided that an activity was not protected, would not ordinarily have to decide whether it was prohibited, and having decided that an activity was not prohibited, it would not ordinarily have to decide whether it was protected.) Even the flexibility provided by the word "reasonably" seems designed only to assist in determinations which have to be made on the pleadings, and to provide guidance where the court must decide on the basis of plaintiffs' allegations, and it might be concluded that where the court has before it all the evidence which the Board might have, it must proceed as the Board does to determine the applicability of the act.

In spite of the inconsistency in *Garner*, and in spite of the confusing language of *Weber*, it seems to me that it simply cannot be true that every court in the land has received a commission to operate as a National Labor Relations Board. In the first place, the mere statement of the proposition demonstrates that it is unworkable, even unthinkable. In the second place, the holding of *Garner*, regardless of what *Weber* says it held, was that the courts, including the Supreme Court itself, were not to decide whether or not the conduct in question constituted an unfair labor practice. ("It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided

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12. *Id.* at 481

this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us.")<sup>13</sup> And in the third place the course of decision since *Garner* and *Weber* gives no support for the proposition.

How then is the *Garner* decision to be applied in the state courts? I take *Garner* to mean, in effect, that unless there is no possibility at all that the activity which the state court has before it could be considered, on the basis of all the evidence which *might* be presented, to be either prohibited or protected, the state court cannot act. Since I cannot think of any situation which involves a labor activity where this would be the case, I take it that the whole field is preempted, with certain exceptions, such as violence, which are based on other considerations. My sweeping statement would, of course, include the kind of injurious conduct involved in *Briggs-Stratton*,—recurrent work stoppages. I take it that that very conduct would not be preempted because *Garner* says it would not. But under the *logic* of *Garner*, it, too, would be preempted, and I do not believe that any attempt to extend *Briggs-Stratton* beyond its exact facts would be successful. And this warning would apply even to conduct which has been held by the Board, much more clearly than had the conduct involved in *Briggs-Stratton*, to be unprotected, though not prohibited. If, for example, a situation should arise, as in *NLRB v. Electrical Workers*,<sup>14</sup> in which a state court was asked to enjoin pickets who were distributing handbills saying "Is East St. Louis (or Cairo) a Second-Class City?", that court had better not rely on the theory that this conduct has been held by the Board and by the Supreme Court to be unprotected.

It is not surprising, however, that some state courts have accepted the proposition that they have the power to decide for themselves whether or not an activity is in the protected-prohibited category, and have thus set themselves up, rather unsuccessfully in most instances, as National Labor Relations Boards. An outstanding example was the decision of the New York Court of Appeals in *Goodwins Inc. v. Hagedorn*,<sup>15</sup> which was decided before *Garner*, but which has not been re-

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13. 346 U.S. at 489.

14. 346 U.S. 464 (1953).

15. 303 N.Y. 300, 101 N.E.2d 697 (1951).

versed and, indeed, has been followed in recent cases by some of the lower courts.

One such case, for example, granted an injunction against peaceful picketing of an employer's office to induce him to return his factory to New York, holding that neither the picketing nor the conduct at which it was directed, was an unfair labor practice, that the unlawfulness of the objective took the situation out of the *Garner* rule and, indeed, out of the field of labor relations, and that the activity was precisely that kind of injurious conduct to which the court referred in *Garner* as ungovernable, unless governed by the states.<sup>16</sup> Other courts have held that recognition picketing by a minority union may be enjoined, because it is neither protected, nor prohibited by the National Labor Relations Act,<sup>17</sup> that inducing employees not to handle is not prohibited by the act, unless there is picketing,<sup>18</sup> that a secondary boycott is not "cognizable" under section 8(b) (4) (A) of the act,<sup>19</sup> that picketing by a dissident minority is not an unfair labor practice, because the act sets forth only unfair labor practices of employers and unions,<sup>20</sup> and that an employer who brings himself within the *Goodwins* rule by petitioning the Board for an election is entitled to an injunction against picketing pending the Board's decision.<sup>21</sup>

Even when the lower courts of New York have denied injunctions, they have sometimes done so after making NLRB determinations. For example, one judge found that picketing to induce an employer to hire more musicians was an unfair labor practice, because any "distinction between services not performed or not to be performed, and services not needed is specious."<sup>22</sup> And in another case, the National Labor

16. *Freydberg, Inc. v. International Ladies Garment Workers*, 128 N.Y.S.2d 470 (Sup. Ct. 1954). See also *Anheuser-Busch, Inc. v. Brewery Workers*, 35 L.R.R.M. 2740 (N.Y. Sup. Ct. 1955), *aff'd*, 285 App. Div. 1134, 141 N.Y.S.2d 925 (1st Dep't 1955).

17. *Baylis v. Quinonez*, 286 App. Div. 1030, 145 N.Y.S.2d 232 (2d Dep't 1955); *Colonial Super Markets v. Liss*, 7 Misc. 2d 746, 168 N.Y.S.2d 599 (Sup. Ct. 1957); *Trading Port, Inc. v. Robilotto*, 8 Misc. 2d 343, 168 N.Y.S.2d 594 (Sup. Ct. 1957). See also *Armstrong Daily, Inc. v. New York Mailers' Union*, 34 CCH Lab. Cas. ¶ 71535 (N.Y. Sup. Ct. 1958).

18. *Maplewood Farms, Inc. v. Beck*, 6 Misc. 2d 905, 164 N.Y.S.2d 50 (Sup. Ct. 1957).

19. *Willoughby Camera Stores, Inc. v. District 15, Int'l Ass'n of Machinists, AFL*, 205 Misc. 455, 129 N.Y.S.2d 734 (Sup. Ct. 1954).

20. *Parodi Cigar Co. v. Gaeta*, 156 N.Y.S.2d 282 (Sup. Ct. 1956).

21. *Licht v. Lasky*, 34 L.R.R.M. 2635 (N.Y. Sup. Ct. 1954).

22. *General Teleradio, Inc. v. Manuti*, 205 Misc. 655, 658, 129 N.Y.S.2d 757, 759 (Sup. Ct. 1954).

Relations Board was said to have exclusive jurisdiction because the activity alleged was not unlawful.<sup>23</sup> Another judge refused to grant an injunction on the ground that the evidence was conflicting as to whether the objective of the picketing was lawful or unlawful, and advised the parties to apply to a federal court for determination of that issue.<sup>24</sup>

On the other hand, at least one of the intermediate appellate courts has shown a good understanding of *Garner*, and, in reversing a decision granting an injunction, has pointed out that it is the duty of the National Labor Relations Board, rather than of the state courts, to decide whether an activity is or is not an unfair labor practice.<sup>25</sup>

Courts in several other jurisdictions have suffered similar difficulties in dealing with these protected-prohibited categories as if they were National Labor Relations Boards.<sup>26</sup> Recognition picketing, where there is an incumbent union with a contract, has been held not to be an unfair labor practice.<sup>27</sup> One court held that this is one of the situations which *Garner* says is left to the states. Recognition picketing by a minority union against an uncertified incumbent has been held to be neither protected nor prohibited.<sup>28</sup> The Supreme Court of Georgia has held that picketing for recognition when another union has been certified, is enjoined in the state courts, because the employer is not entitled to protection under the National Labor Relations Act.<sup>29</sup> The Wisconsin supreme court held that picketing of a product was not an unfair labor practice, and found *Garner* contradictory on whether or not it was protected.<sup>30</sup> It rejected the idea that the activity was protected by section 7. Similar difficulties were encountered by the Supreme Court of Idaho,

23. *Tensolite Insulated Wire Co. v. Local 1783, Int'l Bhd. of Elec. Workers*, 34 CCH Lab. Cas. ¶ 71379 (N.Y. Sup. Ct. 1958).

