Masthead Logo

DePaul Law Review

Volume 16
Issue 1 *Fall-Winter 1966*

Article 7

State Jurisdiction over Unfair Labor Practices

James Burnstein

probate assets. Most true apportionment problems arise out of poor drafting of a tax provision in a will or out of no provision. In the latter situation we may assume that the testator was aware of the significance of this omission and intended the consequence. However, it is more likely that the omission occurred innocently and without realization of the consequences.

Since the *Del Drago* decision, the courts and legislatures have followed a definite trend by adopting apportionment in one form or another. In view of the increasing employment of tax minimizing devices and the subsequent disposition of property by means other than residuary estates and intestacy, non-application of the apportionment doctrine places an undue burden on the recipients of the residue estate. These recipients are usually closely related to the decedent; therefore, there is no reason to place the entire burden of the tax on them. If some reason existed to make such placement advisable, it could be accomplished by proper will provisions. A statute should reflect the interests of the public, and these interests can best be served by Illinois' enactment of a federal estate tax apportionment law.

Donald Glassberg

STATE JURISDICTION OVER UNFAIR LABOR PRACTICES

During the past two decades, there have been major jurisdictional disputes over certain unfair labor practices. The conflict has arisen because the same conduct may also constitute a common law tort, a breach of contract, or an activity which the state, under its police power to provide for the general welfare, has the authority to control. This comment examines the general topic of pre-emption by the National Labor Relations Board (NLRB) over litigation involving unfair labor practices and the jurisdictional limitations imposed upon the Board.

Congress, pursuant to its delegated constitutional power to regulate commerce among the states enacted the Labor Management Relations Act in 1947.[1] Commonly referred to as the Taft-Hartley Act, its purpose is to promote the flow of commerce and protect the rights of individuals, employees, employers, labor organizations, and the public.[2] Prior to 1947, Congress established the National Labor Relations Board under the National Labor Relations Act. Consisting of five members appointed by the President with the advise and consent of the Senate, the Board is em-

[1] Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 1 (1964).

[2] 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

powered to prevent any employer, labor organization, or its agents from engaging in any unfair labor practice[3] affecting commerce.[4]

The intent of Congress when it promulgated the Labor Management Relations Act was to provide a uniform body of federal substantive law to protect the rights of both management and employees. In order to effectuate this purpose, it was mandatory that the NLRB, rather than various state and federal tribunals be acknowledged as having primary jurisdiction over acts constituting unfair labor practices. The Board is given broad power to enjoin the activities of any person who commits an unfair labor practice, and has the authority to order the reinstatement with back pay of any employee who is the victim of an unfair labor practice perpetrated by an employer or a labor organization.[5] To enforce its orders, the NLRB can petition any court of appeals of the United States or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, where the unfair labor practice occurred or where such person resides or transacts business. The intent of this legislation was to grant the NLRB exclusive and primary jurisdiction over labor disputes involving unfair labor practices. To this end Congress provided that the finding of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.[6]

INJUNCTIVE RELIEF

The question of state control over labor disputes was raised as early as 1942 in *Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board.*[7] In this case the U.S. Supreme Court affirmed the Wisconsin Employment Relations Board order that the union, its officers, agents, and members cease and desist from mass picketing of the employer's factory, threatening personal injury and property damage to employees desiring to work, obstructing the entrance and exit of the factory, obstructing the streets and public roads about the factory, and picketing the homes of employees. The Court, relying on precedent to the effect that an intention of Congress to exclude states from exerting their police power must be clearly manifested, held that "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the Federal

[3] 61 Stat. 138 (1947), 29 U.S.C. § 158 (1964).

[4] 61 Stat. 146 (1947), 29 U.S.C. § 160 (a) (1964).

[5] 61 Stat. 147 (1947), 29 U.S.C. § 160 (c) (1964).

[6] 61 Stat. 148 (1947), 29 U.S.C. § 160(e) (1964).

[7] 315 U.S. 740 (1942).

Board."[8] Due to the absence of any conflict between the state legislation and the federal enactment, and the failure of the federal act to regulate such conduct, state control prevailed.

