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Comments

Various Editors

COMMENTS

LABOR LAW—FEDERAL AND STATE JURISDICTION—NO-MAN'S LAND AND SECTION 701(a).

The power of a state to regulate and offer relief against labor practices which it considers illegal and contrary to its public policy has been the subject of considerable discussion and litigation during the past decade.[1] Even as many problems have been settled, more have been raised. Almost as soon as the United States Supreme Court, after a tortuous journey down the labyrinthian ways from *Garner*[2] and *Guss*,[3] seemed to have settled the "no-man's land" doctrine in the second *Garmon*[4] case, Congress passed the Landrum-Griffin Act,[5] which because of section 701(a) has again caused widespread speculation concerning the extent of the newly acquired power of the states in the former "no-man's land."[6] One of the more important questions raised is whether state or federal labor law should be applied in the state courts and agencies empowered to assert jurisdiction by section 701(a).

However, that there is conflict and unsettledness in this area should not be surprising. To begin with, the courts are dealing at close quarters with that "delicately balanced and finely drawn line" of state versus federal power in an area where exponents of both sides have excellent arguments to bring before both courts and legislatures. In addition to this, the politically and emotionally charged concept of the relative advantages to labor and business of having more or less control exercised by the states in the field of labor relations is omnipresent. The purpose of this comment is to present the law as it now stands, and to present a "non-judicial hunch" as to where it ought to go in the future.[7]

1. Nine out of the seventeen labor cases heard by the United States Supreme Court in 1959 dealt with jurisdictional questions.

2. Garner v. Teamsters Union, 346 U.S. 485 (1953). A state court's granting of an injunction was reversed on the ground that the alleged union conduct constituted a federal unfair labor practice and, therefore, the federal remedy was adequate and exclusive.

3. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), forbade a state labor board to exercise jurisdiction over a labor practice which was unfair under federal legislation.

4. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

5. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 29 U.S.C. § 164 (1959).

6. See Papps, *Section 701 and the State Courts, What Law To Be Applied?* 48 GEO. L.J. 316 (1959), and Reilly, *Federal-State Jurisdiction,* 48 GEO. L.J. 304 (1959).

7. For comment as to the future course of the law in this area see articles cited *supra* at note 6.

Within the area of federal pre-emption and permissive state action in labor disputes there are two basic divisions. The first is where the conduct regulated is within the jurisdictional standards of the National Labor Relations Board, and the second, where the conduct is such that the states are empowered to exercise jurisdiction under section 701(a).

I.

ACTIVITIES WITHIN THE JURISDICTIONAL STANDARDS OF THE NLRB

In the *Garmon* case,[8] the United States Supreme Court finally cleared away much confusion on the question of federal pre-emption in the labor field. The Court at last decided to face the basic issue of choosing between the competing interests of national uniformity and of providing remedies for private individuals, and held that if the conduct involved is arguably or potentially protected or prohibited by federal legislation the right of the states to act has been completely pre-empted.[9] In other words, before the states may act the conduct involved must be clearly neither protected nor prohibited by the national labor legislation, therefore federal pre-emption now depends on the type of conduct involved not on the type of relief sought. Thus, the legal niceties drawn between the state's interest in regulation and private damages made in *Laburnum,*[10] and the tenuous distinction between whether the right to be vindicated was of a public or a private nature found in *Russell,*[11] have been discarded. Of course, the problem of determining which activities are neither arguably protected nor prohibited is now raised. State power in regard to right to work legislation seems rather clear,[12] and this activity would seem within state control because of section 14(b) of the Labor Management Relations Act.[13] There are areas which are far less clear. In the past, such activities as partial strikes[14] and slowdowns[15] were not considered to be protected or prohibited, however, in these rather indefinite areas one who acts on the assumption that federal law will not apply certainly assumes the risk of a future determination that it was applicable.

