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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—FURTHER COMMENTS ON FEDERALISM—Until a decade ago, the nation's lawyers paid little attention to the status of federal-state relations in the regulation of labor disputes. Today there hardly appears a volume of a legal journal that does not contain the product of new efforts to bring order out of the chaos that prevails in this area.[1] A number of writers have apparently given up the task of reconciling statutory provisions with case law and case law with sound federal policy, and have resorted to the simpler, yet challenging, method of proposing amendments to existing federal statutes.[2] Worthy as these efforts may be in calling attention to the need for further congressional action and in suggesting possible courses for such action, they are of little help to unions and employers who are now suffering the consequences of congressional stagnation. New cases are appearing with what seems to be increasing frequency, and recent decisions suggest the probability that a further increase of litigation in this area is in the offing.

No effort will be made here to offer a complete restatement of the present law of federalism in labor relations. In the first place, there is considerable disagreement as to what that law is. In the second place, the legal periodicals and some of the recent decisions have devoted hundreds and perhaps thousands of pages to that task. Consequently, the aim of this comment will be only to select certain portions of the problem and examine those portions in the light of *Weber v. Anheuser-Busch, Inc.*,[3] decided last March by the United States Supreme Court.

I. *The Areas of Jurisdictional Conflict*

At the outset, it would be well to distinguish briefly the two quite distinct areas of conflict between federal and state jurisdiction in the labor field. First, there are those conflicts which have their roots in the fact that Congress has vested in the National Labor Relations Board jurisdiction over certain disputes "affecting commerce." Students of constitutional law are aware that the term "affecting commerce" now covers a multitude of sins—and

1 Seven lead articles on the subject are cited in 53 MICH. L. REV. 602 at 604, n. 9 (1955). To these may be added Roumell and Schlesinger, "The Preemption Dilemma in Labor Relations," 18 UNIV. DET. L.J. 17, 135 (1954-1955); Brody, "Federal Pre-emption Comes of Age in Labor Relations," 5 LAB. L.J. 743 (1954).

2 See Roumell and Schlesinger, "The Preemption Dilemma in Labor Relations," 18 UNIV. DET. L.J. 135 (1955); Brody, "Federal Pre-emption Comes of Age in Labor Relations," 5 LAB. L.J. 743 (1954).

3 348 U.S. 468, 75 S.Ct. 480 (1955).

sinners. It was, therefore, not surprising that the Board's power was soon recognized as being considerably broader in scope than that which available appropriations and personnel would permit the Board to exercise. Partly because of this and perhaps partly because it has been thought that matters essentially local in character should be handled by local authorities, the Board has declined to take jurisdiction over certain classes of cases which fall within the powers granted to it by Congress.[4] Here the question has been, who, if anyone, has jurisdiction over cases which the Board in its discretion has declined, or would decline, to take on jurisdictional grounds. The answer would be easy were it not for the proviso to section 10 (a) of the amended National Labor Relations Act.[5] This proviso states, in substance, that the Board has power to cede its jurisdiction to state agencies under certain conditions, one of which is that the applicable state law may not be inconsistent with "the corresponding provision" of the Taft-Hartley Act. Since no state labor law is patterned exactly along the lines of Taft-Hartley, no state has "corresponding provisions" which enable its agencies to receive grants of jurisdiction from the Board.[6] Thus, the proviso to section 10 (a) serves no purpose other than to offer support for the idea that a vacuum is created when the Board declines to take jurisdiction—a vacuum wherein neither federal nor state law is applicable. That such a vacuum does indeed exist continues to be the view of some courts[7] and

[4] The most recent announcement of standards which the Board will employ in deciding whether to assume jurisdiction over a given case appears in NLRB Releases R-445 and R-449, July 1 and 15, 1954. On the scope of Board jurisdiction, see, generally, 1 CCH LAB. L. REP. ¶1610 (1955). Approval of the Board's practice of limiting its own jurisdiction was indicated in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S.Ct. 943 (1951).

[5] Labor-Management Relations Act, 1947, 61 Stat. L. 146, 29 U.S.C. (1952) §160. The post Taft-Hartley history of this section is discussed in Brody, "Federal Pre-emption Comes of Age in Labor Relations," 5 LAB. L.J. 743 at 764 (1954), where the author points out that Congress has been reluctant to amend the section even though the problems it has created have been recognized.

[6] To date no cession agreements have been made by the Board pursuant to the proviso to §10 (a). But see Satin, Inc. v. Local Union 445, IBEW, (Mich. Cir. Ct. 1954) 26 CCH Lab. Cas. ¶68,508, for an instance in which a state court construed a Board refusal to assert its jurisdiction as a cession under this proviso. The soundness of such a construction is, to say the least, questionable.

[7] See Retail Clerks Local 1564 v. Your Food Stores of Santa Fe, (10th Cir. 1955) 225 F. (2d) 659; Adelphia Construction Co. v. Building & Construction Trades Council of Philadelphia, (Pa. Com. Pl. 1954) 27 CCH Lab. Cas. ¶68,843; Universal Car and Service Co. of Grand Rapids v. IAM, Lodge 1573, (Mich. Cir. Ct. 1954) 27 CCH Lab. Cas. ¶68,825; WERB v. Chauffeurs, Teamsters & Helpers, Local 200, 267 Wis. 356, 66 N.W. (2d) 318 (1954). But see Satin, Inc. v. Local Union 445, IBEW, (Mich. Cir. Ct. 1954) 26 CCH Lab. Cas. ¶68,508; Cleveland v. Local Union 655, Plumbers, (Pa. Com. Pl. 1954) 27 CCH Lab. Cas. ¶68,842. Cf. NYSLRB v. Wags Transportation System, (N.Y. Sup. Ct. 1954) 26

writers.[8] Its very absurdity, however, may well result in Supreme Court disregard for this strict interpretation of section 10 (a), in so far as Board refusals to accept jurisdiction are concerned.[9]

The other area of jurisdictional conflict is broader in scope than the one just described; it is not occasioned by the Board's exercise of discretionary power to decline jurisdiction. Instead, it stems from the fact that the Board has not been given exclusive jurisdiction over *all* types of labor disputes in industries affecting commerce. Federal legislation has created certain rights and has prohibited some specified types of conduct, but *some* powers have, nevertheless, been reserved to the states. Thus, the Board's jurisdiction is limited in subject matter to that which has been conferred upon it. At the same time, in so far as Congress has not acted to govern completely a particular sphere of activity, some authority remains in state agencies. Just where that state authority begins and ends, however, is more than a little in doubt. First, it is apparent that the exact limits of Board jurisdiction to grant relief have not yet been fixed. In fact, it is unlikely that they will ever be fixed with precision under current statutes because of the broad language employed in section 7 and 8 of the amended

CCH Lab. Cas. ¶68,754. In the Universal Car case, supra, the court concluded that to recognize the vacuum would be a lesser evil than the chaos that would result from having state court jurisdiction depend upon the day to day discretionary jurisdiction of the Board, that discretion being dependent upon budgetary conditions and the economic, political and social views of the Board members. Apparently the court entertains the quaint notion that an absence of law is better than a changing law.

State labor boards have also had occasion to adopt one view or the other. The Michigan, New York and Wisconsin boards have rejected the "no-man's land" view. See 6 LAB. L.J. 602 (1955).

8 E.g.: Hays, "Federalism and Labor Relations in the United States," 102 UNIV. PA. L. REV. 959 at 976 (1954); Brody, "Federal Pre-emption Comes of Age in Labor Relations," 5 LAB. L.J. 743 at 763 (1954). Both authors, however, deplore the result.

9 See Building Trades Council v. Kinard Construction Co., 346 U.S. 933, 74 S.Ct. 373 (1954), where the Supreme Court declined to pass on the question of state court jurisdiction because the Board had not yet refused to entertain the case and there had been no showing that it would have been futile to apply to the Board for relief.

