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FEDERAL SUPREMACY IN LABOR MANAGEMENT RELATIONS

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IT WOULD seem that a discussion at this time on the subject of federal supremacy or pre-emption in the elusive field of labor management relations would be similar to a postlude to the last satisfying crescendo of a delightful symphony. Since the Supreme Court of the United States decided on March 25, 1957 *Guss v. Utah Labor Relations Bd.*,[1] *Amalgamated Meat Cutters, AFL v. Fairlawn Meats, Inc.*,[2] and *San Diego Bldg. Trades Council v. Garmon*[3] much has been said and written regarding these cases and their implications in the field of labor relations.[4] In October of 1957, Senator Ives, who spoke before the Association of State Labor Relation Agencies, stated: "[L]egislative approaches towards the elimination of the jurisdictional 'no-man's land' created by the Supreme Court decisions must receive Congressional consideration next year."[5] On January 23, 1958, the President of the United States sent a labor message to Congress,[6] in which an amendment was proposed, authorizing the states to act with respect to matters over which the National Labor Relations Board declined to assert jurisdiction, and to eliminate the jurisdictional vacuum referred to in the three recent Supreme Court decisions. On the same day that the President's message was sent to Congress omnibus bills embodying the President's recommendation were introduced before Congress.[7] Since the introduction of these bills, and to the date of this writing, much has been officially said but there has been no legislation to remedy the situation which the three Supreme Court cases pointed up. At the same time, courts generally have manifested a reluctance to follow the pathway hewn by the Supreme

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

2. 353 U.S. 20 (1957).

3. 353 U.S. 26 (1957).

4. See generally 45 Calif. L. Rev. 216 (1957); 26 Fordham L. Rev. 349 (1957); 56 Mich. L. Rev. 133 (1957); 43 Va. L. Rev. 133 (1957).

5. Daily Labor Rep. No. 203 (Oct. 17, 1957).

6. 104 Cong. Rec. 645 (daily ed. Jan. 23, 1958).

7. S. 3097, S. 3098, S. 3099, 85th Cong., 2d Sess. (1958). Since the writing of this article, in the Judiciary Committee Report, H.R. Rep. No. 1878, 85th Cong., 2d Sess. (1958), the majority of the Committee opined that its bill would "preclude the courts from presuming a legislative intent to preempt the field," and that its bill as reported favorably to the House (H.R. 3) would not allow such construction unless the Act contained express provision to that effect, or unless there was a direct and positive conflict between such act and the state so that the two could not be reconciled or consistently stand together.

Court; illustrative of court reaction are the cases of *Johnson v. Grand Rapids Bldg. & Constr. Trades Council, AFL-CIO*[8] and *Elsis v. Evans*.[9] The subject of federal pre-emption had also received the attention of writers in the field prior to the *Guss* case.[10]

Manifestly, the question could logically be put, "What more can be said on the subject that has not already been said?" The Supreme Court cases have been ably analyzed, interpretations have been erudite and criticism has been offered. It is submitted, however, that there is an area of federal supremacy in which a reasonably fresh approach is possible. This approach would be couched in some of the fundamental concepts for the student and the practical and busy general practitioner who must make his living in the profession midst a kaleidoscopic flow of cases with ever-changing patterns in various fields of law. The approach would be concerned as little as possible with the current and intricate controversies which have been kindled into flame by the recent Supreme Court decisions. Little emphasis will be placed on the eternal argument of federal supremacy, as that supremacy is opposed to the area of states' rights. With these subjects as backgrounds, this article will pragmatically approach the subject of federal pre-emption, showing the interconnection of occurrences and decisions. There are those who might suggest that the panoramic view which would be thus produced would suffer for want of intricate detail. However that may be, the fact remains that highly controversial legal issues which are infused with intricacies *need the benefit of a main-line approach* so that the student and lawyer may acquaint themselves with the basic principles of the issues. Once this is done, there is time enough for dialectics and the details of the issues.

Background of Federal Supremacy

The title, "Federal Supremacy in Labor Management Relations," is designed to imply that if relief is sought in a labor dispute,[11] and that

8. 40 L.R.R.M. 2616 (Cir. Ct. Mich. Sept. 7, 1957). "Congress has no power to deny due process . . . in exercising its power in commerce." Id. at 2617.

9. 41 L.R.R.M. 2600 (2d Dist. Ct. App. Cal. Feb. 4, 1958). The court held that the NLRB had exclusive jurisdiction but declared there is "no moral or legal reason why, in the event federal labor boards decline to accept jurisdiction in a given case, the state courts should not be permitted to enforce a legislatively declared public policy, where that policy is consistent with the federal policy in the field of labor relations." Id. at 2607.