There are two exceptions to the rule of federal pre-emption which mark out areas wherein the states may permissively act.[16] The first of these applies when the activity involves violence or is traditionally criminal in nature. Thus, state courts may grant injunctive relief against labor

8. 359 U.S. 236 (1959).
9. *Id.* at 245.
10. United Construction Workers v. Laburnum, 347 U.S. 656 (1954).
11. UAW v. Russell, 356 U.S. 634 (1958).
12. Al Goma Plywood & Veneer Co. v. Wisconsin Employment Bd., 336 U.S. 301 (1949), sustained a state injunction which prevented enforcement of a maintenance of membership clause.
13. Labor Management Relations Act, 61 Stat. 164 (1947), 29 U.S.C. § 164(b) (1959); Section 14(b) allows the states to regulate union security measures.
14. 110 N.L.R.B. 1589 (1954).
15. 91 N.L.R.B. 333 (1948).
16. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

violence whenever such conduct threatens personal injury or property damage,[17] and in addition may award damages for losses resulting from such activity.[18] However, the scope of conduct which the states may characterize as violent will be carefully scrutinized to avoid an overreaching by the states which would result in frustration of national labor policies.[19]

The second exception to the rule of federal pre-emption, which can be termed the doctrine of peripheral activity, is based on the *Gonzales* case,[20] which held that an activity only on the perimeter of our national labor legislation can be regulated by the states. *Gonzales* was concerned with the power of the state to give relief against conduct involving internal union activity. The basis of the holding is that power of the states has not been pre-empted merely because under certain circumstances there may be some peripheral remedy afforded federally. *Garmon* has left *Gonzales* substantially intact.[21] However, with the provisions in the Landrum-Griffin Act regulating many aspects of internal union affairs the permissive area of jurisdiction given appears to have been substantially contracted.[22]

What is only peripheral to federal legislation is rather difficult to ascertain and at best is subject only to a case by case analysis. Illustrative of what a state will term peripheral is a Wisconsin case in which a union imposed a fine on one of its members for crossing a picket line.[23] The court cited *Gonzales* for its holding that such internal union activity was only peripherally related to federal legislation. However, it is submitted that if federal law does not make such conduct an unfair labor practice it may be inconsistent with a uniform national application of federal labor legislation to permit a state to characterize this type of conduct as an unfair practice. Of more doubtful validity are state cases granting remedies for loss of employment due to union opposition to individual workers,[24] and compelling bargaining with a union in the face of an existing contract with a rival union.[25]

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17. Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).

18. In UAW v. Russell, 356 U.S. 634 (1958), the court recognized state power to award damages, both actual and purchase, to a non-striking employee whose entry to work had been prevented by threats of violence.

19. For an excellent pre-*Garmon* discussion see Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6, 26-36 (1959).

20. Int'l. Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

21. Indeed, it may well be said that support for the periphery doctrine has been given by *Garmon*, because *Garmon* held that the existence or nonexistence of parallel remedies is not as important as the regulation of basically the same subject matter by two different rules of substantive law.

22. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 29 U.S.C. § 164 (1959).

23. Joseph Carey, 44 L.R.R.M. 1060 (1959).

24. Sound Technicians v. Super. Ct., 141 Cal. App. 2d 23, 296 P.2d 395 (1956); MacDonald v. Feldman, 393 Pa. 274, 142 A.2d 1 (1958); Selles v. Local 174, Teamsters Union, 314 P.2d 456 (Wash. 1957).

25. J. Radley Metzger Co. v. Fay, 4 App. Div. 2d 436, 166 N.Y.S.2d 767 (1957). Arnold Bakers, Inc. v. Strauss, 207 Misc. 752, 153 N.Y.S.2d 999 (Sup. Ct. 1956), secondary pressure by union against customers was enjoined.

These cases would appear to represent an overreaching of state jurisdiction under the guise that the conduct regulated is only peripheral. However, it should not be presumed that the states will uniformly attempt to overexpand the peripheral doctrine. A good example of state restraint is the case of *Wagner v. Hartnett*,[26] in which the Delaware court held that the refusal of union membership to a worker was potentially an unfair labor practice and that primary jurisdiction must be afforded to the NLRB.[27]

