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LABOR LAW-RELATIONSHIP OF FEDERAL AND STATE AUTHORITY OVER LABOR RELATIONS

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LABOR LAW—RELATIONSHIP OF FEDERAL AND STATE AUTHORITY OVER LABOR RELATIONS—In three recent cases, the United States Supreme Court has been required to determine the impact of federal labor relations legislation on certain state enactments in this area. The importance of these decisions, concerning a problem which has caused difficulty since enactment of the National Labor Relations Act in 1935, is increased by their consideration of the significance of the amendments contained in the Labor-Management Relations Act of 1947.

(1.) The appellant La Crosse Co., which handled interstate telephone calls, had made a collective bargaining agreement with appellant A. F. of L. union, to continue from year to year. During renegotiation of part of this agreement, a rival union asked the National Labor Relations Board to certify the bargaining representative of the employees covered by the agreement. Before the N.L.R.B. acted, the rival union withdrew the petition and sought the same relief from the Wisconsin Employment Relations Board, which held an election and certified the rival union as the representative. The Wisconsin Supreme Court held that the W.E.R.B. had jurisdiction to issue the certification. On appeal to the United States Supreme Court, *held*, reversed. This employer is concededly engaged in interstate commerce, and the N.L.R.B. has consistently exercised jurisdiction over the industry. Since the Wisconsin Act and the National Labor Relations Act provide different standards for determining the bargaining unit and define "employee" differently, certification by the state board would disrupt practice under the federal act. The federal act must therefore be allowed supremacy,

though not yet applied formally to this employer. *La Crosse Telephone Corp. v. W.E.R.B., International Brotherhood of Electrical Workers, Local B-953, A. F. of L. v. W.E.R.B.*, 336 U.S. 18, 69 S.Ct. 379 (1949).

(2.) Plaintiff union had been certified as collective bargaining agent by the N.L.R.B. and had negotiated agreements, expiring in 1944, with the employer. Bargaining for a new contract had reached a deadlock, and after some time the union instituted a policy calling repeated special union meetings during working hours, without notice to the employer of the meetings, their purpose, or whether or when the employees would return to work. Union leaders publicly described this new technique as "a better weapon than a strike," since production was more effectively disrupted, but there was no hardship on the employees. At the employer's request the W.E.R.B. investigated and ordered the union to cease and desist from the practices described or any other concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.[1] The Wisconsin Supreme Court construed the order as prohibiting only the course of conduct described, and approved it. On certiorari, *held*, affirmed. Section 7 of the original and amended N.L.R.A.[2] does not make all work stoppages federally protected concerted activities; activities otherwise illegal are not made legal by concert. The N.L.R.B. cannot forbid a strike because of its illegal method, and such activities are either controlled by the states or they are entirely ungoverned. Four justices dissented. *International Union, U.A.W.A., A.F. of L., Local 232 v. W.E.R.B.*, 336 U.S. 245, 69 S.Ct. 516 (1949), rehearing denied, (U.S. 1949) 69 S.Ct. 935.

(3.) Under pressure from the War Labor Board in 1943, the Algoma Co. had agreed to a maintenance of membership clause in its contract with the union certified as bargaining representative by the N.L.R.B. The contract was renewed from year to year, and the clause was still in effect in 1947, when an employee was discharged after

[1] The Wisconsin act makes it an unfair labor practice for an employee to cooperate in picketing, boycotting "or any other overt concomitant of a strike" without a majority vote of the employees concerned, or "to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." Wis. Stat. (1945) c. 111, §111.06(2)(e),(h).

[2] Section 7 gives employees the right to self-organization, collective bargaining, "and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 49 Stat. L. 452 (1935), 29 U.S.C. (1946) §157. The Labor-Management Relations Act added the right to refrain from such activities, except as limited by a proper "union shop" agreement. 61 Stat. L. 140 (1947), 29 U.S.C. (Supp. 1948) §157.