Subsequently, the Court again permitted state control and upheld an injunction issued by the Wisconsin Employment Relations Board which forbade a local labor union, certified under the National Labor Relations Act as collective bargaining representative for certain employees, from promoting work stoppages.[9] Following the theory of *Allen-Bradley*,[10] to the effect that federal control had not been clearly manifested, the Court found that recurrent unannounced work stoppages to gain various ends, was neither forbidden by federal statute,[11] nor approved.[12] Thus, the state was free to govern her own internal affairs and regulate conduct which had an obviously coercive effect. The Court recognized that concerted union activities to aid unionization was protected activity under Federal legislation,[13] however, since the action was found to be illegal, the fact that it was in concert did not in itself take it out of the state's control.

In *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board*,[14] the Court held that the state's interest in law and order precluded interpreting the Labor Management Relations Act as providing the exclusive method of controlling union violence. However, this opinion must be distinguished from *Allen-Bradley*,[15] by the fact that it was rendered after Congress had provided that labor unions could commit unfair labor practices and consequently could be enjoined by the NLRB. By this time the National Labor Relations Act had been amended to prohibit unions from coercing employees who wanted to refrain from any concerted activities including striking.[16] Notwithstanding this amendment, the *United Automobile*[17] opinion held that the act did not have such regulatory pervasiveness to pre-empt state control in a situation such as here, where union members en-

[8] *Id.* at 749.

[9] International Union U.A.W.A., A. F. of L., Local 232, v. Wisconsin Employment Relations Board, 336 U.S. 245 (1948).

[10] *Supra* note 7. [11] *Supra* note 3.

[12] 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

[13] *Ibid.* [14] 351 U.S. 266 (1956). [15] *Supra* note 7.

[16] 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1). The statute provides: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157: . . ." Section 157 states "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protections, and shall also have the right to refrain from any or all of such activities . . ."

[17] *Supra* note 14.

gaged in mass picketing, obstructed access to the employer's plant and coerced employees who desired to work with threats of physical violence. Here again the state was left free to govern its own internal affairs.

In *Garner v. Teamsters, Chauffers, and Helpers Local Union*,[18] an action was brought by an interstate trucking company to enjoin a union from peaceful picketing in order to coerce the company to compel its employees to join the union. The suit was dismissed in the Pennsylvania state courts,[19] but affirmed by the Supreme Court[20] which held that plaintiff's grievance was within the exclusive jurisdiction of the NLRB. Contra to *Allen-Bradley*[21] which maintained that state police power could only be overridden by express federal legislation, the Court here held that the federal legislation pre-empted state power to issue injunctive relief similar to that available through the NRLB. Congress can save supplemental or alternative state remedies by express terms, or by some clear implication,[22] but in the absence of this, legislation such as the Labor Management Relations Act pre-empts state action to prevent unfair labor practices.[23] The rationale for such exclusive jurisdiction was crystallized by the Court's statement that,

> Congress evidently considered that centralized administration of specifically designated procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.[24]

The *Garner* case,[25] made it apparent that in the absence of violence which compelled state action, federal control would prevail in regard to the granting of injunctive relief. It indicated however, that the question of jurisdiction over labor disputes was not a settled one. The Court recognized that the federal act left much to the states,[26] though Congress had not clearly designated the jurisdictional boundaries. The opinion concluded, "We must spell out from conflicting indications of congressional will the areas in which state action is still permissible."[27]

[18] 346 U.S. 485 (1953).

[19] 373 Pa. 19, 94 A.2d 893 (1953).

[20] *Supra* note 18. [21] *Supra* note 7. [22] *Supra* note 18, at 501.

[23] *Ibid.* The court emphasized the exclusiveness of the federal act over state remedies whether the federal power is constitutionally executed for the protection of public or private interests or both. The enactment was recognized as the supreme law of the land and the state courts could not adjudge the same controversy and extend its own form of relief.

[24] *Supra* note 18, at 490. [25] *Supra* note 18.

[26] *Ibid.* See also, Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 313 (1949); Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 773 (1947); Hill v. Fla., 325 U.S. 538, 539 (1945).

[27] *Supra* note 18, at 488.