10. See Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Lab. L.J. 114, 116 (1952); NLRB Jurisdictional Standards and State Jurisdiction, 50 Nw. U.L. Rev. 190 (1955); Smith, The Taft Hartley Act and State Jurisdiction Over Labor Relations, 46 Mich. L. Rev. 593 (1948); Cooper, Extent of State Jurisdiction Due to Abnegation by NLRB, 8 Syracuse L. Rev. 58 (1956); Tobriener & Grodin, Taft-Hartley Pre-emption in the Area of NLRB Inaction, 44 Calif. L. Rev. 663 (1956).

11. The term "labor dispute" is defined in 61 Stat. 138 (1947), 29 U.S.C. § 152(9) (1952).

dispute is in commerce, the lawyer will inevitably find his pathway leading to the Labor Management Relations Act of 1947.[12] Before going into jurisdiction as provided in the act itself with the current interpretative decisions of the Supreme Court, the background will be discussed very briefly.

The doctrine of federal pre-emption, of course, stems from the Constitution of the United States.[13] The issue of supremacy under the constitutional provisions has long occupied the courts in an ever-changing and developing economy in America. Changes and developments are still with us, as witness the controversy which is the subject of this article. And, those changes and developments will still be with us within the foreseeable future as the courts and Congress attempt to keep abreast of our restless economy.

The industrial revolution in America actually marked the beginning of an interdependent economy and the attendant inability of the several states to cope with the mounting social and economic problems which gradually spread beyond state lines into regional and national areas. Hence, the states, through their laws, became increasingly impotent to contain or control these problems. It was because of the failure of the states successfully to control an expanding economy through local laws that the notion of federal supremacy took hold on the theory that only the federal government could deal with issues that were gradually affecting the nation.

As a direct result of the growth of the economy into a restless, sprawling giant, the Interstate Commerce Act[14] began its laborious career as a law in 1887. Under this law, the Interstate Commerce Commission was the first permanent administrative board to which was delegated broad and multiple powers, quasi-judicial and legislative. The establishment of this board was, of course, an innovation, but it presaged the inexorable surge of pre-emption in America.

Liberalism took on a new meaning under Theodore Roosevelt and constitutional issues became increasingly important, especially in the field of interstate commerce and taxation. Conservative sources took the position that the Constitution of the United States was an inflexible

12. 61 Stat. 136 (1947), 29 U.S.C. § 151 (1952).

13. U.S. Const. art. I, § 8. "The Congress shall have Power . . . [3] to regulate Commerce with foreign Nations, and among the several States. . . . [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."; art. VI, [2] (The so-called supremacy clause), "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

14. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

document and could not be changed except by amendment, and most certainly not by judicial interpretation. The Supreme Court through change of personnel gradually became more liberal and less "property minded" in constitutional interpretation following the turn of the century. Federal pre-emption reached a peak during the era of Franklin Delano Roosevelt and the New Deal. During this period the National Industrial Recovery Act was declared unconstitutional, but from its unconstitutional ashes emerged the nation's first full-fledged Labor Relations Act.[15] Known as the Wagner Act, it set up the National Labor Relations Board (NLRB), a board with quasi-judicial powers to administer the law. The Labor Management Relations Act of 1947 became law and replaced its narrower predecessor, the Wagner Act. This act, its short title being the Taft Hartley Act, is one of the most comprehensive pieces of regulatory legislation ever to control a given economic field. It goes without saying that in this era, regulatory legislation, both economic and social, has been declared constitutional. Great strides have been made in the field of federal pre-emption via liberal judicial reviews of the commerce clause of the United States Constitution.

The Current Status of Federal Supremacy

The NLRB has been granted plenary jurisdiction over labor relations in matters "affecting commerce." Section 10(a) of the amended act is the so-called "cession clause"[16] under which the NLRB may cede jurisdiction to a state court in any case where the Board declines to exercise its jurisdiction. To the date of this writing we know of no cession agreement granted by the NLRB under section 10(a) to the agency of any state. Under the power granted the NLRB which is buttressed by constitutional provisions regarding interstate commerce, all employers whose operations "affect" interstate commerce are covered by the National Labor Relations Act (NLRA). The power to act by the NLRB is present, and in light of recent holdings it is not now imaginative to conclude that the power would exclude the intervention of any state or its agency in the area of commerce within the field of labor management relations. Hence, if a labor dispute affects commerce nothing else is really

15. 49 Stat. 449 (1935), 29 U.S.C. § 151 (1952).

