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Labor Law—Labor Management Relations Act—Section 14(c)—State Court Jurisdiction over Labor Dispute.—Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers

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the primary flaw in this decision is its failure clearly to draw the line between allowable and prohibited product picketing and to delineate some standards which would guide this determination in situations where the struck product comprises less than all of the secondary employer's business. It would seem that by allowing product picketing of a multiproduct secondary employer but not of a single-product secondary employer that the standard for determining the allowability of such product picketing is the nature of the secondary employer's business and the possible economic impact thereon. Still undetermined by this decision is the situation where the union pickets products comprising 80 percent of the secondary employer's business. In such a case, the union is not requesting customers to boycott the entire business, only 80 percent. Yet the possible loss of 80 percent of one's business necessarily coerces the secondary employer to cooperate with the union and cease dealing with the primary employer. Again even if the picketed products comprise 70 percent, or 60 percent, or 50 percent of the secondary employer's business, the question still remains: where to draw the line and on what basis. The present case presents the first limitation on the *Tree Fruits* product-picketing privilege. Only future Board and court opinions will determine the ultimate extent of this privilege with the only apparent test being whether, in the context of each case, the picketing is in the nature of secondary restraint and coercion.

PETER A. AMBROSINI

Labor Law—Labor Management Relations Act—Section 14(c)—State Court Jurisdiction over Labor Dispute.—*Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers.*[1]—Plaintiff beer distributor is a Pennsylvania business concern composed of husband and wife. Under existing business conditions, plaintiff purchased its supply of beer from an "importing distributor," who imported beer from outside the state. A Teamsters Union affiliate, which had a collective-bargaining contract with some importing distributors, picketed the plaintiff's premises. The purposes of the picketing, according to the union, were to advertise the fact that plaintiff was nonunion and to attempt to organize plaintiff's employees. Because employees of the importing distributors would not cross the picket line to make deliveries to the plaintiff, the picketing precluded all shipments of beer supplies from those distributors. Plaintiff did not, initially, seek relief from the National Labor Relations Board. Instead, it brought suit in the local court of common pleas against the union seeking damages and asking for injunctive relief to restrain the picketing. After a hearing, the court refused to issue a preliminary injunction on the ground that the matters at issue were arguably within the exclusive jurisdiction of the NLRB.[2]

Plaintiff appealed to the Supreme Court of Pennsylvania. Central to the controversy was Section 14(c) of the Labor Management Relations Act.[3] This

[1] 426 Pa. 512, 233 A.2d 264 (1967).

[2] Id. at 515, 233 A.2d at 266.

[3] 29 U.S.C. § 164(c) (1964). This section states:

(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to

provision was added in 1959 to allow state tribunals to take jurisdiction in labor disputes when the NLRB declines to assert its statutory jurisdiction because of the lack of substantial impact on commerce. The Pennsylvania court was willing to assume, arguendo, that the NLRB would, if the dispute were presented to it, refuse jurisdiction for the two reasons advanced by the plaintiff: (1) the only employee was the son of the husband and wife who operated the plaintiff business;[4] (2) plaintiff's annual gross sales were only $230,000.[5] The state supreme court, nevertheless, affirmed the lower court's decree. HELD: A state court must decline jurisdiction in a labor dispute affecting commerce when, at the time of the hearing in the state court, the NLRB has not actually declined to assert jurisdiction in the particular controversy involved. In reaching this conclusion, the majority treated as irrelevant the fact that, since the hearing below, the Board had specifically declined to take jurisdiction in this labor dispute.[6]

Chief Justice Bell and Justice Roberts filed separate dissenting opinions. Chief Justice Bell felt that the lower court should have issued the injunction. He pointed out that there was not the slightest doubt that the NLRB would refuse jurisdiction in this labor dispute, and emphasized that the plaintiff would be forced out of business by this picketing if it had to wait for relief until the Board had gone through the formality of specifically declining jurisdiction. Justice Roberts argued that section 14(c) allows a state to take jurisdiction when it is "obvious" that the NLRB will decline jurisdiction in the case, and that the plaintiff had fulfilled its burden of showing that the NLRB would decline to assert jurisdiction over this labor dispute.[7] He felt that, on this basis, the state court should have considered the arguments on the merits as to the preliminary injunction.