24. *Monitor Knitwear Corp. v. Nelson*, 35 L.R.R.M. 2756 (N.Y. Sup. Ct. 1955).

25. *Pleasant Valley Packing Co. v. Talarico*, 5 App. Div. 2d 943, 172 N.Y.S.2d 268 (3d Dep't 1958).

26. E.g., *Breidert Co. v. Sheet Metal Workers, AFL*, 139 Cal. App. 2d 633, 294 P.2d 93 (1956); *Seven Up Bottling Co. v. Grocery Drivers Union*, 301 P.2d 631 (Cal. App. 1956); *Groom v. International Bhd. of Teamsters*, 34 L.R.R.M. 2440 (Cal. Super. Ct. 1954).

27. *Standard Oil Co. v. Oil Workers, AFL-CIO*, 40 L.R.R.M. 2445 (Ohio C.P. 1957); *M. & M. Wood Working Co. v. United Bhd. of Carpenters*, 35 L.R.R.M. 2053 (Ore. Cir. Ct. 1954).

28. *Seven Up Bottling Co. v. Grocery Drivers Union*, 301 P.2d 631 (Cal. App. 1956).

29. *Ellis v. Parks*, 212 Ga. 540, 93 S.E.2d 708 (1956).

30. *Milwaukee Boston Store Co. v. American Fed'n of Hosiery Workers*, 269 Wis. 338, 69 N.W.2d 762 (1955).

two of whose decisions were reversed by the United States Supreme Court.<sup>31</sup> And a decision of the Supreme Court of Ohio affirming, four months after the decision of the United States Supreme Court in the *Fairlawn*<sup>32</sup> case, a lower court injunction against a union's picketing for recognition after it had been defeated in a Board election was reversed per curiam, the Court citing *Fairlawn, Weber and Garner*.<sup>33</sup> On the other hand, the Kansas supreme court held in 1955 that peaceful recognition picketing by a minority union was a violation of section 8(b)(1), thus anticipating the Board by some two years.<sup>34</sup>

The appellate courts of several states have attempted to explain at considerable length the principles applicable to preemption, no doubt for the guidance of the lower courts.<sup>35</sup> In *Hyde Park Dairies v. Teamsters Union*,<sup>36</sup> the Supreme Court of Kansas presented an especially useful exposition, though it found difficulty with the inconsistencies in *Garner* to which reference has been made above.

Other high courts, like the Supreme Court of Virginia in the *Dougherty*<sup>37</sup> case, have, in deciding preemption cases, given little useful guidance to the lower courts. The lower courts of Ohio might even find a suggestion of rebellion in the language used by the supreme court of that state in a recent case:<sup>38</sup>

Despite the temptation to do so, it is not necessary to discuss several questions presented by this record, such as . . . whether the so-called 'no-man's land' recognized by the Supreme Court of the United States [in *Guss*, etc.] requires the judiciary of Ohio to abdicate its responsibility to secure to each citizen the constitutionally guaranteed right to a 'remedy by due course of law' for injury done him.<sup>39</sup>

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31. *Pocatello Bldg. & Constr. Trades Council v. Elle Constr. Co.*, 352 U.S. 884 (1956); *Retail Clerks Ass'n v. Newberry Co.*, 352 U.S. 987 (1957).

32. *Amalgamated Meat Cutters, AFL v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957).

33. *International Ass'n of Machinists v. Cavett Co.*, 355 U.S. 39 (1957).

34. *Kaw Paving Co. v. International Union of Operating Eng'rs*, 178 Kan. 467, 290 P.2d 110 (1955).

35. *E.g.*, *Asphalt Paving, Inc., v. International Bhd. of Teamsters*, 181 Kan. 775, 317 P.2d 349 (1957); *Binder v. Construction and Gen. Laborers Union*, 181 Kan. 799, 317 P.2d 371 (1957); *Friesen v. General Team and Truck Drivers Union*, 181 Kan. 769, 317 P.2d 366 (1957); *Wisconsin Employment Relations Bd., v. Teamsters Union*, 267 Wis. 356, 66 N.W.2d 318 (1954).

36. 182 Kan. 440, 321 P.2d 564 (1958).

37. *Dougherty v. Commonwealth*, 199 Va. 515, 100 S.E.2d 754 (1957).

38. *Faxon Hills Constr. Co. v. United Bhd. of Carpenters*, 151 N.E.2d 12 (Ohio 1958).

39. *Id.* at 13.



A misunderstanding of the significance of the *Vogt* case<sup>40</sup> has led in a few cases to state court action in disregard of the preemption doctrine. The decision in *Vogt* concerned only the limitations on picketing of the fourteenth amendment. It held that the free speech doctrine did not prevent a state's enjoining coercive recognition picketing. The case had nothing to do with preemption and both the Supreme Court and the lower court seem to have assumed that *Vogt's* businesses did not affect interstate commerce.<sup>41</sup> But as able a court as the New York appellate division, first department, was misled by the Supreme Court's failure to state that preemption was not involved, into affirming the granting of an injunction against rival picketing of an incumbent contracting union, on the ground that, as the court said in its opinion:<sup>42</sup>

There can no longer be any doubt about the power of a state court to enjoin picketing under circumstances where its legislature or courts have adopted a public policy directed against picketing for unlawful objectives. The decision in *International Brotherhood of Teamsters, Local 695, A.F.L. v. Vogt*, 354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. 2d 1347, makes this indisputably clear. In effectuating its own public policy, the courts do not intrench upon the preempted field of labor relations provided for in the Taft-Hartley Act.<sup>43</sup>

Some of the lower New York courts have hastened, of course, to follow along this happy path.<sup>44</sup> The Texas court of civil appeals has fallen into the same error,<sup>45</sup> as perhaps has the highest court of Connecticut.<sup>46</sup>

The Supreme Court of Virginia has upheld, against a claim of preemption, the applicability of its statute prohibiting stranger picketing on the ground that "the Taft-Hartley Act . . . is concerned with and limited to the relations between employers and employees."<sup>47</sup> Although the court does not develop the argument, it might run as follows:

40. *International Bhd. of Teamsters, AFL v. Vogt*, 354 U.S. 284 (1957).

41. See *Vogt v. International Bhd. of Teamsters, AFL*, 270 Wis. 315, 74 N.W.2d 749 (1956).

42. *Metzger v. Fay*, 4 App. Div. 2d 436, 166 N.Y.S.2d 87 (1st Dep't 1957).

43. *Id.* at 439, 166 N.Y.S.2d at 91.

44. E.g., *General Iron Corp. v. Livingston*, 171 N.Y.S.2d 975 (Sup. Ct. 1958); *Planet Wood Corp. v. Marine Workers*, 42 L.R.R.M. 2160 (N.Y. Sup. Ct. 1958).

45. *Office Employees Union, AFL-CIO v. Houston Lighting and Power Co.*, 314 S.W.2d 315 (Tex. Civ. App. 1958).

46. *Devine Bros. v. International Bhd. of Teamsters*, 145 Conn. 77, 139 A.2d 60 (1958). See also Marnet, *Federal Preemption, Free Speech and Right to Work Statutes*, 32 NW. U.L. REV. 143, 171-72 (1957).

47. *Dougherty v. Commonwealth*, *supra* note 37, at 379, 100 S.E.2d at 760.

Since the defendants in the case were individuals, and not labor organizations, their picketing activity was not prohibited by the act.

Since they were not employees, they were not "protected" by section 8 in the sense that it would be an unfair labor practice to discharge or otherwise discriminate against them with regard to the terms or tenure of employment.

Since the state, and not the employer, brought the action against them, it is hard to see that the employer had committed any unfair labor practice.

