Chicago-Kent Law Review

Volume 59 | Issue 4 Article 6

October 1983

The Common Law Contract and Tort Rights of Union Employees: What Effect after the Demise of the At Will Doctrine

S. Richard Pincus

Steven L. Gillman

THE COMMON LAW CONTRACT AND TORT RIGHTS OF UNION EMPLOYEES: WHAT EFFECT AFTER THE DEMISE OF THE "AT WILL" DOCTRINE?

S. RICHARD PINCUS* AND STEVEN L. GILLMAN**

Traditionally union employees covered by a collective bargaining agreement were foreclosed from seeking to remedy unjust discharges under the common law. Their rights are governed by the collective bargaining agreement which typically prohibits discipline or discharge without "just cause."[1] Employees seeking to vindicate an alleged unjust discharge must do so under the contractually agreed-upon grievance machinery normally culminating in final and binding arbitration. As a result, the concept of just cause discharge is firmly entrenched in the industrial common law.[2]

In contrast to the discharge rights provided to organized workers, unorganized workers, who comprise between sixty and sixty-five percent of the non-agricultural work force,[3] are without contractual job protection. Their employment relationship, if of indefinite duration, is terminable at will. The "at will" doctrine allows the employee or the

* B.A. George Washington University; J.D. University of Chicago, 1961. Mr. Pincus is a partner in the Chicago law firm of Fox and Grove, which was counsel for the defendant in Roberts v. Automobile Club of Michigan, and represented an amicus on behalf of the petitioner in Belknap, Inc. v. Hale.

** B.A. Cornell University School of Industrial and Labor Relations; J.D. University of Michigan Law School, 1980. Mr. Gillman is an associate of Fox and Grove.

The authors express their appreciation for the assistance of Janice E. Linn rendered in preparation of this article.

1. Approximately seventy-nine percent of all collective bargaining agreements provide that employees may not be terminated without "cause" or "just cause." 2 COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS (BNA) § 40:1 (1979). Even where "just cause" protection is not provided by express agreement, arbitrators may imply a "just cause" limitation on the employer's right to discharge. *See, e.g.*, Peerless Laundry Co., 51 Lab. Arb. 33 (1968) (Eaton Arb.); Keeny Mfg. Co., 40 Lab. Arb. 974 (1964) (Donnelly, Arlio Arbs.).

2. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS ch. 15 (3d ed. 1976). Numerous factors may be relevant in evaluating whether a termination is justified within the meaning of "just cause". The more prominent factors include the nature of the offense, the grievant's past record (including length of service), whether reasonable rules had been clearly disseminated and enforced in a consistent manner, and whether the concept of progressive discipline has been applied.

3. Approximately 60% to 65% of all American employees are hired on an at-will basis. Another 22% are unionized and approximately 15% are federal or state employees. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979 at 427 (table 704) (union membership); *id.* at 392 (table 644) (total work force); *id.* at 313 (table 509) (government employees). *See generally* Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1, 8-9 (1979).

employer to terminate at any time, without notice and "for a good cause, for no cause, or even for cause morally wrong."[4] The harshness of the doctrine has been softened somewhat by federal and state anti-discrimination laws.[5] Furthermore, enlightened management may not be disposed to engage in whimsical firings. Nonetheless, until recently most unorganized, at will workers have remained at risk of unjust discharge. Now viewed by some as an outmoded legal rule,[6] a growing number of state courts are chipping away at the doctrine or repudiating it completely.

Judicial modification of the at will law has proceeded on three fronts. First, and broadest, is an express contract theory which describes the employment at will doctrine as a presumptive rule of construction, as opposed to a rule of substantive law. The presumption may be rebutted by evidence of the parties' intent that the relationship not be at will.[7] Thus, where an employer promises job protection in an employment manual or gives other oral or written assurances upon which the at will employee relies to his detriment, the presumption that

4. Payne v. The Western & Atlantic RR. Co., 81 Tenn. 507, 520 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). In contrast, an employment contract for a fixed or definite term may be terminated only for justifiable cause. *See generally* Note, *Job Security For The At Will Employee: Contractual Right Of Discharge For Cause*: Toussaint v. Blue Cross & Blue Shield, 57 CHI-KENT L. REV. 697 (1981).

5. *See, e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1976) (prohibits employment discrimination on the basis of race, religion, color, sex, and national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1976) (bars employment discrimination on the basis of age for workers between forty and seventy); the Federal Rehabilitation Act, 29 U.S.C. § 794 (1976) (proscribes handicap discrimination in employment by governmental contractors); and the National Labor Relations Act of 1935 ("NLRA" or "Act"), §§ 7, 8(a)(3), 29 U.S.C. §§ 157, 158(a)(3) (1976) (prohibits discharge for engaging in union activity). More generally, on a state-by-state basis statutes have been enacted which track and occasionally supplement the rights and remedies granted employees by the federal equal employment laws. Some states also prohibit discharge on the basis of political activity or affiliation (*see, e.g.*, CAL. LABOR CODE § 1102 (West 1971)), discriminatory discharge because of physical handicap, (*see, e.g.*, CAL. LABOR CODE § 1420(a) (West Supp. 1980); MASS. ANN. LAWS ch. 149 § 24k (Michie/Law Co-op 1976), retaliatory discharge for filing a workman's compensation claim (*see, e.g.*, TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1979)), and retaliatory discharge for reporting or threatening to report the employer's violations or suspected violations of any federal or state law (*see, e.g.*, Michigan Whistleblower's Protection Act, MICH. COMP. LAWS ANN. §§ 15.361 *et seq.* (1981)).

6. *See, e.g.*, Blades, *Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 499-500 (1976).

This country is almost the last bastion in the industrialized world to withhold legal protection against unjust dismissals. Some 65 nations prohibit unjust terminations, including all Common Market countries, Sweden, Denmark, Norway, Japan, Canada, and Puerto Rico. "The Employment-at-Will Issue," BNA Vol. 111, No. 23, p. 24.

7. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

an indefinite contract is at will may be overcome.[8]

Second, some courts have sustained actions for wrongful discharge on an implied contract theory. Under that theory, an employer may be liable for wrongful discharge if he has violated the covenant of good faith and fair dealing said to be inherent in all contracts, including employment contracts. The implied contract may be violated if a discharge is not for "just cause."[9]

Finally, an exception to the at will doctrine has been recognized under tort principles if the discharge violates public policy.[10] Accord-

8. *Id.* at 599-600. Moreover, such assurances can become part of the parties' employment contract even though there was no mutual intention to create contractual rights in the employee at the time of hire and even though the employee did not learn of the policy until after the employment had commenced. 408 Mich. at 613-15. New York adopted the *Toussaint* rationale in Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982), in upholding a breach of employment contract action where the employee alleged he was discharged without cause in violation of the employer's written policy manual. *See also* Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 440 N.E.2d 998 (1st Dist. 1982), where an Illinois court treated an indefinite term employment as merely creating a presumption of at will employment which could be overcome by evidence that the employee gave up a competing employment offer in exchange for his employer's assurance that he would be retained so long as his work was satisfactory.

Personnel manuals and employee handbooks have, however, been rejected as the basis for legally binding modifications of the at will employment doctrine in other recent decisions. *See, e.g.*, Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); Sargent v. Illinois Institute of Technology, 73 Ill. App. 3d 117, 397 N.E.2d 443 (1979); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976).

9. This principle was first enunciated in Fortune v. National Cash Register Co., 273 Mass. 96, 364 N.E.2d 1251 (1977). Thereafter, it was adopted and followed by the California courts in Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) and in Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

10. See, e.g., Petermann v. International Bd. of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee fired for refusing to commit perjury at his employer's behest in violation of a statutorily prohibited policy). In Suchodolski v.Michigan Consolidated Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982), involving an accountant who was discharged after claiming that his employer's accounting procedures were inconsistent with accepted accounting principles, the Michigan Supreme Court refused to recognize the tort of abusive or wrongful discharge absent breach of a clearly defined statutory policy. Although New York, like Michigan, recognizes a contractual cause of action based upon policy manuals (Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982)), New York's highest appellate court has similarly refused to further alter the common law employment relationship without the express guidance of the legislature. Murphy v. American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983). In *Murphy*, also involving an accountant discharged over an accounting procedure dispute, the court held "that recognition in New York State of tort liability for what has become known as abusive or wrongful discharge should await legislative action." 58 N.Y.2d at 297, 461 N.Y.S.2d at 236, 448 N.E.2d at 90. *See also* Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982); Givens v. Hixon, 275 Ark. 370, 631 S.W.2d 263 (1982); Gil v. Metal Services Corp., 412 So. 2d 706 (La. App.) *cert. denied*, 414 So. 2d 379 (1982); Hans v. National Living Centers, Inc., 633 S.W.2d 672 (Tex. App. 1982); Meredith v. C.E. Walther, Inc., 422 So. 2d 761 (Ala. 1982). In Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), however, the New Hampshire Supreme Court recognized the tort of abusive discharge even absent a declared public policy. The *Monge* court held that "a termination . . . which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract." 114 N.H. at 133, 316 A.2d at 551.

ingly, employees have recovered for the torts of abusive or retaliatory discharge where they were fired for serving on juries,[11] filing worker's compensation claims,[12] seeking employer compliance with consumer protection laws,[13] and "whistle blowing."[14]

This article will examine whether and under what circumstances common law rights won by at will employees should be provided to organized employees and whether the extension of common law protections after unionization can be harmonized with federal labor policy. Specifically, this article will consider the application of common law contract and tort rights in two principal settings: where a labor agreement is in effect and where one has not been executed or has expired.

In the former instance, this article concludes that individual contract or tort actions will seldom be justified. Employees covered by a labor agreement already enjoy adequate protection under that agreement. Furthermore, the extension of individual common law rights to such employees will undermine the federal policy promoting the resolution of labor disputes through collective bargaining. Conversely, where unionized employees are not protected by an existing labor agreement, this article concludes that individual common law rights may be exercised only where there is no demonstrable interference with the National Labor Relations Board's (hereinafter "Board") primary jurisdiction or where the assertion of those rights does not unduly burden the legitimate economic weapons of labor or management. In these instances, individual common law rights must yield under federal preemption principles.

11. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 225 Pa. Super. 28, 386 A.2d 119 (1978). *But see* Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (employer's motivation for discharging at will employee irrelevant notwithstanding employee's claim that he was terminated for serving on a grand jury).

12. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Lally v. CopyGraphics, 173 N.J. Super. 162, 413 A.2d 960 (App. Div. 1980); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978). *But see* Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978); Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979). *See* Blevins v. General Electric Co., 491 F. Supp. 521 (W.D. Va. 1980), where court held employer's motivation for discharging at will employee irrelevant notwithstanding employee's claim that he was terminated for filing workers' compensation claim.

13. Harless v. First National Bank, 246 S.E.2d 270 (W. Va. 1978).

14. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); Palmateer v. International Harvester, 85 Ill. App. 3d 50, 406 N.E.2d 595 (1981). *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (court recognized cause of action for retaliatory discharge in case involving employee terminated for his efforts to correct mislabeling of food).

I. APPLICATION OF STATE COMMON LAW PROTECTIONS DURING THE TERM OF A COLLECTIVE BARGAINING AGREEMENT

A. Individual Contract Rights

The union movement is predicated on the notion that employees most effectively bargain for job improvements by joining together, pooling their economic strength and acting through a labor organization.[15] Once a union is designated as the bargaining representative by a majority of employees, it becomes the exclusive bargaining agent. The employer may no longer deal directly with individual employees.[16] From that point forward, federal law prohibits individual contract rights from being interposed to forestall collective bargaining obligations.[17] Upon execution of a collective bargaining agreement, the terms of any pre-existing individual contracts merge into the labor agreement,[18] absent exceptional circumstances.[19] The individual's power to order his own relations is "extinguished"[20] and he implicitly agrees to be bound by the bargain struck by his union.[21]

15. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

16. 29 U.S.C. § 159(a). *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Taft Broadcasting Co., 264 N.L.R.B. 28, 111 L.R.R.M. 1340 (1982); Friederich Truck Service, Inc., 259 N.L.R.B. 1294, 1299 (1982).

17. As the Supreme Court stated in J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement.

18. *See, e.g.*, Klepacky v. Kraftco Corp., 80 L.R.R.M. 3144, 3146 (D.C. Conn. 1972) ("[t]he national labor policy requires that a duly negotiated collective bargaining agreement should be the sole determinant of [the employees] seniority status"); Pietrzykowski v Safie, 60 L.R.R.M. 2587, 2588 (Mich. Ct. App. 1965) ("the union contract superseded the individual contracts"); Quinlan v. Consolidated Edison Co., 237 N.Y.S.2d 745, 52 L.R.R.M. 2625, 2626 (N.Y. Sup. Ct. 1963) ("[t]he collective bargaining agreement supersedes any individual agreements. . . .").

19. There may be exceptional instances where the collective bargaining agreement itself may provide for the continuation of individual contracts. *See* J. D. Alexander v. Standard Oil Co., 53 Ill. App. 3d 690, 368 N.E.2d 1010 (5th Dist. 1977). In *Alexander*, the collective bargaining contract between the union and the employer had expired, and the employer threatened to implement his last best offer. Individual salesmen, who were members of the union, brought an action to enforce their individual employment contracts. The individual actions were allowed to proceed, despite the existence of a collective bargaining relationship. This result appears to have been justified because the labor agreement expressly contemplated the continued existence of the individual agreements both during and after the term of the labor agreement. Thus, the individual contract between Standard and the individual agents, which granted the agents exclusive territories and provided that they would be paid commissions, "were meshed with the union negotiated 'Working Agreement,'" 368 N.E.2d at 1014. In these circumstances, "[t]he total relationship between an individual agent and Standard" was deemed to be "governed by both agreements, but if any inconsistencies occurred," the provisions of the collective bargaining agreement would control. *Id.*

20. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

21. Congress established this majoritarian principle "in full awareness that the superior

Upon execution of the union agreement, the individual's exclusive source of contract rights is found under that agreement.[22] He should not be allowed to resurrect individual, common law contract rights[23] under either an express contract theory[24] or an implied covenant of good faith and fair dealing.[25] The contractual grievance machinery culminating in binding arbitration contained in virtually all union agreements is typically the sole avenue for redress of an alleged "unjust" termination.[26]

B. Individual Tort Rights

The union employee covered by a collective bargaining agreement who is terminated for a reason "contrary to public policy" also should be barred from seeking redress in a common law action. Since invariably the labor agreement expressly or implicitly prohibits discharge without "just cause," and provides a dispute resolution mechanism, the

strength of some individuals or groups might be subordinated to the interest of the majority", Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975), and that "[t]he complete satisfaction of all who are represented is hardly to be expected." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). Nevertheless, in vesting unions with broad authority "Congress did not . . . authorize a tyranny of the majority over minority interests . . . [and] Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit." *Emporium Capwell*, 420 U.S. at 64. This duty of fair representation may be invoked by individuals to prevent arbitrary union conduct. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967).

22. The exclusive basis for employee or union enforcement of the terms of a collective bargaining agreement is § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976). Section 301 provides that: "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." Although suits to enforce labor contracts under § 301 may be brought in state as well as federal court, such actions must be decided "according to precepts of federal labor policy," rather than state law, "[since] [the] possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962). Moreover, employees may not seek judicial enforcement of their individual rights under the collective agreement without first seeking to exhaust their grievance and arbitration rights. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Labor Board v. Miranda Fuel Co., Inc., 326 F.2d 172 (2d Cir. 1963). Direct judicial recourse against their union and employer is only available if the union fails to process a grievance in good faith. Vaca v. Sipes, 386 U.S. 171 (1967). This result is premised upon the strong federal policy encouraging the use of "contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

23. *See supra* note 18.

24. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

25. *See, e.g.*, Fortune v. National Cash Register Co., 273 Mass. 94, 364 N.E.2d 1511 (1977), and the cases cited *supra* note 9.

26. After exhausting his rights, the employee may sue under § 301 to set aside an adverse arbitration award. Smith v. Evening News Assn., 371 U.S. 195 (1962). However, the award will be deemed conclusive unless the employee can establish that the award was tainted by the union's failure to adequately represent him before the arbitrator. Hines v. Anchor Motor Freight, 424 U.S. 554, 568 (1976). See *infra* note 43.

employee should be required to exhaust this contractual remedy. Assuming the arbitrator's award is fair and regular on its face, it should be binding and exclusive.

This is not to say that no argument exists for allowing the unjustly dismissed union employee to recover under a common law tort theory. If his discharge contravenes a clearly defined state policy, the state's interest in providing an independent common law action competes with the federal interest in encouraging the timely resolution of labor disputes through arbitration.[27] Since state law is directly subverted by, for example, the retaliatory discharge of an employee who files a valid worker's compensation claim,[28] state law arguably should provide a remedy to at will *and* union employees alike.

The Illinois appellate courts have split on this issue. The First and Fourth District held that exhaustion of the contractual grievance machinery is not required[29] because the cause of action is grounded in tort, rather than contract principles. These courts also reasoned that to do otherwise would result in the anomalous award of punitive damages to non-union employees while limiting union employees to compensatory damages through arbitration.[30]

The opposite—and better—view is illustrated by the Third District's decision in *Cook v. Caterpillar Tractor Co.*[31] *Cook* also involved a union employee who was discharged allegedly in retaliation for filing a worker's compensation claim. Relying upon the federal policy expressed by the Supreme Court in the *Steelworkers Trilogy*[32] and the broad discretion afforded arbitrators to construe the "just cause" requirements in the bargaining agreement, the Third District found that the dispute was plainly one which was arbitrable under the agree-

27. *See* United Parcel Service v. Mitchell, 451 U.S. 56 (1981).

28. *See, e.g.*, ILL. REV. STAT. ch. 48, ¶ 138.4(h) (1975), where the Illinois legislature made it unlawful for any employer to discriminate or to threaten to discriminate in any way because of an employee's exercise of rights granted by the Workman's Compensation Act. Violation of the statute subjects an employer to criminal sanctions. In addition, a civil action in tort has been implied by the courts. *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

29. *See* Wyatt v. Jewel Tea Cos., 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1st Dist. 1982). *See also* Deatrick v. Funk Seeds International, 109 Ill. App. 3d 998, 441 N.E.2d 669 (4th Dist. 1982) where the court, adopting *Wyatt*, similarly held that exhaustion was not required.

30. *Wyatt*, 108 Ill. App. 3d at 389. Furthermore, it has been argued that reliance on the collective bargaining agreement alone to protect the state's policy in furthering the right of workman's compensation claimants to pursue their claims is not adequate if, for example, a union declines to arbitrate the claim. Note, Kelsay v. Motorola, Inc.—*Illinois Courts Welcome Retaliatory Discharge Suits Under The Workman's Compensation Act*, 1980 U. ILL. L.F. 839.

31. 85 Ill. App. 3d 402, 407 N.E.2d 95 (3rd Dist. 1980).

32. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

ment.[33] It rejected the claim that exhaustion was unnecessary because punitive damages are unavailable in arbitration or because a retaliatory discharge action is grounded in tort, not contract.

According to *Cook*, the cause of action for retaliatory discharge afforded Illinois employees in *Kelsay v. Motorola, Inc.*[34] only protects the terminable at will employee who is without other avenues of recourse against his employer. Absent that protection, the at will worker would otherwise be forced "to choose between continued employment and the workmen's compensation legally due him."[35] *Kelsay* was not intended, the *Cook* court said, to apply to a union employee who is protected by a just cause provision culminating in arbitration. This employee, unlike his non-union counterpart, is not forced into sacrificing his compensation benefits or losing his job. Under this view, the state's interest in protecting employees from retaliatory discharges is adequately insured by the collective bargaining agreement.[36]

Clearly, the *Cook* decision represents a more faithful reading of the policies underlying *Kelsay* and the federal policy encouraging collective bargaining. The Seventh Circuit recently adopted *Cook*'s reading of *Kelsay* in *Lamb v. Briggs Manufacturing*.[37] In *Lamb*, the court observed that the retaliatory tort created in *Kelsay* was designed "to spare employees the Hobson's choice of receiving Workmen's Compensation or retaining a job, alternatives which are mutually exclusive only in the absence of a third: grievance arbitration and a 'just cause' contractual provision."[38] The unionized employee, in contrast, "may utilize the formidable tool of binding arbitration, and win reinstatement and backpay. . . ."[39] Moreover, the *Lamb* court found that *Cook's* interpretation of *Kelsay* furthers "the public policy of facilitating orderly, bilateral industrial relations."[40]

33. The court correctly noted that it was not necessary that the contract "specifically enumerate retaliatory discharge as a grievance" to be arbitrable under the "just cause" provision. Arbitrators are authorized to determine whether any kind of termination meets the "just cause" requirement of a contract. 85 Ill. App. 3d at 405, 407 N.E.2d at 98.