In addition to the arguably protected or prohibited test another restraint on state power has emanated from *Garmon*,[28] namely that the courts should not take the initiative in defining whether the activity involved was arguably protected or prohibited. Thus, primary jurisdiction in this matter is conferred on the National Labor Relations Board.[29] This conferring of primary jurisdiction on the Board appears to have been based both on considerations of national uniformity and recognition of the Board's administrative expertise in the area. Consequently, before the courts may assume jurisdiction in a labor dispute they would apparently be required to have a determination by the Board as to the nature of the activity involved, or, at the minimum, compelling precedent from previous Board determinations. This causes a problem though, since when the Board declares that an activity is not prohibited it does not necessarily decide that it is not protected, and as a result the courts remain with no compelling precedents as to whether they may exercise jurisdiction. To eliminate this difficulty perhaps the Board will broaden the scope of its holdings in order to make clear that activities which it holds not prohibited are also not protected. A more practical as well as probable solution would be for the Board to issue advisory opinions as it will do now in cases involving its jurisdictional standards for section 701(a) purposes.[30] Again, when there is compelling Board precedent, it appears that a prior determination on the facts may not be necessary. A recent Minnesota case, which involved a strike in violation of a no-strike clause containing no provision for reopening or renegotiation during its term seems to illustrate this.[31] The court made the initial characterization and held that the conduct was not protected nor prohibited by the federal act and was thus enjoinable under state law. However, even though the Board's primary jurisdiction was seemingly ignored by the state court, both the United States Supreme Court[32] and the Board[33] had previously

26. 153 A.2d 584 (Del. Super. 1959).
27. See also Pa. Labor Relations Bd. v. Napoli, 395 Pa. 301, 150 A.2d 546 (1958).
28. 359 U.S. 236 (1959).
29. *Ibid.*
30. See text accompanying note 39 *infra*.
31. McLean Distrib. Co. v. Local 993, Brewery Union, 94 N.W.2d 514 (Minn. 1959), *cert. denied*, 360 U.S. 917 (1959).
32. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).
33. W.L. Mead, Inc., 113 N.L.R.B. 1040 (1955); United Elastic Corp., 84 N.L.R.B. 768 (1949). *But see* Local 9735, UMW, 117 N.L.R.B. 1072 (1957).

declared that a strike in violation of a no-strike clause is not protected by federal legislation. Therefore, it may be that only in doubtful cases need the Board's primary jurisdiction be called into play.

II.

FEDERAL AND STATE POWER OVER ACTIVITIES WITHIN THE SCOPE OF SECTION 701(a).

In order to rectify the injustices created by the "no-man's land" doctrine, Congress enacted section 701(a) of the Landrum-Griffin Act.[34] This section gives the states jurisdiction over labor activity when such activity falls below the jurisdictional standards set by the NLRB. The states are empowered to assert jurisdiction even though the activity affects interstate commerce and even though it is an activity arguably protected or prohibited by federal labor legislation. The NLRB is also authorized to decline jurisdiction over any labor disputes involving any class or category of employees where the effect on commerce is not substantial.[35] However, this section marks no retreat by the NLRB in the exercise of its jurisdiction, because although the jurisdictional standards of the NLRB may be lowered, they cannot be raised above those in effect on August 1, 1959.[36] In addition, with increased manpower and greater delegation to the regional offices of the NLRB permitted, it is quite probable that the standards will be again lowered in the near future.[37] Although section 701(a) has put an end to the inequities of the "no-man's land" doctrine it has raised a great many problems of scope and interpretation. For purposes of clarity these will be grouped and discussed as (A) jurisdictional problems, and (B) the problem of whether federal or state substantive labor law should be applied by the courts and agencies empowered under section 701(a) to assert jurisdiction.

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34. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 29 U.S.C. § 164 (1959). The pertinent provisions of which are: "Section 14 of the National Labor Relations Act . . . is amended by adding . . . the following new subsection: '(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 assert jurisdiction over any labor dispute involving any class of employees, 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 Act 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 . . . to assert jurisdiction.' "

35. Thus, in effect, overruling Hotel Employee's Local 255 v. Leedom, 358 U.S. 99 (1958).

36. In this connection it should be noted that NLRB standards on August 1, 1959, embraced the widest jurisdiction in its history. NLRB Press Release No. 576, October 2, 1959.

37. See McCoid, *Notes on a "G String": A Study of the "No Man's Land" of Labor Law,* 44 MINN. L. REV. 205, 247-49 (1959).

A.

Jurisdictional Problems.

