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THE QUESTION OF PREEMPTION
IN LABOR INJUNCTIONS*

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At the threshold of every problem involving the possible use of an
injunction in labor disputes is the problem of the court's jurisdiction
and the application of the so-called doctrine of federal preemption. It is
my purpose to discuss the matter briefly, for anyone seeking relief on
behalf of a client must inevitably face this very difficult problem before
relief is sought.

What can be done when your client is faced with a strike or picketing
situation? Where the union's action is lawful—that is, for a lawful pur-
pose—and it is lawfully conducted, there is nothing that can be done
by way of recourse to the Labor Board or to the courts, even though
the concerted action by the union is coercive and damaging to an em-
ployer who may be completely justified in the position he is taking
from both a moral and legal standpoint. In such situations, your client
either works out a compromise with the union, capitulates, or he must
simply wait it out by a test of economic strength as against the union,
which in the case of a single small employer is often against overwhel-
ing odds.

However, there are occasions when the union's conduct is subject
to some legal restraint, inadequate as the remedy may be. I say this
advisedly, for many so-called remedies for illegal picketing or strikes
are wholly ineffective. Too frequently, the cause is irretrievably lost
before a remedy is forthcoming. Assuming, however, that the union
conduct is unlawful, the question which the practitioner must determine
—and, I might say, possibly the most important question—is the determi-
nation of the forum in which to proceed. Is the dispute subject solely
to the jurisdiction of the NLRB, or may the attorney proceed before a
state court or possibly a federal district court where the remedy may

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Bar Association.

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1934, J.D., 1936.
be more prompt and effective? The difficulty stems from section 10(a) of the Taft-Hartley Act,¹ which provides that the Labor Board's jurisdiction shall be exclusive. Combined with that are the provisions of sections 7 and 13 which give employees a right to engage in concerted activities and which also provide that nothing in the act, except as specifically provided therein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike.

Section 8(b) prohibits certain union conduct designated as union unfair labor practices. Unions cannot, under section 8(b)(1), engage in certain types of restraint or coercion; or they cannot, under section 8(b)(2), attempt to cause an employer to discriminate against an employee in his employment unless under a valid union-shop clause; or they cannot, under section 8(b)(3), refuse to bargain collectively; or they cannot, under section 8(b)(4), engage in types of secondary boycotts, or jurisdictional disputes; or they cannot, under section 8(b)(5), exact an excessive or discriminatory initiation fee; or, under section 8(b)(6), require an exaction for services not performed. But in all these violations, except when the violation is under section 8(b)(4), where the Regional Director—not the employer—may seek an injunction in the federal court under 10(j) or (l), the remedy is slow and, in more cases than not, inadequate as an answer to an immediate problem.

The question is, must your client be bound to the forum of the National Labor Relations Board? Is there no relief in the state courts? Or if the union conduct is not an unfair labor practice under section 8(b), and not affirmatively protected, can the employer seek a state remedy? Or is he without relief in the state courts absolutely, being foreclosed by the doctrine of federal preemption?

Unfortunately, in a field of law, where the need for certainty is probably greater than in other branches of the law because of the impact of human emotions and the urgency usually permeating a labor dispute which erupts into a strike and picket, we find not certainty, but rather a prevalence of conflicting decisions that is the bane of every lawyer, whether general practitioner or specialist, whether representing management or labor. In many labor controversies, the lawyer simply does not know how a client's interests can be best protected or what forum

provides the appropriate jurisdiction for the most effective remedy, if any.

This dilemma of conflicting state v. federal jurisdiction was crystallized in the landmark case of Garner v. Teamsters Union,\(^2\) decided December 14, 1953. That case probably has had a greater influence on labor law than any other case in recent times.