34. 74 Ill. 2d at 172, 384 N.E.2d 353 (1978).

35. 85 Ill. App. 3d at 406, 407 N.E.2d at 98.

36. *Id.* at 407, 407 N.E.2d at 99.

37. 700 F.2d 1092 (7th Cir. 1983).

38. *Id.* at 1094.

39. *Id.*

40. *Id.* at 1095. The Illinois Supreme Court's post-*Kelsay* decision in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) further supports the Seventh Circuit's conclusion. Thus, as the Seventh Circuit observed in *Lamb*, "[i]n *Palmateer*, the Illinois Supreme Court again underscored that the tort of retaliatory discharge 'is an *exception* to the *general rule* that an 'at will' employment is terminable *at any time for any or no cause*.'" 700 F.2d at 1095 (emphasis in original).

In sum, the alleged anomaly of depriving the union worker covered by a collective bargaining agreement of punitive damages which are available to the non-union employee who is discharged in violation of public policy must be weighed against the orderly and expeditious employee remedy available through arbitration.[41] On balance, the exhaustion requirement customarily applied to unionized employees seeking to vindicate employment contract rights[42] should also be applied where recovery for unjust discharge is sought under a tort theory.[43]

II. Application of State Common Law Protections When No Collective Bargaining Agreement is in Effect

Whether a union employee can claim individual contract or tort rights where no collective bargaining agreement exists poses a more difficult problem than where a contract is in effect. There are two periods of time when the terms and conditions of employment of unionized employees are not fixed by a labor agreement: (1) after a union wins an

41. Requiring unionized employees to utilize their contractual grievance machinery is also consistent with the exhaustion requirement imposed on the non-union employee by the Michigan Supreme Court in Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980), in instances where a procedure for final and binding arbitration is made available to the non-union employee under the employer's personnel policies. Thus, while granting, on the one hand, enforceable contract rights to the at will employee based upon an employer's personnel manual, the Michigan Supreme Court noted that the employer "can avoid the perils of jury assessment by providing for an alternate method of dispute resolution," such as binding arbitration. 408 Mich. at 624. In the State of Michigan at least, it appears that union and non-union employees alike must exhaust alternative dispute resolution mechanisms provided by the employer prior to filing a breach of contract or tort suit growing out of the employee's discharge.

42. The only significant exception to the exhaustion requirement has been in the equal employment area. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court rejected the claim that a Title VII complainant is required to exhaust the grievance-arbitration machinery of a collective bargaining agreement in light of Congress' intent through the legislative scheme to provide aggrieved individuals multiple remedies. Thus, while the grievance procedure contained in a collective agreement does not have to be exhausted in an equal employment case, this result is mandated by Congress' desire to single out the equal employment area for special protection. Absent evidence of an affirmative intent by the state legislature to provide multiple forums in retaliatory discharge cases, the exhaustion requirement should be applied.

43. *See* discussion *supra* at note 26. An arbitrator's award in a retaliatory discharge case should be granted the same degree of finality as any other arbitration award. Generally, a court is not authorized to review the merits of an award and can only set it aside if it fails to "draw its essence from the collective bargaining agreement." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Thus, so long as the union is faithful to its statutory obligation to represent the grievant fairly and fully in that process and the procedures are fair and regular, the arbitrator's award will be given finality by the courts. *Cf.* Harvey Aluminum, Inc. v. United Steelworkers of America, 263 F. Supp. 488 (D.C. Cal. 1967) (court vacated an award and remanded the case for rehearing because the arbitrator refused to hear an important rebuttal witness); Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), *modified on other grounds*, 514 F.2d 285 (2d Cir. 1975) (court vacated an award because the record revealed that the arbitrator was biased).

election and up until the time the initial agreement is reached; and (2) after expiration of an existing agreement but before the time the parties agree on a new contract. Absent an executed agreement, the concept of merger of rights may be inapplicable.[44] Nonetheless, there are circumstances where individual employee rights must yield to overriding federal labor law policies.

A threshold question is: does the mere fact of unionization extinguish existing individual common law contract and tort rights? Assuming that it does not, is there any point on the continuum between unionization and execution of an agreement when federal labor policy overrides the common law? In *J.I. Case Co. v. NLRB*,[45] the Supreme Court indicated, albeit in *dicta*, that individual contract rights are not necessarily extinguished by the advent of a union. As the Court noted, "[c]are has been taken in the opinions of the Court to reserve a field for the individual contract, even in the industries governed by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract."[46]

This language suggests that following a union's certification and until the completion of the collective bargaining process a union employee is protected under both state and federal law. He may not only reap the benefits achieved through collective bargaining but, until the contract is finalized, may continue to assert the individual contract rights he enjoyed before unionization. Conversely, the employer not only remains at risk against individual contract claims but, because of the union's exclusive representative status under federal law, he may not even seek to negotiate changes in those terms directly with his employees.[47] Any such changes must be negotiated with the union. Moreover, since federal law precludes the employer from making any unilateral changes in employment conditions pending exhaustion of the collective bargaining process, the terms of the individual employment contracts must be maintained in full force and effect.[48]

It is doubtful that this apparent inequity was perceived in 1944 when *J. I. Case* was decided. The Court's principal concern was in insuring that individual contract rights could not be improperly as-

44. *See* cases cited *supra* at note 18.

45. 321 U.S. 332 (1944).

46. *Id.* at 336.

47. *See supra* note 16. Once the union is certified, it becomes the exclusive representative of all employees in the bargaining unit by virtue of § 9(a) of the Act. As a result, the employer is legally precluded from dealing directly with employees to effect any change in the employment terms. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

48. NLRB v. Katz, 369 U.S. 736 (1962).

serted to undermine the process of collective bargaining. Similarly, the Court was careful to assure that the employees enjoying individual contract protections would not be unduly discouraged from their newly gained right to organize. Subsequent to *J. I. Case*, however, the Act has been construed to require employer maintenance of the *status quo* until a lawful deadlock has been reached. Arguably, therefore, federal law now adequately protects the individual and makes it unnecessary for the states to extend common law protections to the union employee even where a collective bargaining agreement is not yet effective. However, even though an employer may not unilaterally change such basic employment terms as wages and associated fringe benefits during negotiations, an employer would still be free under federal law to discipline or discharge employees without just cause so long as his motive is not tainted by anti-union animus.

In short, while the unionized employee is in less need than his non-union counterpart of state law protection during the initial bargaining process, protection from unjust discharge is not achieved by federal law. It is unlikely that the courts will be persuaded that unionized employees must be denied the same rights as non-union employees based solely upon their selection of a collective bargaining representative.

If the enforcement of individual employment rights interferes with the federal collective bargaining process, however, the states will be precluded from providing a forum. This result is dictated by the doctrine of federal labor law preemption. The preemption doctrine rests on the premise that Congress, in enacting the NLRA, established a comprehensive national labor policy to obtain uniform administration of the substantive rules and to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."[49] Labor preemption was designed to preserve this uniform federal labor policy since "nothing could serve more fully to defeat the congressional goals underlying the Act than to subject . . . the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law."[50]

The Supreme Court has established three distinct areas in which, under the preemption doctrine established in *San Diego Building*

49. NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971), *quoting* Garner v. Teamsters Union, 346 U.S. 485, 490 (1953).

50. Amalgamated Ass'n of Street, Elec. Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971).

Trades Council v. Garmon[51] and *Machinists v. Wisconsin Employment Relations*,[52] a state generally may not act: (1) when it is fairly clear that the activities which a state seeks to regulate are actually or arguably protected by Section 7[53] of the National Labor Relations Act; (2) when the conduct sought to be regulated is arguably an unfair practice under section 8[54] of the Act;[55] and (3) when, although neither "protected" by section 7 nor "prohibited" by section 8, Congress intended that the conduct be "unregulated" by the states so that the parties may freely use their legitimate economic weapons.[56] Thus, states remain free to act only where the conduct is neither "protected nor prohibited" and does not involve an area Congress intended to be left "unregulated."

Two recent state cases illustrate the difficulty in the context of a labor dispute in reconciling the extension of common law protections with principles of federal preemption. The first, *Belknap v. Hale*,[57] which was recently decided by the United States Supreme Court,[58] concerns the alleged state law employment rights of strike replacements who were terminated as the result of a strike settlement agreement negotiated between the union and employer. The second, *Roberts v. Automobile Club of Michigan*,[59] involves an effort to enforce common law contract rights which were allegedly breached by the employer during the period of collective bargaining.

A. Enforcement of Individual Contract Rights During A Strike

In *Belknap*, the Supreme Court addressed, for the first time, an

51. 359 U.S. 236 (1959).

52. 427 U.S. 132 (1976).

53. Section 7 of the NLRA gives employees the right to form, join or assist a labor organization or to engage in other concerted and protected activities designed to achieve that result as well as to engage in collective bargaining through their chosen representative.

54. Section 8 of the NLRA generally makes unlawful employer or union conduct which interferes or restrains employees from exercising the rights granted them under Section 7 of the Act. It also precludes employers or unions from discriminating against employees based upon their union activity or refusal to engage in such activity and imposes a duty on both to engage in good faith bargaining once a union is validly designated as the employees' bargaining agent. Finally, under the provisions of § 8(b)(4) and 8(b)(7) unions are precluded from engaging in various kinds of secondary boycott or other coercive activities which tend to interfere with employees freely exercising their § 7 rights.

55. 359 U.S. at 244.

56. 427 U.S. at 140.

57. None of the opinions rendered by the Kentucky courts are reproduced in either an official or unofficial reporter. References to these decisions shall cite from the Joint Appendix filed by Belknap in the United States Supreme Court.

58. 103 S. Ct. 3172 (1983).

