



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 2

Article 13

2-1-1957

Labor Law -- State Jurisdiction Over Picketing

J. Halbert Conoly

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

J. H. Conoly, *Labor Law -- State Jurisdiction Over Picketing*, 35 N.C. L. REV. 329 (1957).

Available at: <http://scholarship.law.unc.edu/nclr/vol35/iss2/13>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

"insuperable and unsurpassable hardship or difficulty in exercising some constitutional right."²⁰ The Court, unlike the Board, found no such countervailing hardship or difficulty here.

With this decision, the Supreme Court has more clearly defined the basic rule to be applied here. The employees' right to discuss self-organization among themselves, as set out in *Le Tourneau Co.*, has been reaffirmed.²¹ In a situation where the employees spend the greater part of their living as well as working time on the company property, the employer may not prohibit the entrance of the union on the property for organizational activity.²² Nor may the entry be prohibited where the company rule discriminates against the union.²³ But, as the Court ruled in the principal case, if the living quarters of the employees in town or country are within reasonable reach of the union, no nonemployee access to the company property has to be granted. Thus, the remaining question is the factual one of what combination of distances and proportions of employees will have to prevail before the employer is made to open his doors to nonemployee organizers.

HENRY H. ISAACSON

Labor Law—State Jurisdiction Over Picketing

While the extent of the jurisdiction of a state to enjoin peaceful picketing still remains uncertain,¹ the United States Supreme Court in a recent decision, *United Automobile Workers v. Wisconsin Employment Relations Board*,² made definite the power of a state to enjoin picketing or other employee activity which assumes the form of violence or coercion. The Court thus reaffirmed the reasoning in *Allen Bradley v. W.E.R.B.*³ that otherwise an ". . . intention of Congress to exclude the states from exerting their police power must be clearly manifested."⁴

If the *U. A. W.* case had involved an employer seeking to prevent violence and destruction of property, by securing an injunction from a state court acting under its traditional police power to preserve the general order by preventing violence and breaches of the peace, the decision

167 F. 2d 147 (6th Cir. 1948); cf. *NLRB v. Cities Serv. Oil Co.*, 122 F. 2d 149 (2d Cir. 1941)

²⁰ Brief for Appellee Babcock & Wilcox Co., p. 17, *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956).

²¹ *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105, 113 (1956) (dictum).

²² *NLRB v. Lake Superior Lumber Corp.*, 167 F. 2d 147 (6th Cir. 1948); *Weyerhaeuser Timber Co.*, 31 N. L. R. B. 258 (1941).

²³ *NLRB v. Stowe Spinning Co.*, 336 U. S. 226 (1949).

¹ See Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A. B. A. J. 415 (1956) for discussion of pre-emption problems arising from the Taft-Hartley amendments to the National Labor Relations Act.

² 351 U. S. 266 (1956).

³ 315 U. S. 740 (1942).

⁴ *Id.* at 749

of the Supreme Court would have conformed to the jurisdictional pattern which the Court apparently has been developing in recent cases concerned with federal-state relationship in labor disputes. In the *U. A. W.* case, however, more was involved than a state court exercising the police power which the National Labor Relations Act⁵ does not preclude from state action. It involved an administrative board acting under statutory authority from the state legislative body regulating labor-management relations.

The Kohler Company of Wisconsin and the appellant union reached an impasse in collective bargaining for a new contract. The production workers struck and picketed the premises of the company. The Kohler Co. filed a complaint with the Wisconsin Employment Relations Board charging the union and its members with the commission of unfair labor practices within the meaning of the Wisconsin Employment Peace Act.⁶ On the authority of the Wisconsin Act, one provision of which made it an unfair labor practice for employees to engage in mass picketing and other coercive activities,⁷ the state board ordered the union and certain members to cease and desist from a fairly inclusive list of activities which the board found to be coercive and intimidating. Simultaneously, the board issued positive regulations limiting the number and conduct of pickets. The board's order was enforced by a Wisconsin Circuit Court and the judgment was affirmed by the state supreme court⁸ and the United States Supreme Court.⁹

While *Garner v. Teamsters Union*¹⁰ denied the state's jurisdiction to enjoin peaceful picketing where the conduct of the union would constitute an unfair labor practice under the NLRA, state courts have continued to enjoin union activity where violence or intimidation is present as a valid exercise of the police power.¹¹ In the *Garner* case

⁵ 49 STAT. 449 (1935), as amended 29 U. S. C. §§ 151-68 (1952), hereinafter referred to as NLRA.

⁶ WIS. STAT. 111.01 *et seq* (1953). The Wisconsin Act is a comprehensive labor relations statute differing in parts and scope but generally patterned after the federal act and administered by an agency similar to the National Labor Relations Board.

⁷ WIS. STAT. 111.06 (2) (1953).

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights including those guaranteed in sect. 111.04 or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railroads, airports, or other ways of travel or conveyance."

⁸ *U. A. W. v. W. E. R. B.*, 269 Wis. 578, 70 N. W. 2d 191 (1955).

⁹ *U. A. W. v. W. E. R. B.*, 351 U. S. 266 (1956).

¹⁰ 346 U. S. 485 (1953).

¹¹ In *Perez v. Trifilette*, 74 So. 2d 100, 102 (Fla. 1954); *cert. denied*, 348 U. S.

itself, the Supreme Court carefully limited the decision to the facts presented by quoting from *Allen-Bradley v. W. E. R. B.*¹² that the state could still exercise “. . . its historic powers over such traditionally local matters as public safety and order . . .” [and also stating that] nothing suggests the activity enjoined threatened a probable breach of the state’s peace or would call for extraordinary police measures by state or city authority.”¹³ In *Erwin Mills v. Textile Workers Union*,¹⁴ decided before *Garner*, but after amendments to the NLRA had determined that certain union conduct could be an unfair labor practice, the North Carolina Supreme Court found nothing in the NLRA or decisions of the United States Supreme Court¹⁵ to prevent a state court from enjoining mass picketing or other violent conduct.¹⁶

In deciding the *U. A. W.* case, the United States Supreme Court conceded that the enjoined conduct was a violation of section 8 (b) (1) of the NLRA,¹⁷ that the Kohler Company was subject to that act, and that the National Labor Relations Board¹⁸ could have issued an order similar to the one issued by the state board. The appellant union argued that while a state may, within its police power and under its applicable criminal statutes, restrain and punish violence, it should not be permitted to exercise this reserved power through an agency concerned primarily with labor relations and operating under a state statute which seeks to effectuate a declared labor policy of the state. The Court, in rejecting this argument, said that the inclusion of unfair labor practices by unions in the NLRA did not make *Allen-Bradley* obsolete and that “The fact that Wisconsin has chosen to entrust its power to a labor

926 (1955), the Florida court said “. . . it seems settled that while states are precluded from applying their preventive labor law in controversies affecting interstate commerce, their power to preserve the peace remains intact even though it may be invoked in connection with a labor dispute.”

¹² 315 U. S. at 749.

¹³ *Garner v. Teamsters Union* 346 U. S. 485, 488 (1953).

¹⁴ 234 N. C. 321, 67 S. E. 2d 372 (1951).

¹⁵ The North Carolina court quoted at length from the so-called “Briggs-Stratton” case, *International Union v. W. E. R. B.*, 336 U. S. 245, 253-54 (1949), where the United States Supreme Court upheld an order of the Wisconsin Employment Relations Board ordering a union and its members to cease from collectively engaging in intermittent work stoppages. The Court said: “While the federal board is empowered to forbid a strike when and because its purpose is one that the federal act made illegal, it has no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left to the states. . . . This conduct is governed by the states or it is entirely ungoverned.” *Id.* at 328, 67 S. E. 2d at 379.

¹⁶ “. . . nothing . . . interferes . . . with the right of a state to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by violence or the threat of violence, or to protect property and to safeguard its lawful use during a strike or labor dispute.” *Id.* at 329, 67 S. E. 2d at 379.

¹⁷ 61 STAT. 141 (1947) as amended 29 U. S. C. § 158 (b) (1) (1952).

¹⁸ Hereinafter referred to as NLRB.

board is of no concern to this court."¹⁹ Three justices dissenting argued that the majority was allowing a duplication of administrative remedies which the Court had disallowed in *Garner*. The dissent reasoned that the police power which the Court exempted from exclusive jurisdiction of the NLRB was that traditional power which a state could have exercised independently of any general state labor policy or specific legislation. Apparently the dissenters had no objection to the state protecting against the type of conduct in which the union had here engaged, so long as the state did not award administrative relief similar to that available from the NLRB.

The majority view, in so far as it allows the state to exercise its police power to prevent violence in labor disputes, confirms what it had already said in *Garner*.²⁰ However, by allowing Wisconsin to implement this power through a local administrative labor board, the Court takes a position which seems inconsistent with the federal-state jurisdictional relationship it had been developing in cases since the NLRA was amended in 1947. Although the *U. A. W.* case can be distinguished from *Amalgamated Association v. W. E. R. B.*,²¹ since there was no issue of violent conduct in the latter, it would seem anomalous that a state is completely powerless to prevent a crippling strike in a vital public service affecting the community at large, and yet, may invoke the full weight of its labor regulation machinery in an isolated case of mass picketing or intimidation involving a small segment of the populace.

