Preemption, Predictability and Progress in Labor Law

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By CLARENCE M. UPDEGRAFF

So law is an authoritative pronouncement, put forth or recognized by a politically organized society thought of as a legal order, that given certain defined behavior or a certain defined event, certain defined action of those who exercise the authority of the legal order will follow.1

Preemption

At the turn of the century, it appeared that all commerce (like all Gaul when Caesar wrote) was divided into three parts. These were:

1. Local or intrastate commerce.
2. Interstate commerce: Local aspects.

The belief, then, was that all matters of local or intrastate commerce were exclusively within the control of the affected sovereign states and would so remain. Matters in the class of local aspects of interstate commerce were, if Congress had taken no action in respect to them, subject to state control until Congress decided otherwise and took action (preemption). Matters in the area of national aspects of interstate commerce were beyond the reach of the states and exclusively in the federal area. Silence of Congress implied its conclusion that these were to be left unregulated by laws; it did not open them to state control.2

For several decades certain labor relations problems—aspects of commerce—were apparently considered only under the contracts clause of the Constitution, and their character as aspects of commerce was ignored. Thus legislation against the “yellow dog” contract was sent down the drain of unconstitutionality when enacted by the

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12 POUND, JURISPRUDENCE 167 (1959).
U.S. Congress and by a state. However, when the pressure against the enforcement of such agreements, and against the employer organizations which had supported and made them effective, gained decisive strength, the Norris-LaGuardia Anti-Injunction Act was passed and signed by President Hoover. This statute must be regarded as a forerunner of the National Labor Relations Act (Wagner Act), and of the Fair Labor Standards Act, and the latter statutes are now sustained under the commerce clause.

It is the purpose of this writing to study, and not to praise or to condemn the movement since the turn of the century from what may be called "stateism" toward "nationalism," and to emphasize the present extreme need for a thorough statutory clarification and ordering process in the labor law area.

Early in this century it was commonplace to say that we were a nation of dual sovereignty, that the states were sovereign in their sphere of authority, and that the federal government (one of limited and delegated powers) was sovereign within, and only within, the boundaries then assumed fixed by the Constitution in that delegation of powers. However, even at that time some trends away from stateism and toward nationalism unmistakably appeared. While The Minnesota Rate Cases upheld the state established freight rates on intrastate movements, it was implied that this decision would be reversed if the Interstate Commerce Commission should find that the intrastate rates involved unjust discrimination against interstate commerce. In the later Shreveport Rate Case it was held that intrastate rates which adversely affected interstate freight rate adjustments and which might operate discriminatorily against shippers in interstate commerce could be ordered discontinued by the Interstate Commerce Commission. This appears to be a clear holding that any state established or approved intrastate freight rate, or rule, or practice, which might interfere with interstate commerce, must give way to the latter. Nationalism was emphasized over stateism.

4 Coppage v. Kansas, 236 U.S. 1 (1914).
9 Cases cited supra note 1, see Updegraff & McCoy, Arbitration of Labor Disputes 54-55 (2d ed. 1961) and cases therein cited.
10 230 U.S. 352 (1913).
In the early years of this century the executive branch of the government sponsored numerous proposals designed to implement a strong policy of nationalism. It was desired to end subordination to state conservatism of politically conceived national objectives. This subordination had based its genesis in the theory that the federal government had very limited powers and all the residuum of sovereignty lay in the states. Recommendations of President Theodore Roosevelt in this vein subjected him to attack for advocating many things which appear to have become an accepted part of political thinking of today.  

From that time until the present, there has been a general expansion of nationalism at the expense of stateism. True, there have been judicial reiterations of the limitations upon federal power from time to time as in Coronado Coal Co. v. UMW. In that case there was emphasis upon the view that while the states had exclusive authority over wages, hours and working conditions that had to do with such things as mining and processing of goods in factories, movement of goods in commerce was under the federal authority and that upon proof there existed an intention to interfere with transportation of goods in commerce, the federal courts had authority and jurisdiction to protect interstate commerce by means of punitive damages and the injunctive process under the Sherman Act. In 1935 in the case of Schechter Poultry Corp. v. United States, the Supreme Court again indicated the exclusive authority of each state over wages and hours.

12 Frank L. Cobb wrote concerning Theodore Roosevelt, in the U.S. World, January 2, 1912, as follows: "The menace of the Roosevelt campaign does not lie in the third term tradition, but in the state of mind that could desire four years more of Roosevelt in the White House, four years more of executive contempt for Congress, courts and Constitution, four years more of centralization, four years more of wanton extravagance, four years more of denunciation and demagogy—i.e., a state of mind that wants new national aims, that wants federal interference with every form of human industry and activity, that wants the states stripped of their powers, that wants the minority deprived of all safeguards against the tyranny of the majority, and bureaucracy substituted for the Bill of Rights. "The danger lies not in popular indifference to the third term tradition, but in popular indifference to the fundamental principles of Liberty upon which this Republic was established."

13 288 U.S. 295 (1935); see Cox and Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211 (1950).


15 295 U.S. 495 (1935). Here is found emphasis upon the separation of powers. The court states: "We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power." Id. at 542. The view taken in Schechter was soon reiterated in Carter v. Carter Coal Co., 298 U.S. 238 (1936).
of labor of persons employed in internal commerce and processing of goods within the state.

However, the provisions of the Wagner Act in 1935 apparently brought about a very marked change in attitude when its constitutionality was sustained in *Jones & Laughlin Steel Corp. v. NLRB*. While this was a 5-to-4 decision, and while it did apparently overrule *Schechter* and *Carter v. Carter Coal Co.* as to commerce, there had been previous indications that all branches of the federal government, certainly the White House and the Congress, and in some respects the Supreme Court, were moving towards nationalism and away from stateism.

This trend may be seen when the Railway Labor Act of 1926, as amended in 1934, is studied. Moreover, the Norris-LaGuardia Act indicated a stiffening determination of the federal government to "take over" further authority. It was apparently felt the national welfare required federal supremacy in the labor area because the decentralized and sometimes conflicting views of the several states might permit, if they did not create, chaos destructive to the national welfare.

The members of the Supreme Court in 1938 were again divided in their opinions as to the lines of demarcation between state and national authority when they handed down the decision of *Consolidated Edison Co. v. NLRB*. From this point onward the majority of the Court has moved steadily in the direction of expansion of federal authority, at the expense of state authority, by starting from the basic conclusions in *Jones & Laughlin*—that Congress had full constitutional authority to assume complete and exclusive jurisdiction over interstate commerce and the production of goods for such commerce. The Court held in 1946 that the New York State Labor Relations Board was without authority to deal with matters within the scope of the National Labor Relations Act.

In declaring that a Pennsylvania statute could not be applied to prevent strike and picketing pressures for the purposes of organizing employees of an interstate trucking company, Mr. Justice Jackson stated that "the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed

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16 301 U.S. 1 (1937).
17 298 U.S. 238 (1936).
19 305 U.S. 197 (1938).
processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge upon the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.”21 Here is an unmistakable assumption that the “federal policy” is to be sustained as dominant in the area of interstate commerce and the production of goods for commerce and that the states must not impair the consequences of such “federal policy.”

In Construction Workers v. Laburnum Constr Corp.,22 which was handed down the following year, however, the Supreme Court upheld a Virginia state court common law tort decision indicating that Congress had not given the National Labor Relations Board exclusive jurisdiction over the type of action concerned therein. The Court apparently approved the thesis that if a state did impose a heavy damage liability, such liability would strongly inhibit the disputed conduct in subsequent incidents. To this extent, the decision gave the state courts co-jurisdiction with the National Labor Relations Board to determine the legality or illegality of borderline conduct which might or might not be an unfair labor practice in the opinion of the board.23 Also, in Weber v. Anheuser-Busch Brewing Co.24 a state undertook to enforce its antitrust laws, and the Supreme Court demurred the authority of the state, asserting that even though “no unfair labor practices were involved, it would not necessarily follow that the State was free to issue its injunction. If this conduct does not fall within the prohibition of Section 8 of the Taft-Hartley Act, if may fall within the protection of Section 7.”25 The court added for emphasis that “the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by

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21 Garner v. Teamsters Union, 346 U.S. 485, 499 (1953). In the very recent decision of Brotherhood of R.R. Locomotive Eng’rs v. Chicago R.I.&P.R.R., 36 Sup. Ct. 594 (1956), the majority of the Court, apparently with less reason on the record for doing so, indicated far more disposition to respect the powers of the states than was shown in Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), Bethlehem Steel Co. v. New York State Labor Relations Bd., supra note 20, or Garner. Justice Douglas’ dissenting opinion appears to be more consistent with the conclusions reached in those cases (where the Court was interpreting the National Labor Relations Act) than is that of the majority.


23 Id. at 668-69; see id. at 670-71 (dissenting opinion).


25 Id. at 478-79.
fixed metes and bounds." In this connection, the Court quoted from Garner v. Teamsters Union: the Labor Management Relations Act leaves much to the states, though Congress has refrained from telling us how much. This penumbral area, it added, "can be rendered progressively clear only by the course of litigation."

In another incident where a lower state court had issued an injunction, the Nebraska supreme court stated: "[T]he union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the costs of collective bargaining." The U.S. Supreme Court discussed the Railway Labor Act and declared, "we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support for the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." The Nebraska supreme court's decision was reversed.

In the atmosphere of this period, in 1950, the NLRB promulgated certain criteria to be applied in rejection or acceptance of jurisdiction of labor disputes. These criteria indicated that only the larger and more important matters and parties would be heard by the Board. The limiting criteria were amended in 1954 and in 1958. State boards and state officials in some locations assumed that the disputes rejected by the NLRB were thereby automatically returned to the jurisdiction of the states, might be treated as "local aspects" of interstate commerce, and therefore were under concurrent jurisdiction of the states and the United States. The Supreme Court, however, quite positively indicated that even though the NLRB was rejecting jurisdiction of a number of such disputes, they were not returned to the jurisdiction of the states because the federal government had established a policy, expressed in the Wagner and Taft-Hartley Acts, vesting exclusive jurisdiction over such matters in the federal board and the federal courts. Hence a

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28 Id. at 480.
28 348 U.S. at 480, quoting 346 U.S. at 488.
29 348 U.S. at 480-81, see 346 U.S. at 488.
30 Railway Employees Dep't v. Hanson, 351 U.S. 225, 230 (1956).
31 Id. at 238.
32 For the Aug. 1, 1959 NLRB Jurisdictional Standards, see LRX p. 310a. See also UPDEGRAFF & McCoy, op. cit. supra note 9, at 56.
“no man’s land” was created in which certain comparatively minor labor disputes (though probably extremely important to the parties concerned) would not be considered by the NLRB and could not be heard by any other tribunal. This holding was in effect reversed by section 701 of the Labor-Management Reporting and Disclosure Act of 1959 which provides a subsection (c) to be added to section 14 of the Taft-Hartley Act providing that states do have jurisdiction to decide cases which may arise under any section of the National Labor Relations Act of which the NLRB declines to take jurisdiction. It adds further that the board shall not refer back to the states any class of case over which it would have taken jurisdiction as of August 1, 1959. This legislation, however, neither qualifies nor undermines the view that the nationalistic labor policy excludes state authority except where the state is permitted to have or retain jurisdiction at the sufferance of Congress or under “interpretations” of the Supreme Court.