That case, when strictly confined to the issues, simply held that, where a state seeks to regulate a field also regulated by the federal government, state authority must give way. In that case, Pennsylvania sought to regulate union conduct also regulated by Taft-Hartley. The United States Supreme Court there stated: "Congress has taken in hand this particular type of controversy,"\(^3\) and the state cannot "through its courts [adjudicate] the same controversy and extend its own form of relief."\(^4\) But, in completely unwarranted and unnecessary dictum, the Supreme Court also declared that, where union conduct was not specifically outlawed by Taft-Hartley, it was free from any restraint whatsoever either by the state or federal government. The amazing language of the Court was as follows:

The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing.\(^5\)

That the Supreme Court was wrong is demonstrated by the fact that both before and since Garner, there are types of picketing which while not specifically prescribed as unlawful, are nonetheless not free from restraint.\(^6\)

The Supreme Court, in the United Constr. Workers v. Laburnum

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3. Id. at 488.
4. Id. at 489.
5. Id. at 499-500.
Constr. Corp. case, decided about six months after Garner, seemed to recognize that the dictum in the Garner case went too far afield, and it withdrew to what was a more logical and correct interpretation of the significance of the Garner case. In the Laburnum decision, the Supreme Court held that Taft-Hartley did not preempt the field, and the state court had jurisdiction of a common law tort action by the employer to recover damages from the union, even though union conduct constituted an unfair labor practice. The court, in justifying its decision under Garner, quoted that portion of Garner which had stated:

The national Labor Management Relations Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.\(^8\)

Then, in Weber v. Anheuser-Busch, Inc.,\(^9\) decided March 28, 1955, the Supreme Court swung back to the broad dictum of the Garner case. In that case, Missouri enjoined union conduct which the NLRB had previously found not to be a jurisdictional dispute under section 8(b)(4)(d) of the act. The Missouri court enjoined on the theory that the union's conduct constituted a violation of the state's restraint of trade statute and that Garner would in no event apply because the Board had previously determined that there was no unfair labor practice. The Supreme Court of the United States reversed, holding that the NLRB had not ruled that no unfair labor practice was involved but only that there was no violation of section 8(b)(4)(d), the jurisdictional dispute section; that it had not "encompassed a ruling on other subsections."\(^10\) Moreover, the court stated:

If this conduct does not fall within the prohibitions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7 as concerted activity.\(^11\)

In Anheuser-Busch, the Supreme Court, in also justifying its decision under Garner, quoted that portion of Garner to the effect that "the detailed prescription of the procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other

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8. Id. at 664.
10. Id. at 478.
11. Id. at 478-79.
methods and sources of restraint." It made no difference to the Supreme Court of the United States that the Missouri decision was grounded on its restraint of trade statutes, because it said:

[T]his distinction is not decisive . . . the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations.\(^\text{13}\)

As a result of these Supreme Court decisions, and others which I shall later mention, state courts have been faced with exceedingly difficult questions of jurisdiction. The United States Supreme Court has itself taken note of this dilemma. In Weber v. Anheuser-Busch, for example, the Supreme Court said: "This penumbral area can be rendered progressively clear only by the course of litigation,"\(^\text{14}\) and in ACW v. Richman Bros., it added: "What is within exclusive federal authority may first have to be determined by this Court to be so."\(^\text{15}\) It is thus readily apparent that the practitioner has a real problem if he is not able to determine jurisdiction until after the Supreme Court has spoken. However, insofar as a statement of present law is concerned, I believe the attorney can fairly well rely on that portion of the Anheuser-Busch opinion which is as follows:

... Where the facts reasonably bring the controversy within the sections prohibiting these [union] 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.\(^\text{16}\)

While this principle may now be fairly well established, whether union conduct in any particular case is outside of federal reach and thereby subject to state control or whether it is either proscribed or protected and thereby regulated exclusively under federal law poses an entirely different problem. I am not, of course, referring to those clear cut cases involving mass picketing, or violence on the picket line, where the states still retain jurisdiction, or cases involving such parties as non-profit hospitals, the federal government, or a political subdivision, which,

\(^{12}\) Id. at 475.
\(^{13}\) Id. at 479-80.
\(^{14}\) Id. at 480-81.
\(^{15}\) 348 U.S. 511, 516 (1955).
\(^{16}\) 348 U.S. at 481.
under section 2(2), are excluded by statutory definition from the Taft-Hartley Act.