The first problem is created by the requirement of primary jurisdiction enunciated in *Garmon*,[38] that is, the NLRB shall have primary jurisdiction to determine whether a particular dispute is within its jurisdiction. It appears that this doctrine would also be applicable to activities under section 701(a) since there must be an initial characterization as to whether the dispute in question is below the minimal standards of the NLRB. However, in response to this problem, the NLRB has announced that in the future it will issue advisory opinions concerning the application of its jurisdictional standards on petition of the parties, state courts, or state agencies.[39] This pronouncement substantially lessens the practical importance of the question; on whom does the burden of proving jurisdiction or lack thereof rest? Of more importance is the fact that this method of proceeding, first to the NLRB for an advisory opinion and then to the state court or agency, may result in a delay which could prove exceedingly costly to the aggrieved party in a labor dispute. The solution seemingly lies in requiring an advisory opinion as to jurisdiction from the NLRB only in the most doubtful of cases, especially since there jurisdictional standards are generally a mere matter of computation.

Another difficulty raised by the act may be termed the problem of fluctuating standards, that is, if the NLRB lowers its jurisdictional standards to embrace more businesses will it apply federal law retroactively? A retroactive application could have the effect of creating an unfair labor practice out of conduct which was proper under state law at the time of commission.[40] The NLRB has applied federal law retroactively in the past;[41] however, this can be attributed to an attempt to ameliorate injustices resulting from the former "no-man's land" doctrine.[42] Now, because of the express power given to the states by section 701(a), it seems that a retroactive application of federal law will be made only when the failure to do so would cause a result completely at odds with our national labor policies.[43]

B.

Application of Federal or State Law.

Section 701(a) does not specify which substantive law, federal or state, must be applied by the newly empowered state courts and agencies. The

38. 359 U.S. 236 (1959).
39. NLRB Rules and Regs. 8H, 29 C.F.R. §§ 102. 98-104 (1959).
40. Siemons Mailing Serv., 122 N.L.R.B. 13 (1959).
41. *Ibid.*
42. See Tom Thumb Stores, Inc., 95 N.L.R.B. 57 (1951); Screw Mach. Prods. Co., 94 N.L.R.B. 1609 (1951).
43. See Woll & Antoine, *Who goes There? Recent Moves Along the Federal-State Front in Labor Law*, 11 SYRACUSE L. REV. 1, 10 (1959).

legislative history, while enlightening, is far from conclusive, and proponents of each side find support for their separate interpretations from it.[44]

As early as 1958, what may be called the Ives Bill contained a provision which would have required the NLRB to assert all the potential which it had.[45] Again, in 1959, more bills were before Congress concerning the problem. In the Senate, the Kennedy-Erwin Bill would have required the NLRB to assert all of its potential jurisdiction, but granted it power to cede jurisdiction to state agencies when the state law would not be inconsistent with federal law.[46] What finally emerged from the Senate was a bill which would have allowed state agencies, other than courts, to assert jurisdiction in instances where the NLRB declined to do so, but the state agency would have been required to apply federal law.[47] Considerable change in the Senate bill was made in the House of Representatives, one of the chief objections to it being that it only allowed cession to state agencies and not courts, where only a minority of the states had agencies in any way similar to the NLRB.[48] Basically, in the House there were two solutions to the "no-man's land" problem put forth. One was that of Representatives Shelly and Elliot. Their bills would have required the NLRB to assert all of its potential jurisdiction.[49] The other solution was that proposed by Representatives Landrum and Griffin, which was the solution finally accepted.[50] This is fundamentally now section 701(a), except that in conference the proviso was added that the NLRB may not allow its jurisdiction to decline further than its most recent standards.[51]

At first glance, the legislative history would appear to authorize the states to apply their own substantive law, however, this interpretation does not necessarily follow. The debates in the House over the relative merits of the various bills dealt mostly with the issue whether the NLRB should be required to exercise the full measure of its jurisdictional power, or whether the state courts and agencies should have jurisdiction over areas in which the NLRB would be allowed to decline jurisdiction.[52] It would seem that many who finally