This is nowhere better illustrated than under section 14(b) of the National Labor Relations Act as amended by the Taft-Hartley Act which provides that union shops shall be valid in any part of the United States where not expressly prohibited by the state. Some nineteen states have “right to work” laws containing such prohibitions. A recent and much publicized issue before Congress was whether Congress should repeal section 14(b), thereby striking down all of the statutes of the nineteen states which have prohibited union shops.

The atmosphere created by the labor preemption decisions had so pervaded the jurisdictional question that a California court declared in 1957 that “whatever doubt there may have been as to the jurisdiction of the State courts following a refusal of the Federal Board to assume jurisdiction in the first instance was completely set at rest by the recent decisions of the Supreme Court of the United States in the Guss, Fairlawn and Garmon cases. As long as the facts of a given case fall within the jurisdiction of the National Labor Relations Board, the Congress has completely displaced the power of the courts of this state to deal with the matter even though those same facts might otherwise give our courts jurisdiction under the Jurisdictional Strike Act.” The California court refused to award damages for losses

37 McKenzie, Inc. v. International Ass’n of Machinists, 32 CCH Lab. Cas. ¶ 70,628 (Cal. Super. Ct. 1957) at p. 93,752.

The federal preemption doctrine was, no doubt, a factor in the California Attorney General’s opinion Local Regulation of Professional Strikebreakers, 45 Ops. Cal. Atty Gen. 140-45 (1965).
brought about by certain picketing and refused to apply the result of the *Laburnum* decision. It distinguished the latter by noting that there the peace of the state was threatened; apparently it was not under the California facts, for no violence was charged.\(^8\)

In 1957, and no doubt partly as a result of the same developing atmosphere of sweeping preemption, the Supreme Court handed down a revolutionary and far-reaching decision in *Textile Workers Union v. Lincoln Mills*.\(^9\) The opinion, by Justice Douglas, held that section 301(a) of the Labor Management Relations Act, 1947\(^40\) (Taft-Hartley Act) “is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.”\(^41\) In a later part of the opinion the Justice states: “We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.”\(^42\) He indicated that “federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy.”\(^43\) He explained that any state law applied, however, would be absorbed as federal law and would not be an independent source of private rights.\(^44\) Mr. Justice Frankfurter, commonly esteemed as a great liberal, had written an opinion only a short time earlier in which he concluded that section 301 could not be construed as the majority later interpreted it in *Lincoln Mills* “even if constitutional questions” could be avoided.\(^45\)

It is important to remember that while the courts have traditionally


For a very good study of *Garmon* and surviving state powers, see Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rsv. 641 (1961).


\(^{42}\) *Id.* at 456.

\(^{43}\) *Id.* at 457. Here the court cites Jerome v. United States, 318 U.S. 101, 104 (1943).

\(^{44}\) 353 U.S. at 456. In this connection he refers to Board of Comm’rs v. United States, 308 U.S. 343, 351 (1939).

"found" or "declared" legal rules, filling the hiatuses of statutes, and have thus contributed to the growth of law under the aegis of stare decisis, the federal courts have not previously in this manner openly asserted authority to join Congress in law "fashioning" or legislating. Indeed only a few years earlier, in Schechter, the Court sharply defeated a more definite effort of Congress to delegate legislative power to the executive, relying on the doctrine of separation of powers as one basis for holding the National Industrial Recovery Act not unconstitutional.

Preemption Plus Judicial Legislation

Appreciation of the full impact of the Lincoln Mills opinion requires briefly calling to mind some historical background concerning arbitration. In the year 1609 Lord Coke had held in Vynmor's Case that since it was against public policy that any man who desired to litigate be excluded from the King's courts and the opportunity to start an action at law, he could not, even by his promise to arbitrate a possible future dispute, be debarred from appealing to the courts. Hence he could refuse to arbitrate, and litigate though he had agreed not to do so.

This decision has stood as somewhat of an anomaly through the years. The arbitration contract has been a prominent example of a situation in which parties could enter into a solemn, clearly provable agreement (to arbitrate a future dispute) and yet where either of them could completely repudiate the agreement (and litigate instead). Some states have largely reversed the consequences of Vynmor's Case by statute, but it is still effective in certain localities in fields not governed by the Lincoln Mills decision, which is to say in disputes not in the labor area. But as far as contracts to arbitrate labor disputes are concerned the Supreme Court, through Justice Douglas, has overruled Lord Coke without the direction of statute.

Some two years before Lincoln Mills, Mr. Justice Frankfurter had written in Weber v. Anheuser-Busch Brewing Co.,

By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of

46 48 Stat. 195 (1933).
48 4 Coke 302, Trinity Term, 7 Jac. 1 (1609).
49 For brief discussion see UDEGRAFF & McCoy, op. cit. supra note 9, at 5-6.
economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union*.

But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much.

This penumbral area can be rendered progressively clear only by the course of litigation. Regarding the conduct here in controversy, Congress has sufficiently expressed its purpose to bring it within federal oversight to exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.\(^5\)

In *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*\(^6\), Justice Frankfurter wrote,

> But assuming that we would be justified in proceeding further, the suggestion that the section permits the federal courts to work out without more a federal code governing collective bargaining contracts does not free us from difficulties.

> Such a task would involve the federal courts in multiplying problems which could not be solved without disclosing that Congress never intended to raise them. Application of a body of federal common law would inevitably lead to one of the following incongruities: (1) conflict in federal and state court interpretations of collective bargaining agreements; (2) displacement of state law by federal law in state courts, not only in actions between union and employer but in all actions regarding collective bargaining agreement; or (3) exclusion of state court jurisdiction over these matters. It would also be necessary to work out a federal code governing the interrelationship between the employee's rights and whatever rights were found to exist in the union. Moreover, if the general unfolding of such broad application of federal law were designed, the procedural objectives of Congress would have been accomplished without the need of any special jurisdictional statute. Federal rights would be in issue, and, under 28 U.S.C. § 1331, and Federal Rule 17(b), the suit could be brought in any district court by or against the union as an entity. The only effect of § 301 would then be to dispense with the requirement of amount in controversy and to adopt certain other minor procedural rules.\(^7\)

These words of sound logic describe the basic legal problems surfacing in the wake of nationalist preemption. Areas which "have been pre-empted by federal authority and thereby withdrawn from state

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5 Id. at 480-81.
7 Id. at 454-55. (Emphasis added.)
power are not susceptible of delimitation. These require a "federal code" governing employees' rights, unions' rights, employers' rights and the lines between state and federal jurisdiction. It may be hoped that this enormous and most important area will be at some early day occupied by a carefully considered statute. In the meanwhile it must grow (much as did Topsy) by the piecemeal process of stare decisis.

Decisional growth of law by the judicial "fashioning" process is necessarily of an incoherent and fragmentary nature. The decisional or authoritative words of a court in any case are limited to the matters properly within the issues of the particular dispute then before the court. Statements of the court beyond this are dicta and generally regarded as of little authority. Moreover, in reaching its conclusions the court may not explore the entire area of interests likely to be affected directly or indirectly by a newly fashioned decisional rule, but must arrive at its conclusions in the too often dim and limited light of evidence which is relevant only to the narrow issue then requiring the court's decision. A legislative body can open up a broad, general subject and explore it as much as its nature will permit in a prospective way. The judicial light upon the issue is normally of retrospective nature and is required to be relevant to the dispute then pending for decision.

In the light of this situation the doctrine of federal preemption has taken over an enormous area of unsurveyed and largely unexplored jurisdiction. This area seems condemned to remain little understood, difficult to apply and characterized by conflicting judicial views from the state and federal courts, the National Labor Relations Board, and others who perforce must consider and adjust disputes. Surely such is the prognosis if the Supreme Court, alone, is expected to clarify matters. The desirable alternative rests with Congress to codify this entire field as soon as possible by enacting rules which clearly define the areas of exclusive federal authority and jurisdiction and which return the balance to the states or to a carefully defined concurrent jurisdiction.

Something of the confusing nature of judicial legislation or law "fashioning" by the courts can be observed in the majority opinion in *United States v. Hutcheson.* In that opinion Justice Frankfurter

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56 312 U.S. 219 (1941).
perceived that the prohibitions of the Sherman Act did not apply to labor unions or to their activities, though the U.S. Supreme Court had held in 1908, in the Danbury Hatters' cases, that they did apply.

The Hutcheson opinion reached a conclusion against application of the Sherman Act to labor union activities despite the fact Congress had left the opposite effect of the Danbury Hatters' case undisturbed for some thirty years. This indicates an unusual tolerance by the legislative branch if indeed it did not want the Sherman Act so applied. But more importantly, Hutcheson shows the incompleteness of judicial "fashonings," or legislation, when considered with Allen Bradley Co. v. Local 3, IBEW, which four years later added the qualification that the Sherman Act does apply in the situation where a labor union is found to be conspiring with an employer, or group of employers, to accomplish some result prohibited by the statute.

The following comments concerning recent labor law developments have been based as much as possible on the very recent decisions. Particular attention is paid to decisions reached since San Diego Bldg. Trades Council v. Garmon undertook to make the word and concept of arguably the shibboleth of determining state jurisdiction. Since Garmon came down, in 1959, if the issue to be determined is conceived by the court as one which appears arguably to involve section 7 or section 8 of the National Labor Relations Act or in fact arguably to involve any unfair labor practice, though perhaps a very doubtful, borderline case, the court should refuse decision on the merits and

59. 325 U.S. 791 (1945).
reject jurisdiction. The National Labor Relations Board must be accorded a prior right and authority to decide matters arguably within its jurisdiction. Should the Board, too, decline jurisdiction, the matter goes to "no man's land."

The fact seems to be, however, as a discussion of certain cases shall demonstrate, that the word arguably is of such uncertain meaning that it cannot logically be used as a test of jurisdiction. Virtually every case which goes to any court is arguable, or it would not be in litigation. When the doctrine of preemption and consequently the application of the supremacy clause are made to depend upon a word of such cornucopian content, some prompt, thorough congressional study and action are indicated. When the legislature is interpreted to have left important disputes and economic interests entirely without remedies and to have despoiled sovereign states of the police power to protect the continuity of public utility services, some immediate legislative action appears vital.

**Preemption, Judicial Legislation, and Labor Arbitration**

When the *Lincoln Mills* case came to the Supreme Court there was no federal statute applicable to general jurisdiction over and the handling of labor dispute arbitration and there is none today. But the "fashioning" of federal law by the Court to fill this need is just as far reaching as if the *Lincoln Mills* result had been enacted by Congress. Without judicial legislation or the "fashioning" of a federal rule or principle of law and making it retroactive, there was no basis upon which the Court could say that the parties had agreed to arbitrate and hence could be required to do so by a federal court decree.

It is not impossible that the attitude of the Supreme Court in relation to arbitration was in some degree affected by its knowledge that the lower federal courts and the National Labor Relations Board were confronted by an extremely great case load of labor problems. One obvious solution to the dilemma was vastly to expand the scope of arbitration and thereby reduce the burden falling upon the federal courts and the NLRB.

Thus to avoid one consequence of nationalist preemption—a tremendous overload on the National Labor Relations Board—the Court held that agreements to arbitrate labor disputes were specifically enforceable under "fashioned" rules of federal common law. In this way the preemption doctrine was extended to provide some means of deciding the great federal case load of disputes which it caused.

However, as above stated in numerous instances, since *Garmon,*
the plaintiffs who sought enforcement of an arbitration agreement have been refused relief on the basis that the question to be resolved was arguably a matter requiring decision by the National Labor Relations Board. Yet the Court, in the so-called “Triology Cases,” fortified the view that arbitration of labor disputes should be encouraged and that the decisional authority of arbitrators should not be diluted or defeated by substitution of judges’ conclusions for arbitral awards when questions of arbitrability are taken into the courts for enforcement or rejection. In United Steelworkers v. Enterprise Wheel and Car Co., the Court emphasized the view that arbitration of labor disputes is favored as a matter of federal policy and that this policy would be impaired if the courts undertook to substitute their decisions for the awards of arbitrators. In United Steelworkers v. Warrior & Gulf Navigation Co., the Court declared that arbitration “is the substitute for industrial strife.” It went on to assert that “since arbitration of labor disputes has quite different functions from arbitrations under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”

In this case the Court also stated that “arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a

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63 363 U.S. 593 (1960).

64 Id. at 598 (1960). The courts have deferred to a congressionally created Board. Brotherhood of R.R. Trainmen v. Certain Carriers, 349 F.2d 207 (D.C. Cir. 1965).

65 If the contract does not provide for arbitration, the court has jurisdiction to decide the grievance. International Bhd. of Tel. Workers v. New England Tel. & Tel. Co., 240 F Supp. 428 (D. Mass. 1965). For ambiguity or defective procedure, awards should be remanded to the arbitrator. Smith v. Union Carbide Corp., 231 F Supp. 980 (E.D. Tenn. 1964), rev’d, 350 F.2d 258 (6th Cir. 1965); In re Certain Carriers, 349 F.2d 207 (D.C. Cir. 1965).

66 363 U.S. 574 (1960). It has been held that a dispute litigable under § 303(b) of the Taft-Hartley Act must be arbitrated if the parties have so agreed. Old Dutch Farms, Inc. v. Milk Drivers Union, 243 F Supp. 246 (E.D.N.Y. 1965). It has also been held that the propriety of a lockout was arbitrable where it was not expressly excluded. IBEW v. Hearst Corp., 352 F.2d 957 (4th Cir. 1965); see Brewery Workers Union v. Adolph Coors Co., 240 F Supp. 279 (D. Colo. 1964), aff’d, 344 F.2d 702 (10th Cir. 1965).

67 363 U.S. at 578.

68 Ibid.
way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."

The following comments on recent cases, taken mainly from the decisions of the last three or four years, are used to illustrate the recent volume of court decisions concerning labor disputes and the current judicial emphasis on the term arguably as a test of preemption, the judicial “fashioning” of new rules of law, and some uncertainties which are due to the lack of a complete legislated labor relations code.

Arbitrability

The lower courts apparently are generally following the mandate of the Supreme Court in holding that under section 301 arbitration will be enforced unless the arbitration clause clearly excludes the dispute at issue.

Since Lincoln Mills (1957) and Garmon (1959) the state and federal courts have considered the matter of requiring arbitration of all kinds of labor disputes. Whether the courts enforced or enjoined, arbitration turned upon interpretation of the terms of the agreements to arbitrate, including the grievance provisions and, in some cases, submissions. The primary difference in the handling of labor disputes since Lincoln Mills and the “Triology Cases” is that the parties have obtained considerable judicial assistance in enforcing arbitration agreements and thus can rely less on economic pressure in resolving disputes. Several illustrative instances where arbitration was directed

68 Id. at 581.
69 The 1965 Proceedings of the Section of Labor Law of the American Bar Ass’n and the 1965 Report of the Law and Legislation Committee of the National Academy of Arbitrators indicate the great numbers of arbitration and injunction questions in actions in the state and federal courts in recent years. This writer has the privilege of being a member of some of the committees which submitted such reports, and he has derived much assistance from them in the preparation of parts of the present article.

70 United Steelworkers v. Westinghouse Elec. Corp., 413 Pa. 358, 196 A.2d 857 (1964) (contracting out maintenance painting); General Warehousemen Union v. American Hardware Supply Co., 329 F.2d 789 (3d Cir. 1964) (warehouse operations moved to another county; employees denied jobs at new location); United Steelworkers v. General Elec. Co., 327 F.2d 853 (6th Cir. 1964) (arbitrator could determine whether job change made by employer was permissible under the contract,
Courts now, however, require very clear language to exclude a dispute from arbitration, and they are likely to order arbitration if the subject is arguably within the arbitration or grievance provisions of the labor agreement. If the clause relied on to exclude the issue from arbitration is sufficiently definite, it must be given such effect.

This follows from the fact that the right to arbitrate, if it is to exist, must be created by the terms of the contract. Matters normally exclusively managerial may be submitted to arbitration only if the provisions are broad enough to include them. A general exclusion of "management prerogatives" from arbitration excludes those matters not covered in the labor agreement which are customarily decided by management on a unilateral basis.

though not empowered to change wage rates); Newspaper Guild v. Tonawanda Publishing Corp., 20 App. Div. 2d 211, 245 N.Y.S.2d 832 (1964) (employer required to arbitrate omission of Christmas bonus); Thompson v. Elliot Precision Block Co., 233 Cal. App. 2d 761, 43 Cal. Rptr. 923 (1965) (refusal to rehire); Los Angeles Paper Bag Co. v. Printing Specialties & Paper Products Union, 345 F.2d 757 (9th Cir. 1965) (disciplinary action); Belock Instrument Corp. v. Local 479, Int'l Union of Elec. Radio & Mach. Workers, 49 CCH Lab. Cas. ¶ 51,061 (N.Y. Sup. Ct. 1964), aff'd, 252 N.Y.S.2d 260 (1964) (plant removal); United Steelworkers v. G. F. Wright Co., 51 CCH Lab. Cas. ¶ 19,534 (D. Mass. 1964), aff'd, 346 F.2d 923 (1st Cir. 1965) (strike discharges and contract termination by employer because of strike); Local 156, United Packinghouse Workers v. Du Quon Packing Co., 337 F.2d 419 (7th Cir. 1965) (court stated that transfer of work here considered was "arguably" within coverage of agreement to arbitrate); United Bruck & Clay Workers v. Green Fire Brick Co., 343 F.2d 590 (7th Cir. 1965) (overtime pay for Saturday work); Builders' Ass'n of Kansas City v. Greater Kansas City Laborers Dist. Council of Int'l Hod Carriers, 326 F.2d 867 (8th Cir. 1964) (dispute over completion of health and welfare plan).


Local 12298, UMW v. Bridgeport Gas Co., 328 F.2d 381 (2d Cir. 1964) (arbi-
Most courts seem to agree that arbitrability or exclusion of grievances from solution by arbitration must be controlled strictly by the terms of the contract. At times, in the process of interpretation of the words of the contract to determine its scope, evidence of bargaining history and "past practice" may be considered. Such questions are normally decided by the arbitrator rather than the court. Very much, however, depends on the exact phrasing of the labor agreement on matters of grievances, grievance procedure, and arbitration. 76

**Failure to Perform Contract Conditions**

The common law has long been familiar with the doctrine that if one party to a contract containing an arbitration clause should refuse to perform obligations which are contractual conditions, this refusal automatically releases the other party from the obligation to arbitrate. 76 However, the Supreme Court has now "fashioned" federal law to the end that a union's breach of a no-strike clause does not result in forfeiture of its right to arbitration. The Court has sometimes expressed itself otherwise, but it now appears to take the view that the arbitration procedures and the no-strike clauses are not so closely related that breach of the latter clauses will necessarily terminate arbitral rights. 77 Since that view has been asserted, a federal district court has indicated that a material violation of a labor contract may enable the complying party to repudiate all the other provisions of the contract and yet enforce the arbitrational clause. 78 It has been held that bilateral


76 See UPDEGRAFF & McCLOY, ARBITRATION OF LABOR DISPUTES, 119-31 (2d ed. 1961) and cases cited therein.

77 Local 721, United Packinghouse Food & Allied Workers v. Needham Packing Co., 376 U.S. 247 (1964). See also Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionery Workers, 370 U.S. 254 (1962) (union's answer denied that there had been a strike); Scallitz Co. v. International Union of Operating Eng'rs, 351 F.2d 763 (7th Cir. 1965); United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147 (5th Cir. 1964); UMW v. Ronco, 232 F. Supp. 865 (D. Wyo. 1964) (union called strike; later required to arbitrate before suing).

78 Local Joint Executive Bd., Hotel & Restaurant Employees v. Nationwide Downtownier Motor Inns, Inc., 229 F. Supp. 413 (W.D. Mo. 1964). See also Reynolds Elec. & Eng'r's Co. v. Carpenters Union, 401 F.2d 60 (Neve. 1965). An employer who failed to give a discharged employee a written statement of the reason for his discharge, in...
Breaches of conditions do not necessarily nullify arbitrational obligations, and that they are enforceable even though the contract has expired.\textsuperscript{79}

**Preemption, Judicial Law Making, and the Individual**

In the case of *Smith v. Evening News Ass'n*,\textsuperscript{80} the Supreme Court held that individual employees have the right to maintain suits under section 301 of the Labor Management Relations Act. Two years later, in 1964, it held in *Humphrey v. Moore*\textsuperscript{81} that individual employees can maintain an action to enjoin enforcement of a joint union-employer agreement if it violates the union's duty of fair representation.

The courts have generally emphasized the long-established rule that the individual claimant must exhaust contractual grievance and intraunion remedial procedures before bringing suit in court for establishment of his rights.\textsuperscript{82} It has been held that a claimant's failure to comply with the time limitations prescribed by grievance procedure will be fatal to his claims even if he did not know about them.\textsuperscript{83}

\textsuperscript{79} Amalgamated Clothing Workers v. United Garment Mfg. Co., 338 F.2d 195 (8th Cir. 1964) (both parties in default of performance).

\textsuperscript{80} 371 U.S. 195 (1962). The opinion relies heavily on a broad interpretation of § 301 of the Taft-Hartley Act and *Lincoln Mills*. The action was held not preempted under the *Garmon* rule as "arguably" a matter for NLRB decision. See Martin v. Ethyl Corp., 341 F.2d 1 (5th Cir. 1965) (husband may maintain action for wife in community property state).