16. 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1952). The proviso to section 10(a) reads as follows: *"Provided,* That 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 (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

needed to give the NLRB jurisdiction. However, the power to act in matters "affecting commerce" is one thing, and the exercising of that power is another. The NLRB has never exercised its full power. Moreover, the recent Supreme Court decisions point up with obvious clarity that neither congressional nor constitutional intent shall be overridden by the states, their agencies or courts, even though the NLRB has not accepted or has declined to accept jurisdiction. Indeed, in an early case the Supreme Court took the view that in light of the congressional intent, the NLRB's power would stretch to the entire circumference of the commerce clause.[17]

The reason given by the Board for the failure to exercise its full authority was, in the main, budgetary. From the Wagner Act in 1935 until 1950 a case by case approach to jurisdiction was made by the Board. A favorite expression, adopted to decline jurisdiction, was "we decline jurisdiction because to accept would not effectuate the purposes of the Act." This case by case method was, of course, qualified by the frequent application of the legal maxim *de minimis non curat lex.* In other words, the Board also acknowledged jurisdictional declination on the theory that the law does not bother with trifles.

In the year 1950 the Board, for the first time, set out specific standards by which jurisdiction would be accepted.[18] In the adoption of these standards, the Board followed the dollar-volume approach to jurisdiction. However, an analysis of these standards will reveal that the Board neither lowered nor raised its sights; it merely substituted the slide rule, dollar-volume formula for the case by case approach.

In the year 1954, marked changes were made by the Board in its yardstick standards.[19] By virtue of a number of decisions handed down by the Board subsequent to the adoption of these 1954 standards, jurisdiction was declined in operations which had been theretofore accepted under earlier standards. This was accomplished by the relatively simple expedient of the revision upward of the former dollar-volume standards, and, in at least six other strategic areas a different revenue formula was exerted where theretofore full and complete jurisdiction was exercised.[20] Thus, in its jurisdiction, the NLRB both restricted and withdrew its authority from important areas of our economy, leaving "blind spots" upon the horizon. These blind spots eventually became a desert which has been universally referred to as "no man's land." The unilateral adoption by the NLRB of jurisdic-

17. NLRB v. Fainblatt, 306 U.S. 601, 606-07 (1939). The Supreme Court in the Guss case reaffirmed the Fainblatt ruling.

18. 1 CCH Lab. L. Rep. (4th ed.) ¶ 1610 (1950).

19. 1 CCH Lab. L. Rep. (4th ed.) ¶ 1610 (1954).

20. See note 19 supra. But see note 49 infra.

tional standards or yardsticks which fall short of the reach of the authority granted the Board by Congress is the basis for the present legal dilemma.

This declination of jurisdiction poses the question, what happens to these barren areas, that is to say, these areas wherein the NLRB refuses jurisdiction and yet makes no cession agreements under section 10(a) of the act? Do the states, or their agencies or courts have the right to assume jursdiction? It remained for the Supreme Court to answer this question which it did with unquestioned clarity in the *Guss* case. A discussion of the holding of this case should be prefaced with a review of important and guidepost cases which cut the pathway for *Guss* and its companion cases and which presaged the current legal status of federal pre-emption.

The Current Developing Law

The mainline cases regarding the superiority of the federal over state law[21] paved the way for the now famous case of *Garner v. Teamsters Union, AFL,*[22] which started the current legal ball rolling in federal versus state jurisdiction in the labor management relations field. The facts in that case were:

> Petitioners were engaged in the trucking business and had twenty-four employees, four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union. Respondents, however, placed rotating pickets, two at a time, at petitioners' loading platform. None were employees of petitioners. . . . Picketing was orderly and peaceful, but drivers for other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as 95%. The courts below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union.[23]

The Supreme Court held that the petitioners' grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices. State remedies were precluded. The Pennsylvania Supreme Court did not have jurisdiction to issue an injunction restraining peaceful picketing by the union in an effort to coerce the employer into compelling employees to join the union. It should be noted that since

21. Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Plankinton Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950); International Union of United Automobile Workers, CIO v. O'Brien, 339 U.S. 454 (1950).

22. 346 U.S. 485 (1953).

23. Id. at 486-87.

there was no congressional intent indicating that federal and state jurisdiction was concurrent, the Supreme Court upheld the doctrine of pre-emption. It should further be noted that in the *Garner* case there was a Pennsylvania Labor Relations Act involved.[24]

There is no doubt that the *Garner* case became a milestone in the laborious ascent of the doctrine of federal pre-emption, and a formidable number of the bench and bar so considered it. Many of the profession, however, took the position that the holding in the case would not have been so sweepingly in favor of pre-emption had a state statute totally unrelated to labor been involved. In other words, it was thought that if such an unrelated state statute had been violated, the Supreme Court would not have been so willing to apply the doctrine of federal pre-emption over state law. These legal daydreams were dissipated in a bilateral fashion when *Weber v. Anheuser-Busch, Inc.*[25] was decided by the Supreme Court in 1955.