In the course of announcing a rather novel "solution" to the vacuum dilemma in two recent cases, the California Supreme Court neatly sidestepped the language of §10 (a). In Benton, Inc. v. Painters Local 333, (Calif. 1955) 37 L.R.R.M. 2251, it was held that where an employer's business affects interstate commerce but does not meet the Board's minimum jurisdictional standards, a state court is without jurisdiction to enjoin peaceful organizational picketing in the absence of an express refusal by the Board to take jurisdiction. On the other hand, in Garmon v. Building Trades Council, (Calif. 1955) 37 L.R.R.M. 2233, it was held that where the Regional Director has affirmatively refused to take jurisdiction on behalf of the Board, a state court has jurisdiction to enjoin peaceful organizational picketing, even if the employer's business affects interstate commerce. The most remarkable feature of the latter decision was the court's conclusion that in such circumstances the state court will apply federal law rather than state law. At least one feature of the case is not remarkable: three judges dissented.

NLRA and because of the changing interpretations of that language by the Board itself. Second, there appears to be some basis for concluding that, as to very limited areas at least, both the Board and a state agency may, on different grounds, exercise jurisdiction over the same conduct.

At the very least, a birdseye view of decisional law leading up to *Weber v. Anheuser-Busch, Inc.* is necessary to a proper appreciation of the contribution made by that case. *Weber,* however, involved only the second of the two classes of jurisdictional problems described above, i.e., those cases in which the Board has *not* declined to entertain the matter on jurisdictional grounds. The remainder of this comment, therefore, will be devoted principally to an examination of problems in that class of cases.

A. *Prohibited Areas of State Action.* The states are precluded from interfering with or restraining the free exercise of rights granted by federal labor legislation. This principle itself is a rather simple outgrowth of the supremacy clause of the Constitution, but the labor cases in which the Supreme Court has found occasion to invoke it have involved subtle questions of whether the particular state regulations actually constituted infringements upon federally granted rights.[10] State agencies and courts are also precluded from entertaining questions involving certification of appropriate bargaining units and representatives in industries affecting commerce.[11] Finally, the states may not enjoin under their own labor legislation conduct which is forbidden by federal labor law.[12]

B. *Permissible Areas of State Action.* Injunctions and other remedies under state law are available where violence occurs or is threatened or where mass picketing takes place.[13] The same is true where a union engages in recurrent and unannounced work stoppages,[14] and where other matters are involved which are neither regulated nor consciously left unregulated by Congress.[15] Finally, the state court damage remedy is sometimes available since

10 Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373 (1945); Amalgamated Street Ry. Employees v. WERB, 340 U.S. 383, 71 S.Ct. 359 (1951); International Union v. O'Brien, 339 U.S. 454, 70 S.Ct. 781 (1950).

11 Bethlehem Steel Co. v. NYSLRB, 330 U.S. 767, 67 S.Ct. 1026 (1947); La Crosse Telephone Corp. v. WERB, 336 U.S. 18, 69 S.Ct. 379 (1949).

12 Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161 (1953).

13 Allen-Bradley Local No. 1111 v. WERB, 315 U.S. 740, 62 S.Ct. 820 (1942).

14 International Union, UAW-AFL v. WERB, 336 U.S. 245, 69 S.Ct. 516 (1949), the so-called Briggs-Stratton case.

15 Algoma Plywood & Veneer Co. v. WERB, 336 U.S. 301, 69 S.Ct. 584 (1949).

the federal law does not provide for compensatory relief in all cases and thus there is no conflict between state and federal remedies.[16] This is the case at least where the conduct complained of is not protected under Taft-Hartley.

