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Pre-Emption And Non-Regulation — The No Man's Land Of Labor Relations

Guss v. Utah Labor Relations Board[1]

Since the enactment of the National Labor Relations Act[2] the field of labor-management relations has been dominated by Federal policy, the exclusiveness of which has been made clear in *Garner v. Teamsters Union*[3] and *Weber v. Anheuser-Busch, Inc.*[4] The States were left, for practical and historical reasons, with power over breaches of the peace,[5] mass picketing,[6] threats of violence[7] and violent picketing amounting to torts under state law where no adequate Federal remedy existed.[8]

However, the question had arisen under the Act whether a State could act in a labor dispute where the N.L.R.B. did not choose to act. In *Bethlehem Co. v. State Board*[9] the Supreme Court refused its blessing to the New York Labor Board's certification of a foremen's union as a bargaining agent where the national board's policy was not to grant certification to such unions. It was held that the Federal Act occupied the field, leaving no power to the State in a matter covered by that Act and implied a lack of authority in the national board to confer jurisdiction upon the State. The Court expressly refused to pass on the question of State action in cases where the N.L.R.B. declined to exercise jurisdiction for budgetary or other reasons.

This decision led to the inclusion of a proviso to Section 10(a) in the Taft-Hartley amendments to the National Labor Relations Act,[10] which section expressly authorized

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[1] 353 U. S. 1 (1957).

[2] 49 Stat. 449, as amended 61 Stat. 136, 29 U. S. C. A. §151 *et seq.* (1956).

[3] 346 U. S. 485 (1953).

[4] 348 U. S. 468 (1955).

[5] Auto Workers v. Wisconsin Board, 351 U. S. 266 (1956).

[6] Allen-Bradley Local v. Board, 315 U. S. 740 (1942); Drivers Union v. Meadowmoor Co., 312 U. S. 287 (1941).

[7] Youngdahl v. Rainfair, Inc., ... U. S. ..., 78 S. Ct. 206 (1957). In Auto Workers v. Wisconsin Board, *supra*, n. 4, 272, the Court remarked:

> "No one suggests that violence is beyond State criminal power . . . The State interest in law and order precludes such interpretation . . . Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence."

[8] United Workers v. Laburnum Corp., 347 U. S. 656 (1954).

[9] 330 U. S. 767 (1947).

[10] Labor Management Relations Act, 61 Stat. 146, §10(a), 29 U. S. C. A. §160(a) (1956):

> ". . . 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 . . . even though such cases may involve labor disputes

cession of jurisdiction by the N.L.R.B. in certain cases, under severely restrictive conditions.

The Board, while having full jurisdiction over the labor-management relations which are the subject of the national Act,[11] has refused to exercise its power in many cases for policy or budgetary reasons — usually where the impact on interstate commerce was slight. These classes of cases have since 1950 been governed by an N.L.R.B.-determined set of jurisdictional standards based on annual dollar amounts of interstate transactions made by the company involved in the dispute. The standards were raised in 1954, increasing the area of commerce wherein the Board would refuse its services.[12] The question of what power, if any, a declination of jurisdiction gave to the States was again carefully avoided in *Building Trades Council v. Kinard Construction Co.*[13]

In a series of decisions handed down on March 25, 1957, Section 10(a) was held by the Supreme Court to be declarative of Congressional intent to retain for itself the regulation of labor relations affecting commerce, in spite of the administrative incompleteness of this regulation. The fact situations in these cases are roughly similar and are identical in the essential point discussed in this note.

In *Guss v. Utah Labor Board*,[14] unfair labor practices were charged against the employer by the N.L.R.B. certified bargaining agent. Between the certification and the filing of the charge the N.L.R.B. raised its yardsticks so as to exclude the employer's business from N.L.R.B. jurisdiction. The complaint was refused by the N.L.R.B. since the operations involved were predominantly local in character and it would not effectuate the policies of the Act to exercise jurisdiction. The unfair labor practices charged were clearly within the provisions of the national Act. The union then filed the same charges under the State Act with the State Labor Board which found in the complainant's favor. The State Board's remedial order was upheld by the Supreme Court of Utah from which the appeal was taken.

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affecting commerce, unless the provision of the State or Territorial statute . . . is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

[11] See Labor Board v. Fainblatt, 306 U. S. 601 (1939), wherein the Act was held to reach to the full extent of the Commerce clause.

[12] Set forth in Breeding Transfer Company, 110 NLRB 493, 505 (1954) (Case No. 14-RC-2512).

[13] 346 U. S. 933 (1954). It was not shown that the respondent applied to the National Board, or that it would be futile to do so.

[14] 353 U. S. 1 (1957).

In *Meat Cutters v. Fairlawn Meats*,[15] the N.L.R.B.'s aid was not invoked but the employer's (complainant's) direct interstate imports were but one-tenth of the Board's current minimum standard and presumably the N.L.R.B. would have refused to take jurisdiction. The employer obtained a State Court injunction against the union's peaceful recognition picketing and the secondary pressures exerted by the union. The injunction was upheld by the Supreme Court of Ohio and the union took an appeal to the Supreme Court of the United States.