59. Case No. 82-203-402-CZ (Cir. Ct. Wayne County, Mich. May 1982), *appeal docketed*, No. 66805 (Mich. Ct. App. April 12, 1983). The lower court's opinion and order are unpublished. Reference thereto shall be to the slip opinion ("Slip op.").

apparent conflict between competing state common law employment rights and those arising under federal law. Following an unsuccessful effort to reach agreement on a new contract, members of the Belknap bargaining unit struck. When Belknap granted a wage increase for union members who remained on the job, the union filed unfair labor practice charges. The Board's Regional Director issued a complaint against Belknap asserting that the unilateral increase violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. During the strike, the company also hired "permanent" replacements for its striking employees. Following a settlement conference convened by the Regional Director, the parties entered into a strike settlement agreement. Under the terms of that settlement the company agreed to reinstate 35 strikers per month until all of the strikers were reinstated. To meet this obligation, the company was forced to layoff some of the strike replacements.[60]

The displaced replacements filed an action against the company in Kentucky state court alleging fraud and breach of contract.[61] The trial court granted the company's motion for summary judgment on the ground that the action was preempted by federal law. In an unpublished decision, the Kentucky Court of Appeals reversed. It held that the action was not preempted for two reasons: first, because the complained-of conduct—the layoff of the replacement workers—was not an unfair labor practice;[62] and second, because the conduct at issue was "a merely peripheral concern" of the Board.[63] The court did not consider whether the enforcement of the replacements' state contract rights interfered with the employer's federally sanctioned power to hire or refrain from hiring replacements. Neither did the appeals court consider whether the assertion of state power conflicted with the federal policy granting a union broad authority to negotiate and contract for all bargaining unit members, including strike replacements.

In a divided opinion, the Supreme Court affirmed the ruling of the

60. 103 S. Ct. at 3175-76.

61. The suit was filed by twelve of the laid off replacements. They alleged that the company had induced them to enter into employment contracts by offering them "permanent employment" even though the company never intended to hire permanent replacements. They also claimed that the company had breached their employment contracts by subsequently entering into a strike settlement agreement requiring their displacement. Brief for Petitioner at App. A 1-5, Belknap v. Hale, 103 S. Ct. 3172 (1983) [hereinafter cited as *Belknap* Brief].

62. The Kentucky Court of Appeals found that the Company's alleged conduct did not violate § 8(a)(3) of the Act, which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Court reasoned that the replacements were "non-union workers who sought full-time employment with [the Company] rather than membership in a particular labor organization." *Id.* at App. C 3.

63. *Id.* at App. C 3-4.

Kentucky Court of Appeals in what the concurring and dissenting justices termed "a difficult case."[64] The majority decision, written by Justice White, and joined by Chief Justice Burger and Justices Rehnquist, Stevens, and O'Connor, noted that the Court has preempted state regulation of conduct which is arguably protected or prohibited as described in *Garmon*, and state regulation of conduct that Congress intended to be unregulated as described in *Machinists*.[65] The majority concluded that neither preemption doctrine applied.

Machinists dealt with the state's authority to prohibit a union-imposed ban on the performance of overtime work during negotiations in order to pressure an employer to accept its economic demands.[66] The majority opinion in *Machinists* noted that particular activity may be "protected" by federal law even where it is not covered by the language of Section 7 of the Act. An activity may also be "protected" when Congress intends it to be left unregulated by any governmental power. Congress' legislative purpose may dictate that certain activity, while neither "protected" by Section 7 nor "prohibited" by Section 8, remains insulated from state intrusion.[67] Included within this category of unregulated conduct are the legitimate self-help weapons of labor and management which are "part and parcel of the process of collective bargaining."[68] The *Machinists* Court found that the union's overtime ban represented one such form of economic self-help. Although not explicitly "protected" or "prohibited" by Congress, it constituted activity which Congress implicitly intended to be governed by the free play of economic forces. By seeking to prohibit the union's overtime ban,

64. 103 S. Ct. at 3190.

65. *Id.* at 3177.

66. The Wisconsin Employment Relations Commission found this tactic to be in violation of state law and ordered the union to cease and desist. In an opinion by Justice Brennan, expressing the views of six justices, the Court held that the State commission was preempted from regulating this conduct. 427 U.S. at 141.

67. *Id. See also* Sears v. San Diego Carpenters, 436 U.S. at 199 n. 30:

> Although it is clear that a state court may not exercise jurisdiction over protected conduct, it is important to note that the word 'protected' may refer to two quite different concepts: union conduct which the State may not prohibit and against which the employer may not retaliate because it is covered by § 7 or conduct which a State may not prohibit even though it is not covered by § 7 of the Act. The Court considered protected conduct in the latter sense in *Machinists*. . . .

68. *Machinists*, 427 U.S. at 149, quoting NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 495 (1960). *Insurance Agents* involved a union's refusal to bargain in good faith under § 8(b)(3) of the Act. During the negotiations, the union directed certain on-the-job harassing tactics designed to pressure the employer to accede to the union's bargaining demands. These activities were neither "protected" nor "prohibited" by the Act. The Supreme Court held that the Board was precluded from inferring "bad faith" bargaining from these tactics. It concluded that Congress intended that such economic weapons be free of *any* governmental regulation, including regulation by the Board. 361 U.S. at 483 n. 6.

the Court concluded that the state had improperly intruded into the substantive aspects of the bargaining process and denied one party to an economic contest a weapon that Congress intended to make available.[69]

Although concerning an economic weapon utilized by labor, *Machinists* makes clear that "self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable."[70] Thus, an employer may respond in a number of legitimate ways to an economic strike without violating federal law. He may, for example, refuse to continue payment of striker's insurance premiums[71] or utilize supervisors to maintain production during the strike.[72] He also may lockout the strikers[73] or contract out all or part of his operation without union approval.[74] Finally, in response to an economic strike, an employer may threaten to or actually hire permanent strike replacements in order to either maintain production or to exert pressure for a favorable contract settlement.[75] Where the strike is economic in origin, the utilization of any or all of these economic weapons is sanctioned under federal law as part and parcel of the process of free collective bargaining. Under the *Machinists* rationale, therefore, state laws or regulations which prohibit or limit the use of such permissible weapons are preempted unless Congress affirmatively intended to tolerate such interference.[76]

Belknap, with amicus support from the Board, the AFL-CIO, and the United States Chamber of Commerce, argued in the Supreme

69. 427 U.S. at 155.

70. *Id.* at 147.

71. *See* Utility Workers of Boston Edison Co., 77 L.R.R.M. 2495 (1st Cir. 1971); Ace Tank and Heater Co., 167 NLRB Dec. 663 (1967); Quality Castings Company, 139 N.L.R.B. 928 (1962); Knickerbocker Plastic Co., Inc., 104 N.L.R.B. 514 (1953), *enforced*, 218 F.2d 917 (9th Cir. 1955).

72. Ottawa Silica Co., 197 N.L.R.B. 449 (1972).

73. American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

74. Southern California Stationers, 164 N.L.R.B. 1517, 1537 (1967); Empire Terminal Warehouse Co., 151 N.L.R.B. 1359 (1965); Shell Oil Company, 149 N.L.R.B. 22 (1964); NLRB v. Abbott Publishing, 331 F.2d 209 (7th Cir. 1964).

75. In an economic strike, i.e., one called to extract economic concessions, an employer is, under the Act, permitted to hire permanent replacements and need not at the strike's conclusion displace the replacements to make room for the returning strikers. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967). Conversely, an employer violates the Act if, in response to a strike caused or prolonged by its own unfair labor practices, it grants replacements a permanent job. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

76. *See, e.g.*, U.S. Chamber of Commerce v. State of New Jersey, 110 L.R.R.M. 2328, 2335 (N.J. Sup. Ct., May 3, 1982) (state statute prohibiting recruitment and hiring of strike replacements is preempted by the NLRA as interfering with the balance of economic power between labor and management); and People v. Federal Tool and Plastics, 62 Ill. 2d 549, 553-54, 344 N.E.2d 1, 3-4 (1975) (state statute requiring employers to notify prospective replacements that a strike is in progress is preempted). *See*, *infra*, discussion of New York Telephone Company v. New York State Department of Labor, 440 U.S. 519 (1979).

Court that the Kentucky courts were impermissibly attempting to regulate Belknap's use of the striker replacement weapon. The Court's majority did not question either Belknap's right to hire permanent replacements or the principle "that the federal law intended to leave the employer and the union free to use their economic weapons against one another."[77] Nevertheless, the Court refused "to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships."[78] It reasoned that even if the allowance of damages to the strike replacements would deter employers from making unconditional permanent employment offers, this burden is really no greater than the burden which exists under current law.[79] Federal law already regulates an employer's right to offer and hire permanent strike replacements where the strike is an unfair labor practice strike. According to the Court, since "putative replacements would know that the proffered job is, in important respects, non-permanent and may not accept employment for that reason,"[80] it could see no substantial difference if its ruling forced employers to condition their offers to replacements by stating the circumstances under which they could be fired.[81] In distinguishing *Machinists* from *Belknap*, the Court could find no basis for finding that suits by "innocent" third parties would "burden" the employer's right to hire permanent replacements under federal law. "*Machinists*," the Court stated, "did not deal with solemn promises of permanent employment, made to innocent replacements, that the employer was free to make and keep under federal law."[82] In an opinion wrought more with emotion than careful analysis, the Court stated it could not "agree with the

77. 103 S. Ct. at 3178.

78. *Id.*

79. *Id.* at 3179.

80. *Id.*

81. The Court also rejected the argument that a conditional offer promising permanent employment, subject only to a strike settlement or Board order mandating the strikers reinstatement, would make the replacement a "temporary employee" subject to replacement by a striker at the conclusion of an economic strike. While acknowledging that as a general rule a conditional offer to replacements would be ineffective and require their displacement at the conclusion of an economic strike, the Court argued that this requirement is designed to protect the striker, not the replacement or the employer. *Id.* Further, if the conditional offer is limited to only the strike settlement or unfair labor practice contingency, the Court found such arrangements "create a sufficiently permanent arrangement to permit the prevailing employer [in an economic strike] to abide by its promises." *Id.* Moreover, even if construed as a "conditional offer," the Court stated that the refusal to fire replacements because of the commitments made in the course of an economic strike would not be unlawful since there was "legitimate and substantial justification" for that refusal under the rationale in NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967). 103 S. Ct. at 3179 n. 8.