II. *The Contribution of Weber v. Anheuser-Busch, Inc.*

Two unions in the St. Louis area, the International Association of Machinists and the United Brotherhood of Carpenters and Joiners (hereinafter referred to as the IAM and the Carpenters), each claimed the same type of work for their respective members. Each union represented a portion of the employees of the Anheuser-Busch company. From 1948 to 1952, with the exception of one year, there appeared in the contract between the IAM and the company a provision to the effect that when the repair or replacement of machinery was necessary, this work would be given only to those contractors who had collective agreements with IAM. Prior to negotiations on the 1952 contract between IAM and the company, the Carpenters threatened to make no new contract with the company unless this provision was deleted from the IAM contract. The company therefore refused to agree to a renewal of that provision in the 1952 IAM contract, whereupon the IAM went on strike. The company immediately filed charges against the IAM with the NLRB, alleging that the union was engaging in an unfair labor practice in violation of section 8 (b) (4) (D) of the amended NLRA. Eleven days later the company filed charges against the IAM in a state court, alleging that the strike constituted not only a secondary boycott under Missouri law, but also a violation of subsection (A), (B) and (D) of section 8 (b) (4) of the amended NLRA and section 303 (a) (1), (2) and (3) of the Labor-Management Relations Act. After obtaining a temporary injunction in the state court, the company amended its complaint to include a charge that the conduct of the IAM constituted an illegal conspiracy in restraint of trade under Missouri common law and conspiracy statutes. The state court injunction was made permanent on September 30, 1952, some seven weeks before the Board quashed the notice of a hearing on the alleged violation of section 8 (b) (4) (D). When the Board finally acted on November 18, 1952, it held that there was no unfair labor practice under section 8 (b) (4) (D) in the conduct of the IAM strike.[17] On February 8,

[16] United Construction Workers v. Laburnum Construction Co., 347 U.S. 656, 74 S.Ct. 833 (1954).

[17] District No. 9, IAM, 101 N.L.R.B. 346 (1952).

1954, the Missouri Supreme Court held that the IAM strike was enjoinable under the state's restraint of trade statute. The state supreme court treated the Board's action as a determination that no unfair labor practice was involved.[18] On certiorari, this decision was unanimously reversed by the United States Supreme Court.

The Court first rejected the state court's conclusion that the Board's action amounted to a finding that no unfair labor practice was involved. A determination that there was no violation of section 8 (b) (4) (D), said the Court, does not necessarily mean that there was no violation of other provisions of the federal law.[19] Moreover, such a determination does not settle the question of whether the conduct involved was protected under section 7 of the amended NLRA. In each case, said the Court, it is for the Board to determine whether the conduct complained of may be violative of other provisions of the federal law or may be a protected activity under section 7. Having found that there was some reasonable possibility that the IAM strike was either an unfair labor practice or a protected activity, the Court concluded that the state court had no jurisdiction in the matter because the Board has exclusive jurisdiction to enjoin conduct which has been regulated by the federal government.

It was urged before the Court that this case was distinguishable from *Garner v. Teamsters Union*[20] on the ground that here the union activity was enjoined under a "general" statute having no particular relevance to labor relations, whereas in the *Garner* case the state was attempting to regulate, in a labor statute, the same conduct that was covered by the federal act. The Court's answer to this contention is both interesting and mildly surprising.

> "We do not think this distinction is decisive. In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct. And in *Capital*

[18] Anheuser-Busch, Inc. v. Weber, 364 Mo. 573, 265 S.W. (2d) 325 (1954).

[19] The limitations imposed upon Board jurisdiction by the Taft-Hartley Act dictate this conclusion. The Board is empowered to issue unfair labor practice complaints, conduct hearings and render decisions only when charges have been filed by a party interested in the dispute. This being the case, a party could circumvent the pre-emption doctrine simply by filing an unfair labor practice charge on the weakest possible ground and getting an adverse determination from the Board. This evasive tactic is foreclosed by the holding in the Weber case.

[20] 346 U.S. 485, 74 S.Ct. 161 (1953).

Service, Inc. v. Labor Board . . . we did not stop to inquire just what category of 'public policy' the union's conduct allegedly violated."[21]

