Michigan Law Review

Volume 60 | Issue 7

1962

Labor Law--Federal Pre-Emption--State Jurisdiction to Prosecute Labor Organizers for Criminal Trespass

John W. Galanis
University of Michigan Law School

LABOR LAW—FEDERAL PRE-EMPTION—STATE JURISDICTION TO PROSECUTE LABOR ORGANIZERS FOR CRIMINAL TRESPASS—Defendants, non-employee union organizers, entered the parking lot of a retail department store without permission for the sole purpose of distributing union material to the store's employees. After continued refusal to comply with requests to leave, the defendants were arrested, tried, and convicted of criminal trespass.[1] It was contended that the trial court lacked jurisdiction because the National Labor Relations Act[2] had pre-empted state control of the labor activities involved. On appeal to the Illinois Supreme Court, *held*, affirmed. State jurisdiction was justified not only by the state's interest in domestic peace and the protection of employer's property rights, but also by the refusal of defendants to invoke the jurisdiction of the National Labor Relations Board. *State v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385 (1961), *cert. denied*, 368 U.S. 927 (1961).

Since the enactment of the National Labor Relations Act much controversy has ensued over the extent to which Congress intended to pre-empt state jurisdiction over labor activities.[3] Although the 1959 amendments to the NLRA confer power upon state courts in suits which are declined by the NLRB or which fail to meet NLRB jurisdictional limits,[4] generally a state cannot otherwise assert jurisdiction over labor activities which are arguably either prohibited or protected by the NLRA.[5] This general rule applies even though a state judicial proceeding is founded upon legal theories lying outside the realm of labor relations.[6] Any recognized exceptions to

1 ILL. REV. STAT. ch. 38, § 565 (1957): "Whoever . . . is unlawfully upon the enclosed land . . . of another and is notified to depart therefrom by the owner, or occupant, or by his agent or servant, and neglects or refuses so to do . . . shall be guilty of a misdemeanor . . . ."

2 National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1958).

3 See generally Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Hays, *Federalism and Labor Relations in the United States*, 102 U. PA. L. REV. 959 (1954); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6 (1959).

4 Landrum-Griffin Act § 701, 73 Stat. 541 (1959), 29 U.S.C. § 164(a) (Supp. I, 1959). See generally Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960).

5 See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959), and authorities cited therein.

6 In San Diego Bldg. Trades Council v. Garmon, *supra* note 5, at 244, the Court stated: "Nor has it mattered whether the States have acted through *laws of broad general application* rather than laws specifically directed toward the governance of industrial

the expressed federal pre-emption doctrine are attributable to a conflict between national and state interests and to the interaction between the exercise of federal and state powers.[7] The United States Supreme Court, in balancing the national and state interests, has consistently recognized an overriding state interest in the control of violence in labor disputes by permitting states to enjoin such conduct[8] or to grant tort damage recovery.[9] Whether a state may also enjoin a trespass incident to a labor dispute has never specifically been decided, although that question was presented to the Supreme Court in *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*[10] There the Court expressly reserved the question and rejected the assertion of state jurisdiction on other grounds.[11] Thus the court in the principal case felt that it was not precluded from upholding the state's prosecution of defendants' solicitation on company premises, notwithstanding the fact that this activity was arguably protected under the NLRA.[12] Since no remedies were available to the employer under the NLRA,[13] the court also reasoned that application of the federal pre-emption doctrine would endanger domestic peace in that it would force the employer to resort to self-

relations. Regardless of the mode adopted, to allow States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (Emphasis added.)

7 See De Veau v. Braisted, 363 U.S. 144, 152 (1960).

8 See, *e.g.*, Youngdahl v. Rainfair, 355 U.S. 131 (1957) (state court enjoined threatened violence in picketing); Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (state court enjoined violence). For a collection of state decisions granting injunctions, see Annot., 32 A.L.R.2d 1026 (1953).

9 See, *e.g.*, UAW v. Russell, 356 U.S. 634 (1958) (recovery allowed non-striking employee where entry was blocked by mass picketing). In United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954), tort recovery was allowed against a union that forced the employer to abandon several construction projects. See also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (state jurisdiction to award tort damages denied since no violence present).

10 353 U.S. 20 (1957) (state court enjoined picketing, trespassing, and exerting secondary pressures on suppliers). *Accord*, State v. Williams, 37 CCH Lab. Cas. 67,515 (Md. Crim. Ct., Baltimore City 1959) (trespass jurisdiction denied).

