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Labor Relations -- Federal Pre-emption of Defamation Cases

R. Walton McNairy Jr.
the insurance policy and no insurable interest in the deceased. The defendant has the truck in return for the agreed consideration of paying the debt he assumed. At the same time, the insured’s estate receives what he bargained for—the debt on the property has been paid by the defendant as he agreed to do. In concluding that the estate was entitled to subrogation, the court said:

If such payment by the insurer were allowed to cancel the primary defendant debtor’s obligation, under the assumption agreement . . . the defendant, the primary debtor, would in effect be made a beneficiary although he has no insurable interest in the life of the insured. On the other hand, if the creditor . . . were given an absolute right to the proceeds, independent of the debt involved, the public policy limiting it to indemnification would be contravened . . . .

If the two above mentioned factors are policy considerations in reaching the result in Hatley, the court should reconsider the validity of the doctrine in Miller v. Potter that refused to allow subrogation against the assuming mortgagor when the creditor paid the premiums for insurance on the surety’s life.

DAVID S. ORCUTT

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The Supreme Court has held that libel and slander suits can be entertained by the courts even though the same activity is arguably subject to NLRB cognizance under the Labor Management Relations Act. In Linn v. United Plant Guard Workers an assistant general manager brought a libel action alleging that during an organizational campaign the union circulated defamatory leaflets

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20 265 N.C. at 84, 143 S.E.2d at 268.
21 210 N.C. 268, 186 S.E. 350 (1936).
22 The problem in the instant case probably could have been avoided if the parties had notified the creditor of the transfer. The General Motors Acceptance Corporation Group Creditors policy provides that “Any person who succeeds any such debtor under and by Transfer of Equity accepted and approved by the Creditor, shall be eligible from the acceptance and approval of such transfer.” Letter From Fred R. Gibney to David S. Orcutt, September 30, 1966. (Mr. Gibney is Director of Group Claims for Prudential Insurance Company of America.)

falsely accusing management of lying both to the NLRB and to the employees thereby depriving certain employees of their right to vote in NLRB elections. The district court dismissed on the grounds that defamation actions arising out of a labor dispute were pre-empted by the LMRA, and the court of appeals affirmed. The Supreme Court reversed and held that courts have jurisdiction to apply state remedies in defamation actions arising out of an organizational campaign provided that the statements were made with malice and caused injury to the plaintiff. The Court did not deal with constitutional issues, but directed its opinion solely to the extent to which state remedies are pre-empted by the LMRA.

In order to determine the competency of states to regulate libel and slander in a labor dispute context, the Court looked for authority in a score of pre-emption cases it had handed down in the past fifteen years. The leading case of Garner v. Teamsters Union held that where the activity obviously fell within the NLRB's jurisdiction to prevent unfair labor practices, the state through its courts could not adjudicate the same controversy and extend its own form of remedy. More important than the holding itself was the approach the Court took. The Court no longer concerned itself with the merits of the case, but directed itself solely to the problem of

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8 Linn v. United Plant Guard Workers, 337 F.2d 68 (6th Cir. 1964).

Two important areas where the LMRA itself specifically provides against pre-emption are: suits for breach of a collective bargaining contract under section 301(a), see Smith v. Evening News Ass'n, 371 U.S. 195 (1962); and suits to enforce the state's prohibition against agency shop agreements enacted under section 14(b), see Retail Clerks Ass'n v. Schermerhorn, 375 U.S. 96 (1963).


10 Garner v. Teamsters Union, 346 U.S. 485 (1953). The Court held that a state could not nejoin peaceful picketing as an unfair labor practice even though the picketing had caused a ninety-five per cent loss of business and violated both a state labor relations statute and state tort law.

11 In early cases the Court took upon itself the task of determining the merits of an alleged unfair labor practice. International Union v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).
federal-state relations under the act. The breadth of the new approach became more apparent in 1955 with Weber v. Anheuser-Busch, Inc., where the Court extended federal pre-emption to cover all activity that could reasonably be deemed to come within the prohibitions or protections afforded by the act. For several years following Weber, the Court adhered to its test of reasonable applicability of the act, but still found several situations where the state authority had not been exclusively absorbed by the federal enactment. The 1959 San Diego Bldg. Trades Council v. Garmon decision extended the pre-emption doctrine to its present proportions and put to rest most of the elaborate distinctions which had developed around prior holdings. The Court directed attention to the single issue of whether the activity involved is "arguably subject to" the protections of section 7 or the prohibitions of section 8 of the act. Under this test, both federal and state courts must defer to the exclusive competence of the NLRB in all cases where an argument could be made that the activity involved was subject to the provisions of the LMRA. Once the primary jurisdictional question

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8 Congressional pre-emption in favor of the NLRB prevents all courts, even the Supreme Court, from exercising jurisdiction over matters covered by the LMRA. "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioner presented it to that body. The power and duty of primary decision lies with the Board, not with us." Garner v. Teamsters Union, 346 U.S. 485, 489 (1953).

9 348 U.S. 468 (1955). The Court held that the state was precluded from regulating activities under a state anti-trust law where the complaint also alleged an unfair labor practice under specific sections of the LMRA.

10 A state was allowed to award both actual and punitive damages under a common law tort action for losses to an employer’s business resulting from violent activity clearly subject to the LMRA. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). Actual and punitive damages were again allowed against a union in International Union, UAW v. Russell, 356 U.S. 634 (1958), where an employee had been prevented from going to work by the union’s mass picketing and threats of violence. And in International Ass’n of Machinists v. Gonzales, 356 U.S. 617 (1958), a state court was allowed to award damages for lost wages as well as for mental and physical suffering where the union had wrongfully expelled a member. A state injunction was upheld to the extent that it enjoined acts which had become emmeshed with violence. Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).


12 The distinction most recognized among the courts was that a difference in remedy was sufficient justification for resorting to state courts rather than the NLRB. See, e.g., Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).

13 For a clear example of the application of this test see Marine Eng’rs Beneficial Ass’n v. Interlake Steamship Co., 370 U.S. 173 (1962), where it
of whether the conduct called into question may reasonably be asserted to be subject to NLRB cognizance is decided in the affirmative, state causes of action are totally precluded regardless of the remedy sought. The pre-emption principle applies to damage awards\(^4\) as well as to injunctions,\(^5\) to state court proceedings\(^6\) as well as to regulation by a state agency,\(^7\) and to actions based upon common law\(^8\) or statutes of general application\(^9\) as well as to proceedings under a state labor relations statute.\(^10\)

Although Garmon significantly enlarged the primary jurisdiction of the NLRB,\(^21\) it clearly established two exceptions to the basic rule of pre-emption. If the activity regulated was a merely peripheral concern of the Labor Management Relations Act,\(^22\) state

was argued that the picketing union was composed of marine engineers who were supervisors rather than employees, and, therefore, the union was not a “labor organization” within the definition of the LMRA. The Court found that the activities were at least “arguably subject to” the act and pointed out that the determination of that question was for the NLRB. Compare Hanna Mining Co. v. District 2, Marine Eng’rs Beneficial Ass’n, 382 U.S. 181 (1965) where the identical question was again presented, but the NLRB had previously determined that the engineers were in fact supervisors and not subject to the LMRA. Because of this prior determination, a reasonable argument could not be made, and the state authority was upheld.


\(^7\) Amalgamated Ass’n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).


\(^21\) Justice Frankfurter was careful to couch his reasoning in terms of judicial inability to cope with the peculiar and specialized problems inherent in labor cases:

The nature of the judicial process precludes an ad hoc inquiry into the special problems of labor-management relations. . . . Nor is it our business to attempt this. . . . To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration.

law and remedies could be applied. Cited as representative was *International Ass'n of Machinists v. Gonzales*, but the court did not suggest what types of activity other than arbitrary expulsion from union membership would constitute a "merely peripheral concern," and in two 1963 decisions, *Local 100, United Ass'n of Journeymen v. Borden* and *Local 207, Int'l Ass'n of Bridge Workers v. Perko*, the Court restricted the internal activities exception almost to the point of extinction. Also excepted from the pre-emption doctrine were "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Prior to *Linn*, the only state interest found compelling enough to allow state regulation, in spite of the fact that the activity might also constitute an unfair labor practice, was the regulation of intimidation, violence, and other threats to the peace. The *Garner-Weber-Garmon* line of cases clearly recognized that the state may exercise "its historic power over such traditionally local matters as public safety and order and the use of the streets and highways" by any method consistent with its police powers. But except for situations earmarked by violence, the Court continued to pursue a policy of rigorous pre-emption of state inter-

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24 *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690 (1963). The Court held that the state courts were pre-empted in an action alleging that the union had unlawfully refused to refer the member to a job.
26 While the Court distinguished *Borden* and *Perko* from *Gonzales* on the basis that *Gonzales* focused upon purely internal affairs and that *Borden* and *Perko* focused more on the employment relationship, there is so much similarity between all three cases that the practical effect is to restrict *Gonzales* to its exact factual situation. Were *Gonzales* to be heard again today, it is quite likely that the *Garmon* principles would limit the state jurisdiction with respect to the awarding of consequential damages. See *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690, 697 (1963).
vention into the labor field whether the regulation was applied through injunction, damages, or criminal contempt sanctions.

In *Linn* the Court added new vitality to the two exceptions and expressly brought state defamation actions within the exceptions recognized in *Garmon*. The Court reasoned that state courts handling libel suits deal with an interest entirely different from that with which the NLRB deals. The Board is not interested in protecting reputation or deterring violence; it looks only to the coercive or misleading nature of the statements surrounded by other circumstances in order to determine an unfair labor practice charge, or whether the employees had been so mislead that a fair election had become impossible. Since the Board is unconcerned with the defamatory character of the statement, a judicial determination that the statements were libelous in character would have no effect upon the Board's jurisdiction over the merits of the labor dispute itself. Thus the injury caused to an individual by a defamatory statement is merely incidental to the Board's inquiry and the application of state remedies would be a "merely peripheral concern of the Labor Management Relations Act."

The Court further concluded that the states' concern with redressing malicious libel is "so deeply rooted in local feeling and responsibility 'that an overriding state interest' . . . should be recognized." The traditional justification for libel actions, namely the tendency of libel or slander to cause a breach of the peace, is closely related to the breach of the peace line of cases recognized in *Garmon*. The Supreme Court itself has recognized maintenance of the peace as one of the purposes of civil actions for libel. Moreover, the state is traditionally concerned with providing a peaceful

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54 *Id.* at 61.

55 *Id.* at 61.

56 *Id.* at 64 n.6.

forum to which individuals whose reputations have been damaged by false and injurious statements can bring their claims. Balanced against such meaningful state interests, the use of the known lie as a tool has so little social utility that it should be afforded the minimum protection consistent with national labor policy.

The Supreme Court was not oblivious to the potential conflict in allowing defamation actions to coexist with our national regulatory scheme, in fact, it specifically recognized that to allow these actions as they presently exist would infringe upon national policy. In an effort to accommodate both federal and state interests, the Court elected to pursue a policy of partial pre-emption whereby the most objectionable aspects of state regulation would be eliminated. As stated by the Court:

In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

By applying the standards of *New York Times Co. v. Sullivan*, the Court expects to guard against the abuse of defamation actions and at the same time allow the states to pursue their own remedies in those areas where the state interest is most pronounced.

While the Court has made a salutary effort at compromise, there is a distinct possibility that it has underestimated the extent to which our national policy will conflict with state action even though state action is limited to redressing malicious and injurious defamation. A certain amount of conflict is inevitable due to the fact that the *Linn* holding leaves an overlapping area where both the NLRB and the state courts are empowered to act. Section 8(c) of the act provides that the "expressing of any views, arguments, or opinions, or the dissemination thereof" shall not constitute or be evidence of an unfair labor practice if the expression contains "no threat of reprisal or force or promise of benefit." The NLRB has on occasion