The *U. A. W.* case seems more consistent with the dissenting opinions in earlier cases, which would have allowed the states a freer hand in labor relations.²² The Court, however, indicates no desire to overrule those earlier cases where the majority of the Court severely restricted state interference. Thus, the Court seems to depart from the reasoning of the earlier cases in situations where coercion and intimidation were present, without modifying its rulings in those cases.

This may become clearer through a review of the Court's rulings on the validity of state injunctions against union activity where no overt or threatened acts of violence were involved.²³ Even prior to *Garner*, the

¹⁹ *U. A. W. v. W. E. R. B.*, 351 U. S. 266, 275 (1956).

²⁰ "We have held that the state may still exercise its historic power over such traditionally local matters as public safety and order and the use of the streets and highways." *Garner v. Teamsters Union*, 346 U. S. 485, 488 (1954).

²¹ 340 U. S. 383 (1951), where the Court held that the NLRA precluded Wisconsin from enjoining a peaceful strike in essential public services since § 7 of the NLRA guarantees this right to employees.

²² See *Hill v. Florida*, 325 U. S. 538, 547-61 (1945) (dissenting opinion); *Amalgamated Association v. W. E. R. B.*, 340 U. S. 383, 399-410 (1951) (dissenting opinion); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 777-84 (1947) (separate opinion).

²³ See Smoot, *Stranger Picketing: Permanent Injunction or Permanent Litigation*, 42 A. B. A. J. 817 (1956) for a discussion of the development of court rulings on the validity of state injunctions against peaceful organizational picketing.

Court held that peaceful picketing *per se* was not enjoined unless some other factor was present.²⁴ Picketing was stripped of this protection, however, when it lost its peaceful nature and took the form of force and violence.²⁵ The Court further limited the privilege of peaceful picketing by allowing it to be enjoined if its purpose was to achieve an objective contrary to declared state policy whether this was legislative or judicial.²⁶ Under this limitation state courts were enjoining many union activities which not only sought a result in violation of a state policy, but also amounted to an unfair labor practice under the NLRA.²⁷ *Garner* reversed the trend of the Court by denying the state the power to enjoin the union activity if it would have been an unfair labor practice subject to the jurisdiction of the NLRB. *Weber v. Anheuser-Busch*²⁸ amplified the *Garner* ruling by holding that if the union conduct would be an unfair labor practice under the NLRA, the state was not free to act even if the union activity violated a state policy other than labor policy such as restraint of trade. The state was still free to act where the union activity violated state policy but did not amount to a federal unfair labor practice as in the *Briggs-Stratton*²⁹ case. There the union's conduct was in violation of the Wisconsin Act. Although there was some coercion in the case, the Court based its finding on the fact that the union's conduct while harassing the employer did not seek any specific end. The NLRA only gives the NLRB jurisdiction where the objectives are unlawful and makes no provision for the methods by which the employees seek these ends other than protecting the right of the employees to act in concert.³⁰

In *United Construction Workers v. Laburnum*,³¹ the Court upheld an award of damages by a state court in a common law tort action for violent and intimidating acts by a labor union. The conduct on which the action was based would have constituted an unfair labor practice. The Court distinguished this case from *Garner* stating that the decision there was aimed at preventing a duplication of remedies.³² Since there

²⁴ *A. F. of L. v. Swing*, 312 U. S. 321 (1941).

²⁵ *Drivers Union v. Meadowmoor*, 312 U. S. 287 (1941).

²⁶ *Giboney v. Empire Storage Co.*, 336 U. S. 490 (1949).

²⁷ *Plumbers Union v. Graham*, 345 U. S. 192 (1953).

²⁸ 348 U. S. 468 (1955).

²⁹ *International Union v. W. E. R. B.*, 336 U. S. 245 (1949).

³⁰ The Court in *Briggs-Stratton* gave § 7 of the NLRA a restricted interpretation when it said "No longer can any state . . . treat otherwise lawful activities to aid unionization as an illegal conspiracy. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal conduct is made legal by concert." *International Union v. W. E. R. B.*, 336 U. S. 245, 258 (1949).