The *Weber* case goes much further than *Garner* in its application of the pre-emption doctrine. It involved a strike and picketing regarding a contract clause in a collective bargaining agreement. This clause precipitated a jurisdictional dispute between the Carpenters' Union and the International Association of Machinists. The Missouri Supreme Court held that the IAM's conduct constituted a violation of the state's restraint of trade statute, and because of this the action was enjoinable. The United States Supreme Court considered the principal issue in the case to be "whether the state court had jurisdiction to enjoin the IAM's conduct or whether its jurisdiction had been pre-empted by the authority vested in the National Labor Relations Board. . . ."[26] The Court held:

> [W]here the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.[27]

In two important approaches to the issues in *Weber* the Supreme Court of the United States broadened the doctrine of pre-emption. First, the Court said that if the activity complained of is not an unfair labor practice within the meaning of a certain section of the act[28] then the state would still be precluded from exerting jurisdiction over the issues because the acts complained of could very well be concerted activity

24. Pa. Stat. Ann. tit. 43, § 211.6 (1952).
25. 348 U.S. 468 (1955).
26. Id. at 473.
27. Id. at 481.
28. Section 8 of the Taft-Hartley Act. 61 Stat. 140 (1947), 29 U.S.C. § 158 (1952).

and protected by section 7 of the act.[29] The distinction between the unfair labor practice sections and section 7 of the act should not be minimized. Each covers different phases of activity. The unfair labor practice sections have to do with *violations* whereas section 7 grants *immunity* to concerted and other legal activities, which activities the unfair labor practice sections of the act protect. When this distinction is made it becomes clear that the reach of the pre-emption doctrine was extended beyond the holding in *Garner v. Teamsters Union, AFL.* This extension covers all protected activity involving a labor dispute in commerce.[30] In other words, *Weber* is authority for the proposition that it is not necessary that the acts complained of be violations as a condition precedent to the exclusion of state authority.

Now the second approach by the Supreme Court in the *Weber* case also reaches beyond the holding in *Garner.* In the latter case a state labor statute was involved. In the *Weber* case the state anti-trust law of Missouri was alleged to have been involved, and the alleged violation of this state statute was enjoined by the Missouri court as previously stated. This statute was totally foreign to the field of labor management relations. The holding of the Supreme Court in *Weber v. Anheuser-Busch, Inc.* regarding violation of the state anti-trust statute simply means this: if there is a labor dispute and that dispute is in commerce, and if the dispute might involve concerted activity as protected by section 7 of the act, the states are precluded from assuming jurisdiction over the issues, even though the acts complained of are in violation of a state statute which is totally unrelated to labor management relations.

The two cases discussed substantially provided a rather complete pattern in which the ascendency of federal supremacy over state authority in commerce in the matter of labor disputes became obvious. There was, however, one question which remained unanswered. What would be the situation in the restricted and abandoned areas in which the NLRB had refused to act or declined jurisdiction, even though the Board had juris-

29. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1952) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

30. 61 Stat. 138 (1947), 29 U.S.C. § 152(9) (1952) defines a "labor dispute" as follows: "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

diction? Would the several states have the authority to assume jurisdiction in these areas? The answer to this question would seem clear in the cold light of the prevailing holdings in *Garner* and *Weber*. It would appear from these two decisions that the Supreme Court was moving counterclockwise to the Board. By this is meant the Court was favoring federal control and pre-emption while the Board was shying away from it. Thus, the decisions in *Garner* and *Weber* lead directly to the recent Supreme Court holdings.

THE RECENT HOLDINGS OF THE UNITED STATES SUPREME COURT

Despite the fact that the recent Supreme Court cases, particularly *Guss v. Utah Labor Relations Bd.*, have been analyzed, interpreted and explained by able writers, it would be useful to restate the real significance of the *Guss* case. The Supreme Court at bottom recognized the power granted to the NRLB, and since the Board has seen fit not to exercise this power to its fullest extent, no other tribunal or agency could or should assume jurisdiction. As a direct result of this significant holding at the date of this writing, the now famous "no man's land" principle stands as the law. The decision in that case brought forth a torrent of words, both oral and written. Some were dialectic and erudite, and others were just plain criticism. We cannot concur with the critics of *Guss*. Our reason is that we believe in view of previous decisions by the Supreme Court the result in *Guss* was unsavory but inevitable. If the NLRB had jurisdiction, as it did, and it did not exercise it to the fullest extent, as it did not, the Court in *Guss* could say but one thing, "Here is a 'no man's land.' All we can do is point this out. Some other source must act."