COMMON LAW DAMAGES FOR UNFAIR LABOR PRACTICES

In *United Construction Workers v. Laburnum Construction Corp.*,[28] the corporation sued three labor organizations in a Virginia state court[29] and recovered damages in a common law tort action despite the fact that the complaint constituted an unfair labor practice. In this instance, union agents demanded that Laburnum Corporation employees join the United Construction Workers and that the corporation recognize the United Construction Workers as the sole bargaining agent for the corporation's employees in Kentucky. When the corporation refused to comply and many of its employees did not join, the union agents threatened Laburnum officers and employees with violence, forcing the company to abandon its projects in the area. The Supreme Court,[30] on review of the state court's decision granting relief,[31] affirmed the decision, recognizing that the federal act provided for no general compensatory procedure except in minor supplementary ways.[32] It noted that there was no conflict between state and federal administrative remedies as in the *Garner* case.[33] Since Congress did not provide any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct, the Court concluded that,

> [i]f Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent, or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done.[34]

The Court in *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Russell*[35] following the principles of *Laburnum*,[36] upheld the jurisdiction of the Alabama state courts. In a common law tort action, Russell, a non-union employee, sought to recover damages from the union for malicious interference with his lawful occupation. The complaint alleged that due to the union's mass picketing and threats of violence during a strike, he was prevented from entering the plant where he was employed, and from engaging in his employment for over a month. The Court held that the act did not give the Board such exclusive jurisdiction over the subject matter as to preclude the state court from entertaining the action and awarding compensatory and punitive damages. Consistent with the Court's attitude in *Allen-Brad-*

[28] 347 U.S. 656 (1954).
[29] 194 Va. 872, 75 S.E.2d 694 (1953).
[30] *Supra* note 28.
[31] *Supra* note 29.
[32] 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).
[33] *Supra* note 18.
[34] *Supra* note 28, at 669.
[35] 356 U.S. 634 (1958).
[36] *Supra* note 28.

ley,[37] the Court concluded that in the absence of a clearer declaration of federal policy, an employee could recover in a state court all damages caused him by this type of tortious conduct.

Although the Court concluded that the defendant's conduct constituted an unfair labor practice and that the NLRB could have granted Russell partial relief in the form of back pay, it did not consider this sufficient to deprive state courts of jurisdiction to award common law tort damages. The Court emphasized that the type of conflict of remedies which would result in pre-emption by the NLRB were those in which one forum would enjoin, as illegal, conduct which the other forum would find legal, or where the state courts would restrict the exercise of rights guaranteed by federal legislation. Thus, in *Amalgamated Association v. Wisconsin Board*,[38] the Court held that a state statute restricting the right to strike and compelling arbitration by public utility employees, was invalid for it denied a right which Congress had guaranteed under the Taft-Hartley Act; the right to strike peacefully to enforce union demands for wages, hours, and working conditions. In the *Garner* case,[39] and *Weber v. Anheuser-Busch, Inc.*,[40] the Court expressed similar sentiments. In the *Weber* case, there was a dispute between two unions over work being performed for Anheuser-Busch. When one union struck, Anheuser-Busch filed a complaint in a Missouri state court alleging violations of the federal act constituting unfair labor practices, and was granted an injunction by the state court.[41] On appeal the injunction was reversed on the theory that if the conduct reasonably brought the controversy within the sections of the federal act prohibiting unfair labor practices or if the conduct could reasonably be deemed to come within the protection afforded by the act, the state court would have to decline jurisdiction in deference to the NLRB.[42] Subsequently, the test for NLRB jurisdiction became one of determining if the conduct was "arguably" subject to the provisions of the Labor Management Relations Act.

San Diego Building Trades Council v. Garmon,[43] a leading case in the area of pre-emption, broadened considerably the authority of the NLRB.[44]

[37] *Supra* note 7.

[38] 340 U.S. 383 (1951). See also Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957), in which the Court held that the state cannot enjoin all picketing of employees, but only that picketing which would incite violence, since peaceful picketing is protected under the Taft-Hartley Act and within the NLRB's jurisdiction to pass upon.

[39] *Supra* note 18.

[40] 348 U.S. 468 (1954).

[41] 364 Mo. 573, 265 S.W.2d 325 (1954).

[42] *Supra* note 40.

[43] 359 U.S. 236 (1958).

[44] *Ibid.* The Court held that when the activity was arguably subject to the federal legislation, the state's jurisdiction was displaced even if the NLRB did not assert juris-

In that case a California partnership refused to agree with the union to retain in their employment only those workers who were already members of the union, or who applied for membership within thirty days, because none of the employees had shown an interest in joining the union. Upon refusal, the union began to peacefully picket the employers place of business and to exert pressure on customers and suppliers in order to persuade them to stop dealing with the partnership. The California court, finding that the sole purpose of these pressures was to compel execution of the proposed contract, granted relief.[45] The court considered the union's conduct rather than the remedy available, as the prime determinative of federal control. In reversing the state court's award of damages the Supreme Court implied that in the absence of tortious conduct of a violent nature, which imminently threatens the public order, the state was powerless to award damages for conduct arguably an unfair labor practice.

