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CONSTITUTIONAL LAW — COMMERCE CLAUSE — LABOR LAW — POWER OF STATE TO ENJOIN UNFAIR LABOR PRACTICES OF EMPLOYEES IN INDUSTRIES ENGAGED IN INTERSTATE COMMERCE — The appellant (defendant in the case below) and certain of its members were found guilty of unfair labor practices as defined by the Wisconsin Employment Relations Act.[1] Plaintiff-appellee issued a cease and desist order, which was sustained by the lower court despite defendant's contention that the statute was unconstitutional on the ground that Congress had precluded such state legislation affecting interstate industries by enacting the National Labor Relations Act.[2] *Held*, plaintiff's order sustained. State legislation not repugnant to the Wagner Act is operative in this field so long as the National Labor Relations Board has not acted in the particular matter. *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board*, (Wis., 1941) 295 N. W. 791.

In the absence of federal legislation, it would seem that state supervision of labor relations in industries engaging in interstate commerce would be upheld despite any negative implications of the commerce clause.[3] The states have a legitimate interest in averting industrial strife and, therefore, in the exercise of their police powers may enact statutes similar to that in the principal case. That Congress may preclude state legislation affecting interstate commerce by enacting affirmative legislation has been uncontroverted since *Gibbons v. Ogden*.[4] The difficulty arises in determining when and under what circumstances federal statutes can be deemed to have precluded further state action in this field. The cases involving regulation of interstate railroad carriers indicate a tendency of the United States Supreme Court readily to find supersession of state regulation on the ground that Congress by entering the field has intended to exclude the states, or because state statutes with different provisions are deemed inconsistent.[5]

[1] Wis. Stat. (1939), § 111.01 et seq.

[2] 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1939), § 151 et seq.

[3] U. S. Constitution, Art. 1, § 8. For a survey of the several theories adopted by the Supreme Court when dealing with this problem, see: Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1 (1824); Brown v. Maryland, 12 Wheat. (25 U. S.) 419 (1827); Willson v. Black-Bird Creek Marsh Co., 2 Pet. (27 U. S.) 245 (1829); License Cases, 5 How. (46 U. S.) 504 (1847); Cooley v. Board of Wardens, 12 How. (53 U. S.) 299 (1851). See also, Dowling, "Interstate Commerce and State Power," 27 VA. L. REV. 1 (1940).

[4] 9 Wheat. (22 U. S.) 1 (1824).

[5] Northern Pacific Ry. v. Washington ex rel. Atkinson, 222 U. S. 370, 32 S. Ct. 160 (1911); Erie Ry. v. New York, 233 U. S. 671, 34 S. Ct. 756 (1914), hours of service regulation; Southern Ry. v. Reid, 222 U. S. 424, 32 S. Ct. 140 (1911), state law repugnant to federal rate publication provision. To the effect that there can be no divided authority over interstate commerce and that the regulations of Congress are supreme: Chicago, R. I. & P. Ry. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 33 S. Ct. 174 (1912); Missouri Pacific Ry. v. Stroud, 267 U. S. 404, 45 S. Ct. 243 (1925); Gulf, C. & S. F. Ry. v. Hefley, 158 U. S. 98, 15 S. Ct. 802 (1894). See also New York Central Ry. v. Winfield, 244 U. S. 147, 37 S. Ct. 546 (1916), employers liability legislation; Napier v. Atlantic Coastline Ry., 272 U. S. 605, 47 S. Ct. 207 (1926), safety appliance acts. But in Atlantic Coastline Ry. v. Georgia, 234 U. S. 280, 34 S. Ct. 829 (1913), state specifications for locomotive headlights were upheld although Congress had made various other prescriptions as to locomotive parts.

State enactments adopting quarantine and inspection measures against goods imported through interstate channels have been received more favorably by the Court despite the existence of similar federal statutes.[6] Statutes whose objects were highway safety and upkeep,[7] prescription of tobacco warehouse rates,[8] and control of "bucket shops" [9] have also been upheld notwithstanding pertinent Congressional action. Because of the widely different state and federal laws involved, an attempt to test the decision in the principal case by previous holdings is necessarily hazardous, for each decision may properly be limited to its own facts. A line of cases holding that Congressional delegation of power to administrative bodies, unaccompanied by affirmative action by the commissions, does not displace state legislation [10] gives some authority for the position taken by the Wisconsin court. The contention that the National Labor Relations Act is not self-executing and that an order of the N. L. R. B. is required to oust the states appears in two decisions dealing with unfair labor practices by employers.[11] This proposition may well be adopted by the Supreme Court to sustain the constitutionality of state labor relations statutes, for, in the past, the Court has been reluctant to strike down state legislation bearing directly upon the public welfare of the state and having the objective of resolving local problems, even though necessarily affecting interstate commerce.[12] The Wisconsin statute, designed to avert the violence of industrial strife, would seem vitally related to the preserva-

[6] Missouri K. & T. R. Ry. v. Haber, 169 U. S. 613, 18 S. Ct. 488 (1897); Asbell v. Kansas, 209 U. S. 251, 28 S. Ct. 485 (1907); Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92 (1902); Mintz v. Baldwin, 289 U. S. 346, 53 S. Ct. 611 (1933), affirming (D. C. N. Y. 1933) 2 F. Supp. 700. Somewhat akin to this type of regulation are statutes designed to promote purity and quality of food. Regulation of this type was upheld in Crossman v. Lurman, 192 U. S. 189, 24 S. Ct. 234 (1903); Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715 (1911).