Therefore, since the activity is neither prohibited by the Act, nor protected by it, there is no preemption.

Leaving aside the position that the term "employee," as the Board says, "includes 'any member of the working class,'"<sup>48</sup> the fallacy, of course, lies in overlooking the general protections afforded by section 7. *Garner* itself involved stranger picketing, and the court suggested that, if the activity was not prohibited, it might well be protected. It is true that *Garner* involved a labor organization rather than individuals, but that cannot be the basis of any sound distinction. The Texas court of civil appeals has advanced a similar reason for denying a claim of preemption in a case in which an injunction was sought against a labor organization.<sup>49</sup>

At least one lower Wisconsin court appears never to have heard of the *Guss*<sup>50</sup> case, since it held, nine months after *Guss*, that the state could act in a situation where the employer's business did not meet NLRB jurisdictional standards.<sup>51</sup>

Because so few lower court cases are reported, it is impossible to say how many injunctions are being granted in the lower courts in cases in which there should be preemption under the correct application of the principles laid down by the Supreme Court. Judging, however, by the large proportion of such decisions in the cases which are reported, and by the proportion of the cases on appeal in which injunctions were

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48. Texas Natural Gasoline Corp., 116 N.L.R.B. 405, 406 (1956).

49. Office Employees Union, AFL-CIO v. Houston Lighting and Power Co., 314 S.W.2d 315 (Tex. Civ. App. 1958).

50. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

51. *Sheet Metal Workers, AFL-CIO v. Wisconsin Employment Relations Bd.*, 34 CCH Lab. Cas. ¶ 71305 (Wis. Cir. Ct. 1957).

granted by the lower courts, it would appear that in actuality we have not yet felt in the regulation of labor relations the full impact of the preemption doctrine.

The circuit court of Ottawa County, Michigan, having refused before *Guss* to believe that the Supreme Court of the United States would adopt the *Guss* doctrine,<sup>52</sup> continues to enjoin, holding that the *Guss* case is unconstitutional as depriving parties of due process.<sup>53</sup> The judge states that "nature abhors a vacuum"<sup>54</sup> and cites the dictionary definition of "anarchy"<sup>55</sup> as describing the present situation. Ottawa County may be unique in its attitude, but, adding up the effects of ignorance and misunderstanding of the preemption doctrine, and what in some cases seems to be a deliberate determination to grant injunctions in spite of it, there is still, in practice, a large body of labor activity which is subjected to state power.

I now turn from the problem of the failure to recognize preemption where it is properly applicable, to the question of exceptions from the preemption rule.

First let us consider the possibilities inherent in the old controversy over the term "labor dispute." Although the judge who thought that the ILG, by picketing against a runaway shop, had removed itself from the field of labor relations, was surely wrong, there must in fact be boundaries to that field. The reach of preemption may be very wide, but it cannot include anything and everything which one of the parties may choose to call a labor activity. The Norris-La Guardia Act<sup>56</sup> was enormously effective in widening the limits of what was to be classified as a labor dispute, but the Supreme Court, with the chief author of that act writing for the Court, held that a dispute between a labor union and a store over hours of delivery, payment of a bill and sale of non-union goods, was not, in the circumstances of that case, a labor dispute within the meaning of the act.<sup>57</sup> (I have not done justice to the *Wagshal* case in this brief statement, and its exact significance is certainly arguable; but I firmly

52. *School Dist. v. Grand Rapids Bldg. Trades Council*, 37 L.R.R.M. 2232 (Mich. Cir. Ct. 1955).

53. *Johnson v. Grand Rapids Bldg. Trades Council, AFL-CIO*, 33 CCH Lab. Cas. ¶ 70996 (Mich. Cir. Ct. 1957).

54. *Id.* at 95035.

55. *Ibid.*

56. 47 STAT. 70 (1932), 29 U.S.C. §§ 101-15 (1952).

57. *Bakery Drivers Union v. Wagshal*, 333 U.S. 437 (1948).

believe that it can properly stand for the point which I wish to make.) Even giving the term labor activity the broadest possible meaning in order to avoid the crippling limitations imposed by the old injunction cases, there still must be some kinds of activity in which labor unions or employees engage which does not come within that meaning. For example, in some recent cases in New York, employers seeking an injunction have alleged that the organization conducting picketing activities under the name of a labor union was not in fact a labor union at all, and that it was not seeking bargaining rights or even membership, but that it was a racketeering group which was picketing merely for the purpose of being bought off. Other applications have alleged that pickets claiming to represent a labor organization were in fact hired by business competitors for the purpose of disrupting the business of the picketed firms. When we get into the field of purpose, rather than parties, the questions become more difficult. But not long ago pickets were placed by a union president in front of a business which was owned by the union president's brother-in-law. There was no discoverable reason for the picketing, except to secure a competitive advantage for the brother-in-law's firm. I have always had some doubt about the case of *Hunt v. Crumboch*<sup>58</sup> where the Supreme Court held the Sherman-Clayton Act exception for labor activity<sup>59</sup> applicable to a boycott which was being conducted because of a personal vendetta between the employer and a union leader.

This field, as providing exceptions to preemption, may well be confined to pretty extreme situations, but it is still worth keeping in mind.

Some limited exceptions may be found with relation to the parties involved in labor activities, even where one of them is a genuine labor union. For example, the independent contractor exemption may have possibilities, although the New York court was probably wrong when it denied a claim of preemption where a union was engaged in product picketing for the purpose of organizing the distributors who, the court found, were independent contractors rather than employees.<sup>60</sup>

The Tennessee supreme court was almost certainly right in exercising

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58. 325 U.S. 821 (1945).

59. 38 STAT. 731 (1914), 15 U.S.C. § 17 (1952).

60. *Arnold Bakers v. Strauss*, 1 App. Div. 2d 604, 153 N.Y.S.2d 999 (2d Dep't 1956).

state power with respect to the activities of employees of a municipally owned electric company.<sup>61</sup>

On the other hand, although the Board and the court of appeals for the third circuit have held that a political subdivision of a state (a county) is a "person" within the meaning of the boycott provisions of the act,<sup>62</sup> the Wisconsin supreme court has held the contrary and has denied a claim of preemption.<sup>63</sup> A Maryland circuit court has correctly upheld a claim of preemption on the ground that a railroad is a "person" within the meaning of section 8 (b) (4) (A),<sup>64</sup> citing *Local v. New York, N.H. & H.R.R.*<sup>65</sup>

The question of whether a state court has power to enjoin a strike in violation of the no-strike clause of a collective agreement has also been raised. (Although the issue may have become largely academic, under the *Lincoln Mills* decision,<sup>66</sup> which I shall discuss later, the question is really one of court power vs. board power, rather than state vs. federal power, because that case held that federal law is applicable to all actions for breach of a collective agreement. Since it seems clear, however, that federal courts, because of the Norris-La Guardia Act, cannot enjoin a strike in breach of a collective agreement,<sup>67</sup> I shall discuss the question as one of the power of state courts, leaving until later the problem raised by the case of *McCarroll v. Council*,<sup>68</sup> as to whether state courts in enforcing federal law can use the injunctive remedy which the federal courts themselves cannot use.)

The Supreme Court of Pennsylvania recently affirmed without opinion a decision of the Pennsylvania court of common pleas which held that the matter was not preempted.<sup>69</sup> In the *McCarroll* case, the Supreme Court of California held that the strike which the lower court

61. *City of Alcoa v. International Bhd. of Elec. Workers, AFL-CIO*, 308 S.W.2d 467 (Tenn. 1957).

62. *NLRB v. Local 313, Int'l Bhd. of Elec. Workers, AFL-CIO*, 254 F.2d 221 (3d Cir. 1958).