being expelled from the union for his refusal to pay union dues. The employee complained to the W.E.R.B. that this was an unfair labor practice under the Wisconsin statute which permitted all-union security agreements only when approved by a two-thirds vote in a referendum of employees in the unit affected.[3] No such referendum having been conducted, the W.E.R.B. ordered the employer to cease and desist from giving effect to the maintenance of membership clause and to reinstate the employee with back pay. The Wisconsin Supreme Court upheld the order. On certiorari, *held*, affirmed. Under the original N.L.R.A., section 8(3)[4] did nothing to legalize the closed shop in states where it is illegal, and since section 10(a)[5] gave the N.L.R.B. jurisdiction only over practices proscribed by section 8, there was no conflict between the Wisconsin law and the N.L.R.A. The Labor-Management Relations Act does not change the effect of section 10(a) in this respect,[6] since cession of jurisdiction by the N.L.R.B. is to take place only where state and federal laws overlap, and state jurisdiction is otherwise unimpaired. In addition, the effect of section 14(b)[7] of the amended N.L.R.A. is to permit the states to regulate union security provisions as well as to prohibit them. Two justices dissented. *Algoma Plywood & Veneer Co. v. W.E.R.B.*, 336 U.S. 301, 69 S.Ct. 584 (1949).

Although section 10(a) of the N.L.R.A. gave the N.L.R.B. power to prevent the unfair practices listed in section 8 of that act, no general policy was declared as to the effect of the act on state regulation. The Wisconsin court, faced with the comprehensive state regulation contained in the Wisconsin Employment Peace Act,[8] early adopted a theory of "concurrent jurisdiction," allowing the state board to act until the N.L.R.B. actually assumed jurisdiction.[9] Under this and sim-

[3] The Wisconsin act prohibits discrimination by an employer unless pursuant to an all-union agreement with the bargaining representative which has been approved by two-thirds of the employees voting within the bargaining unit. Wis. Stat. (1945) c. 111, §111.06(1)(c) 1.

[4] Section 8(3) made it an unfair labor practice for an employer to discriminate, but provided that nothing in the act or any other statute of the United States should prevent the making of union security agreements with the bargaining representative. 49 Stat. L. 452 (1935), 29 U.S.C. (1946) §158(3).

[5] 49 Stat. L. 453 (1935), 29 U.S.C. (1946) §160(a).

[6] See note 16, infra.

[7] Section 14(b) provides that the act shall not be construed to authorize "the execution or application" of union security agreements in any state where such is prohibited by state law. 61 Stat. L. 151 (1947), 29 U.S.C. (Supp. 1948) §164(b).

[8] Wis. Stat. (1945) c. 111.

[9] For the history of the Wisconsin decisions, see Lampert, "The Wisconsin Employment Peace Act," 1946 WIS. L. REV. 193.

ilar theories, agreements were negotiated between the federal and a few state boards, assigning certain categories of industries to the state boards.[10] The broad limits of state authority were defined in two important Supreme Court decisions. In the *Allen-Bradley* case,[11] the authority of the W.E.R.B. to prohibit mass picketing, threats and violence was upheld on the ground that the N.L.R.A. did not regulate "this type" of union activity, although no opinion was expressed as to "other types" of activity. On the other hand, in *Hill v. Florida*[12] a state statute requiring the filing of reports, the payment of a small annual fee, and the licensing of union agents was held to be an improper qualification of the union's bargaining rights under the N.L.R.A., and therefore invalid. Thus it seemed that state regulation would be allowed to supplement the federal act, so long as state action did not frustrate the declared policy of the latter. On its facts, the decision of the Supreme Court in the *Bethlehem* case[13] could be so interpreted. In that case, the New York Labor Relations Board had required the company to grant bargaining rights to supervisory employees, although at the time the N.L.R.B. would have denied such rights. In holding that the state board had no power to act in such a case, however, the Court used language indicating that whenever Congress had granted an opportunity for the N.L.R.B. to act, the state board would have no power. In a separate opinion, Justice Frankfurter noted that the practical effect of such a holding would be to put an end to the agreements between the N.L.R.B. and the state boards.[14]

Although the *Bethlehem* case was decided without reference to section 10(a), since the question there raised involved a representation proceeding rather than an unfair labor practice, the problem of the relationship of the N.L.R.B. and state boards is essentially the same. In the *La Crosse* decision, which also involves a representation question, the Court refers to the *Bethlehem* case as controlling,[15] on the ground that in the *La Crosse* case the N.L.R.B. had consistently exercised jurisdiction over the industry, and since the state and federal acts were not consistent in the matters of determining the bargaining unit or the definition of "employee," the state act must give way al-

[10] See Justice Frankfurter's separate opinion in Bethlehem Steel Co. v. New York State Lab. Rel. Bd., 330 U.S. 767 at 777, 67 S.Ct. 1026 (1947).