The majority of the Pennsylvania court has adopted, in this case, a re-

assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[4] Section 2(3) of the LMRA excludes from the definition of "employee" "any individual employed by his parent or spouse." 29 U.S.C. § 152(3) (1964). The plaintiff contended that, by virtue of this section of the Act, the NLRB has refused to accept jurisdiction in a labor dispute between a union and an employer, such as the plaintiff, where the only employee is a son of said employer. Brief for Appellant at 6, 7, 426 Pa. 512, 233 A.2d 264 (1967).

[5] The NLRB has applied a jurisdictional standard under which it asserts jurisdiction over retail enterprises only if they fall within the Board's statutory jurisdiction and have an annual gross volume of business of at least $500,000. Carolina Supplies & Cement Co., 122 N.L.R.B. 88 (1958). It was argued that plaintiff's gross volume of $230,000 was clearly less than the required $500,000. Brief for Appellant at 9, 426 Pa. 512, 233 A.2d 264 (1967).

[6] 426 Pa. at 517 n.9, 233 A.2d at 267 n.9. The Pennsylvania court stressed that only the facts existing at the time of the hearing on the petition for a preliminary injunction were relevant to its decision in the principal case.

[7] 426 Pa. at 523, 233 A.2d at 270.

quirement which has significant procedural consequences in the area of federal-state relations. Pursuant to its power to decline jurisdiction over labor disputes if the effect on commerce is not sufficiently substantial, the Board has announced certain jurisdictional standards.[8] The effect of the Pennsylvania decision is to require a litigant to go to the NLRB for an interpretation and application of those standards even in the instances where the facts clearly indicate that the jurisdictional requirements set out by the Board are not satisfied.

The principal case is of further significance in that it is inconsistent with a number of prior state court decisions. The majority opinion expressly rejected[9] the approach taken by the California Supreme Court in *Russell v. Electrical Workers Local 569*.[10] The California court held, in that case, that a state tribunal may make the initial adjudication as to whether it should take jurisdiction in a labor dispute under section 14(c). This adjudication is to be accomplished by deciding whether the facts of the case place it within the jurisdictional guidelines already announced by the NLRB.[11] There is further state authority which, although not specifically rejected by the Pennsylvania court, is certainly inconsistent with the *Stryjewski* rule. In a number of cases, state tribunals have applied the Board's standards in adjudicating the jurisdictional issue, without considering explicitly whether state action should await the Board's refusal to assert jurisdiction in the particular case.[12] In view of these differences among the states at the present time,[13] and in view of the

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[8] One example of these jurisdictional standards is set out at note 5 supra. That standard for retailers was announced on October 2, 1958. 23 N.L.R.B. Ann. Rep. 8 (1958).

[9] 426 Pa. at 525-26, 233 A.2d at 267-68.

[10] 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966), noted in 80 Harv. L. Rev. 1600 (1967).

[11] The court states explicitly that "[s]ection 14(c) does not require prior application to the board; plaintiff need only demonstrate that the board would decline to hear the case. Plaintiff may show such declination by the board on the basis of published rules and the rules of decision to which Congress referred in section 14(c)." 64 Cal. 2d at 25, 409 P.2d at 928, 48 Cal. Rptr. at 704.

