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> on account of any disease or injury to health, or on account of death from any disease or injury to health, in any way contracted, sustained or incurred by such employee in the course of or because of or arising out of his employment, except only an injury compensable as an injury by accident under the provisions of the Workmen's Compensation Act of Colorado.

Taken at face value this section purports to wipe out common law liability even for diseases which are not compensable under the Act. The net result of five years of operation of the Act appears to be complete protection to employers and their insurance from any liability for occupational diseases whatever at the expense of the disabled workmen.

THE EXTENT TO WHICH TAFT-HARTLEY HAS SUPERSEDED STATE LABOR LAWS

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When Congress has "occupied a field," state legislation therein is precluded since "a concurrent power in two district sovereignties to regulate the same thing involves ***** a moral and physical impossibility."[1] The Taft-Hartley law[2] is a comprehensive measure governing labor relations which affect interstate commerce. Many states, including Colorado, now have labor relations laws of their own, and the question of whether state or federal law is controlling in a particular case is arising with increasing frequency.

There are three types of cases in which this problem may occur: (1) representation cases—*i. e.* proceedings for the selection of a collective bargaining representative; (2) proceedings to authorize the execution of a union-shop agreement; (3) actions, either civil or criminal, growing out of statutory violations which are termed "unfair labor practices."

Of course there is no problem presented in any case where Taft-Hartley can definitely be ruled out of the picture because interstate commerce is not "affected."[3] However, the nebulous character of the concept of interstate commerce is well known and the power of the National Labor Relations Board and other federal agencies has, in recent years, been extended to activities formerly considered to be purely intrastate in character.[4] Still the courts reiterate that there is a line beyond which the federal

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[1] *Passenger Cases* 7 How. 283, 399 (1849); U. S. Constitution, Article VI.

[2] 61 Stat. 136, 29 U. S. C. sec. 141 *et seq.* (1947).

[3] The National Labor Relations Board can act only in cases "affecting commerce" which is defined to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Ibid*, sec. 2(7).

[4] *E.g.* Wickard v. Filburn, 317 U.S. 111 (1942); N.R.L.B. v. United Brotherhood of Carpenters, 181 Fed. 2d 126 (6th Cir. 1950). *Cf.* Groneman v. International Brotherhood of Electrical Workers, 177 Fed. 2d 995 (10th Cir. 1949).

government cannot go,[5] and it must be presumed that there still is such a thing as a purely local enterprise, immune from federal control under the guise of the commerce power.[6] In any event, the marker delineating state and federal power can only be determined in a case by case test,[7] and any attempt to formulate general principles on this point would be futile.

Assuming that in a particular case commerce is affected within the meaning of Sec. 2(7) of Taft-Hartley, the question then presented is whether any of the Act's substantive provisions are applicable. According to recent Supreme Court decisions, the Taft-Hartley Act belongs to that type of legislation which "completely occupies the field" and renders inoperative state laws in cases where the Act's provisions are applicable.[8]

REPRESENTATION CASES

Since the passage of the Wagner Act[9] employees have had the right to choose their collective bargaining representatives in elections conducted by the National Labor Relations Board. An employer is legally obligated to bargain in good faith with the representative so chosen.[10] Many states have set up election machinery of their own for the selection of bargaining representatives by employees, and a number of cases have resulted concerning the power of state agencies to act in cases where interstate commerce is affected.

In the *Bethlehem Steel* case[11] the Supreme Court made it clear that in any case in which the National Board has jurisdiction to conduct a representation election, action by a state agency is foreclosed *even though the National Board, for reasons of policy, declines to exercise its jurisdiction.* Under the Wagner Act, which was then in effect, supervisory employees were not excluded from the National Board's jurisdiction,[12] but the Board, as a matter of policy, declined to conduct elections among foremen.[13] The New York Labor Relations Board assumed jurisdiction over them and conducted elections and made certifications of bargaining representatives. These proceedings of the New York Board were held by the

[5] Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 466, 467 (1938); Polish National Alliance v. N.L.R.B., 322 U. S. 643, 652, 653 (1944); 10 East 40th Street Bldg. v. Callus, 325 U. S. 578, 584 (1945).