\textsuperscript{81} 375 U.S. 335 (1964). But the court held there was no violation of fair representation; the *Lincoln Mills* opinion was explained and followed.

\textsuperscript{82} Desrosiers v. American Cyanamid Co., 51 CCH Lab. Cas. ¶ 19,500 (D. Conn. 1965); Verbiscus v. Marine & Shipbuilding Workers, 238 F Supp. 848 (E.D. Mich. 1964) (union officer required to file complaint with Secretary of Labor). Even a suit brought by the Secretary of Labor to set aside a union election at the request of a defeated candidate was dismissed because of failure to show that the party had exhausted all remedies available under the union constitution. Wirtz v. United Steelworkers, 52 CCH Lab. Cas. ¶ 16,815 (N.D. Ala. 1965). See also Boeing Airplane Co. v. UAW, 349 F.2d 412 (3rd Cir. 1965) (employer who could not initiate arbitration not barred from court for failure to do so); Smith v. General Elec. Co., 63 Wash. 2d 624, 388 P.2d 550 (1964) (aggrieved party not union member but bound to follow grievance procedure). Exhaustion of unduly restricted remedies is not required. Thommen v. Consolidated Freightways, 234 F Supp. 472 (D. Ore. 1964) (contract procedure created only union organizational remedies, hence did not bar action by individual claimant).

\textsuperscript{83} But timeliness is an issue to be decided by the arbitrator. The court should not stay arbitration when this is in question, but should refer the matter to arbitration. Metropolitan Opera Ass'n v. American Guild of Musical Artists, 52 CCH Lab. Cas. ¶ 51,398 (N.Y. Sup. Ct. 1965); Smith v. General Elec. Co., *supra* note 82; Kennedy v. Bell Tel. Co., *supra* note 82.
The burden is upon the individual employee to show that the union failed to represent him properly, and in such case he must proceed within union rules even in cases where the union completely omitted to process his grievance.\textsuperscript{84} The burden is similarly upon the individual when he charges that the union and the employer have entered into a settlement unfavorable to his rights.\textsuperscript{85} It has been held generally that the individual employee, not being technically a party to the collectively bargained agreement under which the arbitration was carried out, has no right or standing to attack the award in court.\textsuperscript{86} However, the individual employee’s duty to exhaust remedies, and the other procedural rules which usually restrict his rights, are likely to be excused where he can show that the union was guilty of a breach of duty of fair representation or that the union and the employer have entered into an improper agreement to limit or destroy his rights.\textsuperscript{87}

\footnotesize{\textsuperscript{84} Kennedy v. UAW, 52 CCH Lab. Cas. \$ 16,578 (1965). But see Archibald v. Local 57, International Union of Operating Eng’rs, 52 CCH Lab. Cas. \$ 16,516 (D.R.I. 1964).}


\footnotesize{\textsuperscript{86} Corbin v. Friendly Frost Stores, Inc., 49 CCH Lab. Cas. \$ 51,090 (N.Y. Sup. Ct. 1964) (petitioner had fully participated in hearing and both parties had agreed on the issue); Pernce v. Burns Bros., 50 CCH Lab. Cas. \$ 51,187 (N.Y. Sup. Ct. 1964) (court held plaintiff not proper party to seek nullification of award; also rejected jurisdiction on ground that there was “arguably” a union unfair labor practice question involved and hence there would be federal preemption); New York Joint Bd., Amalgamated Clothing Workers v. Rogers Peet Co., 50 CCH Lab. Cas. \$ 51,144 (N.Y. Sup. Ct. 1964) (member not formal “party” to arbitration contract).}

It is for the arbitrator to decide whether the employee has lost his right to have his grievance considered in arbitration. Kocuba v. Stubnitz Greene Corp., 52 CCH Lab. Cas. \$ 51,388 (Pa. C.P. 1964).

\footnotesize{\textsuperscript{87} Fuller v. Highway Truck Drivers Union, 233 F Supp. 115 (E.D. Pa. 1964) (employees may maintain suit where unfair representation alleged); Tully v. Fred Olson Motor Serv. Co., 50 CCH Lab. Cas. \$ 19,198 (Wis. Cir. Ct. 1964) (matter “arguably” concerned unfair labor practice, hence federal preemption controlled and six-months limitation on filing unfair labor practices charges applied by state court).}

Courts require evidence of unfair representation such as bad faith, arbitrary action or fraud by the union to excuse a member from being bound by the contracted duty to arbitrate and to allow recovery against the union or the employer. See Kennedy v. Bel. Tel. Co., 52 CCH Lab. Cas. \$ 16,639 (S.D. Cal. 1965); Deacon v. International Union of Operating Eng’rs, 52 CCH Lab. Cas. \$ 16,605 (S.D. Cal. 1965); Desrosiers v. American Cyanamid Co., 51 CCH Lab. Cas. \$ 19,500 (D. Conn. 1965) (union shown to have refused to represent claimant); Thompson v. Brotherhood of Sleeping Car Porters, 243 F. Supp. 261 (E.D.S.C. 1965) (member claimed union unfairly failed to}
It is clearly one of the duties of unions to enforce the personal rights of their members under the labor agreements and under section 301. This means that the unions’ responsibilities in the area of preserving employees’ rights may be much greater than they were before Lincoln Mills.

**Court Jurisdiction and Labor Arbitration**

In the case of *John Wiley & Sons, Inc. v. Livingston* a small firm, Interscience Publishers, was party to a labor agreement which included an arbitration clause. This little company merged with the large Wiley & Sons publishing firm. The latter did not expressly assume the Interscience labor contract, and denied it was subject to any obligations thereunder. The Court held that the question of whether the duty to arbitrate survived the merger was a matter for judicial decision rather than for arbitrational award. It sustained the union’s contention that the obligation to arbitrate grievances survived the merger. The Court indicated that the collectively bargained agreement was more than an ordinary contract. Labor contracts, it was said, called “into being a new common law—the common law of a particular industry or of a particular plant.” The Court also denied the Wiley Company’s contention that the union had failed to comply with the first steps of the grievance procedure, and ruled that this dispute should be decided by the arbitrator, since it had to do with procedural factors set up in the arbitration provisions of the agreement.

Since the *Wiley* decision, the courts have several times indicated that the purchaser of a going business may be bound to honor an arbitration clause which was binding upon the previous owner in a col-

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89 376 U.S. 543 (1964) (hearing may be required under appropriate circumstances to determine whether new owner is bound by predecessor’s contract to arbitrate); Drivers Union v. Wisconsin Employment Relations Bd., 138 N.W.2d 180 (Wis. 1965); see McGuire v. Humble Oil & Ref. Co., 247 F Supp. 113 (S.D.N.Y. 1965); Hart Sales Corp. v. Lubliner, 50 CCH Lab. Cas ¶ 19,157 (N.Y. Sup. Ct. 1964).

For an interesting study of *Wiley* and its implications, see American Bar Ass’n, 1965 Proceedings of the Section on Labor Relations Law 300 et. seq.
lectively bargained agreement. Thus new fields for possible litigation and arbitration of labor problems seem to have been opened.

**Jurisdictions—Federal, State, and Concurrent**

In the *Smith* case, the preemption doctrine was interpreted to mean that the state courts have jurisdiction over suits by individual employees against their employers and that section 301 of the Labor Management Relations Act, creating federal jurisdiction for suits between unions and employers without regard to amount or citizenship, does not exclude the individual's right of action. This is held to be true even though the conduct involved might also be an unfair labor practice or "arguably" so.

In the case of *Carey v. Westinghouse Elec. Corp.*, the Court discussed concurrent jurisdiction of arbitrators and courts over disputes arising from collective bargaining. In that litigation it held that the availability of a section 10(k) proceeding (to settle work rights or jurisdiction) before the NLRB would not bar a union from compelling arbitration of a work assignment dispute where the same was within the terms of the collective bargaining. The federal and state courts have several times declared that the fact that a grievance is within, or "arguably" within, the jurisdiction of the National Labor Relations Board will not prevent either arbitration or enforcement of an arbitral award. It has been recognized that proceedings before the NLRB and before an arbitrator proceed on the bases of different rights and issues, but both rest squarely upon the preemption doctrine. The Board proceedings were provided by statute to safeguard the

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85 United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147 (5th Cir. 1964) (employer had repudiated contract charging slowdown). Cf. Todd Shipyards Corp. v. Industrial Union of Marine Workers, 344 F.2d 147 (2d Cir. 1965), where the question was whether a clause in the contract was proper and legal work protection or an illegal "hot cargo" clause. See also Amalgamated Ass'n of Street Employees v. Trailways, Inc., 332 F. Supp. 608 (D. Mass. 1964) (duty to arbitrate exists though matter in dispute may be unfair labor practice); Westchester, Putnam & So. Dutchess Employers Matenal Yards Ass'n v. Operating Eng'rs, 52 CCH Lab. Cas. ¶ 51,360 (N.Y. Sup. Ct. 1965).
employees’ statutory rights. Arbitration rights are of contractual creation, now resting upon section 301 as interpreted by Lincoln Mills, for the enforcement of rights created by the labor agreements. They exist concurrently with statutory rights arising from unfair labor practices. In one situation a trial examiner had found that a union with a union shop agreement had violated the National Labor Relations Act by excluding replacement employees hired during a strike from becoming members. On these facts a district court granted the employer a stay of arbitration, holding that the findings of the trial examiner should not be ignored. Similarly it was held that when a representation question was pending before the National Labor Relations Board, arbitration should not be ordered until the Board could act since the arbitrator’s award would necessarily have to be consistent with the Board’s determination.

In another case a federal district court enjoined a union from arbitrating a grievance to enforce a hot-cargo clause. The court reached the conclusion that the matter was not arbitrable because the National Labor Relations Board might hold the contract clause itself to be invalid. The court ignored the fact that this result could also have been reached by the arbitrator. The court emphasized the fact that this was not a suit under section 301(a) but one under section 101 wherein the Board was seeking to enjoin arbitration.

One rather unusual recent case involved a refusal by a federal district court to remand to a state court a suit to enjoin arbitration. The employer contended that because of duress no valid collective bargaining agreement was made and that the federal court was, therefore, without jurisdiction. That court held that it had jurisdiction under section 301 since a contract had been signed. It also indicated that

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96 Todd Shipyards Corp. v. Marine and Shipbuilding Workers, 344 F.2d 107 (2d Cir. 1965). See also Local 499, IBEW v. Iowa Power & Light Co., 49 CCH Lab. Cas. ¶ 18,818 (S.D. Iowa 1964). Litigants of labor dispute questions in federal courts are not required to meet either the diversity requirement or the amount in controversy requirement. See Martin v. Ethyl Corp., 341 F.2d 1 (5th Cir. 1965). But diversity of citizenship continues to be required for removal of a suit against an unincorporated union from a state court to a federal court, and such unions may be sued in any states in which they have business locations. United Steelworkers v. Bouligny, Inc., 382 U.S. 145 (1965).


the Connecticut State Mediation Board, which was named as arbitrator in the purported contract, was not a proper party to the removal proceedings, and therefore the federal court retained jurisdiction. The probable next step in this regard might well be a decision as to whether the conduct of which the employer complained was such an unfair labor practice as to invalidate the contract; this could arguably put the matter into the hands of the National Labor Relations Board.  

