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Labor Law

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Legal issues, of course, ought to be resolved on the highest of intellectual planes taking into account only relevant matters of fact, logic and law. Frequently, however, subconscious attitudes on matters involving social and economic policy enter into and unwittingly influence the analytical process. