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Labor Law--Exclusive Power of the NLRB Against Power of State Court to Enjoin Activity Violating State Law

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Satisfaction of a judgment by a third party simply would not in fact disturb the peace and harmony of the home. The second and third reasons are contradictory and an admission of either as a general principle would be to deny the other. The danger of collusion is a common argument used by courts when reasonable arguments are not available. Cooperation by the insured with the insurer in defense of a claim assumes what in fact would not be true in that the insured would not, as a practical matter, begrudge a member of his family compensation for his injuries. Cooperation need not go that far. In answer to the fourth argument it is not apparent why liability should not turn on the presence of insurance if it be decided that the general rule is the best one in cases where the defendant is not insured. Public policy is dependent on existing circumstances as well as other reasons that support rules of law.

Cooley, about sixty six years ago, had this to say about the immunity of parents to tort actions by their children: "In principle there seems to be no reason why such an action should not be sustained . . . ."[32] Prosser, speaking of torts in the family, states: "Few topics in the law of torts, in view of modern economic, social, and legislative changes, display in their treatment greater inconsistency and more unsatisfactory reasoning."[33]

In the absence of legal principle are the reasons in support of the general rule sufficient? The abundance of reasoning which denies the rule is as great as that which upholds it. The pervasiveness of the general rule has been sharply diminished by cases which seize on some factor to escape its harshness.[34] The next logical step would be to permit an injured child or parent to recover for injuries sustained from the negligent operation of an automobile where the defendant is insured. It is to be regretted that Kentucky did not lead the way when the opportunity presented itself to allow suits between parent and child as it did in a suit between husband and wife. The absence of a statute to be construed is a slender basis for the distinction.

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LABOR LAW—EXCLUSIVE POWER OF THE NLRB AGAINST POWER OF STATE COURT TO ENJOIN ACTIVITY VIOLATING STATE LAW—The defendant union called a strike against the American Suppliers, Inc. and placed picket lines around its establishments. One of the establishments was a "stemmery" situated on ground owned by the American Tobacco

[32] COOLEY, LAW OF TORTS 197 (2d ed. 1888).
[33] *Supra* note 1, at 897.
[34] *Supra* notes 24, 25, and 26.

Company and completely surrounded by its cigarette factory and auxiliary structures. The American Suppliers company, a subsidiary of the American Tobacco Company, bought and processed all the tobacco used by the cigarette factory. The employees of a common carrier, who were members of the same union conducting the strike against the American Suppliers company, refused to cross the picket line to handle freight from the American Tobacco Company. This was in accordance with their collective bargaining agreement giving them the right to refuse to cross a picket line or handle "unfair" goods. The American Tobacco Company sought to enjoin the picketing, alleging that it was being subjected to a secondary boycott. It also sought to compel the employees of the common carrier to cross the picket line and handle its freight. The Chancellor held that the picketing was legal, but that the employees of the common carrier could not legally refuse to cross the picket line. *Held:* Affirmed. *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *American Tobacco Company*, 264 S.W. 2d 250 (Ky. 1954), *cert. granted*, 348 U.S. 813 (1954).

The Kentucky Court of Appeals, without considering the allegation of a secondary boycott as an unfair labor practice under the federal Labor Management Relations Act, concluded that the industrial alliance between the two companies was so close that one may be regarded as the "ally" of the other, and therefore the picketing of the one was permissable during a labor dispute with the other and did not constitute a secondary boycott.[1]

On the basis of the allegation that the picketing constituted a secondary boycott, the case should have been presented to the National Labor Relations Board for determination. Section 158 (b) (4) of the Labor Management Relations Act[2] proscribes a secondary boycott as a union unfair labor practice, and Section 160 (a) of the Act[3]

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[1] General Drivers, Warehousemen and Helpers, Local Union No. 89 v. American Tobacco Company, 264 S.W. 2d 250, 252 (Ky. 1954), *cert. granted*, 348 U.S. 813 (1954).