We shall briefly consider *Guss* and the companion cases.

Guss v. Utah Labor Relations Bd.[31]

Guss was a manufacturer of photographic equipment. The United Steelworkers of America were certified as the bargaining representative of Guss' employees. The union filed with the Board charges that Guss had engaged in unfair labor practices. Due to the revised jurisdictional standards, the Board declined jurisdiction. The union filed substantially the same charges with the Utah Labor Relations Board, pursuant to the Utah Labor Relations Act. The state Board found it had jurisdiction, and concluded on the merits that Guss had engaged in unfair labor practices. The case went before the United States Supreme Court which reversed, holding that a state agency cannot exert its jurisdiction in an area wherein the NLRB has declined to act, even though it has the

31. 353 U.S. 1 (1957).

authority to do so; the only way a state agency could act would be by the activation of the cession procedures set forth in section 10(a) of the act. In other words, unless the NLRB actually ceded its authority, and even though the Board declined jurisdiction, the doctrine of federal supremacy in the field of labor management relations was paramount. This, in a nutshell, is the "no man's land" holding.

The Supreme Court specifically recognized the vacuum plus the fact that potential litigants would have no tribunal to which they could go or appeal.

Amalgamated Meat Cutters, AFL v. Fairlawn Meats, Inc.[32]

Here, a retail meat market in Ohio was picketed for organizational purposes. Although the business of the market was local in character, wholesale purchases were made through interstate channels of commerce. The act of picketing was the basis for the complaint, and an action for an injunction was brought in the state courts. The state courts assumed jurisdiction of the issues and enjoined the picketing. The Supreme Court granted certiorari. The high points of the holding are important.

The Taft Hartley Act contains a section which defines the expression "affecting commerce."[33] The Court took the position that this section was controlling and made it clear that if the issues were under the "affecting commerce" definition, nothing else, not even the jurisdictional yardsticks, is needed to give the NLRB jurisdiction. Hence, the interstate purchases by the local market were considered as "affecting commerce."

Unlike Utah in the *Guss* case, Ohio does not have a state labor relations act. This situation becomes important because the Supreme Court held in *Fairlawn* that the proviso of section 10(a) of the act operated to exclude not only state labor boards from disputes within the national Board's jurisdiction, but also state courts from so doing. In other words, the jurisdictional standards of the NLRB, which both restrict and abandon jurisdiction, do not remove the Board's authority to act, and, since the authority is there, even though not exercised, *Fairlawn* is authority for the proposition that state courts are placed in the same category as state agencies as far as the provisions of section 10(a) of the act are concerned.

32. 353 U.S. 20 (1957).

33. "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 61 Stat. 138 (1947), 29 U.S.C. § 152(7) (1952).

San Diego Bldg. Trades Council v. Garmon[34]

This case, which was also a companion case to *Guss*, is just a little more of the same thing. The decisions of the Supreme Court in *Guss* and *Fairlawn* were, of course, direct authorities for the holding in *Garmon*. There was, however, another important facet in the *Garmon* case which requires discussion. Respondents, a partnership operating two retail lumber yards, were picketed by the San Diego Trades Council for a union contract. They filed charges with the NLRB under section 8(a)(3) of the act.[35] Jurisdiction was declined on the basis of the 1954 dollar-volume standards. Respondents then filed suit in a state court of California, seeking an injunction as well as damages. The state court, believing it had jurisdiction after the NLRB's declination, granted the injunction and awarded damages.[36] Of course, it goes without saying that, under *Guss* and *Fairlawn* the state court was without jurisdiction to grant the injunction, but it is the damage phase which requires brief discussion. Because of state judicial affirmance, *Garmon* went to the Supreme Court. The Supreme Court disposed of the state court injunction by reversal on the authority of *Guss* and *Fairlawn*. The damage phase of the case was more troublesome. In *United Constr. Workers v. Laburnum Constr. Corp.*[37] a state court was granted the right to take jurisdiction in a damage action involving a labor dispute when a tort was committed under state law. Notwithstanding the federal supremacy theory, it was held by the Supreme Court that a state could do this when a state law was involved because the Labor Management Relations Act of 1947 did not contain provisions regarding torts, which were violations of state laws.