In the Supreme Court's majority opinion written by Justice Frankfurter, the Court held that, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8,"[46] state and federal court jurisdiction must yield to the exclusive competence of the NLRB. The opinion insisted that it was not the national policy to allow courts either to enjoin such action or award damages, in the absence of conduct which was merely a peripheral concern of the Labor Management Relations Act or conduct which involved interests deeply rooted in local feeling and responsibility. Contrary to the Court's concern in earlier decisions such as *Laburnum*[47] and *Russell*,[48] that the complainant should be fully compensated for the tortious interference with his rights, and that only the courts and not the NLRB could adequately compensate the aggrieved party, the Court here was not troubled

---

diction over the claim. This holding created a no-man's land in which there were cases not subject to any court or agency regulation. Subsequently Congress legislated to correct this void. 73 Stat. 541 (1959), 29 U.S.C. § 164 (c) (1964) states: "(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administration Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employees, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection to assert jurisdiction."

[45] 49 Cal. 2d 595, 320 P.2d 243 (1958).

[46] *Supra* note 43, at 244. [47] *Supra* note 28. [48] *Supra* note 35.

by the fact that the plaintiff could not receive sufficient remuneration in the form of money damages from the NLRB.

Justice Harlan concurred with the majority in reversing the state court's award of damages solely on the ground that the union activity could possibly have been considered protected under the Taft-Hartley Act. He asserted, however, that if the union's conduct was unprotected activity under federal regulation, the California judgment would have to be sustained on the basis of the *Laburnum*[49] and *Russell*[50] decisions. This would be true even if such conduct was found to be federally prohibited. Emphasizing that there was no federal-state conflict over remedies if the union activity was prohibited, Harlan maintained that the majority opinion severely limited the state's power to furnish an effective remedy for non-violent tortious conduct which was not federally protected, but which may have been federally prohibited. He commented that the narrow reparation power of the NLRB would permit those injured by non-violent conduct to go remediless. The Justice quoted from *Laburnum* as follows:

> To the extent, however that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived.[51]

Harlan contended that the *Laburnum* and *Russell* decisions only rendered the violence therein unprotected, but they did not determine the type of conduct for which the state could award damages.

In a Supreme Court decision handed down this year, *Linn v. United Plant Guard Workers of America, Local 114*,[52] the Court seemed to echo some of the theories expressed by Justice Harlan in the *Garmon* case.[53] In a civil action by a company manager against the union for damages for alleged defamation in the course of a labor organization campaign, the lower court dismissed the complaint on the theory that the NLRB had exclusive jurisdiction under the pre-emption ground of *Garmon*. The circuit court affirmed, holding that such conduct would arguably constitute an unfair labor practice under the federal act.[54] The Supreme Court however, reversed the decision holding that where either party to a labor dispute circulates, with malice, false and defamatory statements during a union organizing campaign, the court has jurisdiction to apply state remedies.[55]

[49] *Supra* note 28.

[50] *Supra* note 35.

[51] *Supra* note 28, at 665.

[52] 383 U.S. 53 (1966).

[53] *Supra* note 43.

[54] 337 F.2d 68 (6th Cir. 1964).

[55] *Supra* note 52, at 55.

State action was thus justified because the conduct fell within those classes of cases which the Court considered not to have been pre-empted by federal legislation:[56] cases involving situations in which the activity regulated was a peripheral concern of the Labor Management Relations Act or where the conduct involved interests deeply rooted in local feeling and responsibility.

