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Labor Law--Jurisdiction over Interstate Union Picketing

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5.) The employer is liable for the negligence of the physician under the doctrine of respondeat superior.[11]

Although on the surface the preceding five views seem to be vastly divergent, they have a common denominator, in that they attempt to place the responsibility of the negligent act upon the employer only where the physician is acting as a subordinate. The court in the instant case wisely chose to establish the defendant's liability upon the superior-subordinate relationship which existed.

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LABOR LAW — JURISDICTION OVER INTERSTATE UNION PICKETING

Defendant was the certified NLRB bargaining union for machinists employed by plaintiff, an interstate brewery. Plaintiff refused to recognize it as the exclusive representative of the machinists because a second union which represented other employees would not bargain unless it could represent the machinists as well. Defendant went on strike and picketed plaintiff.

Plaintiff charged before the NLRB that defendant's strike constituted a particular unfair labor practice prohibited by the Taft-Hartley Act.[1] The company also sought an injunction in the state court of Missouri on the grounds that the union was 1) committing several Taft-Hartley unfair labor practices[2] and 2) violating state policy against conspiracies in restraint of trade. The state court sustained this latter ground and granted the injunction. Thereafter the NLRB dismissed plaintiff's complaint, holding that defendant's conduct did not amount to the assigned unfair labor practice. The state injunction was then affirmed by the Missouri Supreme Court.[3]

On certiorari, the United States Supreme Court unanimously dissolved the injunction.[4] This exercise of jurisdiction by the Missouri courts encroached upon the NLRB's supreme and exclusive jurisdiction as established by Congress.

Congress may clearly occupy a field within its power to regulate, so that state regulation, within the field, is necessarily excluded.[5] State regulation may likewise be wholly precluded when Congress regulates a part of a field and manifests an intention thereby that unregulated areas of the field are to remain free from inteference.[6] Exclusion of state regulation entirely from interstate labor relations is impracticable because of the es-

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[11] Knox v. Ingalls Shipbuilding, 158 F.2d 973 (5th Cir. 1947). Phillips v. St. Louis and S.F. Ry., 211 Mo. 419, 111 S.W. 109 (1908); Tompkins v. Pacific Mutual Life Ins. Co., 53 W.Va. 479, 44 S.E. 439 (1903).

sentially local as well as national problems involved.[7] The Court, therefore, has cautiously considered state jurisdiction to have been displaced by the LMRA only to the extent that state remedies have been replaced by those of the NLRB.[8]

Defining the boundaries of the Board's jurisdiction—and thus fixing the permissible area of state regulation—has presented a difficult problem to the Court because of the dual nature of the Board's power. Congress not only empowered this agency to enjoin certain enumerated unfair labor practices,[9] but also to protect certain undefined union "concerted activities."[10] Mr. Justice Frankfurter, in writing for the Court in the instant case, recognizes the complexity of the problem—and its solution. The boundary is "not susceptible of delimitation by fixed metes and bounds." Rather, it must be set case by case. The present decision is a milestone in this survey.

The present interpretation of the Board's jurisdiction is that actions based on conduct which might reasonably constitute either an unfair labor practice remediable by the NLRB or a union concerted activity within the protection of the Board, or both, are within the supreme and exclusive jurisdiction of that agency. Actions clearly outside this jurisdiction, such as suits for damages rising out of an unfair labor practice,[11] are properly within the state's power to adjudicate. But apparently the Court will not anticipate whether the Board has jurisdiction to grant relief in doubtful cases, as it did in holding that intermittent work stoppages could not be

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[1] Labor Management Relations Act § 8(b) (4) (D), 61 Stat. 140, 29 USC § 158 (b) (4) (D) (1947). This provision makes it unlawful for a labor organization to strike for the purpose of forcing an employer to assign work to employees who are members of the organization.

[2] *Id.* § 8 (b) (4) (A) and (B) and § 303 (a) (1), (2) and (4). These sections forbid union coercion upon the employer to recognize an uncertified union as his employees' bargaining agent and secondary boycotts. It is significant that defendant's conduct does not necessarily constitute either of these unfair labor pracitces.

[3] Anheuser-Busch Inc. v. Weber, 265 S.W.2d 325 (Mo. Sup. Ct. 1954).

[4] —— U.S. ——, 75 Sup. Ct. 480 (1955).

[5] New York Central R.R. Co. v. Winfield, 244 U.S. 147, 37 Sup. Ct. 546 (1917).

[6] Houston v. Moore, 5 Wheat. 1 (U.S. 1820).

[7] See Archibald Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297 (1954).

[8] United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 Sup. Ct. 833 (1954); International Union v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 Sup. Ct. 516 (1949); Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 69 Sup. Ct. 584 (1949).

[9] Taft-Hartley Act § 8, 61 Stat. 640, 29 USC § 158 (1947).

[10] *Id.* at § 7.

[11] United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 Sup. Ct. 833 (1954).

either an unfair labor practice or a protected concerted activity in the *Briggs-Stratton* case.[12] The case is discussed, however, without criticism.[13]

The present interpretation clarifies the Court's position in *Garner v. Teamsters, etc. Union*[14] that Congress has occupied the field of interstate labor relations so that state regulation within the field is necessarily excluded.[15] The incompleteness of this rule was pointed up in other portions of the opinion recognizing that the state police power is a complement to federal regulation, rather than an obstruction, when local interest are dominant, as in cases of massed or violent picketing.[16] Further, the rationale of the *Garner* decision is confusingly narrow to sustain such a rule:

> This is not an instance of injurious conduct which the NLRB is without express power to prevent and which therefore either is "governable by the state or it is entirely ungoverned."[17]

Nor can this rationale be reconciled with the Board's duty to protect certain undefined union concerted activities.

The present rule resolves these ambiguities. A complainant must first take his case to the NLRB if it might come within the purview of the Taft-Hartley Act. An exception is made in cases of local emergency which only local procedures can effectively remedy.[18] But federal jurisdiction cannot be precluded in doubtful cases by either a state court's finding that it is not involved, nor a state court's granting of relief based on state laws or policy independent of labor relations.

This rule is sound adjective law.[19] It provides certainty of the proper

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[12] International Union v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 Sup. Ct. 516 (1949); *Supra* note 8.

[13] —— U.S. at ——, 75 Sup. Ct. at 485.

[14] 346 U.S. 485, 74 Sup. Ct. 161 (1953).

[15] "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free from other methods and sources of restraint. For the policy of the national LMRA is not to condemn all picketing, but only that ascertained by its prescribed process to fall within its prohibitions. Ohterwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the Federal Act prohibits." *Id.* at 499.

[16] Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 Sup. Ct. 820 (1942).

[17] 346 U.S. at 488. The basic ambiguity in the *Garner* case is that the disposition is grounded on the interpretation that state courts have jurisdiction to remedy injurious conduct only if the Board has no such jurisdiction, while the dictum is to the effect that states have been completely deprived of jurisdiction over interstate labor relations. See note 15, *supra.*

[18] Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 Sup. Ct. 820 (1942); *supra,* note 16.

[19] United States v. United Mineworkers of America, 330 U.S. 258, 67 Sup. Ct. 677 (1947).