82. 103 S. Ct. at 3181.

dissent that Congress intended such a lawless regime."[83]

In also rejecting the employer's *Garmon* preemption argument, the Court relied on three post-*Garmon* decisions: *Linn v. United Plant Guard Workers of America*,[84] *Farmer v. United Brotherhood of Carpenters*,[85] and *Sears Roebuck and Co. v. San Diego District Council of Carpenters*.[86] Each of these cases involved activity violating common law tort or property rights which, although "arguably prohibited" by the Act, also touched interests which were "deeply rooted" in local feelings. *Linn*, a common law defamation action,[87] was the first case which signaled a departure from *Garmon*. It was followed by *Farmer*, an action to recover for the intentional infliction of emotional distress,[88] and later by *Sears*, where the employer sought to enjoin peaceful union picketing under the state's trespass laws.[89] These common law actions were deemed not preempted under the "arguably prohibited" branch of *Garmon*. As the Supreme Court explained in these decisions, a strict application of *Garmon's* principles is not required where

83. *Id.* at 3178.

84. 383 U.S. 53 (1966).

85. 430 U.S. 290 (1977).

86. 436 U.S. 180 (1978).

87. In *Linn*, an assistant manager of Pinkerton's National Detective Agency filed suit in state court against a union and two of its officers alleging that the defendants had circulated a defamatory statement about him in violation of state law. It was conceded that if unfair labor practice charges had been filed the Board may have found that the Union violated § 8 of the Act by intentionally circulating false statements during an organizational campaign. In addition, the statements could have resulted in the election being set aside.

88. In *Farmer*, a member of the union engaged in an intra-union political dispute with union officials, sued in state court alleging he was subjected to a campaign of personal abuse and harassment, and alleging that the union discriminatorily refused to refer him for employment through its exclusive hiring hall.

89. In *Sears*, the union established picket lines on privately owned sidewalks adjacent to the Sears store. Following a demand by Sears to remove the pickets and a refusal by the union, Sears filed suit in state court against the continuing trespass. Although the legality of the picketing was unclear as a matter of federal law, the Court assumed for purposes of its decision that the picketing arguably may have violated federal law under § 8 of the Act. The Supreme Court noted that a stricter standard would be applied to state regulation of conduct "protected" by the Act as opposed to "prohibited" conduct. 436 U.S. at 200. The Court nonetheless upheld the state's power to enjoin the trespass even if, as the Court assumed, the union's prohibition may have been protected under § 7 of the Act. This potential encroachment on the Board's primary jurisdiction was permitted because Sears, the aggrieved party, had no means for directly obtaining a Board ruling on the legality of the picketing. *Id.* at 202. The only orderly means for obtaining a Board ruling was if the union filed an unfair labor practice charge in response to Sears' demand that it remove its pickets, a course which the union chose not to pursue. Sears was thus left with only three choices: to permit the pickets to remain; to forcefully evict the pickets; or to seek protection of the state's trespass laws, the only option available to Sears to seek an orderly resolution of the dispute. Thus, under *Sears*, where the aggrieved party has no means for securing a Board determination regarding the protected nature of the conduct and where the party who has such means fails to invoke the Board's processes, state courts will not be denied jurisdiction even if the conduct is arguably protected and even if the state court is required to decide issues otherwise within the Board's primary jurisdiction.

each of the following requisites is met: (1) the underlying conduct, such as defamation or trespass, is unprotected by the NLRA, thus posing little risk of state regulation of conduct which Congress affirmatively intended to protect; (2) there is an overriding state interest that is "deeply rooted in local feeling and responsibility;" and (3) there is little risk that the state action will interfere with the Board's primary jurisdiction in insuring the uniform administration of national labor policy.[90]

Since none of these cases involved activity "protected" under the Act, but did involve activity "deeply rooted" in state interests, the critical focus was whether state enforcement would interfere with the Board's primary jurisdiction in assuring a uniform administration of the Act. Because the state courts in each case were considering issues different from those which either were or would have been considered by the Board, state actions were allowed to proceed since no undue interference with the Board's jurisdiction would result. In comparison, in *Operating Engineers Local 926 v. Jones*,[91] the Court found preempted a state common law claim based upon a union's alleged tortious interference with a supervisor's contract rights. Unlike *Linn*, *Farmer*, and *Sears*, the Court concluded this action interfered with the Board's primary jurisdiction under federal law since the state claim was "the same in a fundamental respect" to that which the Labor Board would consider.[92] Where, as in *Jones*, the state controversy is fundamentally similar to issues which the Board could resolve, the state is preempted. Where, as in *Linn*,[93] *Farmer*,[94] and *Sears*,[95] "the controversy . . . is . . . different from . . . that which could have been, but

90. *Farmer*, 430 U.S. at 298, citing Linn v. United Plant Guard Workers, 383 U.S. at 61-62.

91. 103 S. Ct. 1453 (1983).

92. The issue in *Jones* was whether a supervisor excluded from the Act's protections could sue in state court based upon the union's alleged tortious interference with his state contract rights. In *Jones*, the court concluded that a fundamental part of the state law claim was whether the union actually caused his discharge and was responsible for the employer's contract breach. "[T]his same crucial element must be proved to make out a § 8(b)(1)(B) case: the discharge must be shown to be the result of Union influence." 103 S. Ct. at 1462.

93. In *Linn*, the Court concluded that the issues which could be brought in each forum differed because the malicious publication of libelous statements does not constitute an unfair labor practice: "While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements require[d] that . . . [an election] be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation . . . has no relevance to the Board's function." 383 U.S. at 63.

94. The Court in *Farmer* likewise found the issues before the state court to be different from those which would have been considered by the Board since, "[w]hether the statements or conduct of the [Union] also caused [the member] severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award [the member] damages for pain, suffering, or medical expenses." 430 U.S at 304. Additionally, the state court could

was not presented to the Labor Board,"[96] the state's power need not yield to the NLRB's primary unfair labor practice jurisdiction.

The *Belknap* Court found that, even though Belknap's offers of permanent employment were arguably unfair labor practices, the state misrepresentation claim created little risk of interference with the Board's exclusive area of jurisdiction. While questions concerning whether the strike was an unfair labor practice strike and whether the offer of permanent employment to the replacements was forbidden by federal law were matters for the Board, the Court noted that these determinations "would be concerned with the impact on strikers and not with whether the employer deceived replacements."[97] Thus, the majority observed that the unfair labor practice jurisdiction of the Board could only be invoked to remedy any injustice to the strikers. Only the Kentucky courts, which had a strong interest in protecting its citizens from misrepresentations, could remedy the alleged injustice done to the replacements.[98]

The *Belknap* Court similarly found that the replacements' breach of contract suit could be maintained without infringing on the Board's remedial powers. It acknowledged that the finding of an unfair labor practice by the Board would require reinstatement of the strikers, an obligation the state could not disturb.[99] However, the employer had precluded any such adjudication when it settled the strike and reinstated the strikers. Moreover, even if the employer had not settled the strike and the Board had ordered reinstatement of what it ultimately determined were unfair labor practice strikers, only specific performance of the employer's promise of permanent employment to the replacements would be barred. The employer would not be immunized from a damage award in state court to remedy its breach.[100]

Concurring, Justice Blackmun chastized the majority for refashioning the NLRA to conform to the substance of Kentucky contract and tort law, and for failing to show deference to the Board by address-

adjudicate the state tort action without "resolution of the 'merits' of the underlying labor dispute." *Id.*

95. In *Sears*, the Court concluded similarly that the issues before the state and federal forums were distinct: "If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work reassignment objective. . . . Conversely, in the state action, Sears only challenged the location of the picketing; whether picketing had an objective proscribed by federal law was irrelevant to the state claim." 436 U.S. at 198.

96. *Id.* at 197.

97. 103 S. Ct. at 3183.

98. *Id.*

99. *Id.* at 3183-84.

100. *Id.* at 3184.

ing the reasonableness of the Board's position.[101] Justice Blackmun endorsed the Board's position that an employer must be able to promise replacements permanent employment to maintain operations during a strike. In his view, the majority's conclusion that the employer could refuse to reinstate strikers at the end of an economic strike even if the replacements were told they could later be displaced as a result of a strike settlement agreement or Board unfair labor practice order, was not consistent with Board law.[102] Nevertheless, while acknowledging that "the question is close,"[103] Justice Blackmun concluded that enforcement of the employer's promises to the replacements in state court did not infringe upon the employer's right to hire permanent strike replacements. Since federal law sanctions the hiring of permanent replacements, granting a state remedy "is the only result consistent with the promises' federal purpose."[104] Moreover, unlike the union's refusal to work overtime in *Machinists*, Justice Blackmun reasoned that the obligations here were made to "third parties."[105] *Machinists*, in contrast, involved "the clash of weapons used by employer and union against one another."[106] Despite his agreement with the result reached by the majority, Justice Blackmun nevertheless remarked that congressional regulation of this "complex three-way struggle" is desirable.[107]

The dissenting opinion of Justice Brennan, joined by Justice Marshall and Justice Powell, termed the case "unusual" and "novel" because it was brought by former employees who were hired to replace union members.[108] Emphasizing that an integral component of the collective bargaining process lies in the use of economic pressure by both employers and unions to achieve bargaining goals, Justice Brennan found the replacements' complaint to be preempted because "these claims go to the core of federal labor policy."[109] Justice Brennan ap-

101. *Id.* at 3184-85.

102. *Id.* at 3185 (Blackmun, J., concurring). As Justice Blackmun observed, an employer may refuse to reinstate economic strikers only by showing "legitimate and substantial business justifications." *Id. See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967). The employer has the ability to refuse reinstatement where it has promised replacements permanent employment only because a promise of permanency is necessary "to protect and continue his business by supplying places left vacant" by the strikers. 103 S. Ct. at 3185, *quoting* NLRB v. Mackey Co., 304 U.S. 333, 345 (1938). In Justice Blackmun's opinion, the Board's conclusion that this purpose is served only by an unconditional promise of permanency was reasonable. 103 S. Ct. at 3185.

103. *Id.* at 3186.

104. *Id.* at 3187.

105. *Id.* at 3188.

106. *Id.*

107. *Id.* at 3189.

108. *Id.* at 3190 (Brennan, J., dissenting).

109. *Id.*

plied *Garmon* principles in preempting the breach of contract claim and *Machinists* principles in preempting the misrepresentation claim.