Justice Clark, who wrote the *Linn* opinion, justified state jurisdiction by citing *Laburnum*[57] and *Russell*[58] to the effect "that a State's concern with redressing malicious libel is so deeply rooted in local feeling and responsibility that it fits within the exception specifically carved out by *Garmon*."[59] The Court acknowledged the fact that the NLRB might find that an employer or union committed an unfair labor practice and violated the act by deliberately making false statements. However, it was concerned, as was Harlan in his concurring opinion in *Garmon*,[60] with the remedial aspect of granting the state jurisdiction to award damages and examine the conduct of the parties. Because of "the Board's lack of concern with the personal injury caused by malicious libel, together with its inability to provide redress to the maligned party,"[61] the ordinary arguments for pre-emption were insufficient. The Court did not feel that this would impair the jurisdiction of the NLRB, for the injured party might request both administrative and judicial relief. This contention however, is not consistent with the intent of Congress to provide a uniform body of federal substantive law for the protection of the rights of both management and labor. The opinion sanctions what the Court admittedly wanted to eliminate in previous pre-emption decisions: two governing lawmaking sources, the state and the federal government, the former protecting its citizens against defamation, the later controlling unfair labor practices.

In his dissent, in the *Linn* case,[62] Justice Fortas, concerned with this disregard for the intent of Congress, stated that the majority, by permitting state action, "introduced a potentially disruptive device into the comprehensive structure created by Congress,"[63] for resolving disputes arguably constituting an unfair labor practice. Recognizing that the standards for determining a libel suit and the criteria applied in examining labor disputes are different, Justice Fortas contended that the result may likely reflect local attitudes toward unionization rather than "appreciation for the un-

[56] *Supra* note 52. The Court placed major reliance upon the following cases: International Union, United Automobile Workers v. Russell, 356 U.S. 634 (1958), United Construction Workers v. Laburnum Corporation, 374 U.S. 656 (1954).

[57] *Supra* note 28.

[58] *Supra* note 35.

[59] *Supra* note 52, at 62.

[60] *Supra* note 43, at 249.

[61] *Supra* note 52, at 64.

[62] *Supra* note 52, at 69.

[63] *Ibid.*

derlying, long term perplexities of the interplay of management and labor in a democratic society."[64] Clearly, Justice Fortas did not view the union conduct as activity which remained within the traditional powers of the state to control. Following the theory of *Garner*,[65] that supplemental or alternative remedies for unfair labor practices could be saved only by express congressional terms or clear implication, he cited legislation authorizing suits for damages arising out of unfair labor practices,[66] and statutory provisions authorizing judicial remedies where the NLRB declines to assert jurisdiction.[67] In addition, in certain cases, the NLRB has the power to cede jurisdiction to any state or territory even though they may involve labor disputes affecting commerce,[68] and the federal district courts may hear suits for violations of contracts between an employer and a labor organization, representing employees in an industry affecting commerce, or between such labor organizations.[69] When such a breach of contract also includes an unfair labor practice the Supreme Court has held that a suit can be maintained in a state court for damages for breach of the collective bargaining agreement.[70] Nevertheless, the Court has stated that if "there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise."[71]

The *Linn* opinion, as Justice Fortas states, opens a major breach in the wall which has previously confined labor disputes to the regulations defined by federal labor law. This decision may seriously impair the authority of the NLRB over conduct involving an unfair labor practice. When conduct amounts to an unfair labor practice, the fact that the state can more fully compensate the aggrieved party should not be a prime element in determining jurisdiction. Professor Kadish of the University of California, reflecting on the *Linn* departure from the standards established in

[64] *Id.* at 71.

[65] 346 U.S. 485 (1953).

[66] 61 Stat. 159 (1947), 29 U.S.C. § 187 (1964).

[67] 73 Stat. 541 (1959), 29 U.S.C. § 164 (c) (1964).

[68] 61 Stat. 146 (1947), 29 U.S.C. § 160 (a) (1964).

[69] 61 Stat. 156 (1947), 29 U.S.C. § 185 (a) (1964).

[70] Smith v. Evening News Association, 371 U.S. 195 (1962). *Cf.* 375 U.S. 261 (1964); Carey v. Westinghouse Electric Corporation, 375 U.S. 261 (1964). The Court held that contractual arbitration would be compelled where the conduct alleged could also be the basis for invoking NLRB jurisdiction. However, the Court clearly indicated that the submission of the dispute to an arbitrator did not terminate the Board's jurisdiction. The Court stated at 268 "An alternative remedy before the Board is available which if invoked by the employer will protect him." Recognizing that the Board's authority is superior, the Court at 272 held "Should the Board disagree with the arbiter . . . the Board's ruling should, of course, take precedence. . . ."

[71] Smith v. Evening News Association, 371, U.S. 195, 198 (1962).

