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RECENT ACTION IN THE NO-MAN'S LAND OF LABOR LAW

By WALTER L. GERASH

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The purposes of this article are three-fold: 1) to discuss briefly the general doctrine of federal pre-emption; 2) to point out some of the exceptions to the doctrine; and 3) to discuss extensively the leading state agency and court decisions when the NLRB under its new jurisdictional standards refuses or actually declines to exercise its jurisdiction. In short the question posed is: "What have the various states done when this vacuum or no man's land is created?"[1]

THE DIKE OF FEDERAL PRE-EMPTION

Since John Marshall said in 1824 that commerce was "intercourse" the Commerce Clause has been expanded to embrace a multitude of things that Congress can regulate.[2] From the wages of a window washer who washed windows once a week to an automobile plant,[3] to the wheat grown by a single farmer for his own con-

[1] Following is a list of articles published in the Labor Law Journal concerning the subject and the many ramifications therein: Arthur K. Garfinkel 'Conflict Between Federal and State Jurisdiction" (December 1951) P. 1007; Keith Lorenz "Conflict of Jurisdiction Between the National and State Labor Relations Boards" (December 1951) p. 887; Editors "Federal-State Relations in Labor Law" (March 1950) p. 419; Jay E. Shanklin "How NLRB Has Applied Its Jurisdictional Standards" (June 1951) p. 391; Phillip Feldblum "Jurisdictional 'Tidelands' in Labor Relations" (February 1952) p. 114; Edward L. Schwartz "Local Business—No Man's Land in Labor Relations" (December 1949) p. 189; Mozart G. Ratner, "Problems of Federal-State Jurisdiction in Labor Relations" (November 1952) p. 350; Wilbur L. Pollard, "Federal Labor Law Administrative Recession" (December 1955) p. 863; R. H. Roche Jr. and K. L. Hanslowe, "NLRB Absolutism—A Dogma Revisited" (May 1955) p. 279; Fred Witney, "NLRB Jurisdictional Policies and the Federal-State Relationship" (January 1955) p. 3; Walter L. Daykin, "NLRB Jurisdictional Standards I" (September 1955) p. 617; Walter L. Daykin, "NLRB Jurisdictional Stanards II" (October 1955) p. 696.

See also Proceeding of New York University, Fifth Annual Conference On Labor, Emanuel Stein, editor (New York: Mathew Bender and Co., Inc., 1952) pp. 1, 77, 119; First Annual Conference p. 463; Second Annual Conference, p. 505; Third Annual Conference, p. 277; Seventh Annual Conference p. 1 and Eighth Annual Conference, p. 1.

The law review articles are many but several leading ones are: Archibald Cox and Marshall J. Seidman, "Federalism and Labor Relations," 64 Harvard Law Review, p. 1297 (June 1950); Lael S. De Muth, "Federal State Jurisdiction—A Pre-emption Question," 27 Rocky Mountain Law Review, p. 330 (April 1955); Austin F. Shute, "State Versus Federal Jurisdiction in Labor Disputes; The Garner Case," 19 Missouri Law Review, p. 110 (April 1954); George Roumell and Peter Schlesinger, "The Preemption Dilema In Labor Relations," 18 University of Detroit Law Journal (December 1954), January 1955 pp. 17, 135.

[2] Gibbons v. Ogden, 9 Wheat. 1 (1824).

[3] Martino v. Michigan Window Cleaning Co. 10 Labor Cases No. 51220. 327-U.S. 173 (1946).

sumption; these constitute parts of this vast expanse of Federal regulation.[4]

In the field of labor relations the National Labor Relations Act (hereafter referred to as NLRA) was passed on the theory that a promulgation and protection of collective bargaining would reduce the irritants to the flow of commerce. The act was declared constitutional because a strike at the point of production in a large interstate industry would have an "immediate and . . . catastrophic" effect on commerce.[5] The Act was "to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a national labor relations board and for other purposes."[6] Likewise the purpose of the LMRA was ". . . for the mediation of labor disputes affecting commerce. . . ."[7]

The pre-empting character of the Wagner Act was conclusively proclaimed in 1945 when the U. S. Supreme Court struck down a state labor law regulating union business agents.[8] However, it was not until the *Bethlehem* Case that the Supreme Court proclaimed its views on the various jurisdictional problems.[9]

With the cornerstone of the *Bethlehem* decision laid, a host of Supreme Court cases followed, forming the foundation of the dike of Federal pre-emption. Thus wherever the NLRA and Taft-Hartley Act apply, the entire field of labor relations is pre-empted to the Federal government.[10]

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[4] Wickard v. Filburn, 63 S. Ct. 82, 317 U.S. 111 (1942).

