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Labor Law - Federal Pre-Emption - An Inroad Through the Violence Doctrine

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LABOR LAW—FEDERAL PRE-EMPTION—AN INROAD THROUGH THE VIOLENCE DOCTRINE—The Wisconsin Supreme Court affirmed the circuit court's enforcement of an order obtained by the Kohler Company from the Wisconsin Employment Relations Board enjoining the appellant union, as a violation of the Wisconsin Employment Peace Act,[1] from further engaging in mass picketing, coercion, and other activities, which were also unfair labor practices under the amended National Labor Relations Act,[2] to which the Kohler Company was subject. On appeal to the United States Supreme Court, *held,* affirmed, three justices dissenting. While, as a general matter, a state may not, in furtherance of its public policy, enjoin conduct which has been made an unfair labor practice under the federal statutes, an injunction based on the dominant interest of the state in preventing violence and property damage can properly be granted. The dissenting justices

1 Wis. Stat. (1955) §§111.04, 111.06 (2) (a) and (f), 111.07 (1).
2 61 Stat. 141 (1947), 29 U.S.C. (1952) §8 (b) (1) (A).

maintained that a state cannot duplicate an administrative remedy prescribed by Congress reaching identical conduct. *United Automobile Workers v. WERB,* 351 U.S. 266 (1956).

As explained in *Garner v. Teamsters Union,* "when two separate remedies are brought to bear on the same activity, a conflict is imminent. . . . To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts."[3] Since it was within the power of the Board to grant an injunction in that case, the power of the state court was held to be pre-empted in order to avoid a conflict of remedy. This doctrine was approved and explained further in *United Construction Workers v. Laburnum Construction Corp.*[4] in which the Court stated that "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [*Garner*] recognized that the Act excluded conflicting state procedure to the same end." The Court there allowed a recovery for tort damages since that remedy was not in conflict with any federal remedy. This rule of federal pre-emption to avoid a conflict of remedies was again emphasized in the decision in *Weber v. Anheuser-Busch, Inc.*[5] The Court denied the right of a state to enjoin conduct which violated the state restraint of trade law, stating that "Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised."[6] The principal case does not overrule *Garner,* but gives effect to the pre-Taft-Hartley *Allen-Bradley*[7] decision by excepting from the general rule of pre-emption "mass picketing, violence, and overt threats of violence," even though the union commits an unfair labor practice and is now subject to issuance of an injunction by the federal board. Preventing violence and property damage was said to be "a matter of genuine local concern."[8] Under this simple "local concern" test it would be difficult to justify the *Weber* decision, since it is at least arguable that enjoining conduct which violates state restraint of trade laws is as much a local concern as the power to restrain violence.[9] It appears that the Court is willing to except from the *Garner* rule only a special type of "local concern" activity—protection against violence. It has been suggested

[3] Garner v. Teamsters Union, 346 U.S. 485 at 498, 499 (1953).

[4] 347 U.S. 656 at 665 (1954).

[5] 348 U.S. 468 (1955).

[6] Id. at 480.

[7] Allen-Bradley Local v. WERB, 315 U.S. 740 (1942). The principal case affirms uniform state holdings that the federal act does not pre-empt them from enjoining mass picketing or picketing accompanied by threats or violence. See 32 A.L.R. (2d) 1026, 1036 to 1040 (1953). As pointed out by the Court in note 12 at 274 of the principal case, its post-Taft-Hartley decisions intimated continued approval of the Allen-Bradley doctrine, even though the federal act at that time made no provision for enjoining union activities, thus resulting in no conflict of remedies.

[8] Principal case at 274.

[9] See 54 MICH. L. REV. 540 at 551 (1956).

that perhaps the reason the Court did not except the situation in the *Weber* case from the *Garner* pre-emption doctrine was the fear or suspicion that state regulations were being used as mere devices for circumventing federal labor authority.[10] Whether or not this possibility was considered in *Weber,* the opportunity for such practices is present under the principal decision.[11] Under this doctrine, the extent to which a state may regulate labor practices through injunctions is in great part dependent upon its disposition to find the illegal acts of violence threatened and its decision on the extent of regulation necessary. The awarding of tort damages by a state as a supplemental remedy to an injunction by the federal board (as in *Laburnum)* should not normally interfere with the national labor policy, nor the effectiveness of strategic labor strikes and picketing, since the remedy is concerned with past acts and there would be time for an appeal and reversal.[12] But where the state is allowed the concurrent power to enjoin, irreparable damage to the union's efforts and frustration of the national labor policy can result when the state injunction is first granted.[13] The Court's decision was sound in recognizing the need for protection from violence and overt threats of violence.[14] It certainly is true, however, as said by Justice Douglas in the dissenting opinion, that this sanction of duplication of remedies "is pregnant with potentialities of clashes and conflicts."[15] The crux of the problem lies in the inability of the National Labor Relations Board to cope effectively with such emergencies.[16] If action by the Board would be expedited in such instances, it is submitted that injunctions could be granted without requiring state action, thereby preventing violence and preserving

10 Ibid.

11 On the history and use of the labor injunction see TAYLOR, LABOR PROBLEMS AND LABOR LAW, 2d ed., 483 to 499, and collateral readings at 499 (1950); U.S. Senate Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, "State Court Injunctions" Doc. 7, 82d Cong., 1st sess. (1951), hereinafter referred to as Senate Report.

12 Such an action for damages, however, in addition to an injunction, should increase the employers bargaining position and tactical advantages with a union. See Senate Report, note 11 supra, at 10 and 50.

13 In addition to possible misapplication of the injunction where proof of the allegation that violence, intimidation, coercion, etc., is inadequate, or the issuance of an injunction that is broader than required, the unions assert such an injunction is a destructive influence far beyond its terms in that it makes it appear to their members that the courts are on the side of the company and that a governmental agency has ruled that their stand lacks merit. Senate Report, note 11 supra, at 17. This Report points out that the high percentage of injunctive orders that are either reversed or modified on appeal . . . "does not speak well for the quality of the original proceedings. It is particularly disturbing when it is recognized that *the time element in most labor disputes is so critical that few cases will ever be appealed."* (Emphasis added.) Senate Report, note 11 supra, at 18, 48, 64, and 104.

14 In answer to the argument that enforcement of state criminal law should protect against such unlawful acts, it should be noted that in practice local police are often reluctant to interfere in labor disputes until an injunction is issued. See Senate Report, note 11 supra, at 9, 55, 57 and 86.

15 Principal case at 276.

16 See Senate Report, note 11 supra, at 56.

the integrity of the national labor policy simultaneously.[17] Until some such time, however, it is well that the Court will not "interpret an act of Congress to leave [the states] powerless to avert such emergencies without compelling directions to that effect."[18]

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[17] See recommendations in U.S. Senate Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, "The Problem of Delay in Administering the Labor-Management Relations Act," Staff Report, 82d Cong., 2d sess. (1952), and Commission on Organization of the Executive Branch of the Government, Report on Legal Services and Procedure, Recommendation No. 50 at 85, that certain judicial functions, including issuance of injunctive orders by the NLRB be transferred to the federal courts.

[18] Principal case at 275. See general comments on federalism in principal case at 270, n. 4.