Whether the Court intended this language to mean that a state's interest in the matter is entirely immaterial when an unfair labor practice is involved is not quite clear. If such was the meaning of the italicized passage above, the result would be that even violent conduct, such as was involved in *Allen-Bradley Local No. 1111 v. WERB,*[22] and unannounced work stoppages, such as were involved in *International Union, UAW-AFL v. WERB,*[23] would not be subject to a state injunction if an unfair labor practice coincidentally accompanied the violence or the work stoppages.[24] (It will be recalled that in neither of these cases was there any serious suggestion that the enjoined activity constituted an unfair labor practice, and in each case it was determined *by the Court* that the activity was not protected under federal law. In fact, there was no such thing as an unfair labor practice by a union at the time of the *Allen-Bradley* case.) If, on the other hand, the Court merely intended to exclude as a basis for the exercise of concurrent state jurisdiction those state policies which are shields for the regulation of labor relations or which threaten to impede substantially the orderly regulation of matters within Board jurisdiction, then the *Allen-Bradley* and *Briggs-Stratton* cases still authorize effective state restraints on labor activities. This would seem to be the better interpretation of the Court's language. The opinion in the *Weber* case contains several approving references to *Allen-Bradley,* and nowhere else in the opinion is it suggested that the doctrine of that case was being impaired.

21 Weber v. Anheuser-Busch, Inc., 348 U.S. 468 at 479-480, 75 S.Ct. 480 (1955). Emphasis added.

22 315 U.S. 740, 62 S.Ct. 820 (1942).

23 336 U.S. 245, 69 S.Ct. 516 (1949), the so-called Briggs-Stratton case.

24 Following the Garner case, it was thought in some circles that the states were precluded from entertaining jurisdiction to restrain violence growing out of labor disputes in industries affecting commerce. State courts have uniformly held, however, that the power of the states in this regard was unimpaired by the Garner case. Perez v. Trifiletti, (Fla. 1954) 74 S. (2d) 100; WERB v. United Auto., Aircraft and Agric. Implement Workers, (Wis. 1955) 70 N.W. (2d) 191. In McQuay, Inc. v. International Union, UAW-CIO, (Minn. 1955) 72 N.W. (2d) 81, a case in which the Weber case was cited, it was expressly held that a state court may enjoin violent conduct even when that conduct also constitutes an unfair labor practice under the Taft-Hartley Act. No case has been found in which a contrary result was reached, and it seems safe to say that there will be none under current legislation. If violence falls within state jurisdiction even when accompanying an otherwise protected activity, it is difficult to see why an accompanying unfair labor practice should deprive the state of jurisdiction. In either event the relationship of the state agency to the NLRB is the same.

Regardless of which of the above two interpretations is the correct one, it is nevertheless true that several other Supreme Court decisions have diminished considerably in significance with the announcement of the *Weber* decision. In *Giboney v. Empire Storage & Ice Co.*,[25] the Supreme Court sustained the constitutionality of a state injunction against picketing which sought to compel the violation of a state restraint of trade statute. The only constitutional issue praised or considered was the validity of the decree under the Fourteenth Amendment.[26] And in *Building Service Employees International Union v. Gazzam*,[27] the Court upheld an injunction which restrained picketing designed to compel a hotel operator to employ union workers. Again the attention of the Court was directed to the Fourteenth Amendment rather than to the developing concept of federal pre-emption. The significance of these cases must now be confined to the actual basis upon which they were decided, i.e., that the states may impose reasonable restraints upon peaceful picketing without violating the Fourteenth Amendment.[28] No longer can it be said that such restraints upon picketing or other concerted activities are valid exercises of state police powers where there is some reasonable possibility that the activity is prohibited or protected by Taft-Hartley. The Court leaves no doubt on this point.

> "... where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these 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."[29]

25 336 U.S. 490, 69 S.Ct. 684 (1949).

26 The opinion in the Giboney case gives not the slightest hint of whether the employer's operations "affected interstate commerce" so as to bring the case within the jurisdiction of the NLRB.

27 339 U.S. 532, 70 S.Ct. 784 (1950).

28 Two other cases often cited together with the Giboney and Gazzam cases as upholding state powers in the realm of labor relations are International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 70 S.Ct. 773 (1950), and Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718 (1950). Actually, however, these cases, like Giboney and Gazzam, provide no authority for state court jurisdiction over matters regulated by federal labor law.