[12] Continental Slip Form Builders, Inc. v. Brotherhood of Constr. & Gen. Labor, Local 1290, 193 Kan. 459, 393 P.2d 1004 (1964); Local 227, Amalgamated Meat Cutters v. Fleischaker, 384 S.W.2d 68 (Ky. 1964); Smith v. Noel, 24 Ohio Op. 2d 159, 188 N.E.2d 195 (C.P. 1963); Mr. Snow Man, Inc., 46 L.R.R.M. 1375 (N.Y. Lab. Relations Bd. 1960).

[13] The majority in *Stryjewski* refers to the case of Colorado State Council of Carpenters v. District Ct. of Larimer County, 155 Colo. 54, 392 P.2d 601 (1964). Although the Pennsylvania court suggests that the decision in the Colorado case conflicts with the rule adopted in the *Russell* case and supports the result in *Stryjewski*, that analysis of the Colorado case is questionable. The Colorado court does not indicate at any point that it is confronted with an issue of whether a state court may take jurisdiction in the absence of an actual declination by the Board in each case. Although the court states the very general principle that the state court may not enjoin peaceful picketing until the NLRB declines jurisdiction in a controversy, id. at 56, 392 P.2d at 601-02, it does not specify the manner in which the Board must first decline jurisdiction. In effect, the Colorado court seems to be concerned with a situation in which the lower state court took jurisdiction of the labor controversy despite the fact that the NLRB clearly had jurisdiction of the dispute under its existing standards. It is submitted that such a decision is not authority for the result in *Stryjewski*. The principal case is concerned with whether a state court may interpret and apply the Board's jurisdictional standards and take jurisdiction if they are not satisfied, rather than with the question whether a state court can

procedural importance that attaches to the Pennsylvania decision to require actual declination by the Board, it is appropriate to consider the validity of the *Stryjewski* approach to section 14(c).

The court in *Stryjewski* does not develop at length the rationale behind its decision. Rather, it states simply that if the state courts are allowed to interpret and apply the Board's jurisdictional standards, it is clear that such cases "will present many variables and a resolution of such variables by the state courts, in the absence of a declination to act by the NLRB, may well result in a chaotic situation which will harm the national labor policy."[14]

Essential to an understanding of this brief statement of the rationale is an examination of the policy behind the application of the preemption doctrine to labor disputes which are within the scope of the LMRA. The Supreme Court has stressed that most aspects of labor disputes affecting commerce are not subject to state regulation. Specifically, those activities which are "arguably subject" to Sections 7 or 8 of the LMRA are to be referred to the "exclusive competence of the National Labor Relations Board."[15] The basis for this doctrine is found in an earlier preemption case, in which the Supreme Court described the congressional policy underlying the LMRA as follows:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.[16]

This strict doctrine of federal preemption was altered by section 14(c) which expresses tolerance of the diversity that is likely to accompany state regulation of those labor disputes in which the NLRB has declined to assert jurisdiction. Nevertheless, in view of the policy behind the development of the preemption doctrine in labor cases, it is not surprising that the Pennsylvania court reached a decision requiring actual declination. It is arguable that, in order to effectuate the congressional policy of uniformity in the application of the national act, it is appropriate to have the federal labor agency itself determine, in every labor dispute within the scope of the LMRA, whether it will assume jurisdiction. In effect, the actual declination rule would avoid the "diversities and conflicts" incident to state application of NLRB jurisdictional standards[17] in the same way that the preemption doctrine mentioned above

grant relief once it is clear that the controversy falls within the jurisdictional realm of the NLRB.

[14] 426 Pa. at 519, 233 A.2d at 268.

[15] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

[16] Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953).

[17] A typical situation in which diverse interpretations of NLRB standards might occur is found in Cox's Food Center, Inc. v. Retail Clerks, Local 1653, 420 P.2d 645 (Idaho 1966). In that case, the state court was confronted with the issue whether the Board's jurisdictional standard for retailers, discussed note 5 supra, should apply to the

insures "uniform application" of the substantive rules contained in the federal labor act.