The reasoning in the *Laburnum* case was urged by the respondents in *Garmon* to sustain the damage award. The Supreme Court, however, distinguished *Laburnum* on the basis that there an award of damages was sustained because the conduct complained of was a violation of state tort law, whereas in *Garmon* the state court relied upon a federal statute (NLRA) to justify the damage award. The damage cause was remanded to the California state court. The Supreme Court said that in doing this they did not overrule the *Laburnum* doctrine; on the contrary, it still stood, but *Garmon* did not qualify for the reasons above stated. This by no means is a final answer to the problems arising when a state court decides to award damages for an act that may be an unfair labor practice.

34. 353 U.S. 26 (1957).
35. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).
36. 45 Cal. 2d 657, 291 P.2d 1 (1955).
37. 347 U.S. 656 (1954).

AREAS IN WHICH STATE COURT DAMAGE AWARDS ARE SUSTAINED

There are areas within the field of labor management relations wherein state courts have jurisdiction over damage actions even though the acts giving rise to the damages constitute an unfair labor practice under the NLRA.

In *United Constr. Workers v. Laburnum Constr. Corp.*, discussed previously in connection with the *Garmon* case, while the plaintiff was performing construction work in Kentucky, agents of the defendant labor unions demanded that plaintiff's employees join one of the defendant unions. Upon the refusal of plaintiff, and many of its employees, the defendants' agents threatened plaintiff and its employees with violence. Plaintiff was compelled to abandon all of its projects in that area. Plaintiff then sued in the state court for damages and obtained a judgment for a substantial amount. Upon the assumption that their conduct constituted an unfair labor practice under the NLRA, contentions were made that state courts were excluded from entertaining common-law tort actions for the recovery of damages caused by such conduct. The Supreme Court rejected this contention.[38]

The next and more recent matter decided by the Supreme Court was the case of *United Auto Workers v. Russell*.[39] In this case Russell was a maintenance electrician who worked on an hourly basis for his employer who was struck by the union; the union was the bargaining agent for certain employees. Russell was not a member of the striking union, nor had he applied for membership. Russell attempted to go through the picket line but was prevented from so doing. It appears that Russell was not physically touched, struck or beaten. Because of his failure to get into the plant he lost time, and, of course, wages. Russell then filed suit in the state court and was awarded both compensatory and punitive damages. The Supreme Court relied on the *Laburnum* case as the controlling precedent. Indeed, the Court said that the cases were similar in many respects. This may be true, but the decision in *Russell*, in our opinion, goes much further than *Laburnum*. In *Laburnum* it was the employer who sued in tort. When an employer sues a union, eyebrows are not necessarily raised. It is the same as when "dog bites man." In *Russell* it was an employee who was prevented from working and who sued in tort. This is the same as when "man bites dog." The decision in *Russell* is important, even beyond *Laburnum*, in that the Supreme Court

38. "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. . . . (W)e hold that it has not." 347 U.S. at 657.

39. 356 U.S. 634 (1958).

places its jurisdictional stamp of approval on a damage suit by an individual against a union in the give and take realism of a picket line, which, at its legal best, is not a "pink tea party." Russell was prevented from crossing the picket line not by physical force or conduct, but by force of numbers on the picket line. Wholly apart from the common-law tort theory, practically speaking, the *Russell* case poses a real threat to unions. One of the essential purposes, frankly speaking, of the picket line is to keep hourly-rated persons out of the plant. It is obvious that the decision by the Supreme Court makes this purpose a dangerous one to pursue.

Would the result have been the same had Russell been a member of the bargaining *unit*? We believe that it would, because being a member of the bargaining unit would not change the gravamen of the tort approach. However, would the result have been the same had Russell been a member of the striking *union* but not necessarily a member of the bargaining unit? We still believe, substantively speaking, it would have been the same, but it is not necessary here to pass upon various state statutes and the common law pertaining to actions against unincorporated associations nor the various state statutes which could quite possibly create the paradox of an individual bringing an action against himself, in light of the fact that the complainant then would be a member of an unincorporated body which he sues.

Another extension beyond *Laburnum* by the very nature of the facts is that Russell was not required to submit his case to the NLRB for back pay under Section 10(c) of the NLRA.[40] The Court held:

> The power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.[41]

State Jurisdiction Over Violent Union Conduct

At the present writing there is another area in which a state may enjoin, or a state agency may cause a cease and desist order to issue with reference to conduct which violates the NLRA, and where the conduct complained of could be said to be within the confines of the preemption doctrine.