[11] Allen-Bradley Local No. 1111 v. W.E.R.B., 315 U.S. 740, 62 S.Ct. 820 (1942).

[12] 325 U.S. 538, 65 S.Ct. 1373 (1945).

[13] Bethlehem Steel Co. v. New York State Lab. Rel. Bd., 330 U.S. 767, 67 S.Ct. 1026 (1947), 15 UNIV. CHI. L. REV. 362 (1948).

[14] Note 10, supra.

[15] 336 U.S. 18 at 26, 69 S.Ct. 379 (1949).

though the N.L.R.B. had not acted in the particular case. This broad interpretation of the *Bethlehem* case is apparently supported by the language of the Court in the *Algoma* case. The Court there states that the purpose of the proviso added to section 10(a) of the L.M.R.A., allowing cession of jurisdiction to state agencies (except in the case of certain major industries) as long as the state act is not inconsistent with the amended N.L.R.A.,[16] was to meet the situation made possible by the *Bethlehem* case, "where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction."[17] Thus it seems Justice Frankfurter was correct in assuming that the *Bethlehem* case meant state power would be denied even if the refusal of the N.L.R.B. to act were due to budgetary rather than policy considerations.[18]

Under the amended N.L.R.A.[19] it would seem that the states are left free to act in three distinct situations. In the first place, although the act declares no general policy as to its effect on state regulation, certain provisions more or less clearly contemplate state action.[20] For example, section 14(b)[21] provides that the act shall not be construed as authorizing the "execution or application" of union security agree-

16 "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power [shall be exclusive, and] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, [code,] law, or otherwise; *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*" The material in brackets was deleted and the material in italics was added by the L.M.R.A. 49 Stat. L. 453(1935), 29 U.S.C. (1946) §160(a); 61 Stat. L. 146(1947), 29 U.S.C. (Supp. 1948) §160(a).

17 336 U.S. 301 at 313, 69 S.Ct. 584(1949).

18 Note 10, supra. But note that the Court in the Algoma case, 336 U.S. 301 at 315, 69 S.Ct. 584(1949), cited the Bethlehem and LaCrosse cases to support the statement that a state, after certification by the N.L.R.B., may not impose a policy inconsistent with the N.L.R.B's interpretation of national policy. See also the language of the Court in the U.A.W. case, 336 U.S. 245 at 254, 69 S. Ct. 516(1949).

19 All three of the cases set forth at the beginning of this comment actually arose before enactment of the L.M.R.A., but in each case the Court considered the effect of the L.M.R.A. on the problem involved.

20 In addition to sections 10(a) and 14(b), references to state action are found in sections 8(d), 14(a), 203(b) and 303. 61 Stat. L. 136 et seq. (1947), 29 U.S.C. (Supp.1948) §141 et seq. See Smith, "The Taft-Hartley Act and State Jurisdiction Over Labor Relations," 46 MICH. L. REV. 593 at 598 (1948).

21 Note 7, supra.

ments in any state which prohibits such "execution or application."[22] Even in this case, though, there have been decisions which interpreted the provision to mean that the state was empowered only to *prohibit*, and not to enact regulations more stringent than those of the federal act.[23] This problem was settled by the decision in the *Algoma* case in favor of the state's power to impose more stringent regulations upon such agreements.