11 Amalgamated Meat Cutters v. Fairlawn Meats, Inc., *supra* note 10, at 24.

12 Section 7 of the NLRA, which guarantees employees the right of self-organization, has been interpreted to include solicitation by non-employees on company premises when it can be shown that there is no reasonable alternative means of communication with employees or that a valid no-solicitation rule is being unfairly applied. See National Labor Relations Act § 7, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956). See generally Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958).

13 Under the NLRA, there are no rights granted to the employer to cover this activity. See National Labor Relations Act § 8, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958). Also, since there are no declaratory judgment procedures available, a complaint charging an unfair labor practice must be filed to seek NLRB determination of the rights of the parties. This would not help the employer since in effect it would require the employer to charge himself with having committed an unfair labor practice. See 29 C.F.R. § 101.2 (Supp. 1961). *Cf.* Freeman v. Retail Clerks Union, 363 P.2d 803 (Wash. 1961).

help devices.[14] In contrast, the defendants could have protected their statutory rights by invoking the jurisdiction of the NLRB for a proper adjudication.[15] These considerations might seem to justify the court's assertion of jurisdiction to protect the employer's property rights.[16]

No authority, however, supports such an extension of state remedies in this area of federal pre-emption.[17] The absence of previous instances of state criminal prosecution in this area is possibly attributable to the accessibility of NLRB protection for union solicitors who have been unlawfully restrained or prohibited.[18] In any event, no court has had to face the precise considerations which led this court to assume jurisdiction. A conspicuous absence of criminal prosecution also exists with respect to the so-called "violence" cases, where state relief has usually been entirely injunctive in nature.[19] This may be due to the lack of state legislation adapted to meet particular problems of labor violence,[20] thereby necessitating the use of the more flexible injunction. The "violence" cases, by analogy, might tend to support the use of state injunctive powers in trespass situations.[21] Furthermore, if the state should resolve to act in these situations, it is apparent that the use of its injunctive powers offers a more suitable compromise of the interests involved than does a resort

14 The principal case may represent a rounding out of the "violence" requirement as to the degree of violence necessary before states can exercise jurisdiction over labor activities falling within the NLRA. In this connection see De Veau v. Braisted, 363 U.S. 144 (1960), 59 MICH. L. REV. 643 (1961).

15 A complaint charging an unfair labor practice could have been submitted to the NLRB which would have resulted in a subsequent "cease-and-desist" order if the defendant's right had been violated. See, *e.g.*, Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952).

16 Apparently the defendants' refusal to invoke the jurisdiction of the NLRB was the decisive factor in persuading the court to assert jurisdiction. Principal case at 614, 174 N.E.2d at 389, "We are unwilling to hold that the State courts are divested of jurisdiction, not because Congress has preempted the area, but because of the course the union organizers have followed."

17 A search of the authorities suggests this application of a criminal trespass statute in the area of pre-emption is sui generis. *Cf.* People v. Mazo, 38 CCH Lab. Cas. 68,000 (Ill. Cir. Ct., Whiteside County 1959), where the court stated that a criminal trespass suit for peaceful picketing could be maintained because preservation of property rights is a "compelling state interest" comparable to protection from violence.

18 See cases collected in Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958).

19 No case authority was found which applied criminal prosecution to labor activities falling within the coverage of the NLRA.

20 Some states have criminal laws directed at the type of violence which may arise out of labor disputes. But for the most part, state control of labor violence rests with common-law offenses such as assault, breach of peace, unlawful assembly and affray. See Brown, *State Legislative Protection from Labor Violence and Coercion*, 4 LAB. L.J. 822 (1953); Note, 67 YALE L.J. 325 (1957).

21 *But see* Retail Clerks v. Your Food Stores, Inc., 225 F.2d 659 (10th Cir. 1955), in which an injunction issued by a state court based upon the state law of trespass and directed against peaceful picketing was set aside because of federal pre-emption.

to criminal sanctions.[22] Whereas the Illinois court, because of the "primary competence" of the NLRB,[23] declined to decide whether the defendants' trespass was justified under the NLRA, an injunction would leave defendants free to seek NLRB protection.[24] Consequently, an injunction would not only protect the employer's property rights, but would enable union solicitors to invoke the jurisdiction of the NLRB. On the other hand, since the "primary competence" of the NLRB precludes a state court from determining if the defendants were within their rights granted by the NLRA, the enforcement of a criminal trespass statute would force the defendants to seek United States Supreme Court review in order to obtain relief from state criminal penalties. Such extensive litigation seems a high price for union organizers to pay for failing to seek NLRB determination of their statutory rights. Moreover, potential use of criminal trespass prosecutions to imprison[25] union organizers might tend to discourage legitimate union solicitation on company property contrary to the purposes and objectives of the NLRA and, as such, would not seem to be desirable as an allowable employer weapon.

