Michigan Law Review

Volume 61 | Issue 5

1963

Labor Law--Federal Pre-emption--Scope of Arguable NLRB Jurisdiction

Martin B. Dickinson Jr., S.Ed.
University of Michigan Law School

LABOR LAW—FEDERAL PRE-EMPTION—SCOPE OF ARGUABLE NLRB JURISDICTION—Picketing by petitioner interrupted the unloading of respondent's cargo vessels. A state court granted respondent's request for a permanent injunction against further picketing, despite petitioner's contention that, since it was a "labor organization" within the meaning of section 8(b) of the Labor Management Relations Act[1] and respondent had alleged an unfair labor practice,[2] the National Labor Relations Board had exclusive jurisdiction of the dispute. The Supreme Court of Minnesota affirmed the granting of injunctive relief.[3] On certiorari to the United States Supreme Court, *held*, reversed, one Justice dissenting.[4] Since an unfair labor practice has been alleged and petitioner is arguably a labor organization, state and federal courts must yield to the primary authority of the NLRB to determine whether it has jurisdiction of the controversy. *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173 (1962).

Because Congress intended the NLRB to be a centralized agency to provide uniform regulation of labor relations,[5] state and federal courts are generally precluded from adjudicating controversies within the statutory scope of the Board.[6] In order to prevent conflict between state action and federal labor regulation, the NLRB has been endowed with primary authority to determine whether a given controversy is within its domain.[7] In *San Diego Bldg. Trades Council v. Garmon*,[8] the Supreme Court held that where an activity is "arguably" within the competence of the Board, state and federal courts must yield to the authority of the NLRB to determine whether a controversy involving that activity is within the Board's domain.

National uniformity, however, is not always the primary goal in labor relations, for there are important exceptions to the usual rule of exclusive

1 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b) (1958). See also Labor Management Relations Act (Taft-Hartley Act) §§ 2(3), (5), (11), 61 Stat. 137 (1947), 29 U.S.C. §§ 152(3), (5), (11) (1958).

2 See Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4)(A), 61 Stat. 140 (1947), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. III, 1961).

3 Interlake S.S. Co. v. Marine Eng'rs Beneficial Ass'n, 260 Minn. 1, 108 N.W.2d 627 (1961).

4 Mr. Justice Douglas dissented on the ground that petitioner was not even arguably entitled to the protection of the NLRA since it had presented no evidence that any persons other than supervisors were within its membership.

5 See Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953).

6 *Id.* at 491.

7 See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959), 58 MICH. L. REV. 288.

8 359 U.S. 236 (1959).

NLRB jurisdiction.[9] For example, state courts may act in situations of peculiarly local concern, such as violence and mass picketing, despite concurrent NLRB jurisdiction.[10] Furthermore, many labor controversies are entirely outside the Board's authority simply because of the statutory limitations of the National Labor Relations Act and its amendments. A controversy concerning an employer whose business is primarily intrastate, for example, is not within the Board's domain.[11] The judicial remedies now available in the areas totally outside the Board's competence, as well as in the areas excepted from exclusive NLRB jurisdiction, are of vital importance. The *Garmon* decision, however, presented a danger that local court jurisdiction of such controversies might be severely restricted. The principal case, and others similar to it, have emphasized this problem by demonstrating that the *Garmon* test of "arguable" jurisdiction applies not only to the question of whether an alleged activity is an unfair labor practice, but to all the boundaries which delimit NLRB jurisdiction.[12] Yet many of the limits defining NLRB jurisdiction are highly indefinite; few can be applied with substantial certainty. If the "arguable" test is applied to each of these boundaries and interpreted so as to foreclose state or federal court jurisdiction upon a showing of the merest possibility of NLRB jurisdiction, the result could well be a drastic contraction of the areas not presently subject to exclusive NLRB jurisdiction, at least so far as the availability of prompt local action is concerned. It must be remembered that in many labor disputes timing is of the essence, and that denial of an injunction or other prompt remedy often guarantees the success of a strike, whether that denial is a product of a hearing on the merits, or merely based on a tenuous contention of arguable pre-emption by the NLRB.[13] A later NLRB finding of no jurisdiction may be of little comfort.

Initial interpretation of *Garmon* posed just such a danger to the continued meaningful existence of the exceptions to and limitations on exclusive NLRB jurisdiction, for some courts denied jurisdiction on the basis of highly dubious suggestions of NLRB jurisdiction.[14] The principal case,

9 The importance of assuring judicial remedies within these exceptions was emphasized by congressional action designed to fill the former "no-man's-land" created by the jurisdictional yardsticks of the NLRB. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 701(a), 73 Stat. 541, 29 U.S.C. § 164(c) (Supp. III, 1961).

10 See, *e.g.*, UAW v. WERB, 351 U.S. 266 (1956).

11 Labor Management Relations Act §§ 2(6), (7), 61 Stat. 137 (1947), 29 U.S.C. §§ 152(6), (7) (1958).

12 See, *e.g.*, State *ex rel.* Yellow Cab Serv., Inc. v. Superior Court, 53 Wash. 2d 644, 333 P.2d 924 (1959), *rev'd per curiam*, 361 U.S. 373 (1960); Incres S.S. Co. v. International Maritime Workers, 10 N.Y.2d 218, 176 N.E.2d 719, 219 N.Y.S.2d 21 (1961), *rev'd on other grounds*, 83 Sup. Ct. 611 (1963).