[7] Thompson v. McDonald, (C. C. A. 5th, 1938) 95 F. (2d) 937; Maurer v. Hamilton, 309 U. S. 598, 60 S. Ct. 726 (1939).

[8] Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842 (1936).

[9] Dickson v. Uhlmann Grain Co., 288 U. S. 188, 53 S. Ct. 362 (1933).

[10] Missouri Pacific Ry. v. Larabee Flour Mills, 211 U. S. 612, 29 S. Ct. 214 (1908); Smith v. Illinois Bell Telephone Co., 282 U. S. 133, 51 S. Ct. 65 (1930); Board of Railroad Commissioners of North Dakota v. Great Northern Ry., 281 U. S. 412, 50 S. Ct. 391 (1930); Northwestern Bell Telephone Co. v. Nebraska State Railway Commission, 297 U. S. 471, 56 S. Ct. 536 (1936). *Contra*: Oregon-Washington Railway and Navigation Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279 (1926).

[11] Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N. W. 673 (1938); Davega City Radio v. State Labor Relations Board, 281 N. Y. 13, 22 N. E. (2d) 145 (1939). The two statutes involved in these cases in so far as they deal with unfair labor practices by employers are substantially identical. Wis. Stat. (1939), § 111.01 et seq.; N. Y. Laws (1937), c. 443. The Wisconsin statute is the one challenged in the principal case.

[12] See note 6, supra. "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " Kelly v. Washington ex rel. Foss Co., 302 U. S. 1 at 10, 58 S. Ct. 87 (1937).

tion of local social tranquility and an exercise of the police power of peculiar importance to the local citizenry. It is to be noted that the section of the statute challenged in the case at bar proscribes unfair labor practices by employees.[13] Restriction of the National Labor Act to unfair practices of employers gives life to the argument that Congress preferred to leave the states free to cope with the employee side of the problem.[14] The decision in the principal case permits the state to mitigate labor strife in all its industries and at the same time acknowledges the power of the N. L. R. B. by its orders to supersede this regulation and deal with the particular dispute along lines of national policy.[15] This result seems especially desirable when one considers that the N. L. R. B. cannot intervene in labor disputes except upon the charge of an aggrieved party.[16]

[13] Wis. Stat. (1939), § 111.06. Wisconsin alone among states legislating in the labor relations field defines unfair labor practices by employees. For other state statutes, see note 16, infra.

[14] "The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to implied unless the latter fairly interpreted is in actual conflict with the state law." Townsend v. Yeomans, 301 U. S. 441 at 454, 57 S. Ct. 842 (1936). The Wisconsin statute in its terms is not conflicting with the provisions and policy set forth in the Wagner Act. Its similarity leads to the inference that it was modeled after the federal statute. For such minor variations as exist, see Garrison, "Government and Labor: The Latest Phase," 37 COL. L. REV. 897 (1937). The National Labor Relations Act does not protect sit-down strikers from amenability to state laws. National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1939).

[15] A strong policy argument for permitting state collective bargaining statutes to co-exist with the Wagner Act, and for amending the federal act to this end, is made by Garrison in "Government and Labor: The Latest Phase," 37 COL. L. REV. 897 (1937). Three states and Puerto Rico have adopted collective bargaining statutes very similar to those adopted by New York and Wisconsin. Utah Laws (1937), c. 55; Mass. Acts (1938), c. 345; Pa. Stat. (Purdon, Supp. 1940), tit. 43, § 211.1 et seq.; Porto Rico Laws (1938), No. 143. The Pennsylvania statute in defining "employer" (§ 3c) excludes those persons subject to the jurisdiction of the National Labor Relations Board. The Massachusetts act (§ 10b) expressly states that it shall not extend to unfair labor practices covered by the national act.

[16] 49 Stat. L. 453, § 10, 29 U. S. C. (1934), § 160. This section of the act provides that the National Labor Relations Board is to have exclusive jurisdiction to carry out the purposes of the act. The following interpretation is given to this provision by the Wisconsin court: "This section purports to deal not with the scope of the act, but with the powers and jurisdiction of the National Labor Relations Board with respect to its administration. Its purpose is therefore presumably to establish the exclusive character of the board's powers of administration as contrasted with other federal boards and agencies which might otherwise be thought to have like jurisdiction." Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473 at 483, 279 N. W. 673 (1938).