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39 *Id.* at 64-65.
41 LMRA § 8(c), 73 Stat. 525, 542 (1959); 29 U.S.C. § 158(c) (1965). The Court concluded that malicious libel was not immunized by section 8(c) and suggested that "unions should adopt procedures calculated to prevent such abuses." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 n.5
been called upon to determine whether alleged defamatory statements came within the protection of this section.\footnote{Central Massachusetts Joint Bd., 131 NLRB 590. 603-04 (1959).} Also under section 9(c),\footnote{LMRA § 9(c), 73 Stat. 525, 542 (1959), 29 U.S.C. § 159(c) (1965).} the NLRB has had to determine whether statements made during an organizational campaign were so false and misleading as to "prevent the exercise of a free choice by employees in the election of their bargaining representatives."\footnote{Gummed Products Co., 112 NLRB 1092 (1955); General Shoe Corp., 77 NLRB 124 (1948).} At least in these two situations, both the Board and the courts will entertain litigation concerning the exact same statements, but each will be using different procedures and effectuating different policies. The Court has, on other occasions, recognized that the inevitable result of such concurrent jurisdiction is to produce incompatible and inconsistent holdings which would undermine our national policy of uniform labor relations.\footnote{The possibility of inconsistent holdings between the Board and the courts was pointed out in Blum v International Ass'n of Machinists, 80 N.J. Super. 37, 192 A.2d 842 (1963). In fact Linn itself expresses the harbinger of just such a result, "When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief . . . Nor would the courts and the Board act as cross purposes since, as we have seen, their policies would not be inconsistent." 383 U.S. at 66-67.}

Another more fundamental conflict is that by allowing state defamation actions, the Court has now armed both parties with a new weapon entirely alien to the statutory scheme and with absolutely no relevance to the merits of the labor dispute.\footnote{San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959).} One has only to look to the quality of rhetoric customarily used in labor disputes to see how frequently libel actions would be available to the party trying to strengthen its bargaining position. The Court itself recognized that, "Indeed representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrep-
sentations and distortions." As pointed out by the dissent, the charges of lying in the principal case are "pale and anemic when compared with the rich and colorful charges freely exchanged in the heat of many labor disputes." In this context, resort to libel suits as an auxiliary weapon becomes a very real alternative which neither party could afford to ignore. And for the combatants, emotionally and financially committed to winning the immediate battle, considerations of national policy are little incentive to refrain from taking advantage of a fortuitous slip of the tongue by the opponent. Thus, an entirely new factor beyond those provided for by Congress has been thrown into the collective bargaining machinery which could possibly disturb the delicate balance achieved by the act.

Perhaps the greatest defect of the Linn holding is that it leaves the way open for local juries to respond to labor controversies with those local prejudices and attitudes that the Garner-Weber-Garmon line of cases and the act itself sought to isolate from national labor relations. By requiring proof of malice and harm, the majority expects to superimpose upon state decisions a rough uniformity which will be in accord with the policies of the act. But it is sub-

48 Id. at 58.
49 Id. at 70.
50 The adverse effect of a threatened monetary judgment is amplified in a hostile area where local juries often have a propensity to award excessive damages. E.g., Local 207, Int'l Ass'n of Bridge Workers v. Perko, 373 U.S. 701 (1963) ($25,000 compensatory damages); International Union, UAW v. Russell, 356 U.S. 634 (1958) ($10,000 compensatory and punitive damages, 29 identical suits were pending); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) ($275,437.19 compensatory and punitive damages).
51 The situation is aggravated by the fact that the complaining party, whether union or management, usually will have the unique ability to control the forum. See 51 CORNELL L.Q. 827 (1966). The citizenship of an unincorporated labor union for purposes of federal diversity jurisdiction is determined by the citizenship of its members rather than the principal place of business or the place of incorporation. United Steelworkers v. R. H. Bouligney, Inc., 382 U.S. 143 (1965). But Bouligney leaves intact FED. R. CIV. P. 23(a) whereby an unincorporated labor organization may sue or be sued in federal courts by the use of the class action. Salvant v. Louisville & N. R.R., 83 F. Supp. 391 (W.D. Ky. 1949); Montgomery Ward & Co., v. Langer, 168 F.2d 182 (8th Cir. 1948). If the complaining party wants to be in federal court, he will utilize the class action device to create diversity jurisdiction. If, on the other hand, he prefers to be in the state courts, he need only to sue there with the union as an entity. In effect, the complaining party is given full opportunity to take advantage of, or avoid, local prejudices while the defending party is largely denied the opportunity to remove to a less partisan forum. For limitations on the use of class actions see WRIGHT, FEDERAL COURTS § 72 (1963).
mitted that the dissent has the more realistic view, i.e., than since both the type of injury caused by defamatory statements and the malicious intent required by the Court are largely subjective standards responsive to the ingenuity of trial counsel and the pre-existing attitudes of judge and jury, the outcome will probably be more in accord with community attitudes toward unionization than with the national labor policies. Those areas where union or management will most need protection—the hostile anti-union areas of the South or the Northern community racked by labor disturbances—are the precise areas in which the subjective standards laid down by the Court are of such dubious value.