[2] 29 U.S.C. sec. 158 (b) (4) (1952) states: "It shall be an unfair labor practice for a labor organization or its agents—

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

[3] 29 U.S.C. sec. 160 (a) (1952) states: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ."

vests jurisdiction in the NLRB to determine the case. The Supreme Court held in December, 1953, that state regulation of labor relations has been precluded from remedying unfair labor practices as prescribed by Section 158 of the Act.[4] This grievance, therefore, was not subject to litigation in the tribunals of a state, as the power and duty of primary decision lie with the NLRB and not with the state courts.[5]

On cross appeal, the Union attempted to nullify the injunction granted by the Chancellor, which required the employees of the common carrier to cross the picket line.[6]

The Court of Appeals rejected the Union's contention that the employees' right to refuse to cross the picket line, as provided in their collective bargaining agreement, was exclusively controlled by the Labor Management Relations Act.[7] The court declared that, under the Constitution[8] and Statutes[9] of Kentucky, common carriers and their employees have an absolute duty to serve all members of the public without discrimination, and the failure to cross the picket line and handle freight tendered the carrier for transportation would subject the employees to criminal prosecution under the statutes of the Commonwealth.[10] The court further stated that nothing in the Labor Management Relations Act nor in the decisions of the Supreme Court construing this Act made legal what the several states have branded illegal. It also said that federal jurisdiction cannot be invoked to protect a course of action which is in conflict with the declared public policy of a state.[11]

The Supreme Court has held that picketing which violates a state statute[12] or the declared public policy of a state[13] is not constitutionally protected as a means of free speech and may be enjoined by a state court, but state jurisdiction may not be invoked where the Labor Management Relations Act has vested jurisdiction in the NLRB to enforce the policies of the Act when the union or the employer is in an industry affecting commerce.[14]

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[4] Garner v. Teamsters Union, 346 U.S. 485 (1953); Building Trades Council v. Kinard Construction Company, 346 U.S. 933 (1954).

[5] Garner v. Teamsters Union, *supra* note 4.

[6] *Supra* note 1, at 252.

[7] *Id.* at 254.

[8] KY. CONST. sec. 196.

[9] KY. REV. STAT. sec. 281.685 (1, 2); 281.990 (1).

[10] *Supra* note 1, at 254.

[11] *Ibid.*

[12] United Association of Journeymen, Plumbers and Steamfitters v. Graham, 345 U.S. 192 (1953); Giboney v. Empire Storage and Ice Company, 336 U.S. 490 (1949).

[13] Hughes v. Superior Court, 339 U.S. 460 (1950); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950); Building Service Employees Union v. Gazzam, 339 U.S. 532 (1950).

[14] *Supra* note 4.

In *NLRB* v. *Rockaway News Supply Company*[15] the Supreme Court recognized that the parties to a collective bargaining agreement can, in accordance with a proviso in Section 158 (b) (4) of the Labor Management Relations Act,[16] include in their contract a provision whereby the employees are given the right to refuse to cross a picket line. In accordance with such an agreement, a refusal by employees to cross a picket line would not constitute an unfair labor practice on the part of the union, or render the employees liable, as it would be a protected activity under Section 157 of the Labor Management Relations Act.[17]

In the instant case, a Kentucky statute[18] has been applied not only to deprive the employees of the specific right to include in their collective bargaining agreement a provision giving them the right to refuse to cross a picket line, but also to deprive them of the rights expressly guaranteed them in Section 157 of the Act. If the refusal was individual or collective, it was protected by Section 158(b)(4), and if the refusal was concerted, it was protected by Section 157.

The right to refuse to cross a picket line being a protected activity on the part of the employees and the union, an injunction could not properly be granted in a state court. The Supreme Court has held that the protection of Section 157 of the Labor Management Relations Act pre-empts the field of labor relations and precludes the states from acting in this field,[19] even though the employees involved are the employees of a common carrier.[20]

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[Editor's note—After this note had completed the editorial process, the United States Supreme Court, on certiorari, unanimously reversed the Kentucky court and set aside the order. (April 15, 1955) (75 S.Ct. ....., ... U.S. .....)]

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[15] 345 U.S. 71 (1953).

[16] 29 U.S.C. sec. 158 (b) (4) (1952) states: ". . . That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer . . . if the employees of such employer are engaged in a strike. . . ."

[17] 29 U.S.C. sec. 157 (1952) states: "Employees shall have the right to . . . assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or the mutual aid or protection. . . ."

[18] *Supra* note 9.

[19] Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951), where at 390 the Court says: ". . . Since the NLRB was given jurisdiction to enforce rights of the employees, it is clear that the Federal Act had occupied the field to the exclusion of state regulation. Plankington and O'Brien both show that states may not regulate in respects guaranteed by Congress in Section 157."

[20] Garner v. Teamsters Union, *supra* note 4, and Amalgamated Association v. Wisconsin Employment Relations Board, *supra* note 19.