LABOR LAW

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This brief survey is limited to matters of importance to the general practitioner, particularly in Florida, and is not aimed at the specialist in the labor law field. Space will not permit a general survey of two years' development in this area of law. Ample and recent articles treat the subject in depth.1

Probably of widest interest are the questions dealing with allowable enforcement of the Florida right-to-work laws, the place of Florida courts in the enforcement of collective bargaining agreements, and the continued right of Florida courts to exercise their jurisdiction over certain activities of unions and their members. Reference is also made to new legislation of specialized interest.

NATIONAL LABOR RELATIONS ACT, SECTION 14(b) AND PERMITTED ENFORCEMENT OF FLORIDA RIGHT-TO-WORK LAW

The area left to state action to enforce its own policies is far from well-defined, and each new decision of the United States Supreme Court on the subject sets off thinking in new directions. These decisions also tend to nullify prior decisions, particularly those of the state courts. This situation is well illustrated with reference to Florida law.

Retail Clerks Int'l Ass'n v. Schermerhorn2 is the latest decision in this area; it arose in Florida, and deserves study. The basic questions were whether the Florida courts had jurisdiction to determine whether a union security provision in a collective bargaining agreement (an agency shop clause, in this case) was in violation of the Florida right-to-work law,3 and if so, whether Congress had permitted the Florida courts to afford customary remedies in cases of such violations.

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2. 84 Sup. Ct. 219 (1963).
3. FLA. CONST. DECL. OF RIGHTS § 12:
The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.
See also FLA. STAT. ch. 447 (1963).
The district court of appeal and the Florida Supreme Court both decided that "such an arrangement" (the agency shop clause) violated the Florida Constitution, and the United States Supreme Court held that "the legality of [the contract provision] is governed by the decision of the Florida Supreme Court." After a further hearing of the case the United States Supreme Court rendered its decision, which indicated in what instances and to what extent the Florida courts have jurisdiction to afford remedies for violations of its right-to-work law.

This second Schermerhorn decision, which was concerned with permissible remedies, clarified these questions in important respects. First, it was held that section 14(b) of the National Labor Relations Act (Taft-Hartley Law) was expressly designed to preserve to the states, even in cases affecting interstate commerce, at least a limited right to maintain a right-to-work policy. Section 14(b) reads:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

The legislative history was cited to show "it would be odd to construe § 14(b) as permitting a state to prohibit the agency clause but barring it from implementing its own law with sanctions of the kind involved here." When the Court referred to the "overriding authority" of the state and indicated that "even if the union-security agreement clears all federal hurdles, the States by reason of § 14(b) have the final say and may outlaw it," it was confronted by the much-cited and discussed case of San Diego Bldg. Trades Council v. Garmon. The Garmon case held that a state court was precluded by the Taft-Hartley Law from awarding damages under state law for economic injuries resulting from peaceful picketing by a union which had not been selected by a majority of the employees as their collective bargaining agent, since such activity was as an injunction and an accounting. However, the language apparently refers generally to injunctions, damage suits and criminal statutes.

4. Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n, 141 So.2d 269 (Fla. 1962).
5. Retail Clerks Ass'n v. Schermerhorn, 373 U.S. 746, 757 (1963). Cf. NLRB v. General Motors Corp., 373 U.S. 734 (1963), in which the decision of the Indiana court holding that an agency shop clause would not violate the Indiana right-to-work law was upheld.
7. For the result in a situation where interstate commerce is not involved, see International Bhd. of Elec. Workers v. White, 143 So.2d 348 (Fla. 3d Dist. 1962).
8. The key words are "the execution or application of agreements," although reference thereto in the legislative history frequently is by use of the word "arrangements." Some implications from this factor are discussed in this article. See text at notes 17, 18 and 38 infra.
9. 84 Sup. Ct. 219, 220 (1963). The sanctions that were involved in the Schermerhorn case were an injunction and an accounting. However, the language apparently refers generally to injunctions, damage suits and criminal statutes.
"arguably" within the jurisdiction of the National Labor Relations Board.

Garmon was disposed of on the basis that "it did not present the problems posed by § 14(b), viz., whether the Congress had precluded state enforcement of select state law adopted pursuant to its authority." This result was anticipated by some Florida cases, but in others, the distinction of the Garmon case apparently would have affected the results. Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., which held that a state has the right to order the reinstatement of an employee with back pay when he was discharged in violation of a state union security law, was cited in support of the viability of state remedies.

