1986

Labor Law Preemption: Procedure and Substance: An Analysis of International Longshoremen's Association v. Davis

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Labor Law Preemption: Procedure and Substance

by Barbara J. Fick

International Longshoremen's Association, AFL-CIO
v.
Larry Davis
(Docket No. 85-217)

Argued February 25, 1986

ISSUES

Winning a legal case depends as much on presenting the issues to the court at the appropriate time and in the appropriate manner (following procedural rules), as it does on persuading the court of the merits of the case (arguing substantive law).

This case raises questions on both the procedural and substantive levels. At what point in a lawsuit must the issue of federal preemption be raised and to what extent is state law preempted by federal labor law? The answers to these questions will clarify the rules of procedure for litigating cases involving federal preemption issues, and further refine the substantive reach of federal preemption in the field of labor law.

FACTS

In 1981, Larry Davis was employed as a ship superintendent by Ryan-Walsh Stevedoring Company at the port of Mobile, Alabama. He became dissatisfied with his wage rate and began to discuss with other superintendents the possibility of organizing a union. Ben Trione, another Ryan-Walsh superintendent, contacted the International Longshoremen's Association (ILA), and arranged a meeting at which an ILA representative would discuss the organizing campaign.

At the meeting, many of the superintendents were reluctant to sign union authorization cards for fear that the employer might retaliate and they would lose their jobs. The ILA representative allegedly assured the superintendents that if they were fired for their union activities, the ILA would get their jobs back for them with backpay. After the meeting, signed authorization cards, including Davis's, were collected and several of the superintendents, including Davis, signed an application for a charter to establish a new local union of the ILA.

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The next day, Trione was fired by Ryan-Walsh for his union activities. The ILA filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that the discharge violated sections 8 (a) (1) and (3) of the National Labor Relations Act (NLRA). The charge was subsequently administratively dismissed by the Regional Director, who stated that Trione was a supervisor and therefore not protected under the NLRA.

Shortly thereafter, Ryan-Walsh fired Davis because he persisted in his efforts to organize the ship superintendents. Davis, however, did not file a charge with the NLRB; rather he filed a lawsuit in state court against the ILA for fraud and misrepresentation under Alabama law. The complaint alleged that in reliance on the knowingly false misrepresentations made by the ILA that ship superintendents could legally join a union and the ILA would get them their jobs back if fired, Davis signed the authorization card and charter application. At the completion of the trial, the jury returned a general verdict in favor of Davis and awarded him $75,000 in damages. It was at this point in the proceedings that the ILA, in a motion for a judgment notwithstanding the verdict, first raised the issue of federal preemption—claiming that federal labor law regulating union organizing activity under the NLRA supersedes applying the Alabama statutory law of misrepresentation to that same activity. The trial judge denied the motion. On appeal, the Alabama Supreme Court affirmed the trial court judgment and held that the ILA had not timely presented the issue of federal preemption and therefore had failed to preserve the issue for review (470 So. 2d 1215 (1985)). The court found that federal preemption is an affirmative defense which must be raised in the pleadings or it will be considered waived.

BACKGROUND AND SIGNIFICANCE

The threshold issue, whether federal preemption is a waivable defense, is a procedural one and carries ramifications beyond the field of labor law. The concept of preemption is based on the Supremacy Clause in the Constitution, which mandates that federal law supersedes conflicting state law and that federal regulation of a specific field may totally occupy that field to the exclusion of parallel state regulation. As such, the doctrine of preemption arises not only in labor law but in other areas of federal regulation, such as immigration, food

and drug regulation, pension plans and interstate commerce.

If the issue of federal preemption of state law deals with the subject matter jurisdiction of a state court, then it is an issue which may be raised at any time, even on appeal, and can never be waived. Subject matter jurisdiction implicates the very authority of a court to hear the case; if a court lacks subject matter jurisdiction, it is deprived of any power to decide the case. Any decision by a court which lacks subject matter jurisdiction is void from the beginning. Under this view of preemption, the court was required to rule on the merits of the ILA's preemption argument, regardless of when the issue was raised.

However, if preemption is viewed not as limiting the state court's jurisdiction over the field allegedly preempted, but rather as depriving the court of its ability to apply state law to the field, then preemption may be classified as an affirmative defense. The defense would assert that assuming the complaint states a meritorious claim under state law, a defendant is not liable because federal law overrides application of state law. An affirmative defense much be raised in a timely fashion or it is deemed to have been waived. Under this view of preemption, the court was not obligated to decide the preemption claim since it was not timely raised as an issue.

The substantive issue involved in this case—whether the NLRA preempts the application of Alabama's law of misrepresentation to the ILA's organizing activity—will only be decided if the Court initially finds that the preemption issue was timely raised. The contours of federal preemption of state regulation in the field of labor law are not rigidly defined, although the Court over the last few sessions has attempted to more clearly delimit the interplay between federal and state law in this field.