In the second place, the state may clearly act by virtue of cooperative agreements with the N.L.R.B. as permitted by the proviso to section 10(a) of the L.M.R.A. Such jurisdiction is limited, of course, and would not be permitted in the case of certain major industries, or if the state act is inconsistent with the federal act.[24]

Finally, the state retains power to act as long as its action does not overlap the provisions of the federal act. In the *Algoma* case, the Court indicates that cession under the proviso to section 10(a) is contemplated only where the state and federal acts have parallel provisions, and where there is no overlapping, no cession is necessary because the state's jurisdiction is unimpaired.[25] The problem of determining when the federal and state regulations overlap remains a difficult one. In the *La Crosse* case, the problem is one of certification, which was clearly covered in both acts; since they conflicted, supremacy is allowed to the federal act. In the *U.A.W.* case, the problem of state power to regulate union collective action is presented. In holding that the intermittent work stoppages there involved were not within the scope of the federal act and therefore remained subject to state regulation, the Court rejects the argument that these were "concerted activities" protected by section 7.[26] In denying the existence of any fixed N.L.R.B. interpretation that all work stoppages are protected concerted activities, the Court refers to N.L.R.B. decisions condemning discharges for isolated work stoppages,[27] notes that the board itself limited the scope of pro-

[22] The most recent decision allowing state prohibition of union security agreements despite constitutional objections is Lincoln Fed. Lab. Union No. 19129, A. F. of L., v. Northwestern Iron & Metal Co., (U.S. 1949) 69 S.Ct. 251, 47 MICH. L. REV. 852 (1949).

[23] Riley v. Brotherhood of Teamsters, 95 N.H. 162, 59 A.(2d)476 (1948), vacated and remanded as moot after repeal of state statute, 336 U.S. 930, 69 S.Ct. 737 (1949). Cf. Northland Greyhound Lines, Inc., 80 N.L.R.B. No. 60 (1948).

[24] Note 16, supra. The Court in the La Crosse case, 336 U.S. 18 at 26, 69 S.Ct. 379 (1949) referred to section 10(a) of the amended act, but did not discuss its effect since no cession had been attempted in respect to representation matters.

[25] 336 U.S. 301 at 314, 69 S.Ct. 584 (1949).

[26] Note 2, supra.

[27] In re American Mfg. Co., 7 N.L.R.B. 375 (1938); In re Harnischfeger Corp., 9 N.L.R.B. 676 (1938); In re Good Coal Co., 12 N.L.R.B. 136 (1939); In re Armour & Co., 25 N.L.R.B. 989 (1940); In re Cudahy Packing Co., 29 N.L.R.B. 830 (1941); In re Mt. Clemens Pottery Co., 46 N.L.R.B. 714 (1943).

tected activities by its language, and distinguishes the case before it on the ground that it involves no discharges "in a context of anti union animus," but only the use of a state procedure provided for that purpose.[28] Nor did section 13[29] give any greater right to strike than that existing under state law, for that section contemplates only a lawful strike, and did not legalize a sit-down strike, a mutiny, a strike in violation of contract, or one creating a national emergency.[30] The Court then reasons that if activities such as these intermittent work stoppages are to be considered protected by the federal act, the result would be "to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as [were present] here but also the slowdown and perhaps the sit-down strike as well."[31] The dissenting opinions argue that the stoppages in question are included within section 7,[32] and that the present case should fall within the scope of *Hill v. Florida* rather than the *Allen-Bradley* case.[33] In its brief on petition for rehearing, the N.L.R.B. argued that even though the activities in question were not within section 7, the N.L.R.B. might still find them unfair practices under sections 8(b)1 or 8(b)3,[34] and that in any case the question is one which should be decided in the first instance by the N.L.R.B., in order to effectuate the national policy of the L.M.R.A.[35] The board urged that the states

[28] 336 U.S. 245 at 255, 69 S.Ct. 516 (1949). Cf. the discussion of the same cases in the dissent by Justice Murphy. See also the brief of the N.L.R.B. on petition for rehearing, at 22-25.

[29] "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." 49 Stat. L. 457 (1935) 29 U.S.C. (1946) §163. The L.M.R.A. added, "or to affect the limitations or qualifications on that right." 61 Stat. L. 151 (1947), 29 U.S.C. (Supp. 1948) §163. This addition was not mentioned by the Court.

[30] N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490 (1939); Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 62 S.Ct. 886 (1942); N.L.R.B. v. Sands Mfg. Co., 306 U.S. 332, 59 S.Ct. 508 (1939); United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677 (1947). Congress, in making the addition to section 13 (note 29, supra), apparently had in mind the limitations on strike action imposed by such cases as those cited herein. S. REP. 105, 80th Cong., 1st sess., p. 28 (1947).