Of greater impact on various Florida decisions was this observation in the latest Schermerhorn case:

On the other hand, picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union security statute lies exclusively in the federal domain (Local Union 429 etc. v. Farnsworth & Chambers Co., 353 U.S. 969, 77 S.Ct. 1056, 1 L.Ed.2d 1133 and Local No. 438 v. Curry, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514), because state power, recognized by § 14(b), begins only with actual negotiation and execution of the type of agreement described by § 14(b). Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon.14

Despite some apparent ambiguities in this language, it is clear that at least the reasoning of several Florida cases is affected adversely.15

The courts are not powerless to afford a remedy, absent an express contractual provision in violation of the Florida right-to-work law. The Court used the broad word "agreement" which, in labor law, need not be an integrated or even a written contract. Technically, the word has a broader meaning than "contract."16 In determining what the agreement was, the parties' interpretation of their "agreement," as well as their

11. Retail Clerks Int'l Ass'n v. Schermerhorn, supra note 9, at 222.
15. "Execution" presumably means "application"; but could not a strike or picketing be a part of "negotiation" activity?
16. E.g., Hescom, Inc. v. Stalvey, 155 So.2d 3 (Fla. 1st Dist. 1962).
17. RESTATEMENT, CONTRACTS § 3, comment a. See text at note 38 infra.
The available remedies under the Schermerhorn doctrine should be considered in connection with the jurisdiction of both state and federal courts over contracts between an employer and the union as provided by section 301 of the National Labor Relations Act, next considered.

**Right of State Court Under NLRA § 301: Enforcement, Damages, and Other Remedies as to Collective Bargaining Agreements**

Section 301(a) reads:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The purpose and effect of this enactment was not to preempt the field of such suits or to exert federal supremacy, but to afford necessary supplementation to the then existing remedial law, particularly, to avoid federal requirements of diversity and amount in controversy. However, the United States Supreme Court, in *Textile Workers Union v. Lincoln Mills*, held that section 301 has substantive content, that Congress thereby directed the courts to formulate the law applicable under it, and that it is not to be given a narrow reading. The Court stated:

> The question then is, what is the substantive law to be applied in suits under § 301(a)? 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. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if com-

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21. This was not necessary in Florida by reason of FLA. STAT. § 447.11 (1963).
patible with the purpose of § 301, may be resorted to in order to
find the rule that will best effectuate the federal policy... Any state law applied, however, will be absorbed as federal
law and will not be an independent source of private rights.23

That section 301 has by no means suffered a narrow reading, at least
in the interpretation of the words "suits for violation of contracts," is
shown by the variety of causes or forms of actions that have been enter-
tained: specific enforcement of an agreement to arbitrate such individual
grievances as rates of pay, hours of work, and wrongful
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discharge; specific enforcement of an arbitrator's award;25 declaratory action to
determine the existence of a binding contract and to recover wage in-
creases thereunder;26 suit by employer for damages resulting from a
strike by the union in violation of agreement provisions for grievance
procedure and arbitration, even though there was not a "no-strike clause";27 suit by the employer against individual union members for a
violation of a "no-strike clause" in the collective bargaining agree-
ment;28 individual employee's suit against the employer for wages, for
the violation of an agreement provision against discrimination directed
at the employee because of membership in the union;29 suit by the
employer to vacate an arbitration award for unfairness;30 suit by the union
against an association of employers for a declaration whether the union
had effectively terminated the collective bargaining agreement;31 employer's action for a declaration whether the union's claimed grievance
was arbitrable, and the union's opposing counter-claim;32 suits against
an employer for injunction but, because of the Norris-LaGuardia Act,33
no injunction could be obtained in a federal court against a union for
striking.34 The foregoing illustrations certainly do not exhaust the possi-
bilities of variations or departures from the statutory "suits for viola-
tion of contracts between an employer and a labor organization . . . ."

It is clear that the state courts have concurrent jurisdiction under
section 301.35 This does not mean a state court may go its own way and

23. 353 U.S. at 456-57.
29. Charles Dowd Box Co., Inc., v. Courtney, supra note 26, and note cases from 12 states cited therein.
34. Charles Dowd Box Co., Inc., v. Courtney, supra note 26, and note cases from 12 states cited therein.
decide cases under section 301 "within the limited horizon of its local law." The Supreme Court has chided a state court for holding that section 301 does not limit the substantive law to be applied and for disposing of the case exclusively in terms of local contract law, saying: "We hold that in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law."\(^{38}\)

Whether the Florida lawyer who chooses to file suit in a state court is subject to the loss of whatever real or fancied advantages that choice gave him, by virtue of his opponent's attempt to remove the case to the United States district court, is a difficult and yet unresolved question.\(^{37}\)