Because federal law would have required the reinstatement of the strikers in the event there were unfair labor practices, Justice Brennan observed that Belknap's decision to breach its contracts was "arguably required" by federal law. To avoid conflicting state and federal regulatory schemes, he concluded that *Garmon* preemption was therefore necessary. He considered immaterial the fact that the replacements may only have desired damages as opposed to specific performance because, as the Supreme Court pointed out in *Garmon*, " 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' "[110]

Addressing the replacements' claim of misrepresentation, Justice Brennan noted that the right to hire replacements for strikers is an economic weapon an employer may use to combat the union's ability to strike, and part of the balance of economic power struck by the Act between the competing parties to a collective bargaining relationship.[111] He concluded that the replacements' misrepresentation claim was preempted under *Machinists* because it would substantially burden an employer's right to use its economic replacement weapon by exposing employers to substantial financial liability. This result was especially true, Justice Brennan observed, because the question whether a strike is an economic or unfair labor practice strike often is unclear when an employer replaces strikers.[112]

If nothing else, the Court's three opinions in *Belknap* reveal great uncertainty over the application of state employment rights in the face of competing federal rights. While *Belknap*'s peculiar factual situation, involving the rights of unrepresented third parties, may leave the case with little precedential significance, close analysis indicates that the result is completely compatible with the preemption principles developed

110. 103 S. Ct. at 3194, *quoting Garmon*, 359 U.S. at 247. According to Justice Brennan, the potential of such conflicting regulation of conduct was exacerbated in this case because the employer faced with potential liability for discharging workers he had hired to replace striking employees is less likely to enter into a settlement agreement calling for the dismissal of unfair labor practice charges and the reinstatement of strikers. Rather than risk facing a breach of contract claim in state court, the employer is likely to litigate the unfair labor practice charges while keeping the replacements, thus undermining "the strong federal interest in ending strikes and in settling labor disputes." 103 S. Ct. at 3194 (Brennan, J., dissenting). *See* Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962).

111. 103 S. Ct. at 3191, 3196.

112. *Id.* at 3197. Justice Brennan, like Justice Blackmun, also noted that the majority's requirement that employers condition their offers of permanent employment might render the replacements non-permanent under federal law and require the reinstatement of strikers regardless of the nature of the strike. *Id.* at 3198.

in *Machinists* and *Garmon*. The gravamen of the replacements' complaint in *Belknap* was that the employer failed to fulfill his commitment to give them permanent jobs regardless of the strike's outcome. The majority seems to have assumed that the replacements' claim interfered with the employer's strike replacement weapon, but excused this interference because Congress could never have intended to permit employers to deceive innocent third parties.[113] If, however, the strike was economic, the employer was privileged under federal law to make such commitments.[114] He could also refuse to displace the replacements to make room for the returning economic strikers.[115] Thus, it is difficult to see, as Justice Blackmun indicated in his concurrence, how state law enforcement of the employer's promises to the replacements impinges upon his use of the strike replacement weapon. If anything, it complements and reinforces the power granted him under federal law.

If a conflict exists, therefore, it arises under the "prohibited" branch of *Garmon*. Under the post-*Garmon* decisions already discussed, preemption is warranted only if the federal and state claims are fundamentally similar.[116] Where they are, there is a substantial risk that the assertion of state jurisdiction will interfere with the Board's primary jurisdiction to resolve such controversies and thus impede its administration of national labor policy.

All justices recognized that Belknap's conduct in hiring the strike replacements was arguably an unfair labor practice. While an employer may hire permanent replacements for economic strikers, such conduct violates the Act if the strike is either caused or prolonged by the employer's unfair labor practices.[117] Therefore, if, as the Board's

113. Concurring, Justice Blackmun, on the other hand, observed that enforcement of the employer's promise would be consistent with the employer's federal rights: "it appears to me that state enforcement of promises of permanent employment through damage awards for breach of contract and misrepresentation is consistent with the nature of the federal weapon itself." 103 S. Ct. at 3188, n. 4 (Blackmun, J., concurring).

114. See *supra* note 75.

115. See, e.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967). In an economic strike, displaced strikers need only be placed on a recall list and given priority in recall rights over new hires. Laidlaw Corp. v. NLRB, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

116. *See, e.g.*, Local 926, Operating Engineers v. Jones, 103 S. Ct. at 1462.

117. An unfair labor practice strike is one called in response to an employer's violation of the Act. If, during an economic strike, an employer commits what the Board considers to be an unfair labor practice and the union continues to strike beyond its normal duration, the strike is converted to an unfair labor practice strike and the strikers become unfair labor practice strikers. If, at the conclusion of the strike, they make an unconditional offer to return to work, they are entitled to immediate reinstatement even if it requires displacing the strike replacements hired after the strike was converted to an unfair labor practice strike. Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 729 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964). *See also* Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322 (1959).

complaint in *Belknap* alleged, the initial economic strike was converted to and prolonged by the company's unfair labor practices,[118] Belknap would have been required to discharge the replacements to make room for the returning strikers.[119] Belknap, therefore, argued before the Supreme Court that state enforcement of the replacements' claims could conceivably force it to act in contravention of federal law.[120] Thus, even though the state and federal issues do not appear to be "fundamentally similar,"[121] a substantial conflict is arguably created between the state court remedy and the Board's primary jurisdiction.

As the majority recognized, however, that conflict may be more apparent than real. If the strike in *Belknap* was an unfair labor practice strike, the employer plainly had no federal right to promise permanency to the replacements. In fact, it was prohibited from doing so under federal law. Thus, the enforcement of the replacements' rights is not generally incompatible with federal policy or the primacy of the Board's jurisdiction *unless* the state court ordered Belknap to reinstate the replacements.[122] To the extent reinstatement relief was ordered, there would be a direct conflict between any Board ordered remedy or any voluntary Board settlement. As recognized by the majority, so long as the state court limits its relief to damages[123] and refrains from considering the appropriateness of any reinstatement order,[124] a direct

118. During the strike a number of unfair labor practice charges were filed against Belknap. Following an investigation, the Board's Regional Director issued a complaint alleging that Belknap had unlawfully instituted a wage increase during the strike without notice to the union. *Belknap* Brief, *supra* note 61, at 3 and App. F-5. Therefore, under the Board's position, the initial economic strike was converted to an unfair labor practice strike by virtue of the Company's unfair labor practice.

119. Failure to provide for the unconditional reinstatement of unfair labor practice strikers, regardless of an employer's motivation in making representations of permanent replacement status to striker replacements, is prohibited by §§ 8(a)(1) and 8(a)(3) of the Act. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); NLRB v. Top Mfg. Co., 594 F.2d 223, 225 (9th Cir. 1979).

120. "Allowing a state claim by striker replacements whose layoff is required by federal law would present a direct conflict in state and federal regulation of the same activity. . . ." *Belknap* Brief, *supra* note 61, at 12.

121. The issue before the Board would have been whether the strike was converted to an unfair labor practice strike by virtue of the employer's unfair labor practices. If so, the employer could have been required to reinstate the strikers even if it required terminating the replacements. In comparison, the state court would have no concern with the nature of the strike under federal law. Its concern would be limited to whether representations of permanent employment were made and, if so, whether this constituted an actionable right under state law.

122. Failure to reinstate an unfair labor practice striker upon an unconditional offer to return to work would subject the employer to backpay liability commencing from the date of the refusal. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1957); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

123. The laid-off strike replacements in *Belknap* each sought $500,000 in compensatory and punitive damages. *Belknap* Brief, *supra* note 61, App. A 5-6.

124. It may be that the *Belknap* plaintiffs were not entitled to reinstatement under their state law claims of fraud and breach of contract. If they ultimately prevailed in their claims, money

conflict with federal policy is avoided.[125]

The avoidance of such a conflict seems desirable. Otherwise, the following anomalous circumstance could result: An employer legitimately hiring permanent replacements for economic strikers would be liable for firing the replacements; conversely, an employer illegitimately hiring the same replacements for unfair labor practice strikers could escape liability. Thus, as noted by the Court's majority, "[i]t is not easy to grasp why the employer who settles a purely economic strike . . . and fires permanent replacements to make way for returning strikers could be made to respond in damages; yet the employer who violates the labor laws is for that reason insulated from damages liability when it discharges replacements to whom it has promised permanent employment."[126]

Even if preemption is not required under either the *Machinists* or *Garmon* doctrines, another fundamental reason why state jurisdiction must yield was glossed over or left unaddressed by all three opinions. The replacements in *Belknap* were displaced as the result of a fully negotiated strike settlement between the union and employer.[127] This factor appears to mandate dismissal of the state claims. As noted earlier, federal labor policy rests on the premise that once a majority of employees select a union as their representative, the individual bargaining unit member's power to order his own relationship with his employer is either extinguished or subordinated to the collective inter-

damages would presumably provide a complete and adequate remedy. As a general matter, courts are loath to order a party to specifically perform its part of a bargain where money damages are available. *See, e.g.*, SIMPSON, CONTRACTS 405-06 (2d ed. 1965).

125. The Court stated that "even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers." 103 S. Ct. at 3184.

126. *Id.* at 3182 n. 12. Under the analysis suggested here, the employer would be forced to hire permanent strike replacements at his peril. But this is always true even under the Act's processes. If the employer makes the wrong decision and refuses to reinstate the strikers at the strike's conclusion on the assumption that the strike is exclusively an economic one, he may nonetheless be responsible for a substantial backpay liability to the strikers if the Board determines that the strike was caused or prolonged by the employer's unfair labor practices. The only additional risk imposed under the foregoing analysis is the risk of paying back pay to the permanent replacements also where, as a result of such decision, he is required to terminate the replacements or elects to terminate them as a result of a strike settlement. In the latter instance, however, as discussed *infra*, text accompanying notes 128-134, he may escape liability under a different legal theory.

127. The strike settlement agreement provided that 35 strikers would be reinstated each month until all of the strikers had been offered reinstatement. In order to reinstate the strikers in accordance with the strike settlement agreement, the company laid off some of the replacements and informed them that they would be considered for reemployment once all of the strikers had been recalled. *Belknap* Brief, *supra* note 61, App. E 3-4.

est of all members of the unit.[128] Moreover, once a union negotiates an agreement, any pre-existing individual rights arising under state law are merged into the collectively bargained agreement.[129]

In negotiating the terms of the strike settlement agreement, the union in *Belknap* appears to have bargained away the replacements' individual contract rights. In exchange, the union presumably achieved benefits for its entire bargaining membership, strikers and non-strikers alike. Since, under federal law, a union is considered the bargaining agent both for the strikers and their replacements,[130] the strike settlement superseded any enforceable promises to the contrary under state law.