[31] 336 U.S. 245 at 264, 69 S.Ct. 516 (1949). It is not clear how much importance the Court attaches to such factors as the lack of notice to the employer. In the N.L.R.B. brief on petition for rehearing at p. 24, it is argued that notice is not essential to protection under the act. It is interesting to note that the union continued a policy of intermittent stoppages after those considered in the present case, but prior to each stoppage gave notice to the employer of the planned stoppage, that it was designed to enforce specified demands, and that the employees would return to work at a specified time whether or not the demands were granted.

[32] 336 U.S. 245 at 266, 69 S. Ct. 516 (1949).

[33] Notes 11 and 12, supra.

[34] Brief, at pp. 30-32. Section 8(b)1 prohibits union restraint of non-participating employees; section 8(b)3 provides that it is an unfair labor practice for the union to refuse to bargain collectively.

[35] Brief, at pp. 32 et seq.

should be free to deal with problems arising from labor disputes in interstate commerce only on grounds independent of labor relations policy, and thus would distinguish such cases as *Allen-Bradley* and *Fansteel* from the *U.A.W.* case, on the ground that the latter did not involve the type of illegality, subject to state police power apart from local labor policy, which was present in the former group of cases.[36] Rehearing was denied by the Supreme Court, however.[37]

In the *Algoma* case, the Court is faced with the problem of state power over union security agreements. It was argued that since section 8(3) of the N.L.R.A. provided that an employer shall not be precluded by any provision of the act from making a closed shop agreement with the proper representative, such agreements were beyond the power of the state to regulate. The Court refers to the legislative history of the N.L.R.A. to show that the purpose of the provision was only to disclaim a national policy hostile to the closed shop, leaving the states free to regulate such agreements. Under the L.M.R.A., federal regulation of union security was increased, but the express provisions of section 14(b) serve to forestall any inference that Congress intended the federal policy to be exclusive. Apparently, however, the Court would allow state regulation of union security even without the aid of 14(b), on the ground that sections 8(a)3 and 10(a) of the L.M.R.A. had not exclusively occupied the field, and it was therefore left open to the states to impose more stringent regulations than those of the national act.[38]

Although the relative scope of federal and state authority in the field of labor relations remains far from settled, the cases seems to indicate some general principles which will guide the Court in dealing with a particular case, where the employment relation is within the broad scope of the commerce power. It is clear that the state may not impose a policy inconsistent with national policy, or the N.L.R.B.'s interpretation of the national policy. The *Bethlehem* and *La Crosse* cases make it clear that state action may be inconsistent with national policy, and therefore invalid, although the N.L.R.B. has not yet acted in the particular case. On the other hand, it is equally clear that the states may exercise their police powers to prevent violence and protect the public safety. Within these broad limits, Congress has in some instances indicated an intent to leave the field open for state action.

[36] Brief, at pp. 48-53.

[37] (U.S. 1949) 69 S.Ct. 935.

[38] 336 U.S. 301 at 314, 69 S.Ct. 584 (1949).

Thus, as indicated by the *Algoma* case, states may regulate union security agreements, as long as the state regulation is not less stringent than that of the L.M.R.A. In the majority of instances, however, the Congressional intent is not so clear. In such cases, sound policy reasons may be urged both for and against a liberal allowance of authority to the states. Certainly the various states have provided valuable laboratories for the development of new policies in the field of labor relations regulation,[39] and it may be reasonably argued that there is a need for such pioneering to continue. On the other side it may be argued that the states should be precluded from deciding questions of labor relations policy which have been committed to the primary discretion of the N.L.R.B., in order that local variations should not be introduced into the national policy declared by Congress.[40] The present cases clearly recognize that the field for state action is still open in at least some respects. In view of the nature of the activities involved, the *U.A.W.* case in particular seems to extend the scope of such cases as *Allen-Bradley;* whether the approach of the Court in these cases portends a liberal allowance of authority to the states must await further decisions.

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[39] Smith, "The Taft-Hartley Act and State Jurisdiction Over Labor Relations," 46 MICH. L. REV. 593 at 594-595 (1948).

[40] Brief of the N.L.R.B. on petition for rehearing in the Algoma case, pp. 32 et seq., especially pp. 38-46.