However, the Supreme Court has stated it expects "diversities and conflicts" to occur among the state courts (and the eleven federal courts of appeals, for that matter) but it concluded that one of the functions of the Court was to resolve these diversities and conflicts.\(^{38}\)

The contract or agreement which will permit a state or federal court to exercise jurisdiction under section 301 need not be a conventional form of contract as found in business generally, nor is it confined to collective bargaining agreements. In addition, the agreement need not have been between the union and the employer, as held in Retail Clerks v. Lion Dry Goods, Inc.,\(^{39}\) where the Court, after analyzing section 301, approvingly quoted: "Contract in labor law is a term the implications of which must be determined from the connection in which it appears."\(^{40}\)

It must be concluded that jurisdiction under section 301 is, to date, a vast and largely unexplored field generally without artificial or stringent limitations. Nevertheless, while a comprehensive exposition is beyond the scope of this article, reference should be made to the problems arising from the exclusive jurisdiction over certain labor matters for certain purposes, enjoyed by the NLRB. Note should also be made of the obvious fact that neither under section 301 nor otherwise, may either a state or a federal court interfere with the Board's exclusive jurisdiction. In this area of section 301, the question is not the relatively simple one whether

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36. Local 174, Teamsters Union v. Lucas Flour Co., supra note 27, at 102. The Court noted that few of the many state court cases under § 301 have expressly considered state versus federal law. Some courts have found no differences, thereby obviating the question. The Court also noted that the state court decisions "have carefully considered applicable federal precedents in resolving the litigation before them." Id. at 103, n.10.

37. Charles Dowd Box Co., v. Courtney, supra note 26. See id. at 514, n.8, in which the question was raised as to whether there are any impediments to free removal of § 301 cases to a federal court. The Court also raised, but did not decide, the question of whether the Norris-LaGuardia Act precludes state courts, as it does the federal courts, from enjoining strikes where a "labor dispute" is involved. See 28 U.S.C. § 1441(b) (1950). See also John Hancock Mut. Life Ins. Co. v. United Office & Professional Workers, 93 F. Supp. 296 (D. N.J. 1950); Tool & Die Makers v. General Electric Co., 170 F. Supp. 945 (E.D. Wis. 1959) (removal of unfair labor practice proceeding from state labor board).


40. Id. at 28.
the NLRB has, or "arguably" has, jurisdiction, and from the answer thereto, to determine whether the court may proceed. True, federal district courts have been held to be empowered to interfere by injunction with some NLRB proceedings. But, the Supreme Court apparently intends to let the courts and the NLRB each go their own way, under section 301, at least until serious trouble develops. The Court's position is evident from the flat statement in Smith v. Evening News Ass'n: 42

The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If . . . there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise.

A party seeking judicial relief under section 301 is far more likely to run afoul of the terms of an arbitration provision in the collective bargaining agreement, 43 than to fail because the NLRB is found to have priority over the subject matter of his suit.

There are some unsettled questions such as whether the previous state court jurisdiction to give remedies based upon labor contracts is extinguished by section 301, 44 and which court has priority when one party resorts to a state court and the other to a federal court. 45 Dade County v. Amalgamated Ass'n Of St. Elec. Ry. & Motor Coach Employees 46 ostensibly was concerned with a question in this field. This illusion was dispelled, however, because of the statutory exemption involved and because the NLRB, in effect, dismissed the unfair labor practice charge filed with it, having conditioned the dismissal only on the non-application of the statutory exemption. Hence, no particular or independent significance can properly be attached to the court's following language:

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42. 371 U.S. 195, 197-98 (1962). See Local 174, Teamsters Union v. Lucas Flour Co., supra note 27, at 101, n.9, in which it is said that the preemption doctrine of such cases as Garmon is "not relevant." The Court further explained that its present holding that courts, under § 301, may remedy contract breaches which also are unfair labor practices, is not meant to affect the jurisdiction of NLRB to remedy such practices. The Court cited Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 COLUM. L. REV. 52 (1957). See also Mintz, What Rights Under a Collective Bargaining Contract are Enforceable by an Employee? 37 FLA. B.J. 1121 (1963).


46. 157 So.2d 176 (Fla. 3d Dist. 1963).