Viewed from a historical perspective, the Linn decision is reminiscent of earlier attempts by the Court to find concurrent jurisdiction over labor disputes. In Laburnum and Russell the Court attempted to allow the states to pursue traditional tort remedies where the NLRB remedies could not effectively relieve the injured party's plight. This experiment failed, and the Court greatly restricted these holdings by its holding in Garmon. Again, in Gonzales the Court allowed the states to regulate intra-union disputes, but in Borden and Perko the Court greatly restricted its prior holding. Now, several years later, the Court is again experimenting

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62 The Court did not in any way limit the type of harm which may be proved and went on to enumerate what is allowable: "general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." Linn v. United Plant Guard Workers, 383 U.S. 53, 65 (1966).
63 Malice was defined as the publication of defamatory statements "with knowledge of their falsity or with reckless disregard of whether they were true or false." Id. at 65. The dissent attributes to the Court a definition of malice as "a deliberate intention to falsify or a malevolent desire to injure." Id. at 70-71.
64 Id. at 71.
65 Linn is not limited to actions against the union. "We conclude that where either party circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies." Linn v. United Plant Guard Workers, 383 U.S. 53, 55 (1966). For an example of a successful slander suit by a union member against management, see Brantley v. Devereaux, 237 F. Supp. 156 (E.D.S.C. 1965).
as it expressly recognizes, but this time it is giving fair warning that if the experiment fails, it will be free to reconsider its holding. Failure of the prior experiments and support from only a bare majority for this decision indicate the likelihood that Linn will soon be severely restricted or overruled entirely.

R. WALTON MCNAIRY, JR.

Real Property—Easements—Prescriptive Acquisition in
North Carolina

It has been said that the English law of prescription is in such an unsatisfactory condition that no mere restatement can clear up the confusion caused by the courts and legislature.¹ This statement is equally applicable to the present situation in this country. The combination of the lost grant theory—a fiction indulged in as a means to cope with difficulties inherent in the common law prescriptive system²—and the application of adverse possession law to pre-

¹ Holdsworth, History of English Law 352 (2d ed. 1937).
² In early England prescription was founded on the assumption that the right claimed had been enjoyed for a period beginning before the time of legal memory, the date of which was fixed by statute at 1189. During the twelfth and thirteenth centuries, user for such a period was conclusive, as evidence from before the time of legal memory could be of no avail to the owner of the land. This doctrine resulted in great hardship on the claimant, for as time passed, proof of user for such a long period became practically impossible. The courts remedied this situation by devising a rule that if proof of user was established as far back as living memory could go, it would be presumed that it existed from 1189. This also, however, failed to provide a satisfactory prescriptive period and in the absence of statutes pertaining to prescriptive acquisition of incorporeal rights, the courts invented a presumption of user from the time of legal memory whenever user for a period corresponding to that required by statutes of limitation could be shown. This method also caused much difficulty, for when the statutory period was reduced to twenty years, the presumption was often rebutted by proof that the user originated after 1189, although it had persisted for the twenty year period. By the eighteenth century English judges began to think it absurd that although twenty years enjoyment sufficed for the acquisition of a corporeal right, enjoyment since 1189 had to be shown before the claimant could acquire an easement in respect to the same corporeal body. Thus the courts resorted to a legal fiction founded on the medieval idea that every prescriptive title is based on a presumed grant made before the beginning of legal memory. Through this fiction of the lost grant the courts presumed from long user and exercise of right by the claimant with acquiescence of the owner, that there must have originally been a grant of the right which had become lost in modern times, i.e., after 1189. By analogy to the statute of limitations the prescriptive period was set at twenty years. This fiction successfully fulfilled its purpose as it destroyed the effect of proof of user beginning within the time of legal memory. It was in this form and with this background that the lost grant doctrine was ushered