29 Weber v. Anheuser-Busch, Inc., 348 U.S. 478 at 481, 75 S.Ct. 480 (1955). In Local No. 25, IBT v. N.Y., N.H., & H.R. Co., 350 U.S. 155, 76 S.Ct. 227 (1956), the Court invoked the quoted language in holding that a state court was without jurisdiction because the plaintiff below had alleged an unfair labor practice in its amended complaint and the Board had not declined to take jurisdiction. The opinion of the Court contains no

Of added significance in this context is the Court's repetition of language in the *Garner* case to the effect that peaceful picketing in industries affecting commerce may not be restrained by the states because Congress prescribed a detailed procedure for the restraint of specified types of picketing and apparently intended that other types would be free from further restraint.[30]

III. *Some Practical Effects of the Weber Decision*

There will doubtless be circumstances in which a state court will feel free to exercise its injunctive powers even though labor relations in industries affecting interstate commerce are involved. Indeed, the Supreme Court apparently expects the state courts and boards to do so where the facts of a particular case do not appear to fall within the test formulated in the *Weber* case. Realizing that the boundaries of the area pre-empted by the Taft-Hartley Act are by no means precise, the Court has determined to fix those boundaries through an arduous case-by-case method.[31] Only prompt action by Congress can save the Court and the parties from this expensive and troublesome procedure for fixing the law of the land.

There will, however, be many circumstances in which the state court will want to be satisfied that the dispute involves neither a protected nor a prohibited activity under Taft-Hartley before it will assume jurisdiction. In such a case, the party considering himself to be aggrieved and entitled to injunctive relief has no alternative but to file a charge with the Board.[32] In so doing, it

reference to the employer's argument that the evidence failed to show the occurrence of an unfair labor practice. See 24 U.S. LAW WEEK 3134 (1955).

30 Indicative of the fact that all state courts are not prepared to accept the Garner language concerning picketing as being sound law is the decision of the Wisconsin Supreme Court in Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, (Wis. 1955) 69 N.W. (2d) 762. Even Justice Frankfurter's repetition of that language in the Weber case failed to impress the Wisconsin court. See also the California cases referred to in note 9 supra.

31 It is interesting to note that the Court, with Justice Frankfurter leading the way, has departed from its former policy of fixing arbitrary limits to state jurisdiction in this field. Compare the opinion of the Court, and Justice Frankfurter's concurring opinion, in Bethlehem Steel Co. v. NYSLRB, 330 U.S. 767, 67 S.Ct. 1026 (1947). See also Cox, "Federalism in the Law of Labor Relations," 67 HARV. L. REV. 1297 (1954), where the author argues that arbitrary boundaries of state jurisdiction are preferable to the flexible and uncertain standards now employed by the Court. Professor Cox points out that the policy now in effect is excessively burdensome and expensive to litigants, and that the occasional hardships which would attend the fixing of more certain standards do not warrant this burden and expense.

32 Of course, if a damage action is available to him, he may avail himself of the rule of United Constr. Workers v. Laburnum Constr. Co., 347 U.S. 656, 74 S.Ct. 833 (1954).

will behoove him to allege every conceivable violation of the federal act, for if he fails to allege some possible ground for obtaining relief from the Board, his access to the state court or board will remain closed. At this point, he is at the mercy of the regional director or the general counsel of the Board. These officials may in an appropriate case refuse to issue a complaint on jurisdictional grounds, thus raising the first class of federalism problems discussed above. Secondly, they may refuse to issue a complaint on the ground that no unfair labor practice has been committed by the party against whom the charge is brought.[33] In this event, it may at first appear that the way is clear for the complainant to bring his action before a state court or board. But the situation is not this simple. The activity complained of may be either protected or prohibited under federal law, but it is not the function of the regional director or general counsel to determine whether a given activity is protected or prohibited. Their function in the realm of unfair labor practices is limited to the issuance of complaints and the prosecution of those complaints before the Board or its hearing officers. Thus, it is by no means clear that a refusal on the part of these officials to issue a complaint will satisfy a state court that it is entitled to entertain the cause.[34]

Supposing, however, that a complaint is issued on each charge alleged by the moving party (an unlikely event since that party will have alleged violations of the Taft-Hartley Act on every conceivable ground, some of which are likely to be tenuous), the case will then be carried to the Board. If the requested relief is granted, the complainant will probably be satisfied despite the usual delay in processing such complaints. If he is denied relief, the scope of the Board's determination will become important. If the Board determines only that no unfair labor practice was committed, it is conceivable that the state court would still decline to assume jurisdiction because the conduct "may be reasonably deemed" to come within the protection afforded by the Taft-Hartley Act. If, on the other hand, the Board decides that the conduct complained of was not only not an unfair labor practice, but was also a protected activity, then the charging party is definitely foreclosed from any

[33] The determination of the general counsel is conclusive in this respect.