47. 29 U.S.C. § 152(2) (1956), exempting, inter alia, "any State or political subdivision thereof" from operation of the act.
Thus, the question has been reduced to a supposed violation of state law, and a state court is free to determine questions involved. Upon these facts we think that the court had jurisdiction to proceed with the cause.\(^{48}\)

In \textit{Roger Dean Chevrolet, Inc. v. Painters, Decorators \\& Paperhangers},\(^{49}\) although the appeal was on the subsidiary question as to when costs and damages may be assessed against an injunction bond, the reported proceedings in the trial court give helpful guidance for cases in which an injunction against picketing is sought.\(^{50}\)

By analogy, in certain cases under section 301, the decision of the court in \textit{Scott v. National Airlines, Inc.},\(^{51}\) may find some application. The point decided was whether an employee who has prosecuted his claim under an arbitration procedure for wrongful discharge, reinstatement, and back pay, has made an election estopping him from obtaining relief in court by way of damages for breach of the employment contract. More often, in section 301 cases, the question will arise whether the suit is barred by the terms of an agreement for grievance-arbitration procedure, or should be stayed until such procedure is undertaken and concluded.

\textbf{The Nubar Tool Case}\(^{52}\) \textit{and unprotected and non-prohibited activity}

Despite the comprehensive treatment of the subject in the \textit{Garmon} case\(^{53}\) and the clear pronouncement by the Florida Supreme Court in 1962 in the case of \textit{Scherer \\& Sons, Inc. v. Local 415 International Garment Workers Union},\(^{54}\) there persist doubts and reluctance about the right of a state court to enjoin damaging activity of unions or their members.\(^{55}\)

In at least four areas, even though interstate commerce is affected,

\footnotesize{\textsuperscript{48} Note 46, \textit{supra} at 181.  
\textsuperscript{49} 155 So.2d 422 (Fla. 2d Dist. 1963).  
\textsuperscript{50} See quotation from \textit{Schermerhorn} case in text at note 14 \textit{supra}.  
\textsuperscript{51} 150 So.2d 237 (Fla. 1963).  
\textsuperscript{52} United Steelworkers v. Nubar Tool \\& Eng'r Co., 148 So.2d 45 (Fla. 2d Dist. 1963).  
\textsuperscript{53} Note 10 \textit{supra}.  
\textsuperscript{54} 142 So.2d 290, 294 (Fla. 1961). In this case, the court makes the accurate but incomplete statement: "A state may enforce its injunctive processes against conduct of a union which is neither protected nor prohibited by federal labor statutes." \textit{Id.} at 294.  
\textsuperscript{55} Perhaps the following warning in the \textit{Scherer \\& Sons} case has contributed to reluctance to issue injunctions:

[\textit{I}n this broad area of labor relations, unless state jurisdiction is clear, time, effort and money could be conserves by initially employing the expeditious [advisory opinion] procedure which the Congress has now established to obtain a preliminary determination of jurisdiction by the N.L.R.B. \textit{Id.} at 295.  
What the court did not say is that its word "speedy" is quite relative and, more important, that NLRB will only determine whether an employer meets the NLRB's standards for the exercise of its jurisdiction over interstate commerce. The crucial questions, as to "protected" or "prohibited" activity are not covered by this advisory opinion procedure.}
a state court can give remedies, including injunctions, for injurious union or concerted activity: (1) to implement the state police power, as by enjoining violence in picketing; (2) to enjoin negotiation or application of an agreement violative of state right-to-work law, as in the Schermerhorn case;56 (3) in cases brought under section 301 of the NLRA for determination of contract rights;57 and (4) where the cause of action involves conduct which the national labor policy neither protects nor prohibits.

The activity of the union and its members in the Nubar Tool case58 involved the first ground listed above, and also the fourth ground; however, it appears that the court did not get sufficient guidance from the applicable law.

In brief, the facts were that while the certified union and employer were negotiating for a collective bargaining agreement, three employees were fired from the night shift, which precipitated recriminatory conduct between employees and employer. The employer claimed a slow-down by the union president who was discharged. The president claimed his required rate of production had been stepped up. When this discharge was learned of by other employees they became angered, left their machines, and tried to get the employer to take back the dischargee. They also made threats of violence, after which other employees engaged in a slow-down and some walked off the job in protest. At one point a deputy sheriff was required to maintain order and to cause some of the employees to leave the plant peacefully. Subsequently, other employees engaged in a slow-down and were discharged, causing still more employees to quit in protest. The employees who had quit and walked out began to picket carrying placards protesting the discharges, asserting that there was a lockout, and that the employer was unfair to the union.

Although the court quoted from the Garmon decision at great length, it disclosed inadequate recognition of the Garmon case’s exposition of the four possible types of situations with respect to protected and prohibited activity in which state court jurisdiction, or the lack of it, is clear.