The third case, *San Diego Unions v. Garmon*,[16] involved peaceful picketing by an uncertified union to compel the employer to grant a union shop contract. The N.L.R.B., under its monetary yardsticks, dismissed the employer's petition for determination of the picketing union's right to recognition as the employee's bargaining agent. The employer sued in a State court to enjoin the picketing on the ground that he was being coerced into an 8(a)(3)[17] violation and in addition, sought damages resulting from the picketing. Relief was granted on both counts and the Supreme Court of California affirmed, holding that an unfair labor practice as defined by the national Act had no privilege from State law in the absence of Federal exercise of its jurisdiction.

The reasoning of the Supreme Court in the *Guss* case, and followed in the others cited, was briefly that 10(a) of the national Act prescribed the exclusive means whereby a State could be permitted to take jurisdiction of cases falling within the substantive jurisdiction of the N.L.R.B., where the latter for budgetary or policy reasons, refused to exercise that jurisdiction. Section 10(a) required not only an express cession of jurisdiction but also that the industry involved be local in character, and, that the State law to which the N.L.R.B. yields be consistent with Federal law, either by express provision or by judicial interpretation.[18] Congress had shown its intention to require uniformity in labor policy, even at the expense of leaving certain classes of industry free of all regulation. The Court said:

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[15] 353 U. S. 20 (1957).

[16] 353 U. S. 26 (1957).

[17] L. M. R. A., *supra*, n. 9, §8(a)(3), 29 U. S. C. A. §158(a)(3) (1956):
"It shall be an unfair labor practice for an employer — by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

[18] *Supra*, n. 10. In its brief as *amicus curiae* in these cases, the N. L. R. B. stated that it had not been able to make any cession agreements under the proviso to 10(a) since no State statute met these conditions.

> "And here we find not only a general intent to pre-empt the field but also the proviso to §10(a), with its inescapable implication of exclusiveness.
>
> "We are told by appellee that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's land."[19]

The question left open in the *Kinard*[20] decision was thus clearly and decisively answered. The Court suggested that Congress may at any time relax its cession restrictions or that the Board may reassert its full jurisdiction over labor disputes affecting interstate commerce.[21]

The dissenting opinion of Justices Burton and Clark pointed out that traditionally the States retained power to act where Federal power lay dormant. Section 10(a) was intended to provide for those situations where the national Board for policy reasons determined that the State should act in a particular case or class of cases.[22] However, mere failure of the Board to act when it is forced to limit its activities for budgetary reasons is not "cession" and Section 10(a) has no application. In the *Bethlehem*[23] decision, it was noted, the Court expressly refrained from deciding the latter question.[24]

The scope of these decisions is apparent. The States are excluded for all practical purposes, by this view of Section 10(a), from acting upon unfair labor practices in the "No Man's Land", whether the action arises in a State court or before a State labor board, and whether State or Federal law is applied, eliminating as a result both judicial and administrative power in the States except as to certain types of tortious or criminal activities.[25]

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[19] *Supra*, n. 14, 10-11.
[20] *Supra*, n. 13.
[21] *Supra*, n. 14, 11.
[22] *Ibid*, *dis. op.* 12.
[23] Bethlehem Co. v. State Board, 330 U. S. 767 (1947).
[24] *Ibid*, 776.
[25] See cases, *supra*, ns. 5, 6, 7 and 8. The case, Laburnum, *supra*, n. 8, involved a tort under State law.

The doctrine of pre-emption which was of such great assistance in the expansion of Federal policy throughout the area of labor relations (as well as in other areas) has here resulted in the exclusion of Federal or any other labor law or policy with regard to cases lying outside the administrative capabilities of the N.L.R.B. Amendment of the Taft-Hartley Act is exceedingly difficult as a political reality, since bills intended to amend the Act in one respect arouse proposals from other sources to make more sweeping changes.

Legislative proposals by Senators Ives[26] and Watkins[27] involve an express reversal of the doctrine of the *Guss*[28] and its companion cases by authorizing the N.L.R.B. to decline jurisdiction and expressly denying legislative intent to exclude State power over these areas. The Smith bill,[29] which arose out of another application of the preemption doctrine, destroys implied preemption itself by limiting the exclusionary effect of Federal acts to those cases where the statute expressly so states.

The Ives bill[30] has the additional feature of repealing the restrictive conditions of 10(a). Since no State statutes have yet met, nor are likely to meet, these conditions, it would seem that elimination of the proviso to 10(a) is essential to effective use of cession agreements.

The defect of these proposals is that they do not meet the problem of uniformity in the regulation of labor relations in the field of interstate commerce.

Probably the solution lies in the reassertion by the N.L.R.B. of its delegated jurisdiction over the entire field of commerce.[31] This would, of course, entail greater expense to the Federal government in the form of larger N.L.R.B. budgets, as well as some reorganization of the Board. Perhaps something similar to the Supreme Courts' restriction of certiorari might evolve, thus making the regional board's ruling administratively final, unless conflicts need resolution by the National Board.

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[26] S. 1772, 85th Cong., 1st Session (1957).

[27] S. 1723, 85th Cong., 1st Session (1957).

[28] 353 U. S. 1 (1957).

[29] H. R. 3, 85th Cong., 1st Session (1957).

[30] *Supra*, n. 26.

[31] See Office Employees v. Labor Board, 353 U. S. 313 (1957), where the Court reversed a refusal of the N.L.R.B. to exercise jurisdiction on policy grounds. It might be significant to note that in the Guss case the Court was careful to state that it had not passed and was not passing on the validity of any particular set of jurisdictional standards nor upon any particular declination of jurisdiction by the N.L.R.B.