44. In this regard see *The Labor-Management Reporting and Disclosure Act of 1959: Interpretations and Implications*, 48 GEO. L.J. 1 (1959).
45. S. 3974, 85 Cong., 2d Sess. § 602(a) (1958).
46. S. 505, 86th Cong., 1st Sess. § 601(a) (1959).
47. S. 1555, 86th Cong., 1st Sess. § 601 (1959).
48. COLO. REV. STAT. ANN. §§ 80-5-1 to 80-5-22 (1954); CONN. GEN. STAT. §§ 31-101 to 31-111 (1960); HAWAII REV. LAWS § 90 (1955); KAN. GEN. STAT. ANN. §§ 44-801 to 44-815 (1949); MASS. GEN. LAWS c. 150A (1957); MINN. STAT. §§ 179.01-179.17 (1957); N.Y. LAB. LAW § 700-16; PA. STAT. ANN. tit. 43, §§ 211.1-211.39 (1952); R.I. GEN. LAWS ANN. c. 28, § 7 (1956); WISC. STAT. §§ 111.01-111.19 (1957).
49. H.R. 8342, 86th Cong., 1st Sess. 701 (1959).
50. H.R. 8400, 8401, 86th Cong., 1st Sess. 701 (1959).
51. H.R. REP. No. 1147, 86th Cong., 1st Sess. (1959).
52. The final House Report is silent on this matter. See H.R. REP. No. 1147, 86th Cong., 1st Sess. (1959).

voted for the Landrum-Griffin Bill assumed that although the states could now assert jurisdiction they must apply federal law, especially since throughout the debates over the various bills the need for national uniformity was recognized by all sides.[53] Thus, it appears, the final determination is to be made by the United States Supreme Court, with its choice again depending on a balancing of national uniformity and local control.[54]

One of these considerations is whether to afford federal protection to employers and employees in small businesses. Many states have progressed little beyond the conspiracy theory in regard to labor unions.[55] Comprehensive regulation of the collective bargaining process in many states is all but absent, especially in regard to the supervision of representative elections and the determination of appropriate bargaining units.[56] There are other states, though, in which the employer in a small business would receive substantially less protection under state law than he would receive under federal law.[57]

That there are conflicting advantages and disadvantages to both labor and management from the application or non-application of state law under section 701(a) illustrates what is the most salient feature of the issue. That is, local autonomy will favor unions in some states, especially where unions are already well entrenched, and conversely, will favor management in other states where there is less union strength. To generalize that the application or non-application of state law would favor either labor or management is only to cloud the issue unless the analysis is made on a state to state basis. Thus, national uniformity seems much more attractive than local autonomy, an autonomy which would result in the least protection to the interest most in need of protection. Moreover, merely because one activity is deemed quantitatively small is not sufficient reason for discrediting its effect in the aggregate. "Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far reaching in its harm to commerce."[58]

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53. See Papps, *Section 701 and the State Courts: What Law to be Applied,* 48 GEO. L.J. 316 (1959).

54. See Wellington, Labor and the Federal System, 26 U. CHI. L. REV. 542 (1959).

55. See Blumrosen, *Common Law Limitations on Employer Anti-Union Conduct: Protection of Employee Interest in Union Activity by Tort Law,* 54 NW. U.L. REV. 1 (1959).

56. See note 48 *supra.*

57. *E.g.,* closed shop agreements are permitted in some states. CONN. GEN. STAT. § 31-105 (1960); N.L. LAB. LAW § 704 (5); PA. STAT. ANN. tit. 43, § 211.6 (1)(c) (1953).).

58. Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944).

III.

CONCLUSION.

At a time when increasing erosion of state power has even given old friends of federalism cause for alarm, it is difficult to argue for a greater extension of federal power. However, in the area of labor relations extended federal power seems only appropriate. The competence of the states in the collective bargaining process has lagged tremendously behind that of the United States Government. The choice between applying federal law or state law in the newly empowered state courts and agencies is a choice between a highly sophisticated body of federal labor law and, in many states, a few antiquated concepts. Confronted with an ambiguous legislative history, the United States Supreme Court, in the light of its past policy of national uniformity, as evidenced by the *Garmon* case,[59] has an excellent opportunity to further extend that policy in its interpretation of section 701(a).[60]

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59. 359 U.S. 236 (1959).
60. For an excellent discussion of these and problems of labor and national policy generally, see COX, LAW AND THE NATIONAL LABOR POLICY (1960).