In addition to the above rationale, there is another factor to be considered in weighing the merits of the *Stryjewski* interpretation of section 14(c). An advisory-opinion procedure has been established by the Board in a series of promulgated rules.[18] Basically, those rules provide that any party to a labor dispute or any state agency or court may obtain an opinion on whether the Board would assert jurisdiction over the particular labor dispute pending before such court or agency. It has been suggested that the adoption of this procedure is an indication of the NLRB's view that the question of jurisdiction of state courts or agencies under section 14(c) is one which the Board, itself, will decide in each case.[19] If this is, in fact, the Board's view of section 14(c), such a factor deserves considerable attention because of the NLRB's position as expert interpreter of the LMRA.

Even if an actual declination rule is the most effective means of achieving national uniformity in the administration of the LMRA, and even if the NLRB's establishment of its advisory-opinion procedure tends to indicate its acceptance of such a rule, there remains serious doubt as to the merits or necessity of the *Stryjewski* interpretation of section 14(c).[20] A decision as to

calendar year preceding the year in which the labor dispute started or to the twelve-month period immediately preceding the retailer's commencement of legal action to obtain relief. In the absence of an explicit resolution of this question by the NLRB, it is certainly arguable that the states would take different positions on that issue in determining whether the state court or the NLRB is the proper forum for the labor dispute in question.

[18] 29 C.F.R. §§ 101.39-.43, 102.98-.110 (1967). In addition to providing for the rendering by the Board of advisory opinions, the Board's regulations allow the personnel of regional offices to render informal opinions on jurisdictional issues. The regulations point out, however, that the information and advice obtained in this latter fashion are not binding on the Board.

[19] Goldberg & Meiklejohn, Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History, 54 Nw. U.L. Rev. 747, 753 (1960). But see Comment, Federal Pre-Emption and Section 701 of the Taft-Hartley Amendment, 37 U. Det. L.J. 400, 408 (1960).

[20] Although the legislative history of § 14(c) is hardly conclusive on this question, it has been suggested that an actual declination rule is "inconsistent with the general tone of Congressional discussion" of that section. Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 262 (1959). The fact that Professor Cox was chairman of an advisory panel that worked very closely with the congressional committees in the task of revising the LMRA adds weight to this opinion. 105 Cong. Rec. 17,867 (1959).

An example of that congressional discussion, which was hardly consonant with the result in *Stryjewski*, is found in the remarks of Representative Griffin. Speaking on behalf of the proposed § 14(c), he stressed that the Board would be authorized to decline jurisdiction "either by rule of decision or by published rules." He then stated that state courts or agencies would have "authority to exercise jurisdiction over *such classes of cases* as the Board has declined or would decline." 105 Cong. Rec. 14,347 (1959) (emphasis added). The emphasized language certainly seems inconsistent with an actual declination rule.

There is, however, one aspect of the legislative history of § 14(c) which is favorable to the *Stryjewski* result. During the Senate debate on the 1959 Amendments to the LMRA, Senator Morse pointed out that the proposed § 14(c)(2) was ambiguous. He noted, however, that there was only one appropriate way to read that section. He stated that "it is

whether the Board must decline jurisdiction in each case before a state may take jurisdiction under section14(c) should be preceded by serious consideration of the problems created by the preemption cases and the effect which section 14(c) was designed to have upon those problems. It should be noted that one significant preemption case created a remedial "no man's land" by holding that state courts could not take jurisdiction over labor disputes subject to the LMRA even in those situations where the NLRB had specifically declined to assert jurisdiction because of insufficient impact on commerce.[21] As a result of this case, there were labor disputes in which the parties would have no remedy. To correct that situation, section 14(c) was adopted to provide appropriate forums for those in the "no man's land."[22] A question arises as to how an actual declination rule fits into this context of legislative action. It has been suggested that the relief which section 14(c) was supposed to provide could be limited significantly by the delay involved in petitioning the NLRB, in every instance, to take jurisdiction.[23] In a similar vein, another commentator has pointed out that the alternative view, which would allow the state courts to interpret and apply the Board's jurisdictional standards, does appear to be in keeping with the "legislative purpose of providing a forum which could give prompt remedial action in the no-man's land."[24]