In spite of the distinct advantages involved in the use of injunctive relief when compared with criminal prosecution of union activity resulting in a non-violent trespass, to grant states the power to enjoin such a trespass as a singular exception to the pre-emption doctrine seems too narrow a position to be acceptable. No authority supports any such piecemeal grant of state jurisdiction, and such a position would place states in the anomalous situation of having the power to enjoin the labor union trespass without having the power to entertain suits for tort or criminal violations that may arise for the same conduct. A critical view of the purported threat of violence which the Illinois court relied on in reaching

22 The Illinois anti-injunction statute has been interpreted not to apply to unlawful acts incident to labor disputes and thereby would not preclude state injunctive powers. See Bitzer Motor Co. v. Local 604, Teamsters Union, 349 Ill. App. 283, 110 N.E.2d 674 (1953); ILL. ANN. STAT. ch. 48, § 2(a) (Smith-Hurd 1950). See also Annot., 29 A.L.R.2d 323 (1953).

23 Principal case at 613, 174 N.E.2d at 389. See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

24 The NLRB has power upon issuance of an unfair labor practice complaint to petition a federal district court for appropriate temporary relief or a restraining order. Labor-Management Relations Act § 10(j), 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1958). See Capital Serv., Inc. v. NLRB, 347 U.S. 501 (1954) (federal district court has power to restrain enforcement of a state injunction at the instance of the NLRB). *But see* Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511 (1955) (a federal district court has no jurisdiction to restrain state injunction at the instance of a private party).

25 As a result of the recent sit-in demonstrations, many of the Southern states have added imprisonment penalties to their criminal trespass statutes. See, *e.g.*, MISS. CODE ANN. § 2409.07 (Supp. 1960), which imposes a fine of not more than $500 or confinement in the county jail for a period not exceeding six months or both for a conviction of criminal trespass.

its decision suggests that the possibility of actual violence in these situations is in reality not a very great one. In most situations, the employer normally will have suitable passive physical means available such as fences, for example, to prevent union solicitation on his property. Thus, the better solution in the ordinary trespass situations would seem to be achieved through a strict application of the expressed pre-emption doctrine that all non-violent labor activity which is arguably protected by the NLRA is federally pre-empted. Otherwise, granting of jurisdiction to the states would in effect be subjecting non-violent union conduct to state jurisdiction simply because it violates a state criminal statute. Logically, if state courts are pre-empted when the union activity is arguably protected or prohibited by the NLRA in civil suits when violence is not present, the same result should follow when non-violent union activity violates state criminal statutes. While a conceptual distinction could be made between union conduct which violates state civil law and that violating state criminal laws, since states could pass criminal statutes which cover numerous labor activities, this distinction would potentially result in a considerable expansion of state jurisdiction over labor activities that fall within the provisions of the NLRA. Such a result would serve to thwart the policy of national uniformity in labor relations expressed and exemplified by the NLRA.

Admittedly the employer's position in the principal case is a difficult one because of the defendants' refusal to submit to the jurisdiction of the NLRB.[26] However, there will always be cases which occasionally present special problems in the grey area between pre-emption and state jurisdiction wherever the line is finally drawn. Nevertheless, a line must certainly be drawn. Therefore, in trespass situations, the better approach would seemingly lie in a consistent application of the pre-emption doctrine unless a sufficient quantum of violence is present which will permit states to bring themselves within the valid and recognized "violence" exception. Such a quantum should indicate more than a mere possibility but rather an imminent endangering of the public peace, determinable judicially on an ad hoc basis from the particular facts and circumstances of each situation.

John W. Galanis

[26] Perhaps the presence of other reasonable methods of communicating with employees explains the defendants' refusal to invoke the jurisdiction of the NLRB. For a good discussion of the factors considered in determining "other reasonable alternatives," see Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266, 288 (1958).