In another case a federal circuit court considered a dispute between two unions concerning violation of a non-raiding agreement. The National Labor Relations Board had certified the respective units to be represented. An interpretation of the Board's ruling was made by an arbitrator and enforced by the court.

A New York supreme court case recently held that an NLRB decision that an employer removed his plant in good faith, and for sound economic reasons after a contract expiration, would bar the union from obtaining arbitration of issues inconsistent with such findings. A strike to force concession of an arbitrable grievance is a contract violation even in the absence of an express no-strike clause. State and federal courts share jurisdiction in these matters under section 301 of the Labor Management Relations Act. It is established that the NLRB does not commit error by dismissing a complaint upon being advised the matter at issue has been decided by an arbitrator.

In an unusually interesting case, the Board was overruled after it ordered remstatement of two employees. A trial examiner found that the employer had used a "wildcat" work stoppage led by the two discharged women as a false pretext for their discharge. In rejecting the

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103 Blue Bird Knitwear Co. v. Livingston, 49 CCH Lab. Cas. ¶ 51,070 (N.Y. Sup. Ct. 1964) (whether there remained arbitrable issues after decision of NLRB left to arbitrator).
105 Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964) (employee not given notice of the "arbitration proceeding" but made no claim of irregularity or fraud). After arbitration procedure has been initiated the NLRB has discretionary authority to issue a complaint or defer the same until an award has been made. NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965); and see Kracoff v. Retail Clerks, 244 F Supp. 38 (E.D. Pa. 1965).
Board's conclusion the court relied upon an arbitrator's award upholding the discharges.\textsuperscript{106}

The Wisconsin supreme court recently held that termination by retirement of thirty-eight employees between the ages of sixty and sixty-five with substantial pensions as agreed by their labor union was not arguably an unfair labor practice so as to exclude it from jurisdiction. The court stated that the union had bargained for the labor agreement and that the terminations were consistent with it. The court noted that the retirements did not violate the Wisconsin Fair Employment Act and that the pension plan was approved by the United States Internal Revenue Service as complying with its regulations.\textsuperscript{107} Obviously, however, had one or more of the men filed a charge with the General Counsel of the NLRB alleging a conspiracy to remove them from employment, or had they charged unfair representation before the NLRB, as they appear to have charged before the Wisconsin Industrial Commission, the Board could properly have taken jurisdiction.

The NLRB asserts its authority to act on an unfair labor practice complaint even when the same matter falls within the contractual grievance procedure which leads to arbitration.\textsuperscript{108} The Board will refuse to defer to arbitration in situations where the employer has refused to perform a statutory duty to furnish information to the union and has resisted arbitration.\textsuperscript{109} The Board's policy seems to be to honor a "fair and regular" award made in grievance procedure.\textsuperscript{110} It will not, however, give force and effect to the disposition of a grievance indicated to have been made "final" at a step in the grievance procedure prior to formal and proper arbitration even though the grievance was "abandoned" by failure to pursue it within the contracted time limitation.\textsuperscript{111}

\textit{Enforcement of Awards}

The overwhelming majority of arbitrators' awards are promptly performed by the parties. When they do get into the courts, however, the judicial conclusion is usually that the arbitrators have not ex-

\begin{footnotesize}
\begin{enumerate}
\item Raytheon Co. v. NLRB, 326 F.2d 471 (1st Cir. 1964) (court stated NLRB trial examiner made findings against employer's good faith on a bare assumption).
\item Walker Mfg. Co. v. Industrial Comm'n of Wis., 135 N.W.2d 307 (Wis. 1965).
\item Westchester, Putnam and So. Ass'n v. Operating Eng'rs, 52 CCH Lab. Cas. ¶ 51,360 (N.Y. Sup. Ct. 1965).
\item Thor Power Tool Co., 148 N.L.R.B. 1379 (1964). This conclusion of the board was sustained, NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965).
\item Puerto Rico Tel. Co., 149 N.L.R.B. 110 (1964).
\item Modern Motor Express, 149 N.L.R.B. 147 (1964).
\item Electric Motors and Specialties, Inc., 149 N.L.R.B. 125 (1964).
\end{enumerate}
\end{footnotesize}
ceeded the authority given them in the agreement to arbitrate or in the submission. Back-pay awards sometimes have been reviewed. Generally speaking, arbitrators' decisions on this matter have been sustained unless the court concluded that under the contract terms such an issue was not intended to be arbitrated or that it was expressly excluded by some restriction in the contract.

In some instances, however, courts have reviewed the merits of the disputes arbitrated and have concluded the arbitrators have gone beyond their authority. The award of reinstatement with back pay was held in one case to exceed the arbitrator's authority. In that case the court pointed out that the pay issue was not submitted to arbitration and that it was not included in the terms of the labor agreement.

It has also been held by a state court that a contract providing arbitrators' awards were to be effective as of the time when made excluded power to make a retroactive wage increase.

Where a change of conditions caused an award to be ambiguous it was sent back to the arbitrator for clarification. In another matter

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\[112\] In re Certain Carriers, 247 F Supp. 176 (D.D.C. 1965); American Bosch Arma Corp. v. International Union of Elec. Workers, 243 F Supp. 493 (N.D. Miss. 1965). (Award of pay enforced for day other than that claimed in grievance); Atchson, T. & S.F Ry. v. Brotherhood of R.R. Trappers, 229 Cal. App. 2d 607, 40 Cal. Rptr. 489 (1964) (award of extra pay for coupling air hose on cars for other crews within usage or "law of the shop"). Compare Gunther v. San Diego & Ariz. Ry., 336 F.2d 543 (9th Cir. 1964), where it was held that the National Railroad Adjustment Board had no authority to create a Medical Board since the parties did not agree to arbitration which was in fact imposed by statute.

\[113\] In Hodges v. Atlantic Coast Line R.R., 238 F Supp. 425 (N.D. Ga. 1964), award of reinstatement with back pay was held not enforceable against an employer which had been held liable to the employee for a permanent, disqualifying injury. See Oil Workers v. Mobil Oil Co., 350 F.2d 708 (7th Cir. 1965). See also IBEW v. Bally Case & Cooler, Inc., 232 F. Supp. 394 (E.D. Pa. 1964).


\[116\] International Bld. of Teamsters v. New York Lumber Trade Ass'n, 49 CCH Lab. Cas. 51,073 (N.Y. Sup. Ct. 1964). In this case the arbitrator apparently had exceeded his authority in several parts of his award. The court modified it by eliminating its excessive features and directed it be performed as so modified.

\[117\] Kennedy v. Continental Transp. Lines, Inc., 230 F Supp. 760 (W.D. Pa. 1964). The question was whether the arbitrator awarded "identical work" or "identical runs" and a definition was required by the court.
in which diverse interpretations caused collateral disputes, the awards were sent back to the arbitrators for re-study and re-wording.\textsuperscript{118} In yet another case the court indicated belief that the intent of the arbitrator was clear and unambiguous, but the court furnished some supplemental terms further to clarify the award.\textsuperscript{119}

However, where the contract is of uncertain meaning, but the award of the arbitrator based on the contract is clear, it is not proper for the court, by reconstruing the contract, to alter the arbitrator's result.\textsuperscript{120}

\textbf{Preemption—States' Authority—Protection of Operations}

It has long been established that some union pressure tactics, such as sit-down strikes, slowdowns, the calling of union meetings during working hours, and practices involving violence, are not "protected" under the National Labor Relations Act. The process of examining all the various types of union activities which have appeared (and which may yet appear), and concluding whether each one or the manner or objective of its execution is "protected" or not, is likely to extend well into the future. As far as past experience and litigation have clarified this scene, however, some generalizations may be ventured.

Despite the preemption doctrine and the "law fashioning" by the Supreme Court under the \textit{Textile Workers v. Lincoln Mills} decision, the Wisconsin Employment Peace Act\textsuperscript{121} and similar state enactments appear to have continued validity to the extent that they do not invade present federal rules. The Wisconsin courts had held that a union which caused several intermittent work stoppages was guilty of an unfair labor practice under the Act which prohibited any interference with production except leaving the premises of the employer.

\textsuperscript{118} Transport Workers v. Philadelphia Trans. Co., 228 F. Supp. 423 (E.D. Pa. 1964). The dispute was as to an award which did not specify which automobile trucks were to be "gassed" by the employees concerned. See also UAW v. General Motors Corp., 52 CCH Lab. Cas. ¶ 16,549 (E.D. Mich. 1965). Here the award was remanded to the arbitrator for clarification because it left open a possible conflict with the NLRB in a work assignment situation. In another case a matter was sent back for hearing because it was contended there had been no hearing before the first purported award. Private Sanitation Union v. Carratu, 51 CCH Lab. Cas. ¶ 51,295 (N.Y. Sup. Ct. 1965).


\textsuperscript{120} Avco Corp. v. Mitchell, 336 F.2d 289 (6th Cir. 1964).

\textsuperscript{121} Wis. Stat. 1947, c. 111, § 111.06(2).
in an orderly manner for the purpose of going on strike. The Supreme Court affirmed this holding in *International Union, UAW v. Wisconsin Labor Relations Bd.* In reaching this conclusion the Court observed that the state act did not forbid any conduct permitted under the federal statutes. In contrast the NLRB can forbid a strike when its purpose is one of those made illegal by the federal statute, but it has not been given power to forbid a work stoppage because of illegal method.

Under the New York act, however, union conduct was apparently deemed by a state court to be "protected" when it had caused eight noon-day work stoppages in two months, thus disrupting the normal activities of the employer, a dining-club. This characterization as "protected" resulted in a narrow holding by the New York State Labor Relations Board that the act of the employer in discharging some men for this conduct was discriminatory and hence an unfair labor practice.

In a fairly recent case it was held by the state court that the Wisconsin Fair Employment Act was not totally preempted by any federal statute and that the Wisconsin court has jurisdiction to enforce it. On the other hand an action for damages and for injunctive relief against an allegedly closed union under the California statute was denied by the state court on the ground of federal preemption; the court held the matter to be "arguably" one for NLRB decision.

The Supreme Court has held that federal statutes do not license unionized employees to harass the employer by "sit-down strikes" nor to defy the authority of the employer to manage his business while remaining in his service. Nor may the NLRB reinstate men who have been terminated for advocating a slowdown.

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122 336 U.S. 245 (1949). But this result was held inapplicable where there was a single stoppage during working hours. UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949); Wisconsin Employment Relations Bd. v. Algoma Plywood & Veneer Co., 252 Wis. 549, 32 N.W.2d 417 (1948), aff'd, 336 U.S. 301 (1949), and see Smith, *Putting the Wisconsin Employment Peace Act into Effect*, 48 Marq. L. Rev. 263 (1963).