63. *County of Door v. Plumbers Union, AFL*, 89 N.W.2d 920 (Wis. 1958).

64. *Baltimore & O.R.R. v. National Marine Eng'rs Ass'n*, 32 CCH Lab. Cas. ¶ 70737 (Md. Cir. Ct. 1957).

65. 350 U.S. 155 (1956).

66. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

67. See *Bull Steamship Co. v. National Marine Eng'rs Ass'n*, 250 F.2d 332 (2d Cir. 1957).

68. 315 P.2d 322 (Cal. 1957).

69. *Motor Transport Labor Relations, Inc. v. Local 470, Int'l Bhd. of Teamsters*, 40 L.R.R.M. 2567 (Pa. C.P. 1957), *aff'd*, 389 Pa. 638, 133 A.2d 836 (1957).

had enjoined, although in breach of a collective agreement, was neither an unfair labor practice nor a protected concerted activity and that therefore the state court had power to enjoin. In the California case, the court examined at length the nature of the strike before it, and found that it was not a section 8(d) "bargaining strike," that is, a strike called for the purpose of modifying or terminating a collective agreement. The court expressly refused to "decide whether a court has jurisdiction to enjoin conduct that is in breach of a collective bargaining agreement and at the same time may be reasonably deemed an unfair labor practice."<sup>70</sup> The Pennsylvania court did not discuss whether or not the strike involved in its case was a refusal to bargain under section 8(d). From the facts set forth in the report of the case it would seem probable that it was. Moreover it seems not impossible that the strike involved in the *McCarroll* case was also a "bargaining strike" under section 8(d).

There is considerable ground for arguing that under *Garner* principles, state courts may not enjoin strikes in breach of collective agreements:

(1) A strike in breach of a no-strike clause *may* be protected or prohibited. For example, the strike involved in *Mastro Plastics Corp. v. NLRB*<sup>71</sup> was a protected activity, whereas section 8(d) strikes are prohibited as a refusal to bargain.<sup>72</sup> Under the *Garner* rule it would seem to be within the Board's "duty of primary decision" to determine whether such a strike is protected or prohibited.

(2) Not only would it appear that a determination, such as that made by the California court, of whether a particular strike was or was not covered by section 8(d), was a question peculiarly for the Board,<sup>73</sup> but other issues which are similarly Board issues may arise. For example, in the *Thayer* case the Massachusetts court enjoined a strike, holding that it violated the no-strike clause of a collective agreement, while the Board later held that the strike was a protected activity because the collective agreement was made with a company dominated union and was therefore illegal.<sup>74</sup>

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70. 315 P.2d at 328.

71. 350 U.S. 270 (1956).

72. See *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957).

73. See, e.g., *United Mine Workers*, 117 NLRB 1095 (1957); Note, 58 COLUM. L. REV. 278, 281-82 (1958).

74. *Thayer Co.*, 99 N.L.R.B. 1122 (1952).

With respect to other types of violations of collective agreements, which would, of course, ordinarily be violations by the employer, there is a somewhat different question. "The Board has long held . . . that it will not effectuate the policies of the Act for it to police collective agreements by attempting to resolve disputes over their meaning or administration."<sup>76</sup> It is not entirely clear whether this is merely a matter of self-abnegation which, as in the *Guss* case, will not empower state agencies to act, or whether it is founded on the indirect character of the Board's remedies in such situations. (In *Morton Salt*, for example, the claim was that the contract violation also violated section 8(a)(1) and (2) of the act.) If the Board's position is justified by the inappropriateness of its procedures, the states might have power to enjoin.

Of course the whole question of a state court's power to enjoin violation of a collective agreement arises under the *Lincoln Mills* decision which I shall discuss later. But it may be noted at this point that the court in that case did not suggest that the jurisdiction of the National Labor Relations Board presented any obstacle to granting specific enforcement of the arbitration clause of a collective agreement.

Up to the present the effect of preemption on the right of states to limit by legislation the subject matter of collective bargaining has not been widely explored. In order to illustrate what I have in mind let me point out that it would be theoretically possible for a state so far to limit what could be bargained about that there would be no content to the federal right of collective bargaining. In fact state legislation does limit collective bargaining in a number of ways. In New York a collective agreement, for example, in which the employer agreed to hire only Negroes or Catholics or Italians, or to pay women less than he paid men for the same work, would be unlawful, unless there is preemption. The recent statutes prohibiting discrimination on the basis of age, raise a question as to bargaining on the subject of compulsory retirement. The Oregon supreme court has held that state legislation which would have the effect of prohibiting contributory group insurance plans is "clearly forbidden" by the National Labor Relations Act because such plans "are mandatory subjects for collective bargaining inasmuch as section 8(a)(5) of the Labor Management Relations Act requires an employer to bargain with a union concerning the matters set forth in section 9(a) of the act."<sup>76</sup>

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75. *Morton Salt Co.*, 119 N.L.R.B. No. 175 (1958).

76. *Coos Bay Lumber Co. v. Local 7-116, Int'l Woodworkers, CIO*, 203 Ore. 342, 358, 279 P.2d 508, 515 (1955).

This problem is involved in a case in which certiorari has been granted by the United States Supreme Court. The Ohio supreme court affirmed, without opinion, a decision granting, at the instance of an individual owner, an injunction against enforcement of a collective agreement which set minimum rates to be paid by transportation companies to individual owners of trucks. This provision is standard in Teamster Union contracts, and, of course, is intended to meet the old independent contractor problem, the problem of protecting the jobs and rates of employees. The Ohio court held that the agreement violated the state's anti-trust laws, that it constituted no unfair labor practice, and that it was therefore enjoined.<sup>77</sup> In the *Weber* case, the Missouri supreme court had held that the very activity which was enjoined constituted a violation of Missouri's anti-trust laws. Yet the United States Supreme Court found that Missouri was preempted because the activity was prohibited or protected by the federal act. Must state anti-trust laws also yield to the federally protected right to bargain collectively?

When the Tennessee courts enjoined the refusal of employees of a carrier to cross a picket line, the United States Supreme Court reversed.<sup>78</sup> The collective agreements under which these employees worked contained clauses permitting them to refuse to cross the picket lines. These clauses were unlawful under the generally applicable common and statute law of Tennessee.

Can states have the right to limit by legislation the subject matter of collective bargaining and still not have the right through their courts to inhibit labor activity, such as strikes and picketing, which is directed toward forcing an employer to violate that legislation? In other words, if the Supreme Court should uphold Ohio's right by its anti-trust legislation to limit the Teamsters' contract, would the Ohio courts be unable, by reason of preemption, to prevent the Teamsters from striking and picketing to force an employer to sign an agreement which the legislation made unlawful? One would think that if the states could properly adopt such legislation they ought to be able to prevent coercive action directed

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77. *Oliver v. A.C.E. Transportation Co.*, 42 L.R.R.M. 2024 (Ohio App. 1957), *aff'd without opinion*, 167 Ohio St. 299, 147 N.E.2d 856 (1958), *cert. granted*, 356 U.S. 966 (1958).