[5] National Labor Relations Board v. Jones & Laughlin Steel 1 Labor Cases No. 17017, 301 U.S. 1 (1937).

[6] Act of July 5, 1935 c. 772, 49 State 449. 29 U.S. Code Sec. 151 ff (the preamble).

[7] Act of June 23, 1947, c. 120, 61 Stat. 136, Title II, 29 U.S. Code Sec. 171 ff. (the preamble).

[8] Hill v. Florida, 9 Labor Cases § 51208, 325 U.S. 538 (1945).

[9] Bethlehem Steel Corp. v. New York State Labor Relations Board and Allegheny Ludlum Steel Corp. v. Kelley, 12 Labor Cases 51245, 330 U.S. 767 (1947). Foremen in the two companies filed a petition with the NLRB for certification of a bargaining unit for the foremen. This petition was denied, the NLRB refused to take jurisdiction. Then the foremen filed a petition with the New York State Labor Relations Board, which granted it. The companies sought an injunction in the New York State Court to restrain the State Board from enforcing its order. The highest New York court affirmed the order. U.S. Supreme Court reversed. The Court held that exclusion by the Wagner Act must be implied from the nature of the legislation in absence of an express provision; that state laws were invalid when Federal laws governed the same subject matter even though the specific part covered by the state law was not as yet dealt with by the Federal agency set up by the Federal law. The Court also held that a refusal to entertain jurisdiction was not an implied granting or ceding of the power to the states. The Court felt that due to the need of uniformity of regulation of a national problem on a national level it would be dangerous to allow a case by case test of Federal supremacy.

Justice Frankfurter in a concurring opinion felt that a doctrinaire application of the majority opinion to exclude all State activity would create a vacuum due to the immensity of the task and the Federal budgetary limitations.

[10] In the field of representation elections: La Crosse Telephone Corp. v. Wisconsin Employment

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SOME WELL-KNOWN HOLES IN THE DIKE

There are several well-known exceptions to the rule of Federal pre-emption,[11] two of which are to be found in the Taft-Hartley Act. Section 14(b) of the Taft-Hartley Act permits the states to regulate the law of union security agreements. Thus, although the Taft-Hartley Act allows the union shop in section 8(a)(3), state law can supersede Federal law in this regard. Eighteen states have outlawed or restricted union shops.

The other exception in the Taft-Hartley Act is section 10(a)

Relations Board, 16 Labor Cases § 64913, 336 U.S. 18 (1949); Strike vote procedure: International Union of United Automobile, Aircraft and Agricultural Implement Workers v. O'Brien, 18 Labor Cases § 65,761, 339 U.S. 454 (1950): state public utility law for compulsory arbitration: Amalgamated Association of Street Electric Railway and Motor Coach Employees v. Wisconsin Employment Relations Board, 19 Labor Cases § 66,193, 340 U.S. 383 (1951); strike in breach of contract: Weber v. Anheuser-Busch, 27 Labor Cases § 69,064; stranger picketing: Garner v. Teamsters 24 Labor Cases § 68,020, 346 U.S. 485 (1953).

For further analysis see Harry Brody, "Federal Pre-emption Comes of Age In Labor Relations" 5 Labor Law Journal 743 (November 1954).

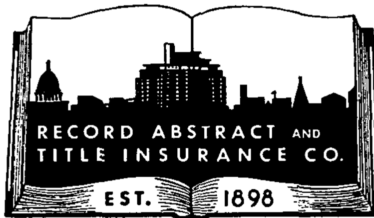
In the above Garner case the court held that where a state acts under its anti-trust law, the controlling Federal power must be resorted to, even though the ground of intervention on part of the state is different than that on which Federal supremacy has been exercised.

Recently the Supreme Court voided a state court order based on a common law action since it would be enforcing an unfair labor practise outlawed by the Taft-Hartley Act. General Drivers, Warehousemen and Helpers, Local Union 89 et al. v. American Tobacco Co. Inc., 27 Labor Cases 69,082, 348 U.S. 962 (1955).

Federal courts are not allowed to enjoin an unfair labor practice on the motion of private parties-only the NLRB can do so. Amazon Cotton Mill Co. & NLRB v. Textile Workers Union 14 Labor Cases 64,443; 167 Fed. (2d) 183 (1948; I. L. W. U. Local 6, C.I.O. v. Sunset Line and Twine Co., D.C., N.D. Calif. 14 Labor Cases 64,444, 77 F. Supp. 119 (1948).