San Diego Building Trades Council v. Garmon (359 U.S. 236 (1959)) established the general guidelines for defining the permissible scope of state regulation of activity touching upon labor-management relations. State law is preempted from being applied to activity which is actually or arguably protected or prohibited under the NLRA, unless the activity which the state seeks to regulate touches interests deeply rooted in local feeling and responsibility. A subsequent Supreme Court case, *Sears, Roebuck & Co. v. United Brotherhood of Carpenters* (436 U.S. 180 (1978)), identified another exception to the general preemptive effect of federal law in the field of labor relations. Where activity is only arguably protected or prohibited by the NLRA, applying state law by the state court is not preempted where the claim arising from the activity is different from any claims which would be considered by the NLRB.

Applying these general preemption principles to the facts of this case is complicated by a dispute over Davis's status as an employee or supervisor. Supervisors are not covered under the NLRA; therefore, organization activity involving supervisors is neither protected nor prohibited. The question of whether an individual is a supervisor under the Act, however, is itself an issue controlled by federal labor law.

In resolving the substantive issue concerning the scope of the NLRA's preemptive effect over state law, the Court will have the opportunity to further clarify the extent of the exceptions to the preemption doctrine. In clarifying the reach of the exceptions, the boundaries of state regulation over labor relations activities could be broadened or narrowed. If the exceptions to preemption are broadened, the possibility of imposing conflicting or multiplicitous obligations on the parties increases —the very problem which preemption was meant to prevent.

ARGUMENTS

For the International Longshoremen's Association, AFL-CIO *(Counsel of Record, Thomas W. Gleason, 26 Broadway, 17th Floor, New York, NY 10004; telephone (212)425-3240)*

1. A claim of federal preemption is addressed to the subject matter jurisdiction of the state court and therefore is nonwaivable and may be raised at any time.
2. A holding that preemption can be timely raised at any point does not necessarily allow a litigant "two bites at the same apple," as a court is under a duty to recognize and decide, on its own initiative, the issue of preemption, without having to wait for a litigant to raise the defense.
3. Alabama is preempted from applying its law of misrepresentation to the facts of this case. Appeals for union membership are arguably protected under the NLRA, and fraudulent representations to induce union membership are prohibited. Any interest which Alabama has in protecting its citizens from misleading solicitations is outweighed by the risk of interference with the NLRA's regulation of that same conduct.
4. Although the NLRA does not regulate organizing activity engaged in by supervisors, there has been no clear determination by the NLRB that Davis was a supervisor. The Regional Director's finding that Trione was a supervisor did not determine the status of any other superintendent. Neither was that finding a determinative one, since it was subject to review by the General Counsel. In the absence of a clear determination by the NLRB on this supervisory issue, the activity in question is arguably protected and state law is preempted.
5. For a jury to decide the ILA engaged in misrepresentation, it would have to find that the superintendents were supervisors. The issue of supervisory status, however, is one which would have had to be deter-

mined by the NLRB if the organizing drive had culminated in a representation petition filed by the ILA. Thus, Davis's claim in state court is not different from a claim which could arise before the NLRB.

6. Even if state law was not preempted, applying a strict liability theory of misrepresentation as well as the award of excessive punitive damages is contrary to the policies underlying the federal labor laws.

***For Larry Davis** (Counsel of Record, Bayless E. Biles, Post Office Box 1140, Bay Minette, AL 36507; telephone (205) 937-7024)*

1. The claim filed by Davis sounded in tort. The state court clearly has jurisdiction over tort law claims. Preemption effects only the state court's exercise of its legitimate power, thus constituting an affirmative defense which under Alabama's rules of procedure must be timely pleaded or it is considered waived.
2. Davis's status as a supervisor did not have to be determined by the NLRB. Given the clear statutory definition of supervisor contained in the NLRA, Trione's testimony in the state court case concerning a superintendent's duties and the Regional Director's ruling that Trione was a supervisor, Davis's supervisory status was clearly established under federal law and such status could be recognized by the state court.
3. Since Davis was a supervisor, the activity in question is not regulated by federal law and the application of state law is not preempted. The issues raised by Davis's fraud claim are not identical to any issues which could be raised before the NLRB.
4. Even if the conduct in question is arguably protected or prohibited under the NLRA, the question of fraud is of only peripheral concern to federal labor policies, whereas the state has a substantial interest in protecting its citizens from misrepresentations which may cause them harm.
5. The ILA failed to timely object to the strict liability theory and there is no indication that the jury's verdict was based on that theory as opposed to an intentional misrepresentation theory.
6. The verdict is not excessive and there is no federal policy for prohibiting punitive damages for intentionally tortious conduct.

AMICUS BRIEF

In Support of Larry Davis

A joint brief was filed by the Council of State Governments, International City Management Association, National Governors' Association, U.S. Conference of Mayors, National Conference of State Legislatures, National League of Cities and National Association of Counties.