The welter of confusion has been epitomized in a recent decision of the United States Supreme Court in Association of Machinists v. Gonzales.\(^{17}\) Justice Frankfurter, speaking for the majority allowing state jurisdiction, in a damage action by an employee against the union, said in characteristically lucid fashion:

The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation,\(^{18}\)

and Chief Justice Warren, dissenting, retorted:

... if elucidating litigation was required to dispel the Delphic nature of that doctrine, the requisite concreteness has been adequately supplied.\(^{19}\)

We can sympathize with the Wisconsin supreme court which took the bull by the horns and finally stated:

Until such time as the United States supreme court has ruled to the contrary, we believe it to be our duty to hold that there has been no pre-emption by congress over the type of secondary picketing of neutrals herein enjoined. ...\(^{20}\)

The Court of Appeals of New York took a similar position in Pleasant Valley Packing Co., Inc. v. Talarico,\(^{21}\) decided June 25, 1958. In that case, involving picketing by a union which did not represent a majority of the employer's employees, the New York court discussed the difficult problem of preemption and stated:

In the light of the foregoing statement emanating from the Supreme Court [to wit: the Taft-Hartley Act leaves much to the states, though Congress has refrained from telling us how much. The penumbral area can be rendered progressively clear only by the course of litigation], we do not think we should be quick to announce a lack of State jurisdiction in this general

\(^{17}\) 356 U.S. 617 (1958).
\(^{18}\) Id. at 619.
\(^{19}\) Id. at 624.
area. If we rule against jurisdiction and we are wrong in so ruling, the unsuccessful litigant may well be irreparably harmed. We are of the mind that any doubt should be resolved in favor of jurisdiction, leaving it to the Supreme Court to finally resolve the matter.\textsuperscript{22}

Much, if not most, of the responsibility for this confusion rests with the Supreme Court itself. The decisions are often irreconcilable, one line of cases holding that federal preemption is applicable because the federal government had entered the field and state regulation had to give way because it sought to regulate a field which the federal government itself purported to regulate;\textsuperscript{23} and another line of cases holding that states retain jurisdiction because federal law did not purport to regulate all labor conduct and there was room for state action.\textsuperscript{24}

I wish to make one further reference to illustrate the inconsistency of the Supreme Court. The Supreme Court said in 1949 in \textit{Giboney v. Empire Storage \& Ice Co.},\textsuperscript{25} a case arising out of Missouri, that peaceful picketing in violation of state anti-trust laws was enjoinable, and that the employer could "invoke the protection of the state law."\textsuperscript{26} In \textit{Giboney}, the Supreme Court said, "it is difficult to perceive how it could be thought that these constitutional guaranties [of freedom of speech] afford labor union members a peculiar immunity from laws against trade restraint combinations, unless . . . labor unions are given special constitutional protection denied all other people."\textsuperscript{27} This, it will be remembered, was at a time when the Taft-Hartley Act was in effect. Yet in \textit{Anheuser-Busch}, six years later, in a case involving a violation of the identical statute of Missouri, the United States Supreme Court

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 47, 152 N.E.2d at 508, 177 N.Y.S.2d at 478.
\item \textsuperscript{25} \textit{Id.} at 490 (1949).
\item \textsuperscript{26} \textit{Id.} at 493.
\item \textsuperscript{27} \textit{Id.} at 495-96.
\end{itemize}
held that the state's anti-trust law could no longer be enforced against labor organizations because of the impact of Taft-Hartley.

In 1949 the Supreme Court said, "To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their anti-trade-restraint laws...."28 Yet, in 1955, such labor union conduct was "exalted" and placed "above all state control," and unions obtained that "peculiar immunity" from the law which the Court condemned in 1949.

The Supreme Court attempted to rationalize the difference in these decisions by stating in a footnote of the Anheuser-Busch case that, in the Giboney case, "no question of federal pre-emption was before the Court."29 This is, I submit, a weak explanation, since the question of jurisdiction can be raised at any time, even by the Court itself. It would seem that, if the states had the constitutional power to regulate unlawful union conduct in violation of a state law in 1949, the states should have had the same power in 1955.