Like Chief Justice Bell dissenting in *Stryjewski*,[25] the above writers show an awareness that, when a labor dispute flares up, relief often must be swift in order to be effective. At least in those instances where it is clear that the Board's jurisdictional standards are not met, section 14(c)'s purpose of making legal relief available to those in the "no man's land" would seem to be effectuated more fully by allowing the state court to decide in the first instance whether it has jurisdiction than by requiring deferral to the NLRB.

The approach which allows the state court to determine whether the Board's jurisdictional standards are met finds some support in two recent Supreme Court decisions. In *Radio & Television Broadcast Technicians Local*

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only after the Board determines that it should decline to exercise jurisdiction in a particular dispute that the state court is to be given the authority to assume and assert its jurisdiction." 105 Cong. Rec. 17,877 (1959). In effect, then, Senator Morse was interpreting the language, which was to be enacted at § 14(c), as requiring actual declination by the NLRB in every case.

Shortly after the 1959 amendments were enacted, several commentators joined Morse in his concern about the ambiguity of the language in § 14(c). They noted that it was not clear whether that section requires an actual declination by the Board in each instance. DeJarmon, Labor and Small Business—Uniformity or Confusion, 1 B.C. Ind. & Com. L. Rev. 175, 178-80 (1960); Hardbeck, Federal-State Jurisdictional Issues and Policies Under the New Labor Law, 12 Lab. L.J. 99, 105 (1961); Comment, Section 701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 108 U. Pa. L. Rev. 587, 594-95 (1960).

[21] Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

[22] See McCoid, Notes on a "G-String": A Study of the "No Man's Land" of Labor Law, 44 Minn. L. Rev. 205, 230-37 (1959).

[23] Comment, Labor Law—Federal and State Jurisdiction—No Man's Land and Section 701(a), 6 Vill. L. Rev. 80, 85 (1960).

[24] Merrifield, Federal-State Jurisdiction in Labor Relations Law, 29 Geo. Wash. L. Rev. 318, 329 (1960).

[25] 426 Pa. at 519, 233 A.2d at 269.

1264 v. Broadcast Serv. of Mobile, Inc.[26] and in *Hattiesburg Bldg. & Trades Council v. Broome*,[27] the Court was faced with situations in which state courts had interpreted the NLRB's jurisdictional standards and had assumed jurisdiction on the basis that those standards were not met. The Court reversed both cases in per curiam opinions. However, the court made no suggestion that the NLRB must, in fact, decline jurisdiction in each case prior to the state court's assumption of jurisdiction. Rather, the Court based its decisions on the errors in the state courts' application of the Board standards.[28] In fact, in the *Local 1264* case, the Supreme Court made a significant statement indicating acceptance of state court interpretation and application of the NLRB's jurisdictional standards. After having stated the reasons put forth by the state court in asserting jurisdiction, the Court stated: "Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has, but declines to assert, jurisdiction, . . . there must be a proper determination of whether the case is actually one of those which the Board will decline to hear."[29] It should be noted that this statement immediately precedes the Court's discussion of the errors in the state court's treatment of the NLRB jurisdictional standards. It is submitted that this context makes it clear that the "proper determination" of whether the NLRB will take jurisdiction may be performed by state courts and agencies.

