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Labor Law - National Labor Relations Board - Effect of the NLRB's Refusal to Take Jurisdiction

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LABOR LAW—NATIONAL LABOR RELATIONS BOARD—EFFECT OF THE NLRB's REFUSAL TO TAKE JURISDICTION—Appellant corporation was charged by the United Steelworkers of America with unfair labor practices in violation of sections 8(a)(1), (3) and (5) of the National Labor Relations Act.[1] Although appellant's business affected commerce within the meaning of the act, the acting regional director of the NLRB declined to issue a complaint because the company's volume of business did not meet the Board's revised minimum "jurisdictional" standards.[2] The union then filed substantially the same charges with the Utah Labor Relations Board. The Utah Board's determination that it had jurisdiction

1 61 Stat. 140 (1947), 29 U.S.C. (1952) §§158(a)(1), (3) and (5).

2 The NLRB's revised minimum jurisdictional standards, released to the press on July 15, 1954, are contained in 34 L.R.R.M. 75 (1954). Jurisdiction is made to depend on the dollar volume of business in interstate commerce. The standards vary depending on the industry.

was affirmed by the Utah Supreme Court.[3] On certiorari to the Supreme Court of the United States, *held,* reversed, two justices dissenting. The proviso to section 10(a)[4] of the NLRA offers the exclusive means whereby states may assume jurisdiction over matters which Congress has entrusted to the NLRB. *Guss v. Utah Labor Board,* 353 U.S. 1 (1957).

The principal case settles an issue which has been of much concern to labor experts, whether states may assume jurisdiction of unfair labor practices covered by the Taft-Hartley Act after the National Labor Relations Board has declined jurisdiction pursuant to its minimum "jurisdictional" standards.[5] The majority ruled that Congress had pre-empted the field, giving the NLRB exclusive jurisdiction[6] except when ceded under the proviso to section 10(a) requiring the state labor act to conform to the Taft-Hartley Act.[7] This ruling was said to be based on the intent manifested by Congress in passing the proviso to section 10(a) after the decision in *Bethlehem Steel Co. v. N.Y.S.L.R.B.*[8] This seems a doubtful basis,

[3] Guss v. Utah Labor Relations Board, 5 Utah (2d) 68, 296 P. (2d) 733 (1956).

[4] 61 Stat. 146 (1947), 29 U.S.C. (1952) §160(a): "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . : Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

[5] The NLRB implied in Breeding Transfer Co., 110 N.L.R.B. 493 at 497 (1954), that the state labor boards and courts could, in their opinion, assume jurisdiction after the Board declined to do so, but Member Murdock in his dissent (at 513) entertained grave doubts as to this. Many writers, both as a matter of policy and in terms of legal analysis of the amended act and previous decisions, thought the state government was left in a position to regulate the controversy. See Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 (1948); Smith, "The Supreme Court and Labor, 1950-1953," 8 S.W. L. J. 1 (1954); Cooper, "Extent of State Jurisdiction Due to Abnegation by NLRB," 8 SYRACUSE L. REV. 58 (1956). But see Cox and Seidman, "Federalism and Labor Relations," 64 HARV. L. REV. 211 (1950).

[6] This exclusive jurisdiction of the NLRB based on congressional pre-emption appears to be the culmination of a series of decisions holding that state labor boards and courts could not act on cases not presented to the NLRB, but within its jurisdiction, because of either potential conflict with later Board rulings or actual conflict with an established policy. Bethlehem Steel Co. v. N.Y.S.L.R.B., 330 U.S. 767 (1947); LaCrosse Telephone Corp. v. WERB, 336 U.S. 18 (1949); Plankinton Packing Co. v. WERB, 338 U.S. 953 (1950); Garner v. Teamsters Union, 346 U.S. 485 (1953).

[7] Because of the condition attached to the proviso that the state law must be consistent with the federal law before the NLRB can cede jurisdiction, no cession agreements between the NLRB and the states have been made. Principal case at 15. It has been argued that the purpose of the proviso to §10(a) is to force states to pass "little Taft-Hartley Acts," but as yet no state has done so. See 50 N.W. UNIV. L. REV. 190 at 202 (1955); 5 UTAH L. REV. 336 (1957).

[8] 330 U.S. 767 (1947). This decision, decided ten days before the Senate bill containing the substance of §10(a) was reported out of committee, held that congressional pre-emption of the field precluded the New York Labor Board from certifying a foremen's bargaining unit against the announced policy of the National Board. The Court in dicta (1) refused to decide the problem arising when the NLRB declines jurisdiction,

however, for the Senate Committee report[9] cited by the Court to demonstrate this congressional intent was, in fact, silent as to whether a state may assume jurisdiction after it has been declined by the Board.[10] The decision, nevertheless, can be justified either on the ground that the NLRB should not be able to do indirectly what it cannot do directly (give jurisdiction to states whose labor statutes do not conform to the Taft-Hartley Act), or that, having expressed one method of conferring jurisdiction on the states, Congress probably did not intend for any other to be available.[11] The Court noted, but did not decide, another extremely important question—the legality of the NLRB's refusal to take jurisdiction.[12] While the discretionary power of the NLRB to decline jurisdiction under the original National Labor Relations Act had been recognized,[13] the Court has never passed on this question since the enactment of the Taft-Hartley Act.[14] Dicta in a Supreme Court decision,[15] and two circuit court cases[16] uphold this power, however.[17]

The effect of the Supreme Court's decision is to leave many employees without legal protection, state or federal, with respect to much of the area

and (2) questioned whether the cession agreements then in existence were valid under their decision. The majority in the principal case reasoned that the proviso to §10(a) was a congressional response expressing approval of limited cession agreements, but disapproval of a state's acquiring jurisdiction upon declination of jurisdiction by the National Board. The dissent, however, reasoned that §10(a) was designed solely to express approval of the already existing practice of ceding jurisdiction by agreement.