127 Superior Engraving Co. v. NLRB, 183 F.2d 783 (7th Cir. 1950), cert. denied, 340 U.S. 930 (1951); Wyman, Gordon Co. v. NLRB, 183 F.2d 480 (7th Cir. 1946).
guidance of these last decisions the NLRB apparently must now follow the view that the states, authorized state agencies, and arbitrators share authority to prevent interference with production by employee groups engaging in harassment other than those protected actions which are taken for a declared and legitimate objective.\(^{128}\)

In 1950 the Third Circuit held that a single more or less spontaneous work stoppage would not justify discharges or penalties for those who participated in it or led it since it was concluded by the court to be a suitable, concerted activity for the purpose of collective bargaining and protected by section 7 of the National Labor Relations Act.\(^{129}\)

On the other hand, it has long been held that refusal to work scheduled overtime is not "protected." However, such conduct apparently does not relieve the employer from the statutorily imposed obligation to bargain collectively.\(^{130}\)

A brief study of the unfair labor practice disputes decided by the NLRB in recent years under section 8(b) (as recorded in the NLRB Digest) confirms the thought that the majority of the practices involved may also be in contention in cases where damages, injunctions, or decrees directing arbitration are sought in state courts under state statutes. Many will, therefore, be "arguably" within the jurisdiction of the NLRB. Hence certain state courts will hold that they do not have jurisdiction, and others will undertake to decide the disputes which come to them concerning interference with production. Some of these latter decisions will be reversed.

The 1959 amendments to section 8(b)(4) of the National Labor Relations Act, forbidding unions to cause any person to refuse to handle the products of any other producer and providing against "hot-cargo" contracts and secondary boycotts, have widened the potential scope of federal action against unfair labor practices by unions. It would seem that this widening is likely to create more situations in which it may be "arguable" that the state will be without jurisdiction because of the need for prior NLRB decision. The confusion which

\(^{128}\) See NLRB v. Montgomery Ward & Co., 157 F.2d 846 (8th Cir. 1946); The Supreme Court, 1963 Term, 78 Harv. L. Rev. 282-92 (1964), and cases therein cited; cf. Elk Lumber Co., 91 N.L.R.B. 333 (1950); Phelps-Dodge Corp. 101 N.L.R.B. 360 (1952). Here it was held that the employer was not under a duty to bargain during a slowdown.

\(^{129}\) NLRB v. Kennametal, Inc., 182 F.2d 817 (3d Cir. 1950).

\(^{130}\) See Superior Engraving Co. v. NLRB, 183 F.2d 783 (1st Cir. 1950), cert. denied, 340 U.S. 930 (1951); NLRB v. Mt. Clemens Pottery Co., 147 F.2d 282 (6th Cir. 1945); E. G. Conn, Ltd. v. NLRB, 108 F.2d 390 (1st Cir. 1939). See also Dow Chemical Co., 152 N.L.R.B. No. 122 (1965).
may well result from this, and the expense and delay, is thought to be well illustrated by a very recent case. In Hanna Mining Co. v. District 2, Marine Eng'rs Ass'n,\(^{131}\) the NLRB disclaimed jurisdiction because supervisors (who were involved in allegedly unlawful picketing) were not covered under the federal labor laws; the Wisconsin supreme court then refused to act because it deemed the power of the state was “arguably” preempted by federal law; the United States Supreme Court returned the matter to the state court with the ruling that the conduct of the union was neither protected nor prohibited by federal laws since its entire membership consisted of supervisors. What now? Though the power of the state court was declared by the Supreme Court not to be preempted, the question was certainly one “arguably” for the NLRB. (A good number of responsible men must have thought so.) In such a case, Garmon indicates there remains only the limbo of “no man’s land.”

Preemption—States’ Authority—Picketing

While picketing seems to have long been subject to state and even local authority,\(^{132}\) peaceful picketing, deemed to be within the protection of the National Labor Relations Act, may not be unduly prohibited by a state court even though such picketing is contrary to state law.\(^{133}\) In Garmon the Supreme Court held that the California state court was preempted of jurisdiction to enjoin peaceful picketing or to assess damages against a union. The reason was that such picketing was “arguably” within the protection of sections 7 or 8 of the National Labor Relations Act, and hence the character of the picketing must be determined by the NLRB. The majority indicated that if the Board decided that the activity was neither protected nor prohibited, or even if the Board declined jurisdiction, the states were not free to regulate such matters. Mr. Justice Frankfurter, in the minority opinion, repeated a statement which he had made in a former decision, that the statutory definition of what authority had been taken from

\(^{131}\) 86 Sup. Ct. 327 (1965).


In one recent matter a federal court declined jurisdiction to enjoin enforcement of a city ordinance restricting distribution of handbills and requiring a license to distribute them. It required a showing of exhaustion of state court remedies before application of federal court aid. This view puts the dilemma of what to do with the “arguable” cases directly into the hands of the state courts in the first instance. United Steelworkers v. Bagwell, 239 F. Supp. 626 (W.D. N.C. 1965).
the states was “of Delphic nature” and required to be made concrete by “the process of litigating elucidation.” A concurring opinion indicated that four members of the Court would not agree that the states should be powerless when the union activities are “neither protected nor prohibited” by the federal act. If such was to be the law, they stated, “then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point.” It may now be suggested, in view of numerous recent cases in which state courts have refused to act because a question was “arguably” for decision by the NLRB, that the vanishing point has been reached. This inquiry seems appropriate: Is the much-sought exclusive power of the NLRB to make primary decisions upon labor disputes of sufficient importance to balance this constriction of the police powers of the sovereign states? Should not Congress re-examine this entire subject and remove it from the tortuously slow, though possibly finally able, “process of litigating elucidation”? Should not state courts, at least in all extreme cases, disorderly or peaceful, have jurisdiction to protect the interests of all parties unless and until the NLRB acts or indicates it will not do so?

If violence becomes an element it seems to be the present rule that the state has authority to award damages and to protect the public peace. Though it has been made clear that the federal courts will generally protect peaceful picketing from unreasonable or extreme state restrictions, it was held in the case of Carpenters & Joiners

\[134\] 359 U.S. at 241. “Delphic nature” imputes obscurity and ambiguity. Ancient learning, from which the term derives (as well Mr. Justice Frankfurter must have known) had the Delphic oracles uttered by a priestess (Pythia) who was seated on a tripod above a chasm from which arose foul and noxious vapors. Inspired by these vapors she uttered the confused-sounding oracles which required especially trained prophets for their interpretation or translation.

All can agree the federal labor laws, taken as a whole today, are obscure and ambiguous oracles as the learned Justice indicated. Whether they originated in a mephitic atmosphere or otherwise, they do need clarification. However, legislation rather than “litigating elucidation” would obviously get the task done sooner and better.

The previous use of this simile was in International Ass’n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).


\[137\] Thornhill v. Alabama, 310 U.S. 88 (1940); International Ladies Garment Workers Union v. Hendrix, 52 CCH Lab. Cas. ¶ 51,375 (D. Ala. 1965). But recent decisions show reluctance of state courts to act where the matter is arguably a labor
Union v. Ritter's Cafe\textsuperscript{158} that specific state statutes which undertake to restrict peaceful picketing to the area in dispute do not involve the use of powers preempted by the federal government. The state law of Texas was upheld. However, the non-statutory policy of the State of Illinois to prohibit peaceful non-employee (or "stranger") picketing was denied enforcement because the Supreme Court concluded that elimination of such pickets would unduly restrict "free communication."\textsuperscript{149} Moreover, while peaceful picketing has repeatedly been held immune from injunctions, the immunity terminates where the picketing is preceded by a "context of violence."\textsuperscript{140}

In the case of Giboney v. Empire Storage & Ice Co.,\textsuperscript{141} the Supreme Court upheld the validity of state-imposed picketing bans, apparently on the theory that a state policy against monopolistic dominance of business should take precedence over freedom of speech. Injunctions imposed under state laws against peaceful picketing have been sustained where the purpose of the picketing was the attainment of objectives not sanctioned by state policy. Representative cases upholding state injunctions have involved picketing to impose a system of racial quota employment,\textsuperscript{142} to compel self-employed persons to work only during union working hours,\textsuperscript{143} to obtain a union shop contract regardless of the employees' wishes,\textsuperscript{144} and to compel an employer to put only union members on his payroll in violation of a state right-to-work law\textsuperscript{145}


\textsuperscript{149} Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

\textsuperscript{144} Hughes v. Superior Court, 339 U.S. 460 (1950). For a recent case of similar nature see Petition of Curtis, 52 CCH Lab. Cas. ¶ 51,351 (E.D. Mo. 1965).

\textsuperscript{145} Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953.)
Nevertheless, in Weber v. Anheuser-Busch Brewing Co., the Supreme Court set aside a state court injunction which involved the same anti-monopoly act under which it had allowed protection by injunction against picketing in the Giboney case. In Weber the court stated the “principal question” to be whether the state court had jurisdiction to enjoin the union’s conduct or whether its jurisdiction had been preempted by the authority given to the NLRB. The answer, the court indicated, must depend upon whether the objective of the picketing, and hence the picketing itself, was “protected” under federal statutes in the opinion of the NLRB. In such an event, “the state cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations.” The Court then reserved to the NLRB the primary right to decide whether the activity was “protected” or not with the implication that in any case of doubt no state injunction could be allowed regardless of what state policy might appear, to state officials (nearest the scene), to be in jeopardy.

The Weber opinion then goes on to state that Congress did not exhaust, by the Taft-Hartley Act, the total of legislative power over industrial relations given to the federal government by the commerce clause. The opinion adds that the statute outlawed some aspects of labor activities and not others but preempted plenary power over both aspects, and that “obvious conflict, actual or potential, leads to easy exclusion of state action.”

To one who seeks to ascertain the boundaries of the states’ jurisdiction in respect to picketing, and who reads the Giboney (by Black, J.) and the Weber (by Frankfurter, J.) opinions to make comparison, it is difficult to perceive that labor relations were not concerned in Giboney. The court there states that “the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.” It concludes that constitutional freedom of speech does not provide immunity for “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”

147 348 U.S. at 473.
148 Id. at 480.
149 Id. at 490.
151 Id. at 498.
The later *Weber* opinion does not explain its apparent conclusion that there was no labor relations question in *Giboney* which should have been reserved for decision by the NLRB. In fact the *Weber* opinion does not mention *Giboney* save in a short terminal footnote in which the reader is informed that the case “was concerned solely with whether the state’s injunction against picketing violated the Fourteenth Amendment.” Was there then no labor relations question in the right of a union and union pickets to stop the sales of ice to nonunion peddlers or in their manner of so doing in violation of a valid state criminal statute?

Perhaps the most disturbing part of the *Weber* opinion is the penultimate paragraph in which, with possibly comforting intent, Mr. Justice Frankfurter informs the states’ representatives and other readers:

> We realize that it is not easy for a state court to decide, merely on the basis of a complaint and answer, whether the subject matter is the concern exclusively of the federal Board and withdrawn from the State. This is particularly true in a case like this where the rulings of the Board are not wholly consistent on the meaning of the sections outlawing “unfair labor practices,” and where the area of free “concerted activities” has not been clearly bounded. But where the moving party itself alleges unfair labor practices, where the facts reasonably bring controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.