Garmon,[72] has stated that the Court may be ready "to subordinate the interests of federal regulatory policy to the interest in filling in regulatory voids."[73] If his observation is correct, state jurisdiction over tortious activity involving an unfair labor practice will not be confined to violent conduct. Nevertheless, the question of whether the state has the jurisdiction to award tort damages for non-violent tortious conduct which may constitute an unfair labor practice, is not resolved. It appears, however, that greater state control over a broad range of tortious activity may whittle always at the oft time referred to exclusive jurisdiction of the NLRB over unfair labor practices. The Court's tendency, however, to emphasize the remedy as one basis for granting the state jurisdiction to adjudicate conduct which may also be an unfair labor practice has not been limited to litigation involving torts.

STATE CONTROL OVER INTERNAL UNION CONFLICTS

An emphasis on remedies was in a large measure responsible for an earlier inroad on federal control of conduct which might arguably constitute an unfair labor practice. In *International Association of Machinists v. Gonzales*,[74] decided the same day as *Russell*,[75] the Supreme Court affirmed a California state court decision which had ordered a union member reinstated in his union and had awarded him damages for his illegal expulsion. The state court held that under California law, membership in a labor union constituted a contract between the member and the union, and that state law provided through mandatory reinstatement and damages, a remedy for the breach.[76] The Supreme Court held that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied."[77] The Court maintained that precluding a state court from its jurisdiction to enforce the rights of union members would often leave an unjustly ousted member without a remedy for restoration of his membership rights, since the NLRB has not been granted the authority to order the reinstatement of membership in a union.

In its appeal, the union objected to the award of damages for loss of wages and the suffering resulting from the breach of contract on the theory that the NLRB could have awarded partial relief in the form of back pay if there was a finding of an unfair labor practice. However the

[72] *Supra* note 43.

[73] CCH. Lab. L. Rep., *Labor Law Decisions of the U.S. Supreme Court, 1965 Term*, ¶ 8035 (1966).

[74] 356 U.S. 617 (1958).

[75] *Supra* note 35.

[76] 142 Cal. App.2d 207, 298 P.2d 92 (1957).

[77] *Supra* note 74, at 620.

Court was interested in permitting the injured party, as in the *Russell* case,[78] to recover all damages available under state law. Justice Frankfurter, the author of the *Gonzales* opinion, was not disturbed by the fact that the union's conduct constituted an unfair labor practice, nor did the possibility of a conflict of remedies over an award of back pay, unlike *Garner*,[79] compel the Court to hold state jurisdiction pre-empted. As the Court indicated, a remote possibility of conflict with the enforcement of the national policy by the NLRB was no barrier to state action. The justification for state jurisdiction, in order to assure an injured party a remedy, notwithstanding the fact that the conduct might involve an unfair labor practice, paralleled the theory subsequently expressed in *Linn*,[80] which emphasized that an injured party might remain remediless if such litigation was pre-empted to federal administrative authority.

Chief Justice Warren, in his critical dissent in the *Gonzales* case, argued that the majority opinion affirmed a duplication of remedies that the Court had earlier condemned in *Garner*[81] and that the decision would frustrate the remedial patterns of the federal act. The majority, however, was not concerned in either *Gonzales* or *Linn*, that the decisions would encourage parties to seek out state relief, rather than submitting the dispute to the NLRB which could provide uniformity in the regulation of labor relations. The Court rather, distinguished the type of union conduct subject to state jurisdiction from that which would come under federal regulation:

> [T]he state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.[82]

Subsequent decisions holding litigation involving union-member conflict pre-empted to the NLRB, have justified and distinguished *Gonzales* on the basis that the activity regulated was merely a peripheral concern of the Labor Management Relations Act,[83] and the internal affairs of unions were not in themselves matters within the NLRB's competence.[84] These defenses for state involvement rather than submission of the alleged claim to the NLRB, tend to emphasize the fact that jurisdictional questions in cases which arguably involve an unfair labor practice will be decided somewhat on an *ad hoc* basis, because the criteria set down in *Gonzales* do not delineate clearly classes of actions which are subject to either state control or federal regulation. The Court in *Gonzales* stated that, "the statutory

78 *Supra* note 35.
79 346 U.S. 485 (1953).
80 *Supra* note 52.
81 *Supra* note 79.
82 *Supra* note 74, at 623.
83 *Supra* note 43.
84 Local 100, United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690 (1963).

implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."[85]

In contrast to the conduct in *Gonzalez*, where the Court allowed state adjudication, the interference by a union with a member's employment opportunities appears to represent an area of conduct which is free from state regulation. Where there is such union interference, arguably involving an unfair labor practice, the Court has held that the NLRB has the exclusive power to make the initial determination.[86] Two opinions handed down the same day, *Local 100, United Association of Journeymen and Apprentices v. Borden*[87] and *Local No. 207, International Assoc. of Bridge, Structural & Ornamental Iron Workers Union v. Perko*,[88] distinguished *Gonzales* and indicated the limitations on state power under *Gonzales*.[89] In both instances the conduct was held to be within the initial jurisdiction of the NLRB, since both constituted union interference with its members' employment, rather than union conduct in regard to union membership. In *Perko*,[90] a union member alleged that the union had prevented him from obtaining work as a foreman by representing to employers that his foreman's rights had been suspended. In *Borden*,[91] a member of a Louisiana plumbers' union sued for damages in a Texas state court. The plaintiff, Borden, had gone to Dallas, Texas, to find a job with a particular construction company whose hiring was done by union referral. He was unable to obtain the referral from the business agent of the Dallas local of the plumbers' union, although the agent had previously accepted his clearance card from the Louisiana local and the company had requested the agent to send him over. In his suit, Borden alleged that the union's actions constituted a wilful, malicious, and discriminatory interference with his right to contract and to pursue a lawful occupation; that the union breached a promise implicit in the membership arrangement not to discriminate unfairly or to deny any member the right to work; and that the defendants had violated certain state statutory provisions. The state court awarded damages and rejected the union's pre-emption argument.[92] The Supreme Court however, upheld the union's argument and reversed the decision for the union, rejecting the defense of Borden that the state court's jurisdiction was not pre-empted under the principles declared in *Gonzales*.

[85] *Supra* note 74, at 619.

[86] *Supra* note 84. Local No. 297, International Association of Bridge, Structural & Ornamental Iron Workers Union v. Perko, 373 U.S. 701. (1963).

[87] *Supra* note 84.

[88] 373 U.S. 701 (1963).

[89] *Supra* note 74.

[90] *Supra* note 88.

[91] *Supra* note 84.

[92] 355 S.W.2d 729 (1962).

Justice Douglas, in his dissent in *Borden*, suggests that this case is indistinguishable from *Gonzales*.[93] He contends that the *Borden* litigation, like that in *Gonzales*, arose out of a dispute between Borden and his union over the scope of his union membership rights. Consequently both involved internal union matters. Notwithstanding this similarity, the majority opinion indicates that it will grant the NLRB initial jurisdiction if the aggrieved party asserts union interference with employment opportunities through unfair labor practices. If however, the primary remedy sought is restoration of membership in the union, the state retains jurisdiction, since the NLRB has no authority to reinstate a member in his union.

CONCLUSION

A noticeable absence of clear congressional will has contributed to the confusion as to what constitutes a labor dispute which the NLRB can adjudicate, and what litigation still remains within the purview of the state. Decisions by the Supreme Court, discussed in this comment, have reflected this absence. Moreover, the intent of Congress to create a body of federal substantive law to be uniformly applied to labor disputes, has not usurped state jurisdiction in cases where the state has traditionally had the authority to act, or where the NLRB cannot provide an adequate remedy. The Court has held that violent tortious conduct may be enjoined by the state. In addition, the state has the authority to award damages for such conduct, notwithstanding the fact that the activity involved an unfair labor practice. In order to provide a union member with a remedy for wrongful ouster from his union, the Court has granted the state jurisdiction to order reinstatement on the theory that this is an internal union conflict. Where an employee alleges union interference with employment opportunities, the court has denied the state jurisdiction, although this too may constitute an internal union conflict. The recent decision in the *Linn* case,[94] which held that the state has jurisdiction in a libel suit, concluded in regard to state libel remedies and national labor policy; "If experience shows that a more complete curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding."[95] It is thus clear that pre-emption to the NLRB is not pervasive when conduct arguably involves an unfair labor practice and the courts will continue to enter the area of labor disputes.

James Burstein

[93] *Supra* note 74. [94] *Supra* note 52. [95] *Id.* at 67.