A reading of the exact language in section 14(c) casts further doubt on the correctness of the holding in *Stryjewski*. Subsection (1) of the provision explicitly allows the Board to decline to assert jurisdiction "by rule of decision or *by published rules*."[30] (Emphasis added.) If Congress intended that the Board must, in fact, decline jurisdiction in each case before the state tribunal would have jurisdiction, it seems apparent that the single phrase, "by rule of decision," would have been sufficient to convey that intent. Congress, however, included an alternate method by which the NLRB could decline jurisdiction. Since the statute does provide two methods, it is arguable that by requiring an actual declination by the Board in every case, the Pennsylvania court is stripping the meaning and effectiveness from that portion of the statute which allows the NLRB to decline jurisdiction "by published rules."[31]

The arguments in favor of an actual declination rule are not persuasive in light of the above considerations. The legislative policy behind section 14(c), the recent Supreme Court cases, and the statutory language all suggest a result contrary to the rule adopted by the *Stryjewski* court.[32] Nevertheless, the

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[26] 380 U.S. 255 (1965).

[27] 377 U.S. 126 (1963).

[28] In the *Local 1264* case, the Court pointed out that the state court had failed to take into consideration the Board's practice of treating several nominally separate business entities as a single employer where they constitute, in fact, a single, integrated concern. 380 U.S. at 256-57. In the *Hattiesburg* case, the Court noted that the state court had failed to consider that, where secondary picketing is involved, it is the practice of the Board to hold that its jurisdictional standards may be satisfied by reference to the business operations of either the primary or secondary employer. 377 U.S. at 126-27.

[29] 380 U.S. at 256.

[30] 29 U.S.C. § 164(c)(1) (1964).

[31] See Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 25, 409 P.2d 926, 928, 48 Cal. Rptr. 702, 704 (1966).

[32] It should be pointed out that the Pennsylvania Supreme Court could have avoided

Pennsylvania court has, quite appropriately, called attention to the undesireability of diverse state interpretations of NLRB jurisdictional standards—especially in view of the policy of uniformity underlying the LMRA. It is submitted, however, that the facts of the *Stryjewski* case would hardly give rise to variant interpretations of the Board's standards. The simple, basic facts were that the employer's gross sales amounted to $230,000, the picketing was not secondary,[33] and the Board's jurisdictional standard for retailers is $500,000 in gross volume. In such clear and uncomplicated fact situations, where differences in the states' applications of Board standards would be unlikely, an actual declination rule is hardly necessary to avoid the diversity which the Pennsylvania court fears.

The question remains whether there is a feasible alternative to the Pennsylvania rule which will guard against divergent state applications of Board standards, and yet will avoid the useless formality of having the NLRB decline to assert jurisdiction when the labor dispute is clearly outside of the Board's jurisdictional standards. In line with the California rule, adopted in the *Russell* case, it is suggested that a state court should be allowed to decide whether the labor dispute is within the Board's standards. However, that approach should be qualified by judicial direction to lower courts or to the parties themselves to defer to the NLRB in those troublesome situations where it is not clear from past decisions and rules what the Board's decision would be as to the assertion of jurisdiction.[34] At least one state court, showing

its adoption of the actual declination rule by treating the jurisdictional issue as moot. This alternative was available because the central issue facing the court was whether the NLRB must decline jurisdiction in this specific case before the state court could assume jurisdiction, and in the interim since the decision of the court below, the NLRB had refused to take jurisdiction in this particular labor dispute. In effect then, both parties were aware that there could now be no doubt that the state courts were open to them, whether or not the actual declination rule was the proper approach to § 14(c). In this state of affairs, the court's decision that such an approach would be adopted amounted to an advisory opinion for the benefit of future litigants. There is authority that suggests the impropriety of such judicial action and states that the jurisdictional issue should be treated as moot on facts similar to those in *Stryjewski*. Bowlavar, Inc. v. Local 90, General Team & Truck Drivers, 252 Iowa 851, 109 N.W.2d 22 (1961).