Furthermore, as noted in the Court's dissenting opinion, the enforcement of the replacements' state court rights would conflict with the federal policy fostering the settlement of strikes and other labor disputes;[131] strike settlement agreements are not only enforceable under federal law to the same extent as other collective bargaining agreements, but are encouraged under the Act's policy of minimizing disruptions to interstate commerce.[132] Allowing a state action in these circumstances could frustrate and undermine the parties' ability to amicably settle their labor disputes.[133]

In granting state court relief, the Court appeared to assume that the replacements would otherwise be left without any recourse. That

128. *See* discussion, *supra*, and text accompanying notes 15-26, and cases cited therein.

129. *See* discussion, *supra*, and text accompanying note 18, and cases cited therein. *See also supra* note 8.

130. 29 U.S.C. § 159(a) (1976); Pennco, Inc., 250 N.L.R.B. 716, 718 n.17 (1980), *enforced*, No. 80-1684 (6th Cir. Mar. 16, 1982), *cert. denied sub. nom.*, Pennco, Inc. v. NLRB, 103 S. Ct. 355 (1982); C.H. Guenther & Son, Inc., 174 N.L.R.B. 1202, 1203 (1969), *enforced*, 427 F.2d 983, 987 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970); Getlan Iron Works, Inc., 175 N.L.R.B. 864, 867 (1969). The union must therefore take the interests of both groups into account in entering into a strike settlement agreement. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967).

131. The Board issues nearly 8,000 unfair labor practice complaints a year. Over 82% of these complaints are resolved through voluntary settlement. 45 NLRB ANNUAL REPORT 6, 244 (1980). The Act encourages voluntary settlement agreements. Settlement promotes the Act's policy favoring the peaceful and expeditious resolution of labor disputes and promotes the Board's regulatory mission by decreasing the number of cases that must be resolved through prolonged and costly litigation. *See* Wallace Corp. v. NLRB, 323 U.S. 248, 254-55 (1944); Poole Foundry & Machine Co. v. NLRB, 192 F.2d 740, 742-43 (4th Cir. 1951), *cert. denied*, 342 U.S. 954 (1952). To the extent state courts are permitted to impose remedies which are inconsistent with the terms of an agreement reached by the parties to a labor dispute, the Board's settlement function is frustrated and undermined.

132. *See* Wallace Corp. v. NLRB, 323 U.S. 248, 254-55 (1944); Poole Foundry & Machine Co. v. NLRB, 192 F.2d 740, 742-43 (4th Cir. 1951), *cert. denied*, 342 U.S. 954 (1952).

133. Both the concurring and dissenting opinions noted that an employer is now less likely to enter into a settlement agreement calling for the dismissal of unfair labor practice charges and for the reinstatement of strikers. 103 S. Ct. at 3189 (Blackmun, J., concurring); *Id.* at 3194 (Brennan, J., dissenting).

void could have been fulfilled under federal labor law without opening the state court to a potentially intrusive damage action. Under established federal labor law principles the union must take the interests of both the strikers and the replacements into account in entering into a strike settlement agreement. Relief was available to the strikers either in federal court or before the NLRB if the replacements could have demonstrated a violation of the union's duty to represent all bargaining unit employees fairly. While this may have been difficult, the replacements' burden would have been no different than the burden imposed on other disgruntled bargaining unit members who contend their individual rights have been improperly bargained away.[134]

B. Enforcement Of Individual Contract Rights During The Negotiating Process

In contrast to the fact pattern illustrated in *Belknap*, the *Roberts* case involved a direct and substantial intrusion upon an employer's exercise of a legitimate economic bargaining weapon. Furthermore, unlike *Belknap*, *Roberts* involved the application of that weapon *vis-á-vis* the Union and its members, not "innocent third parties." In *Roberts*, the parties engaged in protracted and unsuccessful negotiations to forge an initial collective bargaining agreement after the union's selection as bargaining agent. Primarily as a result of the employees' resistance to proposed tighter production standards for commissioned sales persons, impasse was reached. Thereafter, the employer unilaterally implemented its proposed standards. Roberts and other employees were demoted or dismissed for failing to meet the new sales quota.

Neither Roberts nor his union filed charges with the NLRB alleging that the unilateral changes were an unfair labor practice. Instead, Roberts joined with other aggrieved employees and filed suit in state court.[135] They alleged, in light of the Michigan Supreme Court's decision in *Toussaint v. Blue Cross and Blue Shield*,[136] that their dismissals were in violation of their employer's alleged promise not to terminate or demote them except for just cause. The Automobile Club attempted to dismiss the suit on federal preemption grounds. The state circuit court in *Roberts* discussed both the *Garmon* and the *Machinists* branches of the preemption doctrine. The court concluded that neither

134. *See* Vaca v. Sipes, 386 U.S. 171 (1967). *See also supra* note 21.

135. *See supra* note 59.

136. 408 Mich. 579, 292 N.W.2d 880 (1980). See *supra* note 7, and the accompanying text discussing *Toussaint*.

preemption principle was applicable and assumed jurisdiction over the employees' *Toussaint* claims.

The court acknowledged that the employer's conduct in unilaterally implementing tighter production standards during the bargaining process was conceivably "prohibited" by the Act.[137] For example, if the production standards were implemented before a genuine impasse was reached or in the course of bad faith negotiations, the employer would have violated its federal bargaining obligations. During this interim period when no collective bargaining agreement is in effect, the employer and the union have a reciprocal obligation to bargain in good faith.[138] The employer is obligated on its part to maintain without change all employment conditions in effect until all reasonable efforts to reach an agreement have been exhausted.[139] This would include any and all individual employment conditions, including those considered to be contractually protected under state law. The only exception to this requirement arises if and when an impasse results following good faith negotiations. In that event, the employer is permitted under federal law to unilaterally implement its last, best offer.[140] This is one of the arsenal of economic weapons available to employers to force a satisfactory settlement and to counterbalance the union's right to strike.

In *Roberts*, the Automobile Club's action in unilaterally implementing the new production standards served as the basis for a common law action. However, that same conduct could have but was not used as the basis for the filing of unfair labor practice charges. Despite this apparent overlap between state and federal claims, the *Roberts* court nonetheless found that preemption was not required under *Garmon*.

Relying upon the *Linn*, *Farmer*, and *Sears* decisions previously discussed, the court found that the state contract action created little risk of interference with the federal regulatory scheme. It reasoned that

137. *Roberts*, slip op. at 8.

138. Sections 8(a)(5), 8(b)(3) and 8(d) of the Act impose a mutual obligation on the employer and union to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. These sections also require that both parties execute a written contract incorporating the terms of any agreement reached. The obligation to bargain in good faith does not, however, require that either party agree to the other's proposals or make any concessions. *See, e.g.*, H. K. Porter v. NLRB, 397 U.S. 99 (1970).

139. NLRB v. Katz, 369 U.S. 736 (1962).

See, e.g., Bi-Rite Foods, Inc., 147 N.L.R.B. 59 (1964) ("after the parties have bargained to an impasse, that is after negotiating in good faith they apparently have exhausted the prospects of concluding an agreement, the employer is free to institute by unilateral action changes which are in line with or which are no more favorable than those he offered or approved in the negotiations preceding the impasse").

had Roberts' union filed an unfair labor practice charge challenging the implementation of the minimum performance standards as violating the employer's bargaining obligation under section 8(a)(5) of the Act, the Board's inquiry would only focus on whether a *bona fide* good faith impasse had been reached in the negotiations prior to implementation of the standards. Conversely, the state action "would primarily focus on the terms and conditions of employment as originally agreed upon . . . [and] would revolve on whether the original agreement embodied any promise by the employer not to discharge . . . [Roberts] . . . without cause."[141] Therefore, under the Supreme Court's "arguably prohibited" standards the *Roberts* court found that preemption of the employees' common law contract rights was not required.

While *Roberts* may be correct under the "arguably prohibited" branch of *Garmon* as it stood at the time *Roberts* was handed down,[142] its finding that preemption is unwarranted under the "unregulated" prong of preemption analysis articulated in *Machinists* and *Belknap* is open to serious question. The *Roberts* court acknowledged that the economic weapons of labor and management intended by Congress to be left unregulated are protected against state interference. Nonetheless, the Court attempted to distinguish *Machinists* on the ground that its holding was limited to "state regulations which *directly* curtail the use of economic weapons, such as self help" as opposed to the neutral common law right asserted in *Roberts*.[143] This alleged dichotomy between a neutral law and a law directly regulating the use of economic

141. *Roberts*, slip op. at 13.

142. In view of the Supreme Court's most recent discussion of *Garmon* in *Jones*, *Roberts*' finding that preemption is unwarranted under the "arguably prohibited" branch of *Garmon* may be incorrect. A "crucial element" of both an action brought in state court under *Toussaint* and an action brought before the Board alleging bad faith bargaining under Section 8(a)(5) of the Act is whether or not the disputed production standards are fair. 103 S. Ct. at 1462. In state court, the employees in *Roberts* are arguing that the production standards violate their individual "just cause" contracts because the standards are unreasonably stringent. By the same token, in a Section 8(a)(5) proceeding the Board would also examine the fairness of the production standards in assessing the employer's conduct at the bargaining table. *See* NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953) ("if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer during the course of negotiations"). *Accord*, NLRB v. F. Strauss & Son, Inc., 536 F.2d 60, 64 (5th Cir. 1976); Kayser-Roth Hosiery Co. v. NLRB, 430 F.2d 701, 702-03 (6th Cir. 1970); Alba-Waldensian, Inc., 167 N.L.R.B. 695 (1967), *enforced*, 404 F.2d 1370 (4th Cir. 1968). Inasmuch as the issue of production standards was the central and continuing area of disagreement between the parties, the employer would not have been permitted under the Act to insist to impasse on unreasonable standards. Thus, both a *Toussaint* action and a § 8(a)(5) proceeding would largely revolve around whether the standards are fair. Because "this same crucial element" must be addressed in both proceedings, it may be that, under *Jones*, there is preemption in *Roberts* under the arguably prohibited branch of *Garmon*.

143. *Roberts*, slip op. at 16.

weapons was, however, rejected by a majority of the Supreme Court in *New York Telephone Company v. New York State Department of Labor*,[144] concerning the state's authority to award unemployment compensation benefits to strikers. This decision was neither discussed, nor cited, by the *Roberts* court.