It seems to be sound to generalize, then, that states may enjoin: mass picketing, threats of bodily injury or property damage, and obstruction of public ways, gates of factories, and employees’ homes. They may also enjoin recurrent unannounced work stoppages and probably any picketing intended to implement them. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.* expressly authorizes state injunctions against peaceful picketing after a “context of violence” has been created, and state statutes may reasonably limit picketing within an area of dispute. But neither state common law

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163 348 U.S. at 481. While *Weber* briefly dismisses *Giboney* as not dealing with a labor relations issue, *Vogt* and several cases decided between *Weber* and *Vogt* appear to rely much on that opinion.

164 348 U.S. at 481. (Emphasis added.)

165 312 U.S. 287 (1941).

nor non-statutory policy may be enforced to exclude peaceful picketing by non-employees, ("strangers"), in the absence of a dispute between an employer and his employees.\(^{156}\) It must also be recognized that if in any of these cases, normally within the "states' authority," a contention, or perhaps even a mere suggestion, appears that an unfair labor practice may "arguably" be involved, the court may conclude, as in Weber, that even though state protection of the same state policy was approved in a prior case, it will now be struck down. It may conclude that the primary privilege of the NLRB to decide some unfair labor concept must be preserved, even though such concept has been heretofore unknown and hence unannounced. The fact that the Board's opinions are "not wholly consistent on the meaning" of the statutes (as stated by Mr. Justice Frankfurter in the quotation above) creates a situation which demands prompt congressional clarification. This need is particularly acute since the Board may refuse to accept jurisdiction and refuse to issue complaints, while at the same time state courts are frequently refusing to take substantive action upon disputes which they conclude (rightly or wrongly) are "arguably" for decision by the Board.

Mr. Justice Frankfurter, in Teamsters Union v. Vogt, Inc.,\(^{157}\) sought to illuminate this area (perhaps to explain his words quoted above from the Weber opinion) In Vogt he explained that a series of then recent cases had established that a "State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful

\(^{156}\) AFL v. Swing, 312 U.S. 321 (1941).

\(^{157}\) 354 U.S. 284 (1957). Some courts have refused to enjoin picketing to obtain union security contracts on the basis that their jurisdiction is restricted to consideration only of the results of execution of such agreements and putting them into effect. Kitchens v. Doe, 172 So. 2d 896 (Fla. 1965); Panters Union v. Joyce Floors, Inc., 398 P.2d 245 (Nev. 1965). See also Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963) where the holding ignores the fact that under a right-to-work law and § 14(b) of Taft-Hartley, the picketing could be putting pressure on the employer to enter into an agreement which would be a clear violation of both state and federal law. It does not seem to be necessary to make a concession which is itself wrong as the only means of testing an obviously unlawful demand. The legal test could be had in an appeal from an injunction which \textit{prima facie} would be sound and that procedure would maintain matters in status quo until a final judgment could be had. If the demanded clause is of doubtful validity in its nature, the injunction should not issue.

A number of recent cases, without stressing the matter of state policy involved, have held that if a union activity in question appears not to be arguably within the jurisdiction of the NLRB, it may be enjoined by the state courts. See Operating Eng'rs v. Meekins, Inc., 175 So. 2d 59 (Fla. 1960). See also \textit{Ex parte} Ford, 236 F Supp. 831 (E.D. Mo. 1964); Dugdale Constr. Co. v. Operative Plasterers Ass'n, 135 N.W.2d 656 (Iowa 1965).
picketing aimed at preventing effectuation of that policy.\textsuperscript{168} It is difficult to reconcile this statement with the facts and his statements in \textit{Weber}, particularly when the antecedent \textit{Giboney} opinion is called to mind. Three dissenting justices in \textit{Vogt} seem to approve \textit{Giboney}, but with unusual emphasis they state that after the \textit{Vogt} opinion “state courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing.”\textsuperscript{169} Neither the expressed hope of the \textit{Vogt} majority that the law be clarified nor the feared result forecast by the minority seem to have come about in the decisions in the eight years since the publication of \textit{Vogt}.

The \textit{Garmon} opinions, delivered on April 20, 1959, do not discuss \textit{Vogt}, which was then only two years old. They give no explanation as to whether \textit{Garmon} is to restrict or limit whatever state authority is inferrable from \textit{Vogt}. It is submitted that such an explanation would have been an excellent place for some of Mr. Justice Frankfurter’s “litigating elucidation” since he wrote the majority opinion in both cases and was also author of \textit{Weber} (which went unmentioned in \textit{Vogt}).

It is to be noted that the majority and the minority opinions in \textit{Garmon} both indicated that as a result of the majority view the state courts are deprived of jurisdiction whenever it appears that a matter is “arguably” one requiring primary NLRB determination. Thus they recognize that another “no man’s land” is created. Even if the Board, after consideration, does not accept jurisdiction, if the matter was “arguably” one for it to decide the states have been preempted of authority. There exists, then, on this theory, no competent jurisdiction for decision and no remedy, though a clearly defined state policy may be defeated by the challenged activity.

There may be a few instances since \textit{Vogt} and \textit{Garmon} where state courts have felt more confident in issuing labor injunctions, but the recent \textit{Hanna Mining} case,\textsuperscript{169} mentioned above to indicate the inutility of the word “arguably” as a test of jurisdiction, may be used again to show the perplexity into which its attempted use leads. It will be recalled that the Board declined to issue a complaint because supervisors are not covered by the NLRA. The employer next sought relief from the Wisconsin court. The state supreme court declined

\textsuperscript{168} 354 U.S. at 293.
\textsuperscript{169} \textit{Id.} at 297 (dissenting opinion).
\textsuperscript{169} Hanna Mining Co. v. District 2, Marine Eng’rs Ass’n, 86 Sup. Ct. 327 (1965). See p. 501 \textit{supra}. 
to take jurisdiction in the belief that the question was "arguably" within the jurisdiction of the NLRB, and this despite the fact that the Board had already refused to take jurisdiction of the dispute. The Wisconsin court concluded that the Board’s refusal did not amount to a "determination." The Supreme Court reversed and remanded the matter to the Wisconsin court, with emphasis that there was no preemption in the case. Both the state court, in its apparent error, and the Supreme Court in reversing, cited and apparently approved Vogt. The concurring opinion suggests that in many such future cases, the parties may have to visit the Supreme Court to learn whether the "aspects" of the picketing for which an injunction is sought are "primary" or "secondary," since the states may regulate only the former and have been "preempted as to the latter."

Aside from picketing, the present perplexities clouding the limits of state and federal jurisdiction are illustrated by a recent action of a Texas state court in refusing to accept jurisdiction of a suit by union members against their union for causing their discharge in that the union ordered a plant shut down contrary to the employer’s orders. The Texas court concluded that it was "reasonably arguable" that the issue in question was within the jurisdiction of the NLRB. Hence the court decided it had no jurisdiction. Another state court, one judge dissenting, accepted jurisdiction over a libel suit brought by campaigners for one union against another union involved in an NLRB representation election. Contrarily, and further illustrating the present unpredictability of application of law in this area, another state court held it could not decide a damage suit by a member against his own union for failure to prosecute a grievance for him. The

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161 23 Wis. 2d 435, 127 N.W.2d 393 (1963).
162 36 Sup. Ct. at 335 (concurring opinion).
164 Meyer v. Joint Council 53, Teamsters Union, 416 Pa. 401, 206 A.2d 382 (1965). The dissenting judge indicated that, in his opinion, all doubtful tort actions should be rejected as within the scope of primary NLRB authority. In Lin v. United Plant Guard Workers, 86 Sup. Ct. 657 (1966) a district court had held against entertaining a common law libel suit brought by an employer against a union organizer on the ground the matter was arguably within the jurisdiction of the NLRB. The Supreme Court, by a margin of 5 to 4, reversed and indicated that the tort libel action is one of the matters which the National Labor Relations Act left "to the states" when Congress "refrained from telling how much" else was omitted from federal preemption. The dissenters were vigorous in their condemnation, with Mr. Justice Black asserting, "this new Court-made law tosses a monkey wrench into the collective bargaining machinery Congress has set up to try to settle labor disputes" Id. at 665.

May one not ask if this is not in fact a court-made partial repeal of court-made law set up under Lincoln Mills?
165 Owens v. Vaca, 51 CCH Lab. Cas. ¶ 19,613 (Mo. App. 1965).
writer of the majority opinion was apparently yielding (while still in doubt) to what he felt was the somewhat obscure result of the Supreme Court's conclusions. A dissenting judge stated,

While this matter of federal preemption in the field of labor relations remains cloudy, I do not believe that a state court should deny its own jurisdiction where it is unable to point out a logical argument showing that the fact situation is "arguably" within the jurisdiction of the National Labor Relations Board as constituting activity which is protected or prohibited by sections 7 and 8 of the Act.\(^6\)

There appears to have been no substantial judicial treatment of the question as to whether states have power to enjoin organizational and recognition picketing in violation of section 8(b)(7) of the National Labor Relations Act.\(^7\) It seems to be a fair assumption, however, that litigants will normally seek a federal court ruling on such matters, as being "arguably" within the scope of preempted powers, though a state injunction would likely be sustained in a "context of violence" or in any situation so clearly an unfair labor practice that recourse to the NLRB for decision would seem to be obviously unnecessary.\(^8\)

**Preemption—States' Authority—Protection of Continuity of Public Utility Services**

In 1953 Mr. Archibald Cox, who later became Solicitor General of the United States, and who has long been recognized as one of the leading experts in the field of labor law, testified before the U.S. Senate Committee on Labor and Public Welfare, as follows:

Second, it would seem clear to me that the States should have power to deal with strikes in gas and electric utilities and in other situations that may create a serious threat and imminent threat to public health and safety.

Today apparently the States do not have that power. There is a decision by the Supreme Court of the United States invalidating the Wisconsin law providing for compulsory arbitration in public utilities. Some of the other States, like Massachusetts, Senator Kennedy, have a slightly different law and we have continued to apply them,

\(^{16}\) Id. at 33,494 (dissenting opinion). (Emphasis added.)

\(^{17}\) Pennsylvania state courts refused to enjoin some peaceful picketing at construction sites where the union's conduct was "arguably" protected or prohibited under the federal statutes as the NLRB might decide. Seifert & Son, Inc. v. Local 229, IBEW, 52 CCH Lab. Cas. ¶ 16,640 (Pa. C.P. 1965).