[6] But note the assertion of the former General Counsel of the National Board before a Congressional Committee: "The present thought of the Board * * * is that it is a rare case in which business does not affect commerce in some degree, and that where commerce is affected, the Board has jurisdiction". (*Twelfth Intermediate Report of the Committee on Expenditures in the Executive Departments*, May 26, 1948, page 2). At the same hearing the following colloquy took place between the chairman of the Committee and the General Counsel: "The Chairman: Well, there is no business, then, that you would not have jurisdiction over?" "Mr. Denham: I can conceive of very few businesses over which there is not at least technical jurisdiction." (*Ibid.* page 3).

[7] 10 East 40th Street Bldg. v. Callus, *supra*, n. 5.

[8] With the exception of state laws concerning union-shop agreements, *infra*.

[9] 49 Stat. 449, 29 U.S.C. 151 (1935).

[10] *Supra*, note 2, Sec. 8(a) (5).

[11] 330 U. S. 767 (1946).

[12] Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1946).

[13] Maryland Drydock Co., 49 N.L.R.B. 733.

Supreme Court to be of no force or effect because they encroached upon the power of the National Board.[14]

The same result was reached in a case arising under the Wisconsin Employment Peace Act, in which the Supreme Court reaffirmed the rule of the *Bethlehem Steel* case, and held it equally applicable under the Taft-Hartley law.[15] The Wisconsin Supreme Court had held that the state Board could exercise jurisdiction until and unless the National Board acted in the matter,[16] but the U. S. Supreme Court "thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted ***."[17] The effect of these decisions is to leave a vacuum in the area in which the National Board has jurisdiction, but declines to exercise it.[18] Congress attempted to fill this gap by providing that the National Board can cede jurisdiction to a state agency in certain cases "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." [19] In practice this requirement has made it almost impossible for the Board to cede any of its power to state agencies since there is almost certain to be some divergence between the provisions of state and federal statutes, either as written or as construed.[20]

CASES INVOLVING UNION SHOP CONTRACTS

This group includes all cases concerning contracts in any form which require union membership, and which will be referred to loosely as union-shop contracts. Taft-Hartley and some state laws require that any contract between an employer and a union which makes union membership compulsory must be ratified by a certain percentage of the employees covered. The federal Act requires approval by "a majority of the employees eligible to vote." [21] Colorado requires that "three-quarters or more of (an employer's) employees shall have voted affirmatively" in favor of such agreement.[22] Wisconsin requires approval by two-thirds of the employees actually voting.[23]

The Wagner Act contained a specific provision permitting an employer to execute a union-shop contract with the union which represented his employees.[24] There was always some doubt as to

[14] *Supra,* note 11.
[15] La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1948).
[16] 251 Wis. 583; 40 N.W. 2d 241 (1947).
[17] 336 U.S. 25 (1948).
[18] Senate Report No. 105, 80th Congress, April 17, 1947, page 26.
[19] *Supra,* note 2, Sec. 10(a).
[20] "We have explored the possibilities of such agreements with several of the state boards, but thus far we have not concluded any agreements because there are too many instances where the state statute and the Federal statute are inconsistent." Speech of N.L.R.B. Associate General Counsel, N.L.R.B. Release R-48, March 10, 1948.
[21] *Supra,* note 2, Sec. 8(a) (3).
[22] 1943 Colo. Sessions Laws, Ch. 131, Sec. 6(c).
[23] Chapter 424, L. 1945.
[24] *Supra,* note 9, sec. 8 (3).

whether this provision of the Wagner Act foreclosed the states from outlawing such contracts.[25] With the passage of Taft-Hartley, however, Congress specifically provided in Section 14(b) that state statutes prohibiting this type of agreement were not superseded by the provisions of Taft-Hartley. The National Board held that this section did not apply to the Colorado and Wisconsin statutes since they do not completely prohibit union-shop agreements, but only require approval of such agreements by a certain proportion of the employees.[26] But the Supreme Court held to the contrary in a case arising under the Wisconsin statute.[27] The Court construed the language of Sec. 14(b) of Taft-Hartley to protect state laws which regulate the execution of union-shop agreements as well as those which completely prohibit them.