[9] S. Rep. 105, Pt. 2, 80th Cong., 1st sess., pp. 26, 44 (1947). The House committee report, not cited by the Court, on the House bill [H.R. 3020, 80th Cong., 1st sess. (1947)] does state, however, that the jurisdiction of the NLRB is exclusive. H. Rep. 245, 80th Cong., 1st sess., pp. 40, 44 (1947). This is explained by the fact that the House bill expressly stated that the National Board's jurisdiction was exclusive.

[10] For a different interpretation which could be placed on §10(a) in regard to the Bethlehem case, see Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 at 604-606 (1948).

[11] See 50 N.W. UNIV. L. REV. 190 at 202 (1955). The paradoxical situation remains, however, that an area which Congress felt required both federal and state supervision is now completely unregulated.

[12] Principal case at 4.

[13] NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9 at 18, 19 (1943). Sec. 10(a) in both the original NLRA and the Taft-Hartley Act "empowers" rather than "directs" the NLRB to act.

[14] On the basis of §3(d) relating to the General Counsel and his duties, it has been argued that Congress removed the NLRB's discretion. 61 Stat. 139 (1947), 29 U.S.C. (1952) §153(d). See 50 MICH. L. REV. 899 (1952).

[15] NLRB v. Denver Building Council, 341 U.S. 675 at 684 (1951). The principal case cited this dicta after declining to pass on the issue.

[16] Haleston Drug Stores, Inc. v. NLRB, (9th Cir. 1951) 187 F. (2d) 418, cert. den. 342 U.S. 815 (1951); Progressive Mine Workers v. NLRB, (7th Cir. 1951) 189 F. (2d) 1, cert. den. 342 U.S. 868 (1951). But see Joliet Contractors Assn. v. NLRB, (7th Cir. 1952) 193 F. (2d) 833.

[17] In Breeding Transfer Co., note 5 supra, Member Murdock of the Board argued that the true purpose of the stricter jurisdictional standards was to reallocate authority between federal and state governments, and that this was an unconstitutional usurpation of legislative power. The majority of the NLRB stated that the new minimum jurisdictional standards were necessitated by budgetary considerations and the heavy case load. The result in the principal case destroys the basis for Murdock's objection.

of regulation covered by the Taft-Hartley Act,[18] for the states are precluded from assuming jurisdiction even when the NLRB refuses to act.[19] While the Court noted these adverse consequences, it refused to consider them in reaching its decision, pointing out that Congress had recognized the existence of this potential "no man's land" but had failed to act.[20] The present problem can be solved in three ways: state legislatures could pass "little Taft-Hartley Acts"; the NLRB could exercise its complete jurisdiction; or Congress could legislate. The first alternative appears most unlikely.[21] Under present conditions, the second alternative is likewise not feasible because of the heavy case load of the NLRB.[22] It would seem, therefore, that it will be necessary for Congress to legislate. Since the principal case was decided, bills have been offered in both the Senate and the House which would permit states to assume jurisdiction when the Board declines it,[23] but this type of legislation is subject to two criticisms: (1) it would give the Board the power to reallocate regulatory jurisdiction to the states, and (2) state labor boards and courts could not act until the case had been presented to and declined by the NLRB. It is therefore suggested that congressional legislation be directed toward limiting the jurisdiction of the NLRB to the area in which it is presently operating, and removing its discretionary power to decline jurisdiction.[24] The Board would then deal with all cases substantially affecting commerce, leaving to the states those disputes predominantly local in character.

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18 See San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957), a companion case to the principal case in which a union, not management, was appealing a state court's assertion of jurisdiction. This case points up the fact that the decision "cuts both ways." See Breeding Transfer Co., note 5 supra, where the Board hazards a guess as to the number of persons affected by the new standards.

19 A Michigan lower court, however, has recently taken jurisdiction to enjoin organizational picketing, although this is an area covered by the NLRA and although the NLRB had refused to take jurisdiction. The court argued that its failure to take jurisdiction would be to deny any process, and that this would be a denial of due process. John v. Grand Rapids Building Trades Council, (Mich. Cir. Ct. 1957) 26 U.S. LAW WEEK 2156.

20 S. Rep. 1211, Pt. 1, 83d Cong., 2d sess., p. 18 (1954). Senator Ives introduced a bill in 1953 which was designed to end this confusion and uncertainty by giving the state jurisdiction when the NLRB declined to assert jurisdiction. S. 1264, 83d Cong., 1st sess. (1953).

21 See note 7 supra.

22 NLRB Chairman Leedom, however, in a hearing before the House Labor Subcommittee indicated that the NLRB would attempt to alleviate the present situation by expanding its jurisdiction if Congress went home without legislating. 40 LAB. REL. REP. 370 (1957).

23 S. 1933, 85th Cong., 1st sess. (1957), amending the Administrative Procedure Act; H.R. 6432, 85th Cong., 1st sess. (1957), amending the Taft-Hartley Act.

24 The House Labor Subcommittee indicated to Chairman Leedom, however, that the congressional legislation would direct the NLRB to exercise its full authority and would give the Board the appropriation and personnel to accomplish this. 40 LAB. REL. REP. 291 (1957).