\(^{18}\) The California Supreme Court recently vacated an order of a trial court enjoining picketing. This court indicated it would not assume authority to sustain this decree in the absence of a showing that the NLRB had specifically declined to accept jurisdiction. Russell v. IBEW, 64 A.C. 13, 48 Cal. Rptr. 702, 409 P.2d 926 (1966).
but I think everyone agrees there is a real question whether these laws would not be invalidated if they were taken to the Supreme Court. I think that decision should be changed by legislation so that the States can deal with those true emergencies which are nevertheless too local to be handled under the Federal statute. Somebody ought to be able to deal with them.169

A steadfast friend of labor, Mr. Justice Frankfurter, dissented from the decision which declared the Wisconsin public-utility-anti-strike statute ineffective because of federal preemption and stated:

But the careful consideration given to the problem of meeting nation-wide emergencies and the failure to provide for emergencies other than those affecting the Nation as a whole do not imply paralysis of State police power. Rather, they imply that the States retain the power to protect the public interest in emergencies economically and practically confined within a State. It is not reasonable to impute to Congress the desire to leave States helpless in meeting local situations when Congress restricted national intervention to national emergencies.170

The functions and importance of public utility company services are too well known to require much comment. This writer some years ago ventured the following remarks in an article.

It will be recognized that since all public utility properties are owned and operated for purposes which entitle the utility companies to take lands of private owners for their use without violating the "due process" clause, the utility is in the most complete sense discharging a "public service." It is analogous to a branch or department of the state government. Virtually all of the businesses now referred to as public utilities are, in one part of the world or another, commonly owned and operated by sovereign states, so that in a very real and correct sense it may be said that the public utilities are to be identified with government agencies for which they are, in a sense, substituted. Since they have become monopolies because of their duty, like that of the Government, to serve all at reasonable rates, they have reached a point of development where it becomes necessary to sustain their unfailing operation, just as government itself is sustained. This is to secure protection of the health, public safety, and general welfare of the population or general public. Indeed, the public health, morals, safety, and general welfare (so zealously guarded by the sovereign police power) would be much more


quickly impaired by discontinuance of certain public utility services than by temporary suspension of many governmental agencies.

Supporting his bill to restore to the states the power to protect the continuity of public utility services, Senator Spessard L. Holland testified on May 28, 1959 in the following words:

It is difficult for me to understand how anyone could conceive of Congress intending to preempt a field of such vital importance to the general public—which had been entered by many local and state governments—without providing a substitute for local procedure, under an Act which contained in its declaration of policy the statement “...and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which would jeopardize the public health, safety or interest,” and also the words “...and to protect the rights of the public in connection with labor disputes affecting commerce.” In my opinion, the majority opinion of the Supreme Court went completely contrary to the expressed declaration of policy in the Act, without specific language in the body of the Act to justify such a departure, and by this interpretation the Supreme Court accomplished in part what the Act was trying to prevent, by declaring void all protective state laws dealing with strikes in public utilities and thereby permitting the public health and safety to be placed in jeopardy during public utility strikes.

The bill in support of which Senator Holland testified did not pass, nor has any act of Congress since that date alleviated the situation. The states are still without authority to protect continuity of service of privately owned public utilities. Cities and towns continue to be in danger of sudden and complete discontinuance of electric, gas, water, telephone and city transportation services in case a union and a public utility management should encounter unusual difficulty in negotiating a labor agreement. In fact the situation has been compounded by a later decision of the Supreme Court holding a Missouri statute to be ineffective because of the federal preemption of authority over labor relations with the included express preservation of the right to strike.

It is not questioned that the right to strike is of fundamental importance. It should not be lightly valued at any time. Yet its suspen-

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171 Updegraff, Compulsory Settlement of Public Utility Disputes, 36 Iowa L. Rev. 61, 64 (1950).
sion in any case should not be confused with imposition of involuntary servitude, which is anathema to all free people. Involuntary servitude involves denial to the individual of his right to quit his employment and imposes an obligation of personal service upon him against his will. The striking employee does not quit his employment. He does not want to quit. He is interested in combining his efforts with those of fellow union members to put pressure upon the employer.

If denial of the right to strike and consequently stop utility services were actually to involve any vestiges of involuntary servitude the entire subject should be immediately discarded. But involuntary servitude is not involved in striking a balance between conflicting interests. The question is whether utility employees, usually few in number when compared with the numbers of people affected by a strike, should be permitted to inflict loss of light, heat, electric power, water, transportation and the like upon the community in order to exert economic pressure on their employer. The possible harmful ramifications of such economic pressure seem quite disproportionate to the possible benefits. Continuity of service is more important to the public than are the contentions of either workers or owners. As a necessary concomitant to any restrictions upon the right to strike, however, there must necessarily be included an effective means of justly deciding questions of wages, hours, and other conditions of employment.

In giving testimony at a Senate Committee hearing in Washington in 1959 this writer submitted the thought that

"it is indisputable that functions of government are so indispensable that most extreme measures must be taken to prevent their interruption. This conclusion rests upon the principle that the welfare of the people as a whole must be set above the claims or demands of any included, lesser group of them. This principle seems to apply with equal logic and force to the functions and services of public utilities as they are in our time."

The state's authority to define and to apply its police power is not questioned where there has been violence, wrongful occupancy of an employer's property (sit-down strike) or injury to persons (if only one or a few). The state may limit picketing to a restricted area and stop even peaceful picketing after a "context" of previous violence, but the state cannot enjoin a strike which will put out the cooking and

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heating fires in tens of thousands of homes; it cannot insist that electric lights burn, though their extinguishment may mean the closing of many places of business, darkness in homes and streets, and probably increased criminal conduct. It cannot require city transit service though its absence may induce extreme traffic congestion and possible consequential collisions with greater personal and property damage than might ensue from many incidents of violence on picket lines.\footnote{177 See Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Missouri, 374 U.S. 74 (1963); Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). See also Life, Jan. 14, 1966, p. 32 for some terse comments regarding the recent New York transit strike.}

Lawmaking always involves the balancing of claims or demands of competing groups. Outstandingly important as are many of the claims made by and for the organized groups of public utility employees, should these not be balanced against the needs and claims of the rest of the public (which inevitably will contain unnumerable members of other unionized groups)? When the competing contentions are all considered should not Congress sustain the vital needs of the public and give protection to the legitimate demands of the utility workers as far as they can be protected consistently with public requirements? \textit{Salus populi est suprema lex}.

\textbf{Conclusion}

While no one can doubt the ultimate authority of the federal government under the supremacy clause, some uncertainty must always exist as to whether the “interpretation” of a federal statute by the federal courts was less than, more than, or the same as Congress intended.\footnote{178 See Swift & Co. v. Wickham, 382 U.S. 111 (1965).} Of course, legislative power of correction is ever available, but an unintended extreme result of any statute, arising from a too broad judicial interpretation, may have ill consequences unintended by the legislature for a considerable time before the faulty interpretation can be remedied. The natural lag of statutory remedies (for social and economic ills) after the need for the remedies arises is well known. Hence, an unwelcome or unexpected result of judicially extreme application of a federal statute may produce undesirable consequences for a considerable time before the unwelcome effects become sufficiently conspicuous to move Congress to correct the evils.

These results may follow whether the “interpretation” or application by the court creates extreme consequences unintended by the Congress or simply operates to disclose unavoidable logical results of
what Congress did intend but did not fully treat. In either case, prompt legislative correction is desirable.

In the present situation, then, we see that the Supreme Court has interpreted the Wagner Act (and later the Taft-Hartley Act) as requiring a virtually complete preemption of regulatory authority over labor relations arising from commerce (and the production of goods as part of commerce). This is seen mainly in the opinions in the Garner, Laburnum, and Garmon cases. The same view was strongly emphasized in Guss v. Utah Labor Relations Board. Despite the fact that Congress, in the Landrum-Griffin Act, clearly indicated the view of the Court to have been too extreme by reversing its “no man’s land” result, the Court went to a greater extreme in holding the Missouri public-utilities-anti-strike act to be unenforceable. It even indicated its creation of a new “no man’s land” in Garmon.

Depriving the states of normally exercised sovereign powers, to attain the dubious objective of leaving primary jurisdiction over public utility pressure conduct by unions and employers in the NLRB, was even more extreme than in the Guss case, though the legislation which followed the latter seems to imply a lesson broader than the actual “no man’s land” considered in that situation. Had the Court observed this it might well have paused before striking down the efforts of the sovereign states to protect their populations from the drastic effects of public utility stoppages.

In the recent Stuffed Turkey Case the majority concluded that its previous interpretation of the three judge court statute was “unworkable.” The dissent appeared to agree that the procedure required by that act was indeed “unworkable” and if that fact had “thrown the lower courts into chaos, a fair case for its demise might be made out.”

In the present situation relating to labor law and procedure, state and federal courts, in innumerable instances since Garmon, have refused to decide disputes on the merits and have unhappily explained that the problem presented was “arguably” one for primary decision

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180 353 U.S. 1 (1957).
184 Id. at 134 (dissenting opinion).
by the NLRB. Hence they have, in the cases before them, denied any possibility of effective decision and have left the litigants to search for justice elsewhere. But Garmon itself indicates that such decisions may leave the parties in another "no man's land" for which there is no remedy if the NLRB in its wisdom declines jurisdiction. How could the law and the lower courts administering the law be found in more of an "unworkable chaos"? It seems that by both of the opinions in the Stuffed Turkey Case, the Supreme Court is unanimously inviting congressional revision of the growing, baffling contradictions in the field of federal labor law.

President Johnson, in his recent State of the Union message, suggested that Congress should enact "measures which, without improperly invading state and local authority, will enable us effectively to deal with strikes which threaten irreparable damage to the national interest." He no doubt had in mind the New York City transit work stoppage. It seems not illogical to suggest that in the area of all public utilities this can be very well accomplished by enacting the return of adequate authority over such matters to the states. Thus, federal preemption in this area, probably never fully envisaged by Congress in all its consequences, would be corrected.

It is, therefore, respectfully suggested that the subject of federal preemption with respect to labor disputes and the question of the desirability of a federal code concerning labor relations have early and extensive consideration by the Congress. Court "fashioning" of laws, and "litigating elucidation," are too slow and piecemeal to be effective. The present statutes have, as judicially observed in Garner, left much authority "to the states, though Congress has refrained from telling us how much." It may be suggested that Congress define at the earliest possible time, and as clearly as the subject permits, the limitations of state and federal powers in the field of labor relations. Congress should also spell out the primary decisional authority of the NLRB and proper interim disposition of the "arguable" cases until the Board acts upon them. Legislative lawmaking can take place in the light of complete economic and social studies; the "fashioning" or "elucidation" of laws by any court must ever be limited by the narrow issues of the cases which come by chance (more or less) before it. These may never add up to a comprehensive code and at times may be but very remotely reflective of the congressional intent.

In summation, there appears to have been a movement from

stateism towards nationalism for at least the last fifty years. That movement has been much accelerated in the labor law field in recent years by the judiciary’s applying the doctrine of preemption and interpreting statutes as delegating to it authority to "fashion" law and to assume some of the responsibility of the Congress. The national "takeover" of jurisdiction has advanced far ahead of the fine logical balancing and protection of all the numerous, complex, and at times conflicting interests affected. This balancing can only be accomplished by statute. Congress alone can supply the much needed ordering process.