Confronted with this decision, the National Board ruled that even though state requirements for approval of union-shop contracts are not superseded by Taft-Hartley, neither is Taft-Hartley superseded by state law, and, therefore, the concurrent application of both federal and state law is required.[28] The practical effect of these decisions in Colorado is something like this: In an election for the approval of a union-shop agreement, a majority of all eligible employees may vote in favor of such agreement, but this may be less than three-fourths of the employees actually voting, in which case the contract would be legal under Taft-Hartley, but illegal under the Colorado Act. In another case, three-fourths of the employees actually voting might vote affirmatively, but might not constitute a majority of all employees eligible to vote, in which case the contract would be legal under Colorado law[29] but not under Taft-Hartley.

Unfair Labor Practice Cases

The conflict between state and federal law is equally serious in unfair labor practice cases. Under Taft-Hartley only the National Board can issue a cease and desist order and petition the courts for injunctive relief.[30] Many state laws, including that of Colorado, give a private party the right to equitable relief and also damages against a party guilty of unfair labor practice. The question of whether federal or state law controls is thus of great practical importance. If the conduct complained of is either protected by the federal Act, or prohibited by it, the case is removed from the operation of the state law, because, "When Congress has taken the particular subject matter in hand, coincidence is as ineffective

[25] In 1949 the Supreme Court held that Sec. 8(4) of the Wagner Act—no longer in effect—did not affect the power of the states to outlaw or regulate union-shop contracts. *Infra*, Note 27.

[26] Northland Greyhound Lines, 80 N.L.R.B. 288.

[27] Algona Plywood Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949).

[28] Western Electric Co., 84 N.L.R.B., No. 111.

[29] The Industrial Commission has ruled that the Labor Peace Act requires approval by three-fourth of the employees actually voting, rather than three-fourth of all employees eligible to vote. (Resolution adopted July 13, 1949).

[30] Amazon Cotton Mill v. Textile Workers of America, 167 Fed. 2d 183 (1948).

as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[31]

Sec. 7 of the federal Act provides in general terms that employees shall have the right to self-organization, collective bargaining, and the right to refrain from such activity. Since the language of Sec. 7 is general, it is not always easy to determine whether a particular state law runs counter to its provisions. A Florida statute required union business agents to be licensed by a state board, and required unions to file certain reports and pay an annual fee of one dollar. The Supreme Court held both provisions invalid because they were in conflict with the provisions of the then-existing Wagner Act, the purpose of which was "to encourage collective bargaining, and to protect the full freedom of workers in the selection of bargaining representatives * * *."[32] The Court held that the "full freedom" of employees to self-organization and collective bargaining was impaired by the Florida law which created an "obstacle to collective bargaining" inconsistent with the federal Act.[33] Sec. 7 of Taft-Hartley purportedly protects the rights of employees "to bargain collectively through representatives of their own choosing," and it must therefore be presumed that the same result would be reached under the present law.

In an earlier case,[34] it was contended that a Texas statute requiring union organizers to obtain an "organizer's card" from the Secretary of State conflicted with the provisions of the Wagner Act. The statute was invalidated on the grounds that it violated the First Amendment, but the opinion stated that a majoriy of the court did not agree that it conflicted with the provisions of he Wagner Act.[35] Presumably the distinction which the Court made between the Texas and Florida statutes was that the issuance of a license in Florida was discretionary with the state board, but in Texas the applicant was entitled to an "organizer's card" as a matter of right.

Balancing the Police Power v. Federal Law

The Supreme Court has made it clear that the states still may exercise their police power in a labor dispute to prevent violence and disorder. The Court held that the Wagner Act did not protect "mass picketing, threats, or violence," [36] and that, therefore a restraining order, issued under the Wisconsion Employment Peace Act,[37] which enjoined such conduct, did not deprive the defendants of their rights under the Wagner Act. The Court held that an "intention of Congress to exclude states from exerting their police

[31] Justice Holmes in Charleston & W.C.R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1914).
[32] Hill v. Florida, 325 U.S. 538, 541 (1944).
[33] 325 U.S. 543 (1944).
[34] Thomas v. Collins, 323 U.S. 516 (1944).
[35] 323 U.S. 542 (1944).
[36] Allen-Bradley Local Union v. Wisconsin Employment Relations Board, 315 U.S. 740 (1941).
[37] Ch. 57, Laws of 1939.

power must be clearly manifested,"[38] and that the federal Act is plainly not "a mere police court measure."[39]

