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LABOR LAW--FEDERAL-STATE RELATIONS--VALIDITY OF STATE LAW ABOLISHING THE RIGHT TO STRIKE FOR EMPLOYEES OF PUBLIC UTILITIES

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LABOR LAW—FEDERAL-STATE RELATIONS—VALIDITY OF STATE LAW ABOLISHING THE RIGHT TO STRIKE FOR EMPLOYEES OF PUBLIC UTILITIES—In 1948, petitioner-union of the employees of the transit system in the City of Milwaukee called a strike upon failure to agree with the transit company on wages, hours, and working conditions. Under the Wisconsin Public Utility Anti-Strike Law,[1] a state court issued an injunction perpetually restraining petitioner from calling a strike which would cause an interruption of the passenger service of the transit company; petitioner complied therewith. The Wisconsin Supreme Court affirmed the issuance of the injunction, and the United States Supreme Court granted certiorari. Thereafter, the United States Supreme Court granted certiorari to a union of the employees of the gas works in the City of Milwaukee in another case which presented questions substantially similar to those presented by the appeal of the first petitioner-union. *Held,* both judgments reversed. The state legislation under which the injunctions had been issued was invalid, for it denied petitioners a right guaranteed by the federal Labor Management Relations Act of 1947. *Amalgamated Assn. of Street Electric Railway & Motor Coach Employees of America, Div. 998 v. Wisconsin Employment Relations Board,* (U.S. 1951) 71 S.Ct. 359.

Under our federal system, the judiciary possesses the exceedingly delicate and complex task of clarifying the extent to which federal legislation has penetrated and occupied an area in which the federal and state governments enjoy concurrent powers. The consequence of such federal occupation is exclusion of state action. The principal case is the latest in a series of important Supreme Court decisions seeking to delineate the relative positions of the state and federal governments in the regulation of labor relations generally;[2] the principal case deals with regulation of the right to strike. It is clear that prior to the adoption of the National Labor Relations Act of 1935,[3] the states were free to regulate or prohibit strikes.[4] In the principal case, a majority of the United States Supreme Court concluded that Congress has guaranteed the right to strike of all employees whose employment affects interstate commerce by the enactment of the

[1] Wis. Stat. (1947) §111.50 et seq. Sec. 111.62 stated, "It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service." The act provided for a system of compulsory arbitration with the decision of the arbitrators being final and binding upon the parties. The act vested in the state circuit courts jurisdiction to enjoin violations of the act.

[2] For a listing of decisions involving this question in respect to federal labor legislation, see the dissenting opinion in the principal case. For an excellent discussion of the question, see Smith, "The Taft-Hartley Act and State Jurisdiction Over Labor Relations," 46 MICH. L. REV. 593 (1948).

[3] 49 Stat. L. 449, 29 U.S.C. (1935) §151 et seq.

[4] "Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike." Dorchy v. Kansas, 272 U.S. 306 at 311, 47 S.Ct. 86 (1926).

National Labor Relations Act of 1935,[5] as amended by the Labor-Management Relations Act of 1947,[6] section 7 of which safeguards the "right . . . to engage in . . . concerted activities for the purposes of collective bargaining. . . ."[7] Some judicial probing of the intent of Congress in respect to this provision had preceded the decision in the principal case. Neither sit-down strikes[8] nor mass picketing[9] fell within its compass. In *International Union, U.A.W., A.F.L. Local 232 v. Wisconsin Employment Relations Board,*[10] the Court held that frequent, unannounced stoppages by employees during work hours for the ostensible purpose of conducting union meetings were not within the protective scope of "concerted activities." In addition, the majority opinion in that case used language strongly intimating that the Labor Management Relations Act of 1947[11] was not even intended to protect the more usual, full-scale strike against state regulation.[12] However, when that issue was more squarely presented to the Court in *International Union of U.A.W. of America v. O'Brien,*[13] the Court stated: "In the National Labor Relations Act of 1935 . . . as amended by the Labor Management Relations Act . . . Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike."[14] This case involved the validity of Michigan legislation requiring a majority authorization of employees before a strike could be called: it applied to all industry in Michigan. In declaring such legislation invalid, the Court employed language appropriate for both the "occupation"[15] and "conflict"[16] theories utilized for testing the validity of state action. The language in the principal case indicated a fairly strong reliance upon the "conflict" rationale.[17] Excluding

[5] Supra note 3.

[6] 61 Stat. L. 136, 29 U.S.C. (1947) §141 et seq.

[7] Also of importance is section 13 which provides, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[8] National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490 (1939).

[9] Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S.Ct. 820 (1942).

[10] 336 U.S. 245, 69 S.Ct. 516 (1949), discussed in 47 MICH. L. REV. 1201 (1949).

[11] Supra note 6.

[12] The effect of section 7 of the LMRA was to prevent any state from treating "otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert." (At 258). In reference to section 13, the Court stated at 258-9: "This provision, as carried over into the Labor-Management Relations Act, does not purport to create, establish, or define the right to strike. . . . It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal."

[13] 339 U.S. 454, 70 S.Ct. 781 (1950), noted in 49 MICH. L. REV. 144 (1950).

[14] Id. at 456-57.

[15] "Congress occupied this field and closed it to state regulation." Id. at 457.

[16] "Even if some state legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the federal Act." Id. at 458.

[17] ". . . the state legislation is in conflict with federal law." Principal case at 365. "Such state legislation must yield as conflicting with the exercise of federally protected labor rights." Id. at 366. "This Court . . . must . . . declare invalid state regulation which impinges on that legislation." Id. at 367.

for the moment the fact that the Wisconsin legislation applied only to public utilities,[18] the *O'Brien* case constituted a strong precedent for the decision in the principal case. If a state was precluded from merely regulating the act of striking, surely the state lacked power to prohibit striking entirely. However, considering the need for continuous operation of public utilities, the question in the principal case became whether Congress intended to guarantee the right to strike in such industries. A Senate address of Senator Robert A. Taft proved to be the most persuasive beacon for illuminating Congressional intent.[19] The dissenting opinion clashed sharply with the majority opinion as to the proper interpretation of Senator Taft's words. The dissenters contended that ". . . Congress decided no more than that it did not wish to subject local utilities to the control of the Federal Government."[20] When Congress refrains from express declaration of its intentions, such divergent interpretations are inevitable. The provisions in the Labor Management Relations Act of 1947 for handling national emergency strikes further exemplifies this annoying divergence in construction.[21] In spite of the statement of policy in the Wisconsin Act,[22] the majority of the Court felt it was not "emergency" legislation because, for one reason, the act had been previously invoked to avert a threatened strike of clerical workers of a utility.[23] Whether the Court intended to imply that it would uphold state legislation which it considers of an "emergency" character was not made clear. The decision in the principal case should stimulate immediate Congressional action to clarify its intent. The right to strike, an instrument of pressure essential to the successful functioning of the collective bargaining process, should be protected, but it is inconceivable that a state should be powerless to act when confronted with a breakdown in the services essential to the health and welfare of its people.

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[18] Section 111.51, Wis. Stat. (1947), provided that the act should apply to industries supplying water, heat, gas, electric power, public passenger transportation and communications.

[19] "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike. . . . So far as the bill is concerned, we have proceeded on the theory that there is a right to strike. . . . We have considered the question whether the right to strike can be modified. . . . It is suggested that we might do so in the case of public utilities. . . . If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line." 93 CONG. REC. 3835. See also H.R. Rep. No. 245, 80th Cong., 1st sess., 26 (1947), where it is stated that section 7 of the LMRA guarantees the "right . . . to engage in concerted activities, e.g. to strike. . . ."

[20] Principal case at 370.

[21] The majority opinion, in reference to these provisions, stated at 365: "In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce." But the dissenters reasoned that such provisions "imply that the States retain the power to protect the public interest in emergencies economically and practically confined within a State." Id. at 372.

[22] "The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare." Wis. Stat. (1947) §111.50.

[23] See footnote 19 in the majority opinion in the principal case.