In *UAW v. Wisconsin Employment Relations Bd.*[42] the issue was whether a state had power to enjoin violent union conduct when the NLRA empowered the NLRB to enjoin, among other unfair labor practices, coercion of employees who wish to refrain from striking. The majority of the Court held that the pertinent unfair labor practice pro-

40. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1952).
41. 356 U.S. at 642-43.
42. 351 U.S. 266 (1956).

visions of the NLRA were not the exclusive method of controlling union violence, even against employees who desired to work, much less violence interfering with others approaching an area where a strike was in progress. The Court stated:

> As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct "which has been made an 'unfair labor practice' under the federal statutes." (The Court cites *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 at 475). . . . But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. 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.[43]

It is suggested that there is a major similarity between the instant case and *United Auto Workers v. Russell.* In *Russell,* of course, the action was for damages, both compensatory and punitive, to an individual. In *UAW v. Wisconsin Employment Relations Bd.* the remedy was injunction against the union. In both cases, however, there was violence, intimidation and coercive conduct through mass picketing. In this state of fact lies the similarity. In other words, in instances involving such conduct, state courts now have the right to apply a remedy, injunction, damages, or both. It is further important to note that the Supreme Court of the United States revived its pronouncements that "all" picketing should not be enjoined where a pattern of violence was not so enmeshed in the picketing.[44] It is further suggested that in the light of the current holdings in *Russell* and *UAW,* the area alluded to above would seem to be the only one in which a state court could extend its jurisdiction concurrently with the NLRB.

CONCLUSION

The labor management relations field has been pre-empted by federal law to the exclusion of state authority if the dispute is within the field of commerce. If the dispute is within the field, and the factual pattern of the issues affects commerce within the meaning of the definition heretofore cited, the states, their courts and agencies are excluded from acting, even though the NLRB has not acted or has refused to act. It should be noted that in the *Fairlawn* case, the Supreme Court gave to the "affecting commerce" definition a broad and inclusive connotation. In our opinion, this would be true, even to the exclusion of the Board's jurisdictional yardsticks.

The power given the NLRB is broad and plenary, and if the NLRB does not accept jurisdiction, the litigant finds (at least currently) the

43. Id. at 274.

44. Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1958).

doors of other tribunals, whether boards or courts, closed to him. There is only one way whereby state labor boards or courts can exercise jurisdiction in the pre-empted field, and that is when the NLRB cedes jurisdiction to specific state boards or agencies under the proviso of section 10(a) to the act. There have been no such cession agreements.

Are there any exceptions, or better still, qualifications even if the dispute is in commerce? The answer is "yes." Tortious conduct of unions involving state laws, violence or unlawful picketing, coercion, or intimidation would give rise to state court or state jurisdiction on three fronts. First a state court could award damages to an individual who alleges a cause of action based upon tortious conduct violating a state law. The damage award could be both compensatory and punitive. Secondly, state court or agency injunctive action may be had against the union, based upon the same type of conduct. Lastly, a union member may sue for damages in a state court because of his alleged wrongful expulsion from a union, assuming action would be based upon the breach of contract theory. This the member can do notwithstanding the fact that the union's conduct in the expulsion procedure might be construed to be an unfair labor practice under the NLRA.[45] The damage award in this type of case could be both compensatory and punitive.

There is no question that the current status of authority has made exceedingly clear the dilemma in the labor management relations field. The Supreme Court only pointed out the existing "vacuum" in jurisdiction. It did not create it. For whatever cause, budgetary or otherwise, if responsibility must be fixed for the dilemma, the NLRB should bear its fair share. The NLRB, of course, claims that it curtailed jurisdiction because of budgetary necessities. However this may be, all informed sources will agree that the current situation cannot remain as it is. The question is, what is the feasible course to pursue? There is no ready answer to this. Chief Justice Warren said in the *Guss* case: "Congress is free to change the situation at will."[46] About the only logical thing that Congress could do would be to reduce the swelling in the now bulging "no man's land" area by amending section 10(a) to empower state court agencies to act when the board declines jurisdiction. We do not believe this is feasible or practical.

There are only fourteen states, including two territories, that now have full-fledged labor relation acts.[47] It is clear that the proviso in section 10(a) refers to cession agreements made by the NLRB to agencies of states or territories. Labor board agencies do not exist in states which do not have labor relations acts. The majority of the states do not have

45. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

46. 353 U.S. at 11.

47. 4 CCH Lab. L. Rep. (4th ed.) ¶ 40,355 (1957).

such acts, therefore, those same states do not have agencies to which cession agreements could be made now under section 10(a) as it exists, or under any potential amendments thereof. To whom, or to what bodies, in such instances could the cession agreements be made? The only answer would be to the courts in the absence of agencies. Courts differ in their opinions in the law of labor relations, not only from state to state, but from county to county. In light of this judicial difference of opinion, need we argue how maladroit the procedure could become if cession agreements were to be seriously considered under section 10(a) or any amendment thereof? It is obvious that proper administration in the field of labor relations requires uniformity if section 10(a), or any amendment thereunder is to be activated.