33 When the NLRB decided that its jurisdictional standards could be satisfied by reference to the operations of both the primary and the secondary employers in a labor dispute involving a secondary boycott, it also stated the fundamental characteristics of the secondary activity which would give rise to the application of that approach to its assertion of jurisdiction. The Board explained that, "[b]y its very nature the effect of a secondary boycott extends beyond the operations of the primary employer with which the union is engaged in a dispute, and reaches the secondary employers whom the union is attempting to force or require to cease dealing with the primary employer by means prescribed [sic] in Section 8 (b)(4)." Truck Drivers Local 649, 93 N.L.R.B. 386, 387 (1951). The facts of the principal case present no such secondary activity. There is no mention in the briefs of the parties nor in the opinion of the court that the picketing at plaintiff's place of business was in support of a primary dispute with the importing distributors. Rather, the only apparent dispute is between the Teamsters Union affiliate and the plaintiff beer distributor. There is, therefore, no need to look beyond the plaintiff's annual gross volume of $230,000.

34 In deferring to the Board's specific determination as to whether it will assert jurisdiction over the labor dispute, the usual procedure of filing charges or seeking certification could be followed. As an alternative, the advisory-opinion procedure could be utilized by courts or parties in order to ascertain whether the NLRB would assert juris-

an admirable awareness of the federal system regulating labor disputes, has followed such an approach by instructing a lower court to seek an advisory opinion where it was not clear what the Board's decision would be.[35] Such an approach achieves the two-fold objective set out above and assimilates desirable aspects of both the Pennsylvania and the California rules.

WILLIAM A. RYAN, JR.

Labor Law—Railway Labor Act—Carrier's Duty to Bargain During a Representation Dispute.—*Pan American World Airways, Inc. v. International Bhd. of Teamsters.*[1]—In 1946, the Brotherhood of Railway Airline Clerks (BRAC)[2] was certified by the National Mediation Board (NMB) as the collective-bargaining agent for the clerical and related employees of Pan American World Airways, Inc. (Pan Am). Several collective-bargaining agreements were executed between the carrier and the union, the last of which became effective January 1, 1965, and was to continue in effect until March 16, 1967, or thereafter, unless notice of intended change were given 30 days prior to March 16, or any date thereafter.

In August, 1965, the International Brotherhood of Teamsters (IBT) filed a petition with the NMB claiming to represent a majority of the clerical employees at Pan Am. The NMB ordered a representation election, but the BRAC refused to allow its name to appear on the ballot, taking the position that the IBT's failure to obtain more than 50 percent of the eligible votes would leave the BRAC as bargaining agent.[3] This first election was set aside by the NMB before it was completed, when the BRAC called the Board's attention to fraudulent practices in the campaign. Another election was ordered, and the BRAC again refused to appear on the ballot. The IBT won

diction over the particular labor dispute. However, there has been some comment that takes a pessimistic view toward the practical success of the latter procedure. Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086, 1096 (1960). The writer suggests that state courts and agencies are hardly apt to defer to the opinions from the NLRB when those courts and agencies are deciding the question of their jurisdiction to give relief in a labor dispute.

In one recent case a judge displayed the attitude that Professor Aaron anticipated. Dissenting in Cox's Food Center, Inc. v. Retail Clerks, Local 1653, 420 P.2d 645 (Idaho 1966), the judge stated that "the majority improperly dilutes the judicial authority of the district court below in directing that it seek the Board's advisory opinion . . . ." Id. at 659. The dissenter adds that such a requirement "seems unbefitting the district court below, or any court in this state." Id. at 660.

[35] Cox's Food Center, Inc. v. Retail Clerks, Local 1653, 420 P.2d 645 (Idaho 1966). See note 17 supra.

[1] 275 F. Supp. 986 (S.D.N.Y. 1967).

[2] Then known as the Brotherhood of Railway and Steamship Clerks.

[3] This contention seems untenable in view of the fact that the NMB construes an election in which fewer than a majority of employees participate as a vote against *any* representation, since there is no space on the ballot for marking "no union." See Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 668-71 (1965). If a majority of the eligible employees vote for some representative, a majority of those voting will decide the issue. See Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 559-61 (1937).