The principle of the exhaustion of administrative remedies must be adhered to not only in the Federal Courts but in the state tribunals as well. See Costaro v. Simons 19 Labor Cases 66,295, 302 N.Y. 318, 198 N.E. (2d) 454 (1951).

[11] William Isaacson, "Federal Versus State Jurisdiction Over Labor Relations," Proceeding of New York University, Eighth Annual Conference on Labor (New York, 1955) p. 1.



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allowing the NLRB to cede jurisdiction of its cases to any state agency, even though such cases may affect interstate commerce. However, the scope of section 10(a) is restricted by a further clause which holds that state law must be consistent with a corresponding provision of the Federal law and must have received a similar construction as the Federal law.

A third exception to the doctrine of Federal pre-emption is where the economic facts show that there is no effect on interstate commerce. However, the effect on interstate commerce can embrace a multitude of areas and acts not on their face interstate commerce. Thus, this exception is not only nebulous, but is most elastic as well.

A fourth exception is based on the police power of the states. This authority is exercised where there is an imminent threat or actual breach of the peace, as in mass picketing,[12] sit-down strikes,[13] and "quicky" strikes.[14]

A fifth and recent exception is the allowance of damage suits in state courts.[15]

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[12] Allen Bradley v. Wisconsin Employment Relations Board, 5 Labor Cases § 51,135; 315 U.S. 740 (1942).

[13] N.L.R.B. v. Fansteel Metallurgical Corp., 1 Labor Cases § 17,042; 306 U.S. 240 (1939).

[14] U.A.W. v. Wisconsin Employment Relations Board, 16 Labor Cases § 64,992; 336 U.S. 245 (1949).

[15] United Construction Workers v. Laburnam Construction Corp., 26 Labor Cases § 68,460; 347 U.S. 656 (1953).

Union agents threatened the employees with violence to force them to join the union. Because of these circumstances, the employer abandoned his construction work and then sued for the resulting damages. Although the acts were an unfair labor practice in violation of section 8 of the N.L.R.B., the question arose as to whether the N.L.R.B. had exclusive jurisdiction over the subject matter, so as to pre-empt the state court in hearing an action based on common law tort. The

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The sixth exception is at present unresolved by the Supreme Court and can be stated in the form of a question: what can the states do when the NLRB declines to exercise its pre-emptive jurisdiction because of its self-imposed "yardstick" standards? This "no-man's land" or "vacuum" is called such because it is a situation where the states have no jurisdiction, yet the NLRB refuses to take jurisdiction.[16]

STATE DECISIONS REFUSING JURISDICTION

At the outset it should be recognized that even *within* some states there are conflicting decisions as to whether a state does have jurisdiction when the NLRB declines. When the NLRB declines to exercise its jurisdiction based on its yardstick minima, Congress did not intend that this would re-invest the state courts with jurisdiction. Thus far, the most cogently reasoned decision following this position is a Michigan Circuit Court ruling[17] where a retail automobile dealer petitioned for an injunction to restrain a union from picketing in violation of a state statute and the Taft-Hartley Act. At the outset, the Court recognized that the question of whether a state court has jurisdiction has not been resolved by the highest court of the land.

Judge Searle in a brilliant opinion presented his analysis by answering three questions. The first was what has the U.S. Supreme Court held in regard to the effect of the NLRA and the Taft-Hartley Act upon the power of the state and its courts? The Court then reviewed four leading decisions. In *Bethlehem Steel*[18] it was concluded that if there are two administrative bodies dealing with the same subject matter, the NLRB displaced the state Board. The Court quoted Justice Jackson in Bethlehem saying "it has long been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter, although express declaration of such a result is wanting."

In the LaCross Case, Judge Searle pointed out, that the Wisconsin Board was without authority to certify the employees' bargaining representative in an industry engaged in interstate commerce—the court holding that a case by case test of supremacy which would allow the state to act until the Federal Board has acted is not permissible.[19]

In the *Garner* Case, it was pointed out that the Supreme Court affirmed the Pennsylvania Supreme Court when it held that a lower court was without jurisdiction to entertain a motion to enjoin picketing which was in violation of state and federal law.[20]

court allowed the action on the basis that under the Wagner Act, there was no protection against such union conduct, and since Taft-Hartley increased the responsibility of the unions (e.g. section 8 b) the right to proceed in the state forum would not be denied. The rest of the reasoning that allowed a by-pass of the jurisdiction of the N.L.R.B. was very weak.

[16] See Roche and Hanslow, "NLRB Absolutism—A Dogma Revisited," 6 Labor Law Journal 279. This article concerns the political considerations underlying the Board's new standards. The article also challenges the basic power of the Board to decline its jurisdiction. It also points out that the Board's jurisdictional policies are discretionary and hence, subject to judicial review. The author seems to agree with Board-member Murdock, that the new standards are not based on practical considerations, but are a subversion of Congressional policy .

[17] Universal Car Co. v. Association of Machinists, 27 Labor Cases § 68,825; Mich., 1954 Cir. Ct. Kent Co.

[18] See footnote 9.

[19] See footnote 10.

[20] See footnote 10.

A multiplicity of tribunals and a diversity of procedure was frowned upon.

Finally in the *Kinard* Case, the Supreme Court reversed the Alabama Supreme Court, which held that the employer was entitled to have unions enjoined from picketing.[21] The Court held that there was no clear showing that the employer applied to the NLRB for appropriate relief or that it would be futile to do so. The Court then pointed out that it realized a no-man's land existed by saying, ". . . the Court does not pass upon the question suggested by the opinion below of whether the State Supreme Court could grant its own relief should the Board decline to exercise its own jurisdiction."

The second question presented in the Michigan decision was, "What has the Board done or decided in and by the announcement of its 'standards' for the exercise or refusal to exercise jurisdiction?" Quoting the Board itself, from its sixteenth and seventeenth Annual Report together with the holding of the *Star Beef* case,[22] the court held that the question of the extent to which the Board may be bound by its own prior policy decision not to take jurisdiction over a certain industry is conclusive. The Board is *not* precluded from asserting jurisdiction over an employer because it previously has declined to process cases involving similarly situated employers. *The Board has jurisdiction all the time*, according to the court's holding.

[21] Building Trades Council v. Kinard Construction Co., 24 Labor Cases § 68,086; 346 U.S. 933 (1954).
[22] NLRB v. Star Beef Co., 20 Labor Cases § 66,681; 193 F. 2d 8 (1951).

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The court went on to discuss the new "yardstick" standards of July, 1954, and concluded that these standards do not deprive the Board of jurisdiction, but merely indicate policy reasons why it will not exercise the jurisdiction which it *does have* under the law. Under the facts of the *Universal* case, supra, the NLRB in the past *did* exercise jurisdiction in automobile agency fields and the Supreme Court had sustained its jurisdiction. In essence, Congress had taken frcm the state's agencies and courts such jurisdiction in automobile agency fields and the Supreme Court had sustained its jurisdiction. In essence, Congress had taken from the state's agencies and courts such jurisdiction. The mere fact that the Board refuses to exercise its jurisdiction *now* does not re-invest the states and the courts with jurisdiction which they did not have, as long as the Board chooses ultimately to exercise the jurisdiction given it by Congress.

The third and final question was that of whether state courts have any jurisdiction when the NLRB refuses to exercise its jurisdiction on the basis of its yardstick standards? The court approved the reasoning of the *Wags* case, which will be discussed below.[23] It pointed to the language of the Taft-Hartley Act under section 10(a), as the only intention of Congress to set aside remedies for the State. The argument that Congress intended that the states should act in cases where the void exists is weak, for Congress did not remain silent—witness section 10a. Just because Congress created the void due to its agency refusing jurisdiction, the effect cannot be the legislating back to the states the jurisdiction taken from them—this can only be done by section 10a, which was so specified.

The Court concluded that if the jurisdiction of the state courts is to depend not upon the act of Congress and the actual jurisdiction of the NLRB, but upon the month to month or day to day *discretionary* exercise of jurisdiction by the Board, which depends upon changing budgetary conditions or upon its economic, social or political views as of the moment, then neither the courts nor the litigants can ever know with any certainty where jurisdiction lies. Neither will the litigants know whether in a given case, jurisdiction existing at the time of its commencement will continue through the trial, on appeal, or until settled by the highest court. As applied to the specific facts of the case, if the Supreme Court were to agree that the state courts have jurisdiction in those cases where the NLRB refuses to act, the Court would follow its position as it stated in *Kinard*.[24] In this decision, the Court held that the Michigan court was without jurisdiction since there was an absence of an *actual* refusal to act by the NLRB.

A New York appellate court has held that the state court was without jurisdiction and that the NLRB had jurisdiction even where it had failed to exercise such jurisdiction. It commented: "where the field of labor relations is occupied by the Federal Act the State may not furrow. Accordingly, it follows that Federal

[23] New York State Labor Relations Board v. Wags Transportation System, 26 Labor Cases § 68,754; 130 N.Y. 2d 731 (1954)
[24] See footnote 21.

jurisdiction is not dependent upon whether the NLRB acts or declines to act in the premises . . ."[25]

The dissent in the *Wags* case argued that it is better to have any action at the local level, rather than a "no-man's land" in which neither Federal nor local boards could or would act.

A Connecticut court has held that the state Board of Labor Relations does not have jurisdiction over an employer engaged in the building material business.[26] Its reasons were not exactly in point with the Michigan case, since it based its rationale on the fact that the NLRB had *not declined* to exercise its jurisdiction over the employer as yet. It also noted that the employer's purchases from outside the state during the year immediately preceeding the hearing were in excess of the NLRB's minimum yardstick requirements for assertion of jurisdiction. Therefore, the employer was subject to the NLRA and not subject to the Connecticut Act. While this case is not directly in point, it recognizes displacement of the state jurisdiction by Federal jurisdiction before any self-limiting action on the part of the NLRB. However, it does imply that the court might have held differently had the jurisdictional minima of the NLRB not been met.

STATE DECISIONS TAKING JURISDICTION

The *Universal* case represents the strongest position of the decisions of states *not* to take jurisdiction when the NLRB refuses to assert its jurisdiction because of its self-inflicted standards. There is a more recent Michigan case from the same judicial level, but from another county, that has taken the contrary view.[27]

A general contractor had a contract with the several picketing unions. The plumbing and electrical contractors had contracts with a rival union. The Circuit Court held that the lower court had jurisdiction to enjoin the unions from picketing the construction job. This ruling was handed down, even though the NLRB would have jurisdiction of the matter, but for its jurisdictional standards. The union's motion to dismiss on a plea to the jurisdiction was denied. This Michigan state court concluded that since there was no direct inflow of goods or materials from out of the

[25] See footnote 23.
[26] Norwich Lumber Co. v. Teamsters (Conn.) SLRB Decision No. 336 July 26, 1955, § 29,322.
[27] School District of City of Holland et al. v. Trades Council, Michigan Circuit Court, Ottawa County, § 4878½, Nov. 20, 1955. 37 L.R.R.M. 2232.

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state valued at one-half million dollars per year, the NLRB's jurisdictional standards of section 7 had not been met.[28] The court stated that, "For the purposes of this decision the court will *assume* that the NLRB *would* refuse to act in the dispute which is the subject of the litigation."

Another recent decision by the Michigan State Labor Mediation Board took a similar position.[29] It held that since the NLRB *declined* to take jurisdiction the employer and employees had nowhere to go for its representation election. The Michigan Board said, "The Board is strongly of the opinion that where a delegation of authority is not acted upon by the Federal Government such authority should revert to the state."

In this discussion, there are actually two questions before the courts: 1) May state boards and courts take jurisdiction if the NLRB *does nothing* and it appears that the jurisdictional minima have not been met; and 2) May the state boards and courts take jurisdiction when the NLRB *does act,* refusing to take jurisdiction because of its invoking of the yardsticks?

In a New Jersey case, an injunction was issued to restrain picketing, since the object was to destroy the employer's business and not to organize the employees. Also, there were violations of a temporary restraining order. In this case, the employer first petitioned the NLRB to exercise its jurisdiction in the matter; and the Board and the General Counsel declined to exercise their discretion.[30]

The Court held that the Taft-Hartley Act does not deprive the court of jurisdiction since the NLRB did not act when so petitioned. Arguing a similar policy position as in the previous case, the court refused to have any "jurisdictional paralysis" set in and stated that "the genius" of Federalism can prevent such paralysis.

A Texas case seems much in accord with the Michigan School District case,[31] when it took judicial notice of the NLRB's jurisdictional yardsticks.[32] Here the court took over jurisdiction and applied the state law, since under the NLRB's standards the Board would *"probably"* decline jurisdiction over the employer. The union, here, was picketing to compel the employer to recognize it as the bargaining agent for its drivers. The court approved a temporary injunction against picketing, since it appeared that the union did not represent a majority, and also, since there was violence. The union argued that the court did not have jurisdiction and that there was a failure to exhaust administrative remedies before the NLRB. They argued that appellee did not allege or show that it sought relief before the NLRB or that the NLRB would not assert or exercise its jurisdiction if invoked.

In what appears to be the only state supreme court decision dealing with the topic thus far, answers to both of the above ques-

[28] Federal Dairy Co., 91 N.L.R.B. 638 (No. 107) (1950). § 1615; 1615.15; 1615.85.

[29] In re Teamsters Local 376, AFL and Walker Motors, Inc. (Michigan Labor Mediation Board Decision July 7, 1955; § 49,318).

[30] Hammer v. Textile Workers, New Jersey 1945 Sup. Ct. Hudson Co., 27 Labor Cases § 68,938; 111 A. (2d) 308.

[31] See footnote 27.

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tions are given.[33] It should be noted at the outset that the decision was a four-to-three split, with both sides presenting the basic conflict that has been indicated in the decisions already discussed. In the *Garmon* case, the California Court answered question one above in the negative and question two in the affirmative. The court held that the picketing of an employer doing interstate business, even though a violation of the Federal Taft-Hartley Act, may be enjoined where the NLRB has previously refused to assert its jurisdiction of a representation proceeding involving the employer. In the companion case, *Benton*,[35] the court held that where there was no *actual* refusal by the NLRB to assert jurisdiction, the state courts do not have jurisdiction even though the employer's business does not meet the minimum jurisdictional standards established by the NLRB.

There were two picketing unions that were not certified in the *Garmon* case. Both unions wanted a closed shop.[36] The company refused to execute the contract believing it to be a violation of the NLRA, since no election was held as yet. The NLRB refused to take jurisdiction for the purpose of determining whether the defendants should be designated as the collective bargaining representatives of the employees of the plaintiff. A judgment was entered against defendants for damages and an injunction was issued.

The union's position was that the jurisdiction rests exclusively with the NLRB, that the company did not exhaust its administrative remedies, that the evidence did not support the findings, that the findings did not include all the issues tendered, and that the record shows no violation of any state law.

The Court held that thus far Congress had not *prohibited* the states from assuming jurisdiction of conduct which would be an unfair labor practice under the Federal law when the NLRB refused to take jurisdiction. The Court reasoned that the NLRB's initial refusal to take a representation election was based on the fact that the jurisdictional requirements were not met. Also, to meet the union's arguments of not exhausting administrative reme-

[32] Drivers Union v. Jax Beer Co., Texas Ct. of Civil Appeals Fifth Supreme Judicial District § 14949 (1955).
[33] Garmon v. Building Trades Council, 29 Labor Cases § 69642, 291 P. (2d), 1 (1956).
[35] Benton, Inc. v. Painters Local 333, 29 Labor Cases § 69643, 291 P. (2d) 13 (1956).
[36] Park and Tilford v. Teamsters, 10 Labor Cases § 62,963; 27 Cal. (2d) 599 (1946).

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dies, the Court said that since the initial rejection of the petition was based on yardstick grounds, it would be futile to get a review of the Regional Director's action. Also, the fear of the "vacuum" was argued. Thus, if the states are powerless after the NLRB refuses jurisdiction, one of the parties can flout the policy expressed by Congress in national legislation.

Finally, at the same time that the court affirmed the state court's jurisdiction, it held that, although union pressure for a closed shop is legal in California, nevertheless, via the Taft-Hartley Act, section 8(b) (2), it is an unfair labor practice and not privileged under California law.

In a vigorous dissent based on a four-fold analysis, Justice Carter argued that:

1. Federal law is to be administered by the NLRB, not by the state courts;
2. The Board, in refusing jurisdiction, held in effect, that Federal law should not apply in this case;
3. It is neither feasible nor fair to apply Federal law;
4. There has been no such refusal to exercise jurisdiction by the Board as to justify the conclusion that the state court has jurisdiction.

Under point one, the dissent quoted from *Garner*[37] in order to show that the NLRB was the proper forum. Under point two, Justice Carter showed that the Board can properly decline to act, holding at the same time that the policies of the act would not be effectuated by its assertion of jurisdiction in that case. By declining jurisdiction, the NLRB does so due to the fact that the policies of the act would not be effectuated by the Board's assertion of jurisdiction.[38] Thus it follows that the state court should not apply the Federal act where the Board refused to act.

Under point three, the dissent pointed out that in California there was no state board to conduct elections, and thus, the decision results in discrimination. The state law should apply since the NLRB refused jurisdiction. There was also a question as to whether the NLRB actually and finally refused to take jurisdiction. Also, the administrative remedies were not exhausted, since the employer did not appeal to Washington, thus leaving no final determination in regard to the jurisdiction.

Finally, the dissent pointed out that there was an assumption that the refusal to take jurisdiction of the case was ground for the state court to take jurisdiction. This had not been ruled upon by the U.S. Supreme Court. Also, there was not sufficient showing of refusal to exercise jurisdiction, since the Board said no action would be taken "at this time"; thus implying that a change of conditions might bring about a different result or that the charge of an unfair labor practice (which the majority of the California Court found) *would* result in a NLRB action.

In a companion case, decided that same day by the California Court, the general rule of *Garmon* was affirmed.[39] However, the

[37] See footnote 10.

[38] NLRB v. Denver Building and Construction Trades Council, 19 Labor Cases § 66,347; 341 U.S. 675, 684 (1951).

[39] See footnote 35.

court also recognized that where there was *no refusal* (merely inaction) on the part of the NLRB to take the case on jurisdictional grounds, the state court does not have jurisdiction in such a case. Hence, merely because the amount of the employer's business does not meet the minimum requirements of the NLRB's yardsticks, this does not automatically confer jurisdiction on the state court. While the case does affirm *Garmon,* it does run *counter* to the cases that we have discussed which held that the courts may assume that the NLRB won't act because the jurisdictional minima have not been met.

In New York, there are two recent decisions that follow this "assuming" position that was expressly rejected by the California Court. In one case, the company's business was deemed predominantly local by the state board and thus held that the NLRB did not have exclusive jurisdiction.[40] Also, procedurally, the company did not raise it before the N.Y. Board made its order against it. The court also distinguished the situation from the *Wags* case,[41] where there was no proof that the NLRB would have declined to assume jurisdiction at the time the Wags proceedings were instituted. The N.Y.L.B. then found evidence that the employer was guilty of unfair labor practice as defined by state law.

In the other New York case, the court approved the state board's action of taking jurisdiction whether or not the amount of business met the NLRB's yardsticks.[42] The employer contended that the N.Y.L.B. was without jurisdictional standards of the NLRB. The employer further contended that it is not for the state board or courts to invoke these yardsticks, but for the NLRB. Briefly, the Court held:

> Where the National Board refuses to assert jurisdiction labor disputes must be subject to regulation by the states or they will not be regulated at all. Labor disputes may or may not substantially affect interstate commerce, but they invariably have an immediate and direct impact upon the local community in which they occur. We do not believe that Congress, which granted the National Board discretionary power to decline jurisdiction, ever intended to prevent the states when that occurs, from taking necessary steps to protect their own safety, health, and welfare.

In a recent decision of the Michigan State Labor Mediation Board it was held that since the NLRB actually declined to take jurisdiction, it left the employers and the employees nowhere to go regarding their representation election. Thus the Board concluded that Michigan law should govern the authority, ". . . should revert to the state."[43]

In Wisconsin, it was held that the state labor board was *not* precluded from taking jurisdiction in a representation proceeding over two lumber companies, the volume of business of which

[40] New York Board v. Marlene Transportation Co., 27 Labor Cases § 69,119; 139 N. Y. (2) 621 (1955).

[41] See footnote 23.

[42] Raisch Motors Case (N.Y. 1955) 18 SLRB No. 26 § 49,306.

[43] Teamsters Local 376 AFL and Walker Motors Inc. MLMB July 7, 1955, § 49,318.

was less than the NLRB's minimum.[44] This decision was based on *Garner*, since the Supreme Court had not yet determined that state action would be futile in the event that the NLRB refused to exercise jurisdiction.

In another Wisconsin proceeding, where the General Counsel of the NLRB dismissed the charges on the ground that there was insufficient evidence to warrant further proceedings, the local board held it had jurisdiction to determine matters relating to violations of collective bargaining contracts.[45] This was so held even though the employers were engaged in interstate commerce, since such conduct was neither protected nor prohibited by the Taft-Hartley Act.

In one Federal case, it was stated that until the NLRB actually asserts its unexercised jurisdiction, a state court may, under proper circumstances, restrain a union from picketing an employer whose business does not measure up to the NLRB's announced jurisdictional standards.[46] This case was recently reversed, however, the court stating:[47]

> Moreover the refusal by the NLRB to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby revesting the state court with authority to proceed. Amended section 10 (a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state

[44] Cooper-Utter Lumber Co., WERB May 24, 1954, LRRM 1290.

[45] Joseph W. Ryan v. Loberty Powder Defense Corp. (Wis. 1955) WERB Dec. No. 3895 Feb. 11, 1955 § 49498.

[46] Your Food Stores of Santa Fe Inc. v. Retail Clerks, 27 Labor Cases § 68867, 124 F. Supp. 697 (1954). The suit was for trespass and damages, which under the Laburnum reasoning (a well known exception to the pre-emption doctrine) did not deprive a state court of jurisdiction to try a case filed for damages in a tort action regardless if it was also an unfair labor practice within Taft-Hartley. In this case the NLRB refused on its yardstick basis to issue complaints asked for by the union in regard to the employer's unfair labor practice. The Court cited another well-known exception to the pre-emption doctrine, the Briggs-Stratton case (International Union U.A.W., AFL v. WERB 16 Labor Cases 64,992, 336 U.S. 245 (1949) which allowed the state to police "partial strike" activities under the state police power. The court in this New Mexico case, agreed that if the NLRB does exercise its jurisdiction, the jurisdiction of the state court would cease. Its decision, however, was that until the NLRB actually asserts its unexercised jurisdiction, a state court may under proper circumstances, restrain picketing if on trial of the merits thereof, said picketing is deemed to be a trespass which in law and equity is subject to an injunction. This holding seemed to be a clue to the attorney to always join a trespass or damage action or better to bring it in lieu of an unfair labor practice if the NLRB does not take jurisdiction in order to get into a state court. This case was reversed on appeal.

[47] Retail Clerks Local No. 1564 v. Your Foods Stores of Santa Fe U.S. CCA, 10th, 225 F. (2d) 659 (1955).

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agency exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly pre-empted by Congress.

Thus, it is now clear, at least in the 10th Circuit, the NLRB's refusal pursuant to its 1954 yardstick standards to assert jurisdiction of a union's picketing against an interstate employer does *not* vest the state court with jurisdiction over picketing.

CONCLUSION AND COMMENT

It has been estimated by an authority that at least in New York over twenty-five percent of the employees and their employers are being deprived not only of their day in court, but also of their rights and obligations under the Federal labor laws.[48] This wrong without a remedy situation is the strongest argument for the state courts that have taken jurisdiction when the NLRB declines.

Not only is there an actual lack of coverage when the states refuse to take jurisdiction after the NLRB declines, but generally, the quality of coverage is inferior when the states do take jurisdiction. Most states, even large ones like California, do not have active labor boards.

There is an operational uncertainty for both labor and management, since what the NLRB giveth, it may taketh away. Yardstick standards change; they are self-imposed and are guides only and can be relaxed or changed as the board sees fit. Thus, the basis of state intervention is a shifting one, dependent upon the NLRB's operational guide. During the middle of a case or between appeal, the parties could be thrown out on new jurisdictional grounds depending upon the ever shifting sands of the yardsticks and the discretion of the NLRB. Confusion and uncertainty are mounting among and within the states.

If the *Garmon* holding is adhered to by the Supreme Court it will constitute a set-back to the pre-emption concept and the entire purposes of Federal laws concerning collective bargaining. Industry-wide bargaining will be an involved, if not an impossible task, should this decision be affirmed. Different states have different laws concerning labor relations. For example, some parts of a contract legal in State A would be illegal in State B. Also different states have different laws in regard to the setting of the ultimate strike date. To let the states apply different laws affecting nation-wide industry is contrary to economic realities and the purposes of all modern Federal Labor Laws that collective bargaining should be spread as a national policy to improve the social and economic conditions of labor and the country. Even a conservative Congress has recognized this and has pidgeon-holed attempts by openly anti-labor elements to further limit the juris-

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[48] Feldblum, "Jurisdictional 'Tidelands' in Labor Relations," Labor Law Journal, (February, 1952). pp. 114, 118.

diction of the NLRB[49] and to cede to the states full power to regulate industries.[50]

As pointed out by Judge Searle in the Michigan *Universal Car* case, the national policy of federal labor law and the jurisdiction of the states cannot depend on the month to month or day to day discretion of the NLRB, nor the different laws of the states.[51]. To base jurisdiction and the consequent application of substantive law on changing budgetary conditions or upon the economic, political, or social views of the moment, establishes a situation where neither the courts nor the litigants will ever know where jurisdiction is since it may change at any time during the disposition of the case—before action, during trial, on appeal, before decision rendered by the Supreme Court, or even afterward!

The final answer lies with appropriate legislation by Congress. Whether it would be to expand the budget to enable the NLRB effectually to function and abolish its yardsticks or to blanket *all* workers whose work affects interstate commerce, is for Congress to determine. What is obvious is that the Taft-Hartley Act is in need of revision in order to delineate Federal and State control and to make the law applicable to all concerned.

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[49] The Smith Bill S. 1785, 83rd Congress 1st Sess. (1953).
[50] The Goldwater Bill S. 1161, 83rd Congress 1st Sess. (1953).
[51] See footnote 17.

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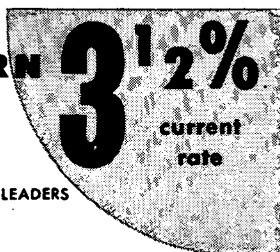

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