³¹ 347 U. S. 656 (1954)

³² *Id.* at 663 where the Court said "In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct."

is no provision in the NLRA for compensation for injuries caused by unfair labor practices, the state tort remedy was not in conflict with any federal remedy.³³

The Court, in *Weber v. Anheuser-Busch*, reviewed and summarized all the important decisions it had made in cases involving federal-state jurisdiction over labor relations. It would seem that the Court had defined the relationship as closely as the vagueness of the NLRA on this point allows, except for the ". . . penumbral area" which Justice Frankfurter in his opinion said ". . . can be rendered progressively clear only by the course of litigation."³⁴

The power of a state to regulate labor disputes and activities prior to the *U. A. W.* case may be summarized as follows:

(1) Peaceful employee or union activity *per se* is not enjoined.
 (2) Peaceful employee or union activity may be enjoined if the conduct or the objectives sought are violative of declared state policy, unless the activity is either

(a) protected by section 7 of the NLRA as one of the rights of employees to act in concert for their mutual benefit,³⁵ or

(b) amounts to an unfair labor practice under the NLRA and the NLRB has jurisdiction over the conduct.

If the activity is not precluded from the states as falling within the exceptions noted, the state may exercise its power through an administrative procedure for labor regulation since it falls in that area which is neither prohibited nor protected by the NLRA.³⁶

(3) If there is a state remedy available in a labor dispute which would be operative independently of any state or federal labor policy and the remedy is one which the NLRB has no power to grant, the state may exercise its jurisdiction to grant the remedy.³⁷

(4) A state is precluded from enforcing through preventive remedies its labor law or labor policy over conduct for which the NLRA provides a federal administrative remedy. It may, however, exercise its traditional power to prevent violence and preserve the peace.

By considering it inconsequential in the *U. A. W.* case that the state exercised its police power through an agency dealing with labor relations, the Court has further blurred the relationship of the state to the NLRB, since state judicial power to prevent violence was already recognized by the Court. The majority argued that a labor board of

³³ See *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 143 (1955) for comparison of the *Laburnum* and *Garner* cases.

³⁴ 348 U. S. at 480.

³⁵ "If the conduct does not fall within the provisions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7 as concerted activity for the purpose of mutual aid or protection." *Weber v. Anheuser-Busch*, 348 U. S. 468, 478-79 (1955).

³⁶ *International Union v. W. E. R. B.*, 336 U. S. 245 (1949).

³⁷ *United Construction Workers v. Laburnum*, 347 U. S. 656 (1954).

the state would probably be more favorable to the interests of labor than a purely judicial court. While this may be true of the Wisconsin Board involved here, it is a dubious assumption to make of states in general.

Violence on a picket line is undesirable in any state but the majority ruling enables a state administrative agency to assume jurisdiction at its own discretion in a labor dispute subject to the provisions of the NLRA, if it finds any coercion present. This could be done even though the coercion factor may be very slight in a labor dispute and possibly unsanctioned by the union leadership. Since the NLRB cannot act until an unfair labor practice charge has been made,³⁸ the employer can secure the protection he desires from the state agency and deprive the NLRB of an opportunity to adjudicate the merits of his case, by not filing a charge with the NLRB.³⁹ The state agency, in effect, is allowed to regulate conduct subject to the jurisdiction of the NLRB on the authority of state legislation patterned after the NLRA, using an administrative remedy that duplicates that available through the NLRB.

Since the NLRA is vague as to the proper relationship of the state and the NLRB, the ultimate answer to the myriad problems raised by the jurisdictional question will lie with the Congress rather than the courts. A partial solution to the problem raised by the *U. A. W.* case would be for Congress to make it mandatory that a charge be filed with the NLRB within a specified period after any state relief had been sought. Then, the NLRB could, at its discretion, request a federal court to enjoin the state proceeding if such were necessary to protect its jurisdiction.⁴⁰ It is to be hoped that the Congress will include a clarification of the jurisdictional question in any future changes which may be made in the NLRA.

J. HALBERT CONOLY

³⁸ The NLRB has consistently interpreted § 10 (b) of the NLRA as only giving it jurisdiction over an unfair labor practice when the aggrieved party has filed a charge and thus the party who may be alleged to be guilty of an unfair labor practice has no standing to bring its own possibly wrongful conduct to the board's attention.

³⁹ In *Capitol Service v. NLRB*, 347 U. S. 501 (1954), the Court held that the NLRB could, at its discretion, request a federal court to enjoin a state injunction against the same conduct and acts over which the NLRB seeks to exercise its exclusive jurisdiction (as laid down by the Court in *Garner v. Teamsters*, 346 U. S. 485 (1954)). Thus the Court allowed the NLRB to come within the exception to the general rule of the Judicial Code that a court of the United States may not grant an injunction to stay proceedings in a state court except ". . . where necessary in aid of its jurisdiction." 28 U. S. C. § 2283 (1952). See *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511 (1955), *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 180 (1956), for a discussion of the applicability of § 2283 of the Judicial Code to enjoin state proceedings in a labor dispute.

⁴⁰ *Ibid.*