78. *Teamsters Union v. Kerrigan Iron Works, Inc.*, 353 U.S. 968 (1957) (per curiam, citing *Weber*).



toward forcing an employer to violate it.<sup>79</sup> But recent cases indicate that this is not true of right-to-work laws. The states are expressly permitted by the federal act itself to adopt such laws, yet the Supreme Court has held that state courts cannot enjoin picketing for the purpose of coercing an employer to violate such a state law.<sup>80</sup> In *Asphalt Paving, Inc. v. Teamsters Union*,<sup>81</sup> the Supreme Court of Kansas expressed its mystified acceptance of this result, and Mr. Justice Fatzer, in an able opinion, pointed out at length the considerations which he believed should have led the United States Supreme Court to the opposite result. He concluded, however, that, as he said, "in the semi-darkness of [the] precedents,"<sup>82</sup> he was forced to concur. Texas and North Carolina have followed with similar bewilderment and reluctance.<sup>83</sup> A Tennessee chancery court<sup>84</sup> has reached the other conclusion, but on the inadequate basis of the Supreme Court's denial of certiorari in a Tennessee case involving the picketing of a barber shop.<sup>85</sup>

State courts may act, of course, in situations which do not affect interstate commerce, and there are an increasing number of decisions in which this issue is raised. As might be expected in dealing with this unfamiliar concept, some lower courts have failed to distinguish between "engaging in" commerce and "affecting" commerce.<sup>86</sup>

In the *Asphalt Paving* case to which I have already referred, the Kansas supreme court presents an excellent analysis of the issue of interstate commerce. In that case the union, in an attempt to organize Asphalt, was picketing construction projects and general contractors. Asphalt's activities were wholly intrastate but some of its equipment, of the approximate value of \$21,700, originated outside the state. Two of the construction projects were for companies admittedly subject to national jurisdiction. One of the general contractors purchased annually

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79. See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1326 (1954).

80. Local 429, Int'l Bhd. of Elec. Workers, AFL v. Farnsworth & Chambers Co., 353 U.S. 969 (1957).

81. 181 Kan. 775, 317 P.2d 349 (1957).

82. *Id.* at —, 317 P.2d at 366.

83. *Ex parte Twedell*, 309 S.W.2d 834 (Tex. 1958); *Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, AFL*, 247 N.C. 620, 101 S.E.2d 800 (1958).

84. *Pruitt v. Lambert*, 34 CCH Lab. Cas. ¶ 71265 (Tenn. Ch. Ct. 1957).

85. *Flatt v. Barbers Union*, 304 S.E.2d 329 (Tenn. 1957), *cert. denied*, 355 U.S. 904 (1957).

86. *E.g.*, *Lillys v. Segal*, 34 CCH Lab. Cas. ¶ 71537 (N.Y. Sup. Ct. 1958); *Cortlandt Co. Dep't Store v. Cohen*, 205 Misc. 165, 127 N.Y.S.2d 261 (Sup. Ct. 1953).

\$400,000 worth of materials originating outside the state, another \$500,000, another \$300,000, and another \$661,000. Two of them had respectively \$16,111 and \$60,000 in direct out-of-state purchases. The court said:

. . . We specifically decline, in answer to the question presented, to decide this case on the basis, for example, that if any one of the general contractors were engaged in interstate commerce it would follow that defendants' activities likewise affected commerce, or that we could not so hold because the operations of the ultimate victim, i.e., Asphalt Paving Company, were so essentially local in character that they would preclude such a finding.

By not looking solely to plaintiff's business operations nor to those of any one of the general contractors against whom the secondary pressure was applied, but rather, casting our regard upon a combination of plaintiff's operations and the total business of all the general contractors, there was substantial evidence that defendants' unfair labor practices affected commerce. As an integral part of this conclusion, however, we enter our caveat that a reversal would not necessarily follow because a district court found otherwise upon the same or similar facts, nor, necessarily, would a case analogous in its outlines be controlled by this conclusion as a matter of *stare decisis*. On the contrary, we treat the matter of an interstate flow of commerce and the existence of a burden upon it as one of fact, and review the record to determine whether substantial evidence supports the findings, measured by decisions construing Taft-Hartley in that respect.

Although the business of plaintiff was essentially local in character, other businesses were necessarily affected, some of which were conceded to be interstate in character, and we think the totality of the situation should be considered in measuring the commerce impact, both that which resulted from the secondary boycott and that which was likely to result, rather than to view the activities of plaintiff and each general contractor separately [citing cases]. Had the general contractors and owners of construction projects refused to accede to defendants' demands, union employees who struck their employment would not have returned to work and those who threatened to do so, would have stopped work. Substantial construction work would have immediately ceased which might well have resulted in a decrease in the inflow of building materials and supplies from out-of-state manufacturers to local retailers and thence to the general contractors affected. The testimony concerning the dollar

volume of business done by the general contractors and other business concerns showed that the general contractors performed construction services valued at several million dollars annually and that they purchased materials and supplies amounting to hundreds of thousands of dollars which indirectly crossed state lines and, in addition, made direct purchases of over \$76,000 in interstate commerce. We think the record fairly presents that a business such as plaintiff's although concededly local in character, cannot be considered as totally unconnected with interstate commerce, at least in a setting of a secondary boycott as here presented. Furthermore, it is credible that defendants' activities, if 'left unchecked,' would affect and burden interstate commerce in the truest sense of the word.<sup>87</sup>

In *Binder Constr. Co. v. Construction Laborers*,<sup>88</sup> the Kansas court, finding no evidence in the record of interstate commerce, although the contractor involved had a government construction contract for an air force base in the amount of approximately \$330,000, held it "inconceivable" that a labor dispute involving local construction, without any evidence that interstate commerce is affected, could be declared to affect interstate commerce as a matter of law. The court said:

If the local character of a given construction project involving employers and employees engaged in the building trades is construed as a matter of law to affect interstate commerce on the ground that it is an integral part of a vast nation-wide construction industry, it would in effect wipe out the whole distinction between interstate and intrastate commerce. There would be no limit upon the power of the Federal Government to regulate the economy of the country in the most far-reaching details.<sup>89</sup>

The Supreme Court of North Carolina has reached substantially the same conclusion with respect to the construction of bank and an office building.<sup>90</sup>

And the Supreme Court of California has held that where a paint company sold \$178,910.10 annually in interstate and foreign commerce, but the lower court made no specific finding as to the interstate com-

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87. 181 Kan. at —, 317 P.2d at 358.

88. 181 Kan. 799, 317 P.2d 371 (1957).

89. *Id.* at —, 317 P.2d at 384.

90. *Jones Constr. Co. v. Local 755, Int'l Bhd. of Elec. Workers, AFL*, 246 N.C. 481, 98 S.E.2d 852 (1957).

merce aspect of its roofing business which was the activity directly involved, there was no preemption.<sup>91</sup>

On the other hand, a Michigan circuit court has held that "the Supreme Court of the United States has spoken to the effect that generally labor controversies in [the construction] industry affect interstate commerce."<sup>92</sup>

Failure to prove effect on interstate commerce has been held to be fatal to a claim of preemption in cases involving a motion picture theater,<sup>93</sup> and a small manufacturing company.<sup>94</sup> In the case of a local telephone answering service there have been decisions both ways.<sup>95</sup>

That the employer involved filed charges with the National Labor Relations Board, alleging effect upon interstate commerce, has been held by Kansas to be sufficient to uphold a claim of preemption,<sup>96</sup> and by Ohio, to be insufficient.<sup>97</sup>

California has held that the issue of interstate commerce cannot be raised for the first time on appeal.<sup>98</sup> But the Wisconsin supreme court holds that "the objection . . . can be raised at any time, and by the court on its own motion," since "in a situation like this, jurisdiction of the subject matter is not conferred by consent of the parties or by estoppel."<sup>99</sup>

The Kansas supreme court has held that the purchase by a dairy company of \$100 a month in supplies from outside the state falls within the de minimis rule.<sup>100</sup> (Incidentally, that was the case which was

91. *Benton v. Painters Union*, 45 Cal. 2d 677, 291 P.2d 13 (1955).

92. *Pollington v. Aalsburg's Builders*, 34 CCH Lab. Cas. ¶ 71295, at 96032 (Mich. Cir. Ct. 1958).

