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However, it should be recognized that this application of the responsive verdict statute subjects a defendant to the possibility of two trials for a single homicide, and it may be argued that the second posecution is contrary to the real spirit of the constitutional guarantee against double jeopardy. Had there been a conviction of manslaughter, surely the defendant could not have been subsequently tried for negligent homicide. Thus it is apparent that two distinct offenses have not been committed in the same act—either there has been a manslaughter *or* a negligent homicide. In the early Louisiana case of *State v. Cheevers*,[25] it was stated that "no man shall be punished twice for the same criminal act." If this test is to determine the scope of the constitutional prohibition against double jeopardy, then it logically follows that this right should not be restricted by the new statutory responsive verdict limitations. This approach, however, is somewhat weakened by the court's holding in the recent case of *State v. Mitchell*.[26] In that case the defendant was convicted of simple assault, and subsequently tried and convicted of cruelty to juveniles, both convictions being predicated upon the same attack upon a sixteen year old boy. The *Mitchell* case was not argued on appeal and may not be entitled to any great weight,[27] but it at least casts a doubt upon the rule stated in the *Cheevers* decision that there shall be only one trial for a single criminal act.

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LABOR LAW—STATE COMPULSORY ARBITRATION ACT INVALID FOR CONFLICT WITH NATIONAL LABOR RELATIONS ACT

Transit workers were fined for disobeying an anti-strike restraining order obtained by the Wisconsin Employment Relations Board, under the Wisconsin Public Utility Anti-Strike Law.[1] This law substitutes for collective bargaining, compulsory arbitration upon order of the Wisconsin board whenever an impasse is reached in disputes between employees and management of public utilities. It prohibits strikes in public utilities and makes disobedience of restraining orders punishable by fine. *Held*, the Wisconsin act conflicts with Section 7 of the National Labor Relations Act of 1935 as amended by the Labor Management Act of

25. 7 La. Ann. 40, 41 (1852).
26. 210 La. 1078, 29 So. 2d 162 (1946).
27. The *Mitchell* case was discussed in The Work of the Louisiana Supreme Court for the 1946-1947 Term—Criminal Procedure, 8 LOUISIANA LAW REVIEW 290 (1948).
1. Wis. Stat. (1947) § 111.50 et seq.

1947. *Motor Coach Employees v. Wisconsin Board*, 71 S. Ct. 359 (U.S. 1951).

The states in regulating labor relations attempt to relieve the public of inconveniences caused by labor disputes, such as deprivation of essential utility services. On the other hand, the federal government has undertaken to encourage collective bargaining at the risk of public inconvenience, except in national emergencies. Because Congress did not designate the bounds of federal and state jurisdictions in the federal act, the Supreme Court must determine in each case whether the application of state law conflicts with federal policy.

The cases involving the problem of such conflict fall into two main categories exemplified by *Allen-Bradley Local v. Wisconsin Employment Relations Board*[2] and *Hill v. Florida*.[3]

In *Allen-Bradley v. Wisconsin Board* the Supreme Court held that because mass picketing, threats, interference at plant entrances and with use of streets, were not made subject to regulation by the national board, nor included among rights conferred and protected by the federal act, the state had power to compel employees to desist from such activities.[4] The decision was based on the belief that such conduct was not essential to realization of federal guaranties to labor. Regulations which in effect required only that a strike be peaceful did nothing to hinder collective bargaining. The state's jurisdiction there was clear, and the decision was unanimous. But the Court pointed out that "If the order of the state Board affected the status of the employees, or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise."[5]

That question arose in *Hill v. Florida*. A Florida statute[6] required union business agents to obtain a license from a state board which had power to deny the license on grounds that the applicant had not been a citizen of the United States for more than ten years, or had been convicted of a felony, or was not of good moral character. The statute also required unions to file an annual report with the state. For their failure to comply with these requirements, a union and its business agent were enjoined from functioning as such. The Court found that the licensing

2. 315 U.S. 740 (1942).
3. 325 U.S. 538 (1945).
4. Wis. Employment Peace Act, Laws 1939, c. 57, Wis. Stat. (1939) c. 111, p. 1610 et seq.
5. 315 U.S. 740, 751 (1942).
6. Fla. Stat. Ann. (1950) §§ 447.04, 447.06.

requirement conflicted with the Wagner Act, which guaranteed employees "full freedom"[7] in selecting their representatives. Though the requirement of an annual union report was not inconsistent with the Wagner Act, the sanction imposed conflicted with "the federally protected process of collective bargaining."[8] Hence both sections of the statute were invalidated.

Although the Wagner Act was enacted to give labor guarantees against employer interference with collective bargaining rights, this decision made those guarantees good against the state also.