In *New York Telephone*, a sharply divided Court found that a New York law awarding unemployment compensation benefits to strikers was not preempted.[145] Writing for the Court's plurality, Justice Stevens, in an opinion joined by Justice White and Rehnquist, acknowledged that New York's policy in awarding unemployment compensation to strikers did alter the economic balance between labor and management by helping to prolong the union's strike beyond its normal duration.[146] The plurality nonetheless found *Machinists*, and its earlier decision in *Morton* applying the unregulated branch of preemption analysis,[147] to be inapplicable. First, unlike *Machinists*, which involved a direct regulation of the parties' economic weapons,[148] the statute at issue in *New York Telephone* was regarded as a "neutral law" which only indirectly benefited one of the parties to a labor dispute. While conceding that this alone was "not a sufficient reason to exempt it from preemption," this factor, the plurality said, made it more difficult to infer a congressional intent to deprive the states of their traditional authority in this field.[149] Second, based upon its analysis of the

144. 440 U.S. 519 (1979).

145. The New York statute authorized the payment of unemployment compensation to strikers after an eight week waiting period. Pursuant to this statute, the striking employees began to collect unemployment compensation after the eight week waiting period and were paid benefits for the remaining five months of the strike. Because New York's unemployment system is financed primarily by employer contributions based on the benefits paid to former employees, a substantial part of the costs of these benefits was passed on to the struck employer. New York Telephone Company sued in federal district court seeking a declaration that the state statute conflicted with federal law. The District Court granted the requested relief, holding that the availability of unemployment compensation was a substantial factor in prolonging the strike and that the payment of such compensation conflicted "with the policy of free collective bargaining established in the federal labor laws and is therefore invalid under the [S]upremacy [C]lause." 434 F. Supp. 810, 819. The Court of Appeals reversed, holding that although the New York statute conflicted with federal labor policy, the legislative histories of the NLRA and the Social Security Act indicated that such conflict was one which Congress decided to tolerate. 566 F.2d 388, 395.

146. 440 U.S. at 531-32.

147. Teamsters v. Morton, 377 U.S. 252 (1964). In *Morton*, the Court held that an Ohio court could not award damages against a union engaged in peaceful secondary picketing even though the conduct was neither protected by § 7 nor prohibited by § 8. Because Congress had focused on this type of conduct and elected not to proscribe it, the Court inferred a deliberate intent by Congress to preserve this means of economic warfare for use during the bargaining process. *See also* International Union of Elec. Workers Local 761 v. NLRB, 366 U.S. 667, 672 (1961), and Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969).

148. 440 U.S. at 532.

149. *Id.* at 533.

legislative history of the NLRA and the federal Social Security Act, the plurality found that Congress affirmatively intended to give the states broad freedom to select the recipients of unemployment compensation benefits.[150] The Court's ultimate holding was not controlled by the application of traditional preemption principles, i.e., deriving Congress' intent from the overall policies of the NLRA. Rather, the Court's holding was predicated on its reading of the legislative histories of the two competing federal statutes.[151]

The concurring opinion of Justice Brennan, writing on his own behalf,[152] and the concurring opinion of Justice Blackmun, joined by Justice Marshall,[153] expressly rejected the plurality opinion's distinction between so called "neutral laws" of general applicability and laws which directly regulate labor management relations. In their view, any state law, regardless of its form, which regulates or impairs the self-help capability of labor disputants is preempted absent *affirmative* evidence of congressional intent to tolerate state intrusion.[154] Thus, while they concurred with the plurality's opinion that the state's decision to award strikers unemployment compensation was not preempted, their agreement turned on their finding that Congress had *affirmatively* decided that this form of intrusion into the federal bargaining process was tolerable. The Court's dissenting members agreed with this analysis. The dissenters' ultimate disagreement with the outcome of the case rested solely upon their contrary reading of the legislative histories.[155]

150. In the plurality's view, "[t]he voluminous history of the Social Security Act made it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation they wish." 440 U.S. at 537. Conversely, the plurality could find "no evidence that the Congress that enacted the National Labor Relations Act of 1935 intended to deny the States the power to provide unemployment benefits for strikers." *Id.* at 540.

151. *Id.* at 537.

152. Justice Brennan refused to "embrace the distinction" made in the plurality's opinion between laws of general applicability and laws directed particularly at labor management relations. *Id.* at 547. He indicated that the "case [might be] more of a case of conflicting federal statutes than a preemption case." *Id.*

153. Justice Blackmun, joined by Justice Marshall, in a separate concurring opinion agreed that preemption would apply based solely upon the plurality's analysis of the legislative histories of the two statutes. Like Justice Brennan, they disassociated themselves from the plurality's preemption analysis and particularly its belief that "congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity." *Id.* at 550.

154. Under the analysis proposed by Justice's Blackmun and Marshall, the *Machinists* case "compels the conclusion that Congress intended to preempt" any state law which seeks to regulate or impair a party's self-help capability "unless there is evidence of Congressional intent to tolerate it." *Id.* at 549.

155. Justice Powell, joined by Chief Justice Burger and Justice Stewart, dissented. They viewed the plurality's "law of general applicability" characterization of the New York law as bearing "no relation to reality." In their view, the fact that the law is not "generally applicable only to labor management relations" does not mean it is a neutral law. Moreover, "this generality

The alleged dichotomy between so-called neutral state laws and those directly regulating labor management relations relied upon by the *Roberts* court was, accordingly, explicitly rejected by a majority of the Court's justices in *New York Telephone*.[156] Moreover, although Justices Powell and Burger initially adopted the "neutral" versus "direct regulation" of labor management analysis in their concurring opinion in *Machinists*, they soon abandoned this approach in their dissenting opinion in *New York Telephone*.[157] Thus, when the concurring members' views in *New York Telephone* are considered together with the dissenters, who regarded any state law which regulated the permissible weapons of labor or management to be incompatible with federal labor policy, it seems clear that a majority of the present Supreme Court would disagree with the *Roberts* court's analysis.

The *Roberts* court also refused to acknowledge that the employer's unilateral imposition of production standards was an economic weapon intended to be unregulated. It argued that this weapon, unlike the union's overtime ban in *Machinists*, was not an integral part of the federal bargaining process. Rather, in its view, this "right . . . essentially emanates from the common law, entrepreneurial right of an employer to run his business."[158]

This novel conclusion appears to be unsupportable. Although *Machinists* dealt with economic weapons utilized by labor, both *Machinists* and *Belknap* make clear that "self-help is also the prerogative of the employer."[159] State regulation of either union or employer weapons is prohibited because Congress has struck the balance of power between the parties to a collective bargaining relationship. States are not free to apply local laws to alter that balance.[160] One of the significant weapons available to employers is the power to implement changes incorporated in its final offer following good faith bargaining.[161] Unions, aware of this significant power, will be induced to com-

of the law would have little or nothing to do with whether it is pre-empted by the NLRA." 440 U.S. at 558.

156. *See* discussion, *supra* notes 152-55, and text accompanying.

157. In their separate concurring opinion in *Machinists*, Justice Powell and Chief Justice Burger suggested their "understanding that the Court's opinion does not . . . preclude the states from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength." 427 U.S. at 156. Subsequently, however, they abandoned this approach in their dissenting opinion in *New York Telephone*. See discussion *supra* note 155.

158. *Roberts*, slip op. at 18.

159. 427 U.S. at 147.

160. *Id.* at 149-50.

161. *See, e.g.*, Bi-Rite Foods, Inc., 147 NLRB Dec. 59 (1964), and discussion, *supra* note 140.

promise their demands prior to reaching impasse in the same manner as employers, when faced with an imminent strike, will be encouraged to compromise. Once the parties have reached an impasse, unilateral change is warranted, not only because it may break the impasse and thereby induce productive bargaining but also because the failure of the parties to reach an agreement, after good faith negotiations, should not permanently restrain the employer from making changes. Any other rule would preclude the employer from ever taking action without the consent of the union. Thus, the employer's power to implement changes at the final stages of bargaining, like the union's power to strike, is "part and parcel of the process of collective bargaining," serves to encourage compromise and agreement, and is fully consistent with the federal policy of encouraging the peaceful resolution of labor disputes. Because in *Roberts* application of the employees' pre-existing *Toussaint* rights beyond the point of impasse directly thwarts the employer's ability to exercise its economic power, these rights must yield.

There is yet another reason why state jurisdiction should be required to yield in *Roberts*. The plaintiffs in *Roberts* were not "innocent" third parties. Throughout the negotiations the union bargained in an effort to benefit the plaintiffs and the other members of the bargaining unit. If the union had successfully reached a contract with the employer, any pre-existing individual contract rights would have merged into the collective agreement.[162] The employer's lawful implementation of its final offer after the parties have negotiated in good faith and exhausted the bargaining process has the same effect as the adoption of a collective bargaining agreement. Assuming the employer's final offer was lawfully put into effect under federal law, any pre-existing individual contracts should merge into the terms of that offer. This result finds support in the premise that, once a majority of employees select a union to represent them, any terms and conditions of employment lawfully implemented in accordance with the federal framework structuring a system of bargaining should override any pre-existing individual rights.

In any event, unlike *Belknap*, there is a direct conflict between state and federal rights posed in the *Roberts* case. While the common law of contracts is undoubtedly a "neutral law," the use of economic weapons in labor disputes is an integral component of the collective bargaining process which Congress implicitly intended to leave unregulated. Any application of state law which disrupts or interferes with a

162. See discussion, *supra* note 18 and text accompanying.

labor disputant's right to lawfully exert its economic power improperly intrudes into the free collective bargaining process established by Congress under the NLRA. Individual contract rights arising under state law may continue to be enforced during the pendency of negotiations. However, these rights must yield where there is a supervening collective agreement, or where, as in *Roberts*, a bona fide deadlock precludes agreement, resulting in the lawful implementation of the employer's last offer.

CONCLUSION

The expansion of individual contract rights under common law tort and contract principles will undoubtedly continue in response to the generally shared belief that non-union employees should have some of the job protections afforded unionized employees under collective bargaining agreements. Until recently, however, courts have not been forced to consider whether and to what extent those rights should be extended to organized employees.

As this article indicates, efforts to extend those rights to a collective bargaining context create a potential conflict between individual rights and national labor policy. Since these individual actions tend to be brought in state courts which may be unfamiliar with or insensitive to the implications of their decisions in the broader labor relations context, there is a substantial risk that the state courts will undermine the large body of federal law and policy developed by the NLRB and the federal courts over the past forty-five years. While that may serve the short range interest in protecting the individual employee's rights, it may weaken the carefully structured federal framework designed to encourage and promote the process of collective bargaining. This may, in the long run, diminish rather than promote the interests of workers generally.

NOTES
&
COMMENTS