93. *Thorman v. International Alliance of Theatrical State Employees*, 320 P.2d 494 (Cal. 1958) (three judges dissenting).

94. *Plattsburgh Ready-Mix Concrete Co. v. Wright*, 7 Misc. 2d 905, 164 N.Y.S.2d 934 (Sup. Ct. 1957).

95. *Compare Elsis v. Evans*, 321 P.2d 514 (Cal. App. 1958), *with Silver*, 21 N.Y.S.L.R.B. No. 36 (1958).

96. *Stieben v. The Constructive and General Laborers Union*, 181 Kan. 832, 317 P.2d 436 (1957).

97. *Faxon Hills Constr. Co. v. United Bhd. of Carpenters*, 151 N.E.2d 12 (Ohio 1958). See also *Dallas Gen. Drivers v. Wamix, Inc.*, 295 S.W.2d 873 (Tex. 1956).

98. *Thorman v. International Alliance of Theatrical Stage Employees*, 320 P.2d 494 (Cal. 1958).

99. *Wisconsin Employment Relations Bd. v. Lucas*, 89 N.W.2d 300, 305 (Wis. 1958); *accord*, *New York State Labor Relations Bd. v. Budoff*, 41 L.R.R.M. 2179 (N.Y. Sup. Ct. 1957).

100. *Newell v. Teamsters Union*, 181 Kan. 898, 317 P.2d 817 (1957).

recently reversed in a per curiam opinion in which *Thornhill*<sup>101</sup> so astonishingly came to life again.) Also held to be within the de minimis rule are a bar purchasing annually \$40,000 worth of liquor originating outside the state,<sup>102</sup> a local telephone answering service which proved only 3 customers out of 360 billed outside the state and only 58 interstate calls out of 13,000,<sup>103</sup> and a contractor on residential construction who purchased \$233 from outside the state, where all the contractors on the project together purchased \$9,640 in such materials.<sup>104</sup>

In the cases involving the following enterprises, injunctions have been granted or state boards have taken action, without mention in the opinions of preemption, presumably either because the point was not raised or on the ground that interstate commerce was not substantially affected:

Restaurants.<sup>105</sup>

Supermarket.<sup>106</sup>

Motion picture theater.<sup>107</sup>

Delicatessen.<sup>108</sup>

Grocery store.<sup>109</sup>

Liquor store.<sup>110</sup>

Moving company.<sup>111</sup>

Construction of packing plant.<sup>112</sup>

101. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

102. *Goldstein v. Bartenders Union*, 40 L.R.R.M. 2706 (Md. Cir. Ct. 1957).

103. *Silver*, 21 N.Y.S.L.R.B. No. 36 (1958).

104. *Caruso v. Madison Bldg. Trades Council, Wisconsin Employment Relations Bd.* Dec. No. 4703 (1958).

105. *E.g.*, *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957); *B & D Luncheonette v. Dallas*, 8 Misc. 2d 457, 167 N.Y.S.2d 611 (Sup. Ct. 1957); *Emerald Inn, Inc. v. Cagiano*, 41 L.R.R.M. 2237 (N.Y. Sup. Ct. 1957); *Pennsylvania Labor Relations Bd. v. Rooney*, 389 Pa. 587, 133 A.2d 533 (1957).

106. *H & M Super Market v. Retail Clerks Union*, 41 L.R.R.M. 2033 (Cal. Super. Ct. 1957).

107. *North Eastern Theatres v. Motion Picture Operators Union*, 41 L.R.R.M. 2037 (Conn. Super. Ct. 1957).

108. *32d St. Delicatessen v. Culinary Workers*, 41 L.R.R.M. 2093 (N.Y. Sup. Ct. 1957).

109. *Brown v. Amalgamated Meat Cutters Union*, 148 N.E.2d 357 (Ohio C.P. 1956), *aff'd*, 148 N.E.2d 360 (Ohio Ct. App. 1957), *appeal dismissed*, 167 Ohio St. 28, 145 N.E.2d 536 (1957); *In the Matter of Employees of Radziewich Economy Markets, Inc.*, 34 CCH Lab. Cas. ¶ 71410 (Pa. C.P. 1957), *aff'd*, 391 Pa. 618, 140 A.2d 162 (1958).

110. *Homann v. O'Grady*, 34 CCH Lab. Cas. ¶ 71510 (N.Y. Sup. Ct. 1958).

111. *New York State Labor Relations Bd. v. Westchester Movers, Inc.*, 34 CCH Lab. Cas. ¶ 71531 (N.Y. Sup. Ct. 1958).

112. *International Bhd. of Elec. Workers v. O'Brien*, 302 S.W.2d 60 (Tenn. 1957).

Dry cleaner employing nine driver salesmen.<sup>113</sup>

Funeral parlor.<sup>114</sup>

Plating business (17 employees).<sup>115</sup>

Wholesale hardware store and warehouse.<sup>116</sup>

Wholesale smoked fish jobber (2 employees).<sup>117</sup>

Cafeteria.<sup>118</sup>

Apartment house superintendent.<sup>119</sup> It has been held, however, that where interstate commerce is affected, regulation of a one-man unit is preempted.<sup>120</sup>

Motel.<sup>121</sup>

Stevedoring company.<sup>122</sup>

Manufacturer of wrought iron furniture.<sup>123</sup>

Book publisher.<sup>124</sup>

Manufacturer of gift ware.<sup>125</sup>

The *Kohler* case established that state courts have not lost their power to enjoin violent picketing, even where that picketing is an unfair labor practice under the act.<sup>126</sup> *Youngdahl v. Rainfair*<sup>127</sup> suggested the possibility of extending the concept of violence somewhat to encompass other types of undesirable activity on the picket line, with a warning, however, to draw a careful line between such conduct and peaceful picketing. In *Newell v. Teamsters Union*,<sup>128</sup> the Supreme Court of Kansas

113. *General Teamsters Union v. Uptown Cleaners*, 40 L.R.R.M. 2286 (Mich. Cir. Ct. 1957).

114. *Dalton v. Zebrowski*, 169 N.Y.S.2d 324 (Sup. Ct. 1957).

115. *Berger v. Livingston*, 33 CCH Lab. Cas. ¶ 71108 (N.Y. Sup. Ct. 1957).

116. *Van Dussen Co. v. Moyer*, 5 Misc. 2d 1020, 165 N.Y.S.2d 836 (Sup. Ct. 1957).

117. *Weiner v. Pruzan*, 172 N.Y.S.2d 287 (Sup. Ct. 1958).

118. *Pennsylvania Labor Relations Bd. v. Fortier*, 34 CCH Lab. Cas. ¶ 71340 (Pa. County Ct. 1958).

119. *E.g.*, *Clark v. Murphy* 34 CCH Lab. Cas. ¶ 71390 (N.Y. Sup. Ct. 1958); *Galiano v. Siegal*, 34 CCH Lab. Cas. ¶ 71391 (N.Y. Sup. Ct. 1958).

120. *International Union of Operating Eng'rs v. Wisconsin Employment Relations Bd.*, 40 L.R.R.M. 2028 (Wis. Cir. Ct. 1957).

121. *Pennsylvania Labor Relations Bd. v. Hankin*, 40 L.R.R.M. 2481 (Pa. C.P. 1957).

122. *Universal Terminal & Stevedoring Corp. v. Hurley*, 9 Misc. 2d 192, 166 N.Y.S.2d 641 (Sup. Ct. 1957).

123. *General Iron Corp. v. Livingston*, 8 Misc. 2d 538, 170 N.Y.S.2d 581 (Sup. Ct. 1957).

124. *McKibbin & Son v. Anastasia*, 40 L.R.R.M. 2656 (N.Y. Sup. Ct. 1957).