In *Bethlehem Steel Company v. New York State Labor Relations Board*[9] the state board was held without jurisdiction to direct recognition of foremen as a bargaining unit, although it had done so only after the National Labor Relations Board had refused to do so. The Court rejected the contention that the state board could act until the federal board had exercised jurisdiction. The precise question of state action in absence of federal action was not at issue, because the Court held that the federal board's refusal to certify the foremen *was* an exercise of the board's jurisdiction.[10]

The holding of the *Bethlehem* case was followed in *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*[11] where certification of a union by the state board was invalidated. The Court found conflict in that the Wisconsin act[12] allowed a majority of the employees in a single craft, division, department or plant to elect to constitute themselves a separate bargaining unit; whereas the federal act[13] left that matter to the discretion of the national board. The national board had not exercised its jurisdiction over the specific situation, as it had in the *Bethlehem* case; the union had withdrawn its petition from the national board and submitted it to the state board, before the former had acted upon the petition. Referring to the *Bethlehem* case the Court said, "Both the state and the federal statutes had laid hold of the same relationship and had provided different standards for its regulation. Since the employees in question were subject to regulation by the National Board, we thought

7. 49 Stat. 449, 450, § 1 (1935), 29 U.S.C. § 151 et seq. (1946).
8. 325 U.S. 538, 543 (1945).
9. 330 U.S. 767 (1947).
10. Id. at 775. "We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised."
11. 336 U.S. 18 (1949).
12. Wis. Stat. (1947) c. 111.
13. 49 Stat. 449 (1935), 29 U.S.C. § 151 et seq. (1946).

the situation too fraught with potential conflict to permit the intrusion of the state agency." The Court then added, "Those considerations control the present cases." And, "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."[14] In short, so long as the national board has jurisdiction over the industry, state boards may not certify unions and bargaining units even when the national board has not acted, because the Court will not allow states to create situations in which potential conflicts between boards might impede collective bargaining.

In *International Union of United Automobile Workers v. O'Brien*,[15] in which the Supreme Court declared that Congress has occupied exclusively the field of regulating peaceful strikes for higher wages, the Court invalidated the strike vote provision in a Michigan law,[16] on the grounds that it required majority authorization by employees before strikes could be called, and it imposed a different waiting period than did the federal law. The cases discussed above[17] are cited evidently as instances in which Congress has occupied a field of labor regulation, implying that for that reason state regulation was prohibited. Yet those cases were decided upon conflict found in application of state and federal laws to specific situations, the conflict in the *La Crosse* decision actually being only a potential one.[18] That case does seem to invalidate the state law on the grounds that Congress occupied the field. But the *O'Brien* case did not need the authority of such precedents. It involved conflict between state and federal law as applied to the particular facts. Thus the statement of the Court about Congress occupying the field of regulating peaceful strikes seems to be broad superfluous language. Yet it was perhaps persuasive in the Court's handling of *Motor Coach Employees v. Wisconsin Board*[19] where that language is approvingly quoted.

14. 336 U.S. 18, 25 (1949).
15. 339 U.S. 454 (1950).
16. Mich. Comp. Laws (1948) § 423.1 et seq.
17. Hill v. Florida, 325 U.S. 538 (1945); Bethlehem Steel Co. v. New York Board, 330 U.S. 767 (1947); La Crosse Telephone Corp. v. Wisconsin Board, 336 U.S. 18 (1949).
18. In the *Bethlehem* case the national board refused to designate foremen as a bargaining unit, which refusal was held by the Supreme Court to be an exercise of the board's jurisdiction. In the *La Crosse* case the union's petition was withdrawn before the national board had acted upon it. Thus in both cases the national board had received a petition upon which it had power to exercise its jurisdiction but it exercised its jurisdiction only in the *Bethlehem* case.
19. 71 S. Ct. 359 (U.S. 1951).

As the *La Crosse* case set the policy of denying state certification of unions and bargaining units where the national board had jurisdiction over an industry, the *O'Brien* case hinted that a similar policy may be followed in regulation of peaceful strikes.

The cases discussed are those in which state laws were invalidated because they were found to conflict with federal labor policy. In the other category, set by *Allen-Bradley Local v. Wisconsin Board*, two cases are to be considered.

Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board[20] upheld a Wisconsin law,[21] requiring two-thirds approval by union members, of maintenance of membership clauses in union-employer contracts. The Court pointed out that the exclusive jurisdiction given the national board in Section 10(a) of the federal act is limited to those unfair practices listed in Section 8. Section 8(3), on the basis of its legislative history, was held not to affect state legislation on maintenance of membership agreements. Evidently the Court believed that state regulation of union security agreements was not the kind of restriction that would hamper collective bargaining.[22]

In *International Union, United Automobile Workers v. Wisconsin Employment Relations Board*,[23] the Court upheld the state's power to prohibit unannounced intermittent work stoppages called for unrevealed purposes. The Court held that the national board had power to forbid a strike only when its *purpose* was illegal and that the state could prohibit illegal strike *methods*. Sections 7 and 13 of the National Labor Relations Act did not give the national board jurisdiction over the concerted activity involved in this case. Such employee conduct was not a mere concerted activity, but a "coercive tactic" such as the slowdown on the sitdown strike.[24]

Comparing *International Union, United Auto Workers v. Wisconsin Board* with *Motor Coach Employees v. Wisconsin Board*,

20. 336 U.S. 301 (1949).