These cases, while of course differing in facts appear to involve an inconsistent application of principle, depending upon the particular result sought to be reached. How can we rationalize, for example, the case of Local 10, United Ass'n of Plumbers v. Graham,30 decided in 1953, where the Supreme Court held that peaceful picketing to force a violation of a state right-to-work law may be enjoined by the state courts, when in 1957 it reversed a state court for issuing an injunction against picketing that violated the state right-to-work law.31 Or how can we reconcile a recent per curiam decision,32 decided April 28, 1958, which, on the sole authority of Thornhill v. Alabama,33 refused to allow the Kansas supreme court in El Dorado Dairy v. Teamsters,34 a purely intrastate case, to prohibit the taking of photographs on the picket line because of its coercive character, thus seeming to equate picketing with free speech when this concept had long ago been discarded by Giboney v. Empire Storage & Ice Co., Teamsters v. Hanke,35 Building Serv. Union

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28. Id. at 497.
33. 310 U.S. 88 (1940).
v. Gazzam,38 and Hughes v. Superior Court,37 The decision is also contrary to Teamsters Union v. Vogt,38 which recognized the right of state courts to enforce state public policy in intrastate matters.

Perhaps Guss v. Utah Labor Relations Board,39 offers the lawyer the most effective solution where union conduct may be unlawful under state law or under federal law, but where the Labor Board declines jurisdiction on the grounds that the business is not sufficiently interstate. There the solution offered was not to seek a remedy at all, state or federal, since Guss says there is none.

Missouri, prior to Garner, consistently held that state courts have concurrent jurisdiction with the NLRB where union conduct is unlawful under state law even though it might likewise have been unlawful under federal law.40

Since Garner, the Missouri court has reflected the dilemma in which it was placed by the United States Supreme Court. In Tallman Co. v. Latal,41 decided shortly after Garner, the Missouri court in its original opinion, took jurisdiction and enjoined union picketing with "an awareness, but without having occasion to consider the effect of, or to apply certain recent, far-reaching pronouncements of the United States Supreme Court [in Garner v. Teamsters Union]."42 In the Anheuser-Busch case, the Missouri court considered the Garner case but distinguished it and asserted jurisdiction from an exclusion of jurisdiction by the Board, but as I have stated, it was reversed on appeal. In Cooper Transp. Co. v. Stufflebeam,43 the Missouri court refused to take jurisdiction over peaceful picketing by unions to compel the company to coerce its employees to join the union even though the picketing involved a violation of state law since it also involved a violation of the Taft-Hartley Act, over which the court said the National Labor Relations Board had exclusive jurisdiction. Having taken this step, the Missouri court, in

40. Katz Drug Co. v. Kavner, 249 S.W.2d 166 (Mo. 1952); Missouri Cafeteria v. McVey, 362 Mo. 583, 242 S.W.2d 549 (1951) (en banc); Kincaid-Weber Motor Co. v. Quinn, 362 Mo. 375, 241 S.W.2d 886 (1951); State ex rel. Allai v. Thatch, 301 Mo. 190, 234 S.W.2d 1 (1950) (en banc); Wolferman, Inc. v. Root, 204 S.W.2d 733 (Mo. 1947) (en banc).
41. 365 Mo. 552, 284 S.W.2d 547 (1955) (en banc).
42. 33 L.R.R.M. 2724, 2727 (Mo. 1954).
43. 365 Mo. 250, 280 S.W.2d 832 (1955) (en banc).
Graybar Elec. Co. v. Automotive Union,⁴⁴ went one step further and in a majority decision decided, erroneously I believe, that the state court had no jurisdiction to enjoin allegedly organizational picketing. Language in the decision, in my opinion, went much farther than necessary, and it seems to me that the dissent of Judges Eager and Hyde expressed a better and more correct view of the law. However, in the most recent case decided by the Missouri court on preemption,⁴⁵ the Missouri court applied as lucid and as definitive an explanation of the doctrine of federal preemption as has yet been announced by any state court. It is, in my opinion, a correct pronouncement of the law. In that case the union, though not picketing, engaged in concerted activity in seeking to boycott a dairy company through various customers because the company refused to deal with the Teamsters Union. The court went into an exhaustive history of federal preemption, considered the conflicting decisions of the United States Supreme Court in their correct perspective, and announced that the state courts are not deprived of jurisdiction where the concerted activity of the union is neither proscribed nor protected by the Taft-Hartley Act; that there was an area of state control; and since the union conduct in question fell within this area, the state court properly exercised jurisdiction.