125. *Handcraft Mfg. Co. v. Livingston*, 40 L.R.R.M. 2657 (N.Y. Sup. Ct. 1957).

126. *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956).

127. 355 U.S. 131 (1957).

128. 181 Kan. 898, 317 P.2d 817 (1957).

sought to apply this doctrine to the pickets' taking pictures of people crossing the picket line. The United States Supreme Court reversed,<sup>129</sup> not, it is true, on preemption grounds, but on the basis of the *Thornhill* doctrine. However, there is no reason to believe that the content of the violence concept is any different in free speech cases from what it is in preemption cases.

A lower New York court has indicated a belief that state courts have the power, under the improper conduct exception, to enjoin the display of untruthful signs on the picket line.<sup>130</sup>

Whatever the extent of the powers of the state courts, there is no doubt, under the doctrine of the *Richman* case,<sup>131</sup> that they retain the right to determine for themselves the question of preemption in the first instance. This primary jurisdiction has been strengthened by a decision of the court of appeals for the eighth circuit which held that the Board itself cannot secure an injunction against action by a state court, except in cases where the state court seeks to act in a case over which the Board has taken jurisdiction.<sup>132</sup>

As Mr. Justice Frankfurter pointed out in *Richman*, the Board in *W. T. Carter and Brother*<sup>133</sup> resorted to another remedy which, though no doubt much more time-consuming, reaches somewhat the same result as would an injunction against state court action. In that case the Board held that an employer's action in securing a state injunction was itself an unfair labor practice, and he was ordered to obtain a vacation of the injunction. It is interesting to note in this connection that, in at least two recent situations, unions have tried a new angle in preemption, an angle based on the *Carter* case doctrine. Faced with an application for an injunction against certain of their activities, the unions claimed that the act of applying for the injunction was itself an unfair labor practice.<sup>134</sup> In neither case were the unions successful, but the idea has possibilities.

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129. *Teamsters Union v. Newell*, 356 U.S. 341 (1958).

130. *Leathercraft Corp. v. Perry*, 33 CCH Lab. Cas. ¶ 71041 (N.Y. Sup. Ct. 1957).

131. *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511 (1955).

132. *NLRB v. Swift & Co.*, 233 F.2d 226 (8th Cir. 1956).

133. 90 N.L.R.B. 2020 (1950).

134. See N.L.R.B. Adm. Dec. of the Gen. Counsel, Case No. 587 (C.C.H. Nat'l Labor Bd. Dec. ¶ 13000) (1953); *Republic Aviation Corp. v. Republic Lodge 1987, Int'l Ass'n of Machinists*, 169 N.Y.S.2d 651 (Sup. Ct. 1957).

The great break-through in state jurisdiction has come in the form of further developments of the *Laburnum* rule.<sup>135</sup> In *Automobile Workers v. Russell*<sup>136</sup> and *Machinists Ass'n v. Gonzales*,<sup>137</sup> the Supreme Court, in an action against a union, held that state courts have power to grant compensation and punitive damages to an employee who is prevented from working by reason of picketing activity or by reason of wrongful expulsion from the union. In reaching this conclusion, the Court made much, as it did in *Laburnum*, of the distinction between court action which would *prevent* labor activity and action which is designed merely to provide redress for damage done after the activity is concluded. This overlooks, as the Chief Justice pointed out in his dissent, the restraining effect which such damage suits are likely to have. Surely punitive damages are designed, like criminal sanctions, to deter the conduct which is punished.

Another point which both majority and minority appear to have overlooked is the departure which these cases represent from what I have called the most important principle of *Garner*. In both cases the Court assumed the correctness of the lower court's finding of facts, as, of course, it is bound to do by procedural rules. But the very point of *Garner* is that the lower court was not to find any facts at all, because the Board has the duty of finding these facts, "the duty of primary interpretation and application."<sup>138</sup> If the Court, instead of assuming that unfair labor practices had been committed, had assumed that the Board, in the exercise of its "duty," would find on the facts that the activities were protected by the national act, this assumption would have provided a true test of the *Garner* rule. The question would then have been, not, may a state give damages, including punitive damages, for an unfair labor practice, but may a state punish unions for engaging in activities which are protected by the act. By granting jurisdiction to state courts to decide this question under local law, the Supreme Court cannot now prevent a state court's penalizing by an award of damages any activity found on the facts to be violative of state law. But, sooner or later, a case will arise where the same conduct is handled by both the Board and a state court and where the Board will hold the conduct which the

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135. *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

136. 356 U.S. 634 (1958).

137. 356 U.S. 617 (1958).

138. 346 U.S. at 489.



state has penalized to be conduct which is protected by the National Act. Mind you, I do not say that this is a bad result. I do say it is a major departure from the *Garner* rule.

The continuing nature of the relationship between employers and their unions, to which the Chief Justice referred in his dissent in the *Russell* case, renders the damage remedy in many instances unavailable to employers as a practical possibility. But there are enormous practical possibilities for policing union conduct in the threat of suits by *employees*, especially where each of a large number may be held to be entitled, like *Russell*, to \$10,000, \$9,500 of which was apparently punitive. In a companion case,<sup>139</sup> arising out of the same strike the verdict was for \$450 in lost wages and \$18,000 for mental anguish and as punitive damages.

The scope of the rule of the *Russell* and *Gonzales* cases remains to be defined. In the case of *Selles v. Local*,<sup>140</sup> for example, the state court upheld recovery in the amount of \$6,500-plus in a tort action based on the wrongful action of the union in denying Selles a job as a reprisal for organizing a meeting to complain about the method of election of union officers. The Supreme Court has denied certiorari.<sup>141</sup> While the *Gonzales* case was a case in contract based on wrongful expulsion, whereas Selles was not expelled and his action sounds in tort, there seems to be no good ground for believing that the Court would not affirm the *Selles* case on the reasoning of *Gonzales*. (Incidentally, the parties conceded the right of the state court to order the restoration of *Gonzales*' membership, a position to which the Court gave its clear approval.)

In the *Garmon* case,<sup>142</sup> a companion case to *Guss*, in which pre-emption of the twilight zone was upheld, the Court expressly left open the question of damages. The California court has now upheld, in a four to three decision, an award of damages against a union for peaceful recognitional picketing where the union did not represent employees.<sup>143</sup> An application for certiorari is pending. The situation in this case differs from that in *Laburnum*, as Judge Traynor points out in a characteristi-

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139. *UAW v. Palmer*, 31 CCH Lab. Cas. ¶ 70330 (Ala. 1956).

140. 50 Wash. 2d 660, 314 P.2d 456 (1957).

141. 356 U.S. 975 (1958).

142. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957).

143. *Garmon v. San Diego Bldg. Trades Council*, 320 P.2d 473 (Cal. 1958). Cf. *Tallman Co. v. Latal*, 365 Mo. 552, 284 S.W.2d 547 (1955), where, however, the state court held that there was sufficient violence and "harrassment" to justify a state court injunction.

cally able dissenting opinion, in that in *Garmon* there was no violence. Moreover, the law applied to the case is not, in a sense, the generally applicable common law of tort, but a common law rule especially applied to this situation, and, in fact, applied for the first time, since the California court reversed its former rule on the lawfulness of the objective of such picketing. These distinctions, particularly the second, might, it seems, lead to a different result in the Supreme Court. An affirmation might be considered to lend encouragement to states to devise all sorts of new rules, statutory as well as common law, for policing union (and, possibly, employer) conduct.

It seems likely that a lower Connecticut court was wrong in deciding recently that preemption prevented it from entertaining a suit for tort damages against a union on the ground of inadequate representation in grievance procedure.<sup>144</sup> Though another question may arise here, that of whether the duty to represent does not arise under federal law, there is no reason to believe that a state court would not have concurrent jurisdiction.