In a later case,[40] also arising under the Wisconsin statute, the Court held that the police power of the states in labor disputes is not confined to cases of physical violence or breaches of the peace. The union in that case had engaged in a novel form of strike activity in which "the stratgem consisted of calling repeated special meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend. It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return."[41] The defendant union contended that the intermittent work stoppages constituted "concerted activity for the purpose of collective bargaining" and were therefore protected by Sec. 7 of the federal Act and immune from state legislation. The Court held to the contrary. Although several pages of the decision were devoted to this point, its rationale is obscure, at least to this writer. The Court holds that the conduct of the union was not "concerted activity" within the meaning of Sec. 7. However, it appears that the intermittent work stoppages were part of a dispute concerning the terms of a new collective bargaining agreement, the old one having expired.[42] Admittedly the workers could have engaged in an all-out strike which would have been protected by Sec. 7. It is therefore difficult to understand the basis of the Court's distinction between "concerted activities" which are protected by Sec. 7, and those which are not. There is nothing in the Court's decision which is of any help in determining in future cases whether particular types of union activity are protected or unprotected by Sec. 7. The Court seems to take the the view that in order to come under the protection of Sec. 7 workers must confine themselves to orthodox types of "concerted activities." But the mere fact that conduct is novel does not mean that it is *malum*.[43]

Are New Strike Weapons Prohibited?

It would not seem that the fact that the strike in this case was unique in its nature would of itself remove it from the protection of Sec. 7. If this is the rule which the Court means to adopt, then labor unions will be unable to evolve new methods and techniques in industrial disputes, although there is no inhibition on the ingenuity of employers in their efforts to devise new ways of resisting the demands of their workers.

Until the decision of the Supreme Court in the *Plankinton*

[38] 315 U.S. 749 (1941).
[39] 315 U.S. 748 (1941).
[40] International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1948).
[41] 336 U.S. 249 (1948).
[42] *Ibid.*
[43] *Cf.* dissenting opinion, 336 U.S. 265 (1948).

Packing Company case[44] on February 13, 1950, there was no controlling decision in a case where the conduct sought to be enjoined under state law was also prescribed by Taft-Hartley. The Supreme Court decisions already referred to indicate that under the general principles of supersedure of state law by federal law, state action would be foreclosed relative to any conduct over which the National Board is given jurisdiction. The Court had already held that state labor tribunals could not conduct representation elections among employees subject to the federal Act, and that state laws could not destroy or impair rights granted to employees by federal law. Still to be decided was whether a state court could enjoin conduct which was prohibited not only by state law but by Taft-Hartley as well. In a six-line memorandum opinion, the United States Supreme Court held in effect that a state tribunal has no power to enjoin acts which constitute unfair labor practices under Taft-Hartley, even though such acts are also proscribed by state law.[45] The decision contains no discussion of the problems presented, but simply reverses the decision of the Wisconsin Supreme Court with reference to the *Bethlehem Steel*[46] and *LaCrosse Telephone*[47] cases. The Court apparently considered the principle of the supremacy of federal law and its proper application so well settled that discussion was unnecessary.

CASES UPHOLDING FEDERAL LAW

The important effect of this decision on the whole problem of supersedure of state labor laws by the federal Act justifies a recitation of the facts as gleaned from the decision of the Wisconsin Supreme Court.[48] The complaining party, Stokes, was a former employee of the Plankinton Packing Company which was admittedly engaged in interstate commerce within the meaning of Taft-Hartley. Stokes charged that he was discharged by the company because he was not a member of the C. I. O. Packing House Workers Union, and that his discharge was therefore in violation of the Wisconsin Employment Peace Act.[49] He further alleged that his discharge had been brought about by the conduct of the C. I. O. union through acts of coercion and intimidation and that both the union and the company were in violation of the Wisconsin Act. The Wisconsin Board found in favor of the complaining party and ordered his re-employment, together with compensation for the wages which he had lost. The decision of the Board was upheld and enforced by the Wisconsin Supreme Court. The basis of the United States Supreme Court's reversal was undoubtedly the fact that the acts of the defendants, which the Wisconsin court found to be inviolation of the Wisconsin statute, also constituted viola-

[44] Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953 (1950).
[45] *Ibid.*
[46] *Supra*, note 11.
[47] *Supra*, note 15.
[48] 225 Wis. 285, 38 N.W. 2d 688 (1949).
[49] *Supra*, note 37.