[34] The general counsel's refusal to issue a complaint may result from the fact that his investigation discloses no activity which, in his estimation, constitutes an unfair labor practice. The question left open by such a refusal is whether Congress has either protected the activity or determined that it shall be left unregulated. In either event the state court or board is seemingly precluded from exercising jurisdiction. See Gulf Shipside Storage Corp. v. Moore, (La. 1955) 23 U.S. LAW WEEK 2494 (1955). See also note 36 infra.

state injunctive remedy.[35] Only if the Board decides that the activity in issue is neither protected nor prohibited is the way open for the assumption of state jurisdiction to issue injunctions.[36] It follows from what has been said that the *Weber* case imposes upon the Board a moral obligation to state with clarity and completeness its basis for denying relief in an unfair labor practice case. Failing such clarity and completeness, a party may be denied a remedy from a state court or board although he is entitled to it.

IV. *Conclusion*

The *Weber* case has not fixed with precision the line of demarcation between exclusive federal jurisdiction and state jurisdiction. It has, however, cleared away at least one barrier to clear thinking in confining the *Giboney* and *Gazzam* cases to the limited issues they involved.

Together with this clarification, the Court has highlighted what promises to be a new classification of state police powers. A subtle contrast has been made between the states' "historic powers over such traditionally local matters as public safety and order"[37] and their powers to regulate labor matters through the medium of laws designed primarily for controlling harmful business and trade practices. As stated above, the states are apparently still free to restrain violence and other breaches of the peace irrespective of accompanying unfair labor practices or the exercise of otherwise protected activities. In this respect, the states exercise powers over "local matters." On the other hand, the control of trade restraints and monopolies and the imposition of obligations upon common carriers are apparently deemed to be something other than "local matters" since a state may not now exercise these powers when the conduct sought to be controlled is also governed by federal labor law.[38]

What basis the Court finds for such a classification is not made clear by the opinion in the *Weber* case. While the Court invokes the "conflict of remedies" reasoning of the *Garner* case, it is submitted that this reasoning is not an adequate justification for the

35 Appeal may be taken to the appropriate circuit court of appeals.

36 The state agency must still contend, however, with the theory suggested in Garner and repeated in Weber that when Congress has regulated certain types of conduct in considerable detail, it has impliedly decreed that other related conduct shall remain unregulated by state law.

37 Allen-Bradley Local No. 1111 v. WERB, 315 U.S. 740 at 749, 62 S.Ct. 820 (1942).

38 In addition to the Weber case, see General Drivers, Warehousemen, & Helpers, Local Union No. 89 v. American Tobacco Co., 348 U.S. 978, 75 S.Ct. 569 (1955).

nullification of state business regulations merely because an unfair labor practice may be involved. It is at least arguable that the problem of regulating business activity is as much a matter of "local concern" as is the problem of restraining violent conduct occurring in the context of labor disputes. And if the concept of "conflict" may be interpreted to include, in part, an equivalence in the activities the two regulatory systems are designed to govern, there is, to this degree, no conflict between state restraints on unlawful business and trade practices and federal restraints on unfair labor practices. There is, it is submitted, much to be said for approaching the problem as one of characterizing the vantage point underlying the attempted state regulation.

It may be that the Court has extended the scope of pre-emption announced in *Garner* because of a fear or suspicion that state business regulations were being used to circumvent federal authority over labor matters. There are indications that such a trend has been gaining momentum. Nevertheless, if this is the rationale of the Court, one may question with reason the breadth of the new pre-emption doctrine. Surely the task of distinguishing between legitimate state business laws and those that are merely colorable devices for regulating labor matters is not insurmountable.

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