May employees or unions, under the doctrine of the *Russell* and *Gonzales* cases, sue employers for damages for conduct which is also a violation of the national act? It seems obvious that here, as usual, what is sauce for the goose can also be used by the gander, and that where there is a basis for state action in local contract or tort law, the fact that the conduct complained of is also an unfair labor practice need not be held to prevent the state's giving a damage remedy. Cases like *Swope v. Emerson*<sup>145</sup> would appear to this extent to be overruled. However, for much of the employer conduct prescribed by the act there are probably no state remedies, since the basic employee rights were created by the act itself. Here the question may arise, as perhaps it does in the *Garmon* case, as to whether a state, so minded, might properly create a new remedy in damages based upon rights under the act.

I have time only to say a very few words about another kind of preemption, the preemption of the state law of collective agreements under section 301 of the Labor Management Relations Act and the *Lincoln Mills* decision.<sup>146</sup> Although this case, too, has created many

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144. *Savva v. Royal Industrial Union*, 20 Conn. Supp. 438, 138 A.2d 799 (Super. Ct. 1958), following *McNish v. American Brass Co.*, 139 Conn. 44, 89 A.2d 566 (1952).

145. 303 S.W.2d 35 (Mo. 1957), cert. denied, 355 U.S. 894 (1957).

146. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

problems, its impact has just begun to be felt in the state courts, which, for the most part, are continuing to enforce collective agreements with no thought, or, at least, no mention of federal law. And yet I understand *Lincoln Mills* to hold that in all suits for violation of collective agreements between employers and labor organizations representing employees in industries affecting commerce, federal law applies. State courts, of course, have concurrent jurisdiction, as they do on all federal questions from which they are not expressly excluded, but state courts must apply federal law. The Supreme Court of California has so held.<sup>147</sup> Certiorari was denied.<sup>148</sup> The Supreme Court of Kansas and an appellate division in New York have upheld the principle of concurrent jurisdiction, but appear to believe that state law applies.<sup>149</sup> A lower court in New York has so held.<sup>150</sup>

Many questions are opened up and left unsolved by *Lincoln Mills*, in addition to the very fundamental question of what is the federal law, which, according to the opinion in *Lincoln Mills*, remains to be "fashioned" by the federal courts. For example, the *McCarroll* case held that state courts are governed by federal substantive law, but may provide the usual remedies available in state courts, including an injunction against breach of contract, even if that remedy is not available in the federal courts because of the Norris-La Guardia Act. This problem, interesting as it is, may prove to be academic, since it is clear that defendants threatened with such injunctions can remove their cases to the federal courts.

Under section 301 only labor organizations can sue, not individuals, and under the *Westinghouse* decision,<sup>151</sup> if that is still law, labor organizations cannot sue to vindicate individual rights. This opens up the possibility that in an action by an individual or by a labor organization vindicating individual rights, a state court may apply state law to the construction of a collective agreement, while the same court, or a federal court, in

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147. *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 315 P.2d 322 (Cal. 1957).

148. 355 U.S. 932 (1958).

149. *Coleman Co. v. UAW*, 181 Kan. 969, 317 P.2d 831 (1957); *Anchor Motor Freight Corp. v. Local 445, Int'l Bhd. of Teamsters*, 34 CCH Lab. Cas. ¶ 71361 (N.Y. App. Div. 2d Dep't 1958).

150. *In re Steinberg*, 40 L.R.R.M. 2619 (N.Y. Sup. Ct. 1957).

151. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

an action by the labor organization in its own right, will apply federal law to the construction of the same agreement.

These are only a few of the many problems opened up by *Lincoln Mills*. As I have said, the state courts, and presumably the parties, seem not yet to have fully realized what has hit them. But it will not be long before employers and unions will be made to understand, for example, that arbitration clauses in collective agreements are now specifically enforceable in every court in the land, and that there is, for another example, a rapidly developing federal law on arbitrability which will govern the decisions of all our courts on that issue.

As for the future, it is only possible to say that there may be whole additional areas of preemption that have not yet been developed. I remember back in 1947, when I told an editor of the *New York Times* that the Taft-Hartley Act, via the then as yet almost wholly unplumbed possibilities of preemption, might in fact prove to be labor's Magna Carta by inhibiting issuance of state court injunctions and thus providing a freedom from effective restraint more extensive than labor had ever hitherto enjoyed in this or any other country, he told me politely but firmly that I was an eccentric who misunderstood the purpose of the act, which was to impose, not remove, restrictions on labor. I suggest now that, in addition to what I have already said about the almost endless possibilities involved in the concept of limiting the subject matter of collective bargaining, there is a good chance that certain aspects of regulation of internal union affairs may be preempted by already existing legislation. (For example, can states provide that convicted crooks shall not serve as union officials or that unions shall have periodic elections? Doesn't this interfere with free choice of bargaining representatives?)<sup>152</sup> And the Kennedy proposals will surely preempt a lot more. (For example, can a state provide for *annual* elections if the federal statute prescribes quadrennial?) A lower Pennsylvania court may have been pre-saging the preemption of all welfare fund matters, including reform statutes like those in New York, Connecticut, Washington and several other states, when it decided recently that it had no jurisdiction to instruct a welfare fund trustee on his power to purchase real estate because that jurisdiction was preempted by Taft-Hartley.<sup>153</sup> And again in this field with additional legislation there will be additional preemption.

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152. See *Hill v. Florida*, 325 U.S. 538 (1945).

153. *In re Bricklayers Union*, 34 CCH Lab. Cas. ¶ 71301 (Pa. C.P. 1957).

And what, if anything, is to be done about it? It seems unlikely that anything at all will be done in the near future. Senator Kennedy's proposed bill omits even the Administration proposal for returning to the states jurisdiction over those cases in which the Board declines to exercise jurisdiction. If anything is done about no-man's land, it seems to me that it is much more likely to be done either by the Supreme Court in enlarging the Board's field of activity by limiting its discretionary power to refuse jurisdiction, first in the hotel case which is now before the Court,<sup>154</sup> and later, perhaps, with respect to the jurisdictional rules generally, or by Congress, as in the Kennedy Bill, or in increasing the appropriation for the Board, as the Board has requested, so that it can take more cases.

And now what *should* be done? For reasons which I cannot now develop in detail, but which include the difficulties of the courts in administering the present rules, and their reluctance to do so, the lack of sound economic or sociological justification for these rules, the inefficiencies of administration in which they result, and the disregard they entail for the basic values of federalism, I believe that a change is demanded. And I still believe in the proposal which I made several years ago<sup>155</sup> for a basic study of the problems and an allocation of power to regulate the various aspects of labor-management relations in accordance with considerations of relevant economic and sociological policies and of efficient administration, and with great emphasis on the values inherent in our federal system. This would mean the assumption by Congress of responsibility for the effective operation of federalism. As Professor Cox has pointed out,<sup>156</sup> Congress has always left the matter of adjustment of the federal system to the Court, and is notably reluctant to undertake responsibility for it. But, unlike Professor Cox, who believed shortly after *Garner* that a few more decisions would largely clear the whole matter up, I believe that the problem is too complex for case by case solution and I can find little that is genuinely illuminating in the "elucidating litigation" and much that seems quite unacceptable in the practical results.

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154. *Hotel Employees Union v. Leedom*, 249 F.2d 506 (D.C. Cir. 1957), *cert. granted*, 355 U.S. 951 (1958).

155. See Hays, *Federalism and Labor Relations in the United States*, 102 U. PA. L. REV. 959 (1954).

156. Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1326 (1954).