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LABOR LAW - NATIONAL LABOR RELATIONS BOARD - CONFLICTING JURISDICTIONAL AREAS OF NATIONAL AND STATE LABOR BOARDS

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LABOR LAW — NATIONAL LABOR RELATIONS BOARD — CONFLICTING JURISDICTIONAL AREAS OF NATIONAL AND STATE LABOR BOARDS — The National Labor Relations Board proceeded against defendant corporation, which was admittedly engaged in interstate commerce and subject to the National Labor Relations Act, to enforce its order enjoining the use of unfair labor practices and compelling the reinstatement of employees discharged because of union activities. Defendant attacked the board's jurisdiction on the ground that prior to the board's proceeding, the Wisconsin Labor Relations Board, acting under the Wisconsin labor law,[1] had assumed jurisdiction of the case and had disposed of it, thus precluding subsequent action by the National Labor Relations Board. *Held*, the N. L. R. B. is not prevented from assuming jurisdiction, since there is no record of any formal proceedings or of an ultimate disposition of the case by the Wisconsin board. *National Labor Relations Board v. Algoma Net Co.*, (C. C. A. 7th, 1941) 124 F. (2d) 730.

It has been held that a state labor board acting under a statute similar to the Wagner Act can exercise jurisdiction over labor disputes which at the same time affect interstate commerce in such a manner as to confer jurisdiction on the N. L. R. B. The Wagner Act and the state acts proceed from different sources: the federal act rests on the commerce power,[2] while the state acts depend upon the police power.[3] Some overlapping between the two is inevitable,[4] and absent any showing of discrimination, state regulation is not invalid merely because it directly affects interstate commerce.[5] Even where Congress has legislated on the subject in the exercise of its commerce power, state action in that field is not necessarily precluded, if there is no showing of any express or implied intent of Congress to pre-empt the field for itself.[6] While section 10a of the Wagner Act[7] lends credence to the view that Congress did intend to

[1] Wis. Stat. (1937), § 111.01 et seq., since repealed by Wis. Stat. (1939), § 111.01 et seq.

[2] See National Labor Relations Act, 49 Stat. L. 449, § 1 (1935), 29 U. S. C. (Supp. 1939), § 151. See also Mueller, "Businesses Subject to the National Labor Relations Act," 35 MICH. L. REV. 1286 at 1288 (1937); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1936).

[3] Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N. W. 673 (1938); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 237 Wis. 164, 295 N. W. 791 (1941); Davega City Radio v. State Labor Relations Board, 281 N. Y. 13, 22 N. E. (2d) 145 (1939).

[4] Actually the field of labor regulation has given rise to comparatively little difficulty caused by the overlapping of state and national jurisdictional areas, a problem which is so characteristic of our federal form of government. See Garrison, "Government and Labor: The Latest Phase," 37 COL. L. REV. 897 (1937), where Dean Garrison five years ago predicted a lot of litigation on this subject. It has failed to materialize.

[5] South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510 (1938).

[6] Mintz v. Baldwin, 289 U. S. 346, 53 S. Ct. 611 (1933); Maurer v. Hamilton, 309 U. S. 598, 60 S. Ct. 726 (1940). Cf. comment in 51 HARV. L. REV. 722 at 729 (1938).

[7] "This power [of the board] shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established." 49 Stat. L. 453 (1935), 29 U. S. C. (Supp. 1939), § 160 (a).

make the power of the N. L. R. B. exclusive as against state action, this construction has not prevailed.[8] There are strong policy reasons in favor of permitting a state board to proceed in a situation which might also come within the jurisdiction of the N. L. R. B. under the Wagner Act. The extent of the jurisdiction of the N. L. R. B. is uncertain, since it depends upon the vague test of substantial interference with the flow of interstate commerce,[9] and this question remains undecided until the N. L. R. B. passes on it.[10] Thus, occasion might arise where immediate intervention by some agency is necessary to preserve industrial peace; in such an event, a state board should be able to act despite the fact that the N. L. R. B. has not yet undertaken jurisdiction.[11] Militating in opposition to these factors in favor of concurrent jurisdiction is the interest in having a uniform national labor policy,[12] and where the state act is