The Garmon case lists four situations: (1) when the NLRB decides that the conduct is protected by section 7 of the NLRA, or prohibited by section 8 of the NLRA, in which case the states are ousted of jurisdiction; (2) when the NLRB has decided that an activity is neither protected nor prohibited, which, absent some other restriction, would permit the state court to act; (3) when, even though the Board has not passed on particular conduct or has not made a clear determination that an activity is

57. See text following note 19 supra.
58. Note 52 supra.
59. Note 10 supra.
or is not protected nor prohibited, there exists definite precedent elsewhere that certain conduct is not protected nor prohibited, then the state court may act; and (4) when the activity cannot be plainly characterized from such precedent or has not been passed on clearly by the NLRB, the matter falls into the preempted class, ordinarily as being "arguably" or "potentially" subject to NLRB jurisdiction. To simplify: courts, state and federal, may follow clear precedent, but they may not initially determine whether conduct is or is not protected or prohibited.

Adopting the foregoing approach to the Nubar Tool case will demonstrate the result that the facts there should have produced.

The court approved all of the pertinent findings of fact of the chancellor, and recited other evidence which shows six classes of relevant conduct:

(1) Initial slow-down by certain employees for the purpose of interfering with the employer's contractual relations with customers. This clearly was unprotected activity, and it was not prohibited activity.

(2) Repeated slow-downs and work stoppages in protest over discharge of three employees for engaging in the initial slow-down. As in the previous instance, this was unprotected, and not prohibited, activity, for additional reasons.

(3) Altercations in the plant between various individual defendants and the employer over the matter of the discharges. Because the facts in the case were not developed, or at least not reported, with a view to the applicable law, there may or may not have occurred unprotected activity of the sort indicated. For example, use of abusive language is unprotected, and fighting or instigating a fight, "even if union activity gives rise to it," is also unprotected activity.

60. The finding of violence is omitted because the report of the facts leaves the possibility that only threats of violence occurred, that these were made inside the plant some considerable time before picketing began and were not repeated after first made. However, that part of the injunction which was affirmed apparently did not prohibit or even limit picketing. Some difficulty in analysis arises from the fact that the court was not reporting the facts with any view to clarifying the character of the conduct as protected or prohibited.


62. These actions were by union members but apparently not done or sponsored by the union. The union, a certified bargaining representative, was in the process of negotiating a collective bargaining agreement with the employer.

63. See note 61 supra, and Local 232, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245, rehearing denied, 336 U.S. 970 (1949). The discharges were justifiable and served to preclude any offsetting argument of employer acquiescence.


(4) Refusal to leave the premises until forced to do so by a deputy sheriff. This is clearly neither protected nor prohibited conduct.\textsuperscript{66}

(5) Strike in protest over the lawful discharges for slow-downs. This is protected activity.\textsuperscript{67}

(6) Picketing in protest over the discharges which were found to be lawful and were for slow-downs or work stoppages. Picketing by discharged employees is unprotected activity,\textsuperscript{68} and is not prohibited.

While inconclusive as to the merits of the case, the foregoing illustrates the areas of inquiry in such cases from which it may be determined what harmful conduct the state court may enjoin or otherwise remedy.

\textbf{NEW LEGISLATION}

No substantial new legislation in the labor field has been enacted in 1961 or in 1963. The 1963 Legislature amended Florida Statutes, chapter 447, which regulates labor matters, by relaxing the disqualifying conditions in the licensure of business agents\textsuperscript{69} and making annual applications for renewals of such licenses easier.\textsuperscript{70}

In a field productive of much litigation, the wage-hour laws, Congress, in 1961, extensively amended the Fair Labor Standards Act.\textsuperscript{71} Numerous extensions in the coverage of the act were enacted. The criteria for determining whether an employee is covered were broadened and changed.\textsuperscript{72} Provision was made for increase of the minimum wage and two different minimum wage requirements were established to apply to previously covered employees and newly employed employees. Enforcement changes were made, such as permitting the Department of Labor to seek recovery of wages in injunction suits.

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In summary, it is suggested that the labor law field will increase in importance with Florida's industrial growth and that at least a very substantial part of this field of law is not at all remote from Florida courts and lawyers.

\textsuperscript{70} FLA. STAT. § 447.04(4) (1963).
\textsuperscript{71} 29 U.S.C. § 201 (1956).
\textsuperscript{72} See 29 U.S.C. §§ 203(r)-(s) (1956).