21. Wis. Stat. (1947) § 111.06(1)(c)1.

22. In 1947, this decision was codified in Section 14(b) of the Labor Management Relations Act.

23. 336 U.S. 245 (1949).

24. The majority took cognizance of the fact that such "coercive tactics" made it impossible for the employer to plan his production and to inform his customers what to expect. Speaking of the majority opinion, Justice Murphy said, "In effect, it adopts the employer's plea that it cannot plan production schedules, cannot notify its customers and suppliers, cannot determine its output with any degree of certainty and that these inconveniences withdraw this activity from § 7 of the national statutes. The majority and the Wisconsin court call the weapon objectionable, then, only because it is effective." Id. at 269.

we find that Black and Douglas who supported federal jurisdiction in *International Union, United Auto Workers v. Wisconsin Board*, also supported it in *Motor Coach Employees v. Wisconsin Board*. And Frankfurter and Burton, who were in the *United Auto Workers* majority for state jurisdiction, are with the minority for state jurisdiction in the *Motor Coach Employees* case. But Vinson, Reed and Jackson are in the majority in both decisions. Since Minton and Clark were not on the bench in the *United Auto Workers* case (and paired in the *Motor Coach* case), it was the fact that Vinson, Reed and Jackson saw a difference between the two cases which kept the *United Auto Workers* case from being cast into the category of the *Hill* case. Those three justices require more persuasion than do the others of the majority in the *Motor Coach* case, to convince them that state law conflicts with federal law.

In view of the fact that *International Union, United Automobile Workers* is a five-to-four decision, and the fact that Vinson, Reed and Jackson shifted their position and supported federal jurisdiction in the *Motor Coach Employees* case, much of the strength has been drained from the *International Union, United Automobile Workers* decision. Further weakening the case's authority is the fact that it preceded the *O'Brien* case with its dictum on congressional occupation of the field of peaceful strikes. The *Motor Coach Employees* case, on the other hand, is in line with the *O'Brien* decision and adds strength to the *O'Brien* dictum on exclusive congressional regulation of peaceful strikes. In future cases involving regulation of peaceful strikes the *O'Brien* case and the *Motor Coach Employees* case will be strong precedents for urging exclusive federal jurisdiction.

The states are faced with the problem of regulating local strike emergencies in spite of the *Motor Coach Employees* decision. Specifically, they are faced with a choice of alternative policies. State ownership of public utilities seems unlikely to evolve on account of opposition from labor and management, and general public antipathy to socialization of industries. The states can, through their police power, seize and operate utilities during emergencies. The policy of seizure if adopted would raise the problems of setting governmental machinery into action during each emergency, and of actual operation of seized plants. The third alternative and the one most favorable to the states, would be amendment of the National Labor Relations Act specifically authorizing the states to regulate industrial disputes which create local emergencies as the states were given power to regulate

union security agreements. The chief obstacle to amendment would be the hesitancy of Congress to let the states decide in each case what constitutes an emergency.

One certain conclusion to be drawn from the *Motor Coach Employees* decision is that the states must re-examine their labor relations policies with a view toward adoption of one which will do most toward making voluntary collective bargaining workable and keeping labor-management disputes at a minimum.

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LEVEE CONSTRUCTION—FEDERAL EXPROPRIATION OF RIPARIAN LAND

The plaintiff's trees, which he owned separate and apart from the land they were situated on, were destroyed by a subcontractor repairing a levee for the federal government. The plaintiff is seeking damages under the Tucker Act,[1] alleging that by destroying the trees the government impliedly contracted to reimburse the owner for them. The decision herein was rendered on a motion to dismiss on the grounds that the petition did not state a cause of action. The defendant attempted to avail itself of the Louisiana constitutional provision that there can be no recovery from the state unless the property was assessed for taxes the preceding year by the state and its subdivisions.[2] The court disposed of the motion in favor of the plaintiff by relying on *Tilden v. United States*[3] and *held* that the case should be tried on its merits. *General Box Company v. United States*, 94 F. Supp. 441 (D.C. La. 1951).

The *Tilden* case, decided by this same district court, was also to recover the value of property destroyed by the federal government in the process of building a levee. There the court held that the Flood Control Act,[4] providing for the building of levees, "specifically provided for payment"[5] and the plaintiff could recover in spite of the fact that the property had not been assessed as required by the Louisiana Constitution of 1921 which provides

1. 28 U.S.C.A. § 1346(a) (1950). "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States. . . ."

2. La. Const. of 1921, Art. XVI, § 6. "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, . . . shall be paid for at a price not to exceed the assessed value for the preceding year; provided, that this shall not apply to batture. . . ."

3. 10 F. Supp. 377 (D.C. La. 1934).

4. 33 U.S.C.A. § 594 (1928).

5. 10 F. Supp. 377, 379 (D.C. La. 1934).