13 See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6, 32, 269 (1959).

14 See, *e.g.*, International Chem. Workers v. Olin Mathieson Chem. Corp., 202 F. Supp. 363 (S.D. Ill. 1962); Wax v. International Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960). *But see* Amalgamated Ass'n of Ry. Employees v. Las Vegas-Tonopah-Reno Stage Line, Inc., 202 F. Supp. 726 (D. Nev. 1962).

the first one since *Garmon* in which the Supreme Court has considered the "arguable" test at length, should serve to prevent such an emasculation of the exceptions to exclusive NLRB jurisdiction, for it suggests that the *Garmon* test does not dictate pre-emption unless there is at least a reasonable basis for such a finding. The Court's choice of the principal case for amplification of the "arguable" test was itself significant, for the jurisdictional question at issue involved one of the least precise and most troublesome distinctions which delimit NLRB jurisdiction—whether the petitioner (defendant below) was a "labor organization" within the meaning of the act.[15] While complexity alone would probably not have been sufficient to assure pre-emption, the defendant presented substantial and convincing evidence in the trial court of its status as a labor organization. The Court relied heavily upon this evidence, which consisted primarily of recent NLRB determinations that petitioner was, at least for some purposes, a labor organization.[16] The result was a clear showing of highly probable NLRB jurisdiction.

The principal case, along with other recent court decisions applying the *Garmon* rule, has hopefully now delineated with somewhat greater certainty the tests to be applied by the courts where pre-emption is claimed. In some instances the pleadings alone may be a sufficient basis for denial of jurisdiction by the trial court. This may occur where the plaintiff's complaint alleges the elements necessary to NLRB jurisdiction without claiming an exception thereto, and the defendant demurs on jurisdictional grounds.[17] Where probable NLRB jurisdiction does not appear on the face of the plaintiff's complaint, it is unlikely that the defendant can obtain dismissal on the pleadings alone. To secure a dismissal the defendant must then present evidence of arguable NLRB jurisdiction.[18] A mere contention to that effect will not suffice,[19] and most courts have required the presentation of relevant NLRB or court decisions demonstrating the competence of the NLRB to determine the issue.[20] Upon such a showing by the defendant the plaintiff's task becomes very difficult; only by presentation of highly convincing authority to the contrary can he avoid dismissal.[21] The principal case suggests that the defendant be given a substantial advantage in this situation, for it indicates that even where the

15 See, *e.g.*, NLRB v. Swift & Co., 292 F.2d 561 (1st Cir. 1961).

16 Principal case at 183.

17 See, *e.g.*, Hobbs-Parsons Co. v. Teamsters Union, 195 Cal. App. 2d 533, 15 Cal. Rptr. 888 (Ct. App. 1961).

18 See, *e.g.*, Wood, Wire & Metal Lathers Union v. Babcock Co., 132 So. 2d 16 (Fla. Ct. App. 1961); *cf. In re* Green, 369 U.S. 689 (1962).

19 See, *e.g.*, Grunwald-Marx, Inc. v. Los Angeles Joint Bd., 52 Cal. 2d 568, 343 P.2d 23 (1959); *Ex parte* George, 358 S.W.2d 590 (Tex. 1962).

20 See, *e.g.*, Wax v. International Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960).

21 See, *e.g.*, Bogle v. Jakes Foundry Co., 362 U.S. 401 (1960), *reversing per curiam* 49 Tenn. App. 309, 329 S.W.2d 364 (Ct. App. 1959); Superior Court v. Washington *ex rel.* Yellow Cab Serv., Inc., 361 U.S. 373 (1960), *reversing per curiam* 53 Wash. 2d 644, 333 P.2d 924 (1959); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959); Gallogly v. Bakery Workers, 180 F. Supp. 778 (D.R.I. 1960).

plaintiff's jurisdictional contentions seem eminently well-reasoned, the defendant's presentation of reasonably relevant NLRB or court authority requires dismissal.[22] Prudent plaintiffs will avoid this eventuality by inserting in the complaint, where possible, specific allegations negating exclusive NLRB jurisdiction, *e.g.*, that the business is not in interstate commerce, or that the union involved is not a labor organization.[23] This tactic will usually cast a heavy burden on a defendant claiming pre-emption.[24] However, while advantageous to the plaintiff, such an approach can easily endanger judicial efficiency, for determination of the jurisdictional issue is likely to become a virtual trial on the merits.[25] This danger is especially prevalent where the plaintiff seeks to avoid immediate pre-emption by alleging that the controversy involves sufficient violence to allow the state to grant relief under its police power.[26] At this point the solution can lie only in the discretion of the trial court. While judicial efficiency and the avoidance of federal-state conflict are vital objectives, the trial court should also recognize the injustice of denying an immediate judicial remedy merely because the defendant raises a tenuous claim of "arguable" pre-emption.

Martin B. Dickinson, Jr., S.Ed.

22 Principal case at 184.

23 See, *e.g.*, Freight Drivers Union v. Quinn Freight Lines, Inc., 195 F. Supp. 180 (D. Mass. 1961).

24 See, *e.g.*, Cox v. Superior Court, 52 Cal. 2d 855, 346 P.2d 15 (1959).

25 See, *e.g.*, Portland Web Pressmen's Union v. Oregonian Publishing Co., 188 F. Supp 859 (D. Ore.), *aff'd*, 286 F.2d 4 (9th Cir. 1960), *cert. denied*, 366 U.S. 912 (1961); Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809 (N.D. Iowa 1960).

26 The jurisdictional issue as to whether such violence has occurred ordinarily involves the same factual determination upon which the plaintiff bases his substantive claim. See Michelman, *State Power To Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 664 (1961).