The Ives bill[48] points up the objections. In this bill, Senator Ives seeks to clarify the authority of the states. In part it reads as follows: "Nothing contained in this Act shall be deemed to 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. . . ."

Is it not obvious that labor disputes should not be distributed to the courts in the first instance? The multiplicity of court decisions would produce an inevitable contrariety, which, in turn, would compound confusion in the labor management relations field. This situation produced by any amendment of section 10(a) could easily dwarf the present dilemma.

We are in the throes of an interdependent economy. Labor law is tied to that economy, and, therefore, it touches every segment of American life. Our economy is always restless and ever-changing, and, therefore, the law itself cannot remain static. We should not, however, deliberately ask for confusion in this all-important field. Uniformity of approach, both administratively and decisionally should be sought after in the field of labor relations, or any other field for that matter, which pervades not part but all of our economy. Diffusion of that authority through the amendment of section 10(a) would not seem to be the solution. The only logical answer to the notion that states should take over if the NLRB refuses to act, would be for all of the states, not just fourteen of them, to enact a uniform labor relations act, with state boards to administer the law, which would not, of course, be repugnant to the federal act. This would, of course, be a solution, but it is not likely to occur. As a matter of fact, the chances of any multiple state legislative action at this writing look dim.

As we have seen, the NLRB now has the power to exercise its broad pre-emptive jurisdiction uniformly. Therefore, if the provisions of the

48. S. 1772, 85th Congress, 2d Sess. (1958).

NLRA are to be administered and enforced without further confusion or even disastrous results to our economy, the necessary budgetary appropriations should be seriously considered for the purpose of augmenting not only the Board's facilities, but its personnel. Since the writing of this article, as bearing upon our theory of this approach, the NLRB has already adopted new standards for the exercise of its jurisdiction. These new standards expand the scope of the Board's activities.[49]

We do not say this is the only way, but really is there any other way without the attendant possibility of injuring our economy, social interests and business cycles to all of which labor law is linked? What the results will be with reference to the problem posed by the application of any remedy perhaps cannot now be seen in proper perspective, because we are so close to the problem. The success or failure of the application of remedies, legislative or otherwise, to issues which are national in scope, can only be seen, as well as understood, when those issues take their rightful place in the stream of history.

49. 5 CCH Lab. L. Rep. (4th ed.) ¶ 50,086, 50,092 (1958). These new standards became effective September 1, 1958. They revise somewhat the proposals set forth in the July announcement; under each statement appears, in parenthesis, the 1954 standard: 1. Non-retail: $50,000 outflow and inflow, direct or indirect.[a] (1954—$50,000 outflow, $500,000 inflow, $100,000 indirect outflow, $1 million indirect inflow.) 2. Office Buildings: Gross Revenue of $100,000 of which $25,000 or more is derived from organizations which meet any of the new standards. (1954—Employer who leases or owns and who operates must be otherwise in commerce and utilize building primarily to house its own offices.) 3. Retail concerns: $500,000 gross volume of business. (1954—Direct inflow of $1,000,000, or indirect inflow of $2,000,000 or direct outflow of $100,000.) 4. Instrumentalities, links, and channels of interstate commerce: $50,000 from interstate (or linkage) part of enterprise, or from services performed for employers in commerce. (1954—$100,000.) 5. Public utilities: $250,000 gross volume, or meet standard 1 (non-retail). (1954—$3,000,000 gross volume.) 6. Transit systems:[b] $250,000 gross volume. (1954—$3,000,000 gross volume.) 7. Newspapers and communication systems: Radio, television, telegraph and telephone: $100,000 gross volume. Newspapers: $200,000 gross volume. (1954—$500,000 test for newspapers, $200,000 for the others.) 8. National defense: Substantial impact on national defense. (1954—$100,000 in goods or services directly related to national defense, and pursuant to government contract.) 9. Business in the Territories and District of Columbia: D.C., Plenary; Territories, Standards apply. (Same as 1954.) 10. Associations: Regarded as single employer. (Same as 1954.)

[a] Direct outflow refers to goods shipped or services furnished by the employer outside the state. Indirect outflow includes sales within the state to users meeting any standard except solely an indirect inflow or indirect outflow standard. Direct inflow refers to goods or services furnished directly to the employer from outside the state in which the employer is located. Indirect inflow refers to the purchase of goods or services which originated outside the employer's state but which he purchased from a seller within the state. Direct and indirect outflow may be combined and direct and indirect inflow may also be combined to meet the $50,000 requirement. However, outflow and inflow may not be combined.

[b] Except taxicabs, as to which the retail ($500,000 gross volume of business) test shall apply.