[8] See comment in 51 HARV. L. REV. 722 at 733 (1938), where it is suggested that this provision was designed to exclude other federal administrative agencies and courts from the field of labor regulation. See also Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N. W. 673 (1938); 32 ILL. L. REV. 732 (1937). The N. L. R. B. has upon occasion refused to give effect to an adjudication of a state court where it felt that such an adjudication conflicted with the policy of the National Labor Relations Act. Matter of Mason Mfg. Co., 15 N. L. R. B. 295 (1939). On the other hand, a state court has declined to issue a ruling that would tend to defeat the effect of an N. L. R. B. order. Fedor, Tepco Employees' Union v. Enamel Products, (Ct. of Common Pleas, Cuyahoga County, Ohio, 1940) 2 Lab. Cas. No. 18,749.

[9] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1936); Mueller, "Businesses Subject to the National Labor Relations Act," 35 MICH. L. REV. 1286 at 1288 (1937). As to just how uncertain is this test, see Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656 (1938); 25 CAL. L. REV. 593 (1937).

[10] Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459 (1938), which held that the N. L. R. B. must pass on the question of its jurisdiction before the Court can decide the matter.

[11] See Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N. W. 673 (1938), which held that the state board could act despite the potential power of the N. L. R. B. See also Davega City Radio v. State Labor Relations Board, 281 N. Y. 13, 22 N. E. (2d) 145 (1939); Garrison, "Government and Labor: The Latest Phase," 37 COL. L. REV. 897 (1937).

It is for this reason that state statutes which contain a self-limitation clause and reject jurisdiction where the employer is subject to the National Labor Relations Act seem to the writer unsatisfactory. See 30 N. Y. Consol. Laws (McKinney, 1940), § 715; 43 Pa. Stat. Ann. (Purdon, 1941), § 211.3(c). This provision of the Pennsylvania statute led the Pennsylvania court to say that if it determines that the dispute involves interstate commerce, the Pennsylvania board has no jurisdiction, despite a prior finding by the N. L. R. B. that interstate commerce is not affected by the employer's alleged unfair labor practices. In re Abbotts Dairies, 341 Pa. 145, 19 A. (2d) 128 (1941).

[12] The desirability of a uniform national policy has been held strong enough in the case of bankruptcy legislation to warrant the suspension of all state laws on the subjects covered by the federal act. International Shoe Co. v. Pinkus, 278 U. S. 261, 49 S. Ct. 108 (1929).

dissimilar to the Wagner Act,[13] it might be superseded altogether to the extent to which it bears on interstate commerce. But conceding the power of a state board to act in the absence of N. L. R. B. intervention does not answer the question raised in the principal case, i.e., what happens when the N. L. R. B. does undertake jurisdiction subsequent to the state board's determination? The Supreme Court apparently answered this question in *Consolidated Edison Co. v. National Labor Relations Board.*[14] There the contention was advanced that the N. L. R. B. had no jurisdiction because the state of New York had enacted comprehensive labor legislation, almost identical with the Wagner Act, covering the labor dispute there involved. The Court dismissed the contention because the N. L. R. B. proceeding had been instituted before the enactment of the New York statute, and no state proceeding had ever been instituted. In addition the Court stated that the only effect of state action might be to enable the N. L. R. B. to find that this action had removed the threat to interstate commerce and thus obviated the need for N. L. R. B. intervention. But the Court said the state action was not binding on the N. L. R. B.: "The question in such a case would relate not to the existence of the federal power but to the propriety of its exercise." [15] In view of this holding, it would seem that ordinary principles of res judicata applicable in judicial proceedings involving state and federal courts of concurrent jurisdiction do not apply here. The court in the instant case is justified in resting its decision on the narrow ground that the N. L. R. B.'s jurisdiction is not foreclosed because the Wisconsin board had not made a formal disposition of the case. The decision might also have been sustained on the broad ground that, despite the action of the state board, the N. L. R. B. had nevertheless found that the threat to interstate commerce arising out of the employer's alleged unfair practices still persisted.

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[13] See for example the new Wisconsin Employment Peace Act, Wis. Stat. (1939), § 111.01 et seq., repealing an act very similar to the Wagner Act which was in force when the principal case first arose. Wisconsin Labor Relations Act, Wis. Stat. (1937), § 111.01 et seq.

[14] 305 U. S. 197, 59 S. Ct. 206 (1937).

[15] 305 U. S. 197 at 223, 224.