So much for the jurisdiction of state courts. What about federal courts? The Norris-LaGuardia Act, for all practical purposes, forecloses injunctions in the federal courts in labor dispute cases. However, as the result of the United States Supreme Court decision in the Lincoln Mills⁴⁶ case, a vast new field has arisen, which we can only briefly consider. Section 301(a) of the Taft-Hartley Act provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."⁴⁷ The section also provides that unions may sue or be sued as entities.

In the Lincoln Mills case, the United States Supreme Court held that this section gives federal district courts power to decree specific performance of collective bargaining agreements to arbitrate and furnishes

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44. 365 Mo. 753, 287 S.W.2d 794 (1956) (en banc).
a body of federal substantive law, not merely procedural law, for the courts to apply in enforcing such agreements. The extent and nature of the federal law to be applied was left by the court for future determination through “judicial inventiveness.” It added, “Any state law applied, however, will be absorbed as Federal law and will not be an independent source of private rights.” In compelling arbitration pursuant to the terms of the contract there involved, the court held that the Norris-LaGuardia Act, which prescribes stiff procedural requirements for issuing an injunction in a labor dispute, did not bar the exercise of the court’s jurisdiction. The Supreme Court said that the failure to arbitrate was not the type of abuse that Norris-LaGuardia was designed to prevent, and that the Norris-LaGuardia Act does “indicate a congressional policy toward settlement of labor disputes by arbitration.”

It would appear, therefore, that where an injunction is sought in the circumstance of a union striking in violation of a no-strike clause in a labor agreement, the strike should properly be enjoined by a federal district court, with the union being compelled to go to arbitration if the contract so provides. This would particularly seem to be so since in the *Lincoln Mills* case, the Court said that the arbitration clause was a *quid pro quo* for the no-strike clause, and if one is enforceable, so should the other. Moreover, the legislative history showed that Congress expected “faithful performance” by the parties of their agreements which should be “enforceable in the Federal Courts.” In *Bull S.S. Co. v. Marine Engineers*, the federal district court in New York so held. It issued a decree of specific performance, with the Norris-LaGuardia Act not applicable. The decision, however, was reversed on appeal. The court of appeals held that section 301 did not impliedly repeal the Norris-LaGuardia Act. However, I believe this question is still open, and the *Bull Steamship Company* case must be limited strictly to the factual situation there involved. There, the issue was whether or not a union can strike when an impasse is reached in bargaining upon a wage reopening clause in a contract containing a no-strike clause. It involved new and future conditions of employment. However, where the issue is over

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48. 353 U.S. at 457.
49. Id. at 458.
50. Id. at 466.
a grievance or a past controversy, it seems to me that as a matter of law and policy, strikes in violation of a no-strike clause during the life of a collective agreement should be subject to restraint if the doctrine of *Lincoln Mills* is to be given full vitality and is to be enforced impartially against both sides.

Does section 301 make the federal courts the exclusive tribunals for all breach of contract actions affecting interstate commerce in labor dispute cases, or may the state still exercise jurisdiction? In a California decision, the state court decided that the state courts have concurrent jurisdiction with the federal courts over actions to enforce collective bargaining agreements, but that in exercising its jurisdiction the state court must apply federal substantive law.

In the growing body of federal law, it has been held that in a proper contract case in the federal courts, the National Labor Relations Board does not have exclusive jurisdiction, even though the union conduct may also be an unfair labor practice. While the decision is manifestly correct since breach of contract actions are traditionally left to the courts, and not the Labor Board, still it is interesting to note in suits for injunction in state courts not founded on contract, the United States Supreme Court has held that a state court is deprived of jurisdiction when the union conduct is an unfair labor practice. This is so even though a violation of state law is involved. The Supreme Court, you will remember, told Missouri in *Anheuser-Busch* when it enjoined because the union violated anti-trust laws, that "the state cannot be heard to say that it is enjoining conduct for reasons other than those having to do with labor relations." In my opinion, where union conduct violates state law, and is also an unfair labor practice, the distinction drawn between contract actions and tort actions to deprive courts of concurrent jurisdiction in the latter, is not well taken.

We have only touched upon the problem of federal preemption, but I believe that enough has been shown to give verisimilitude to the court's statement in *Anheuser-Busch* that "This penumbral area can be rendered progressively clear only by the course of litigation." 

55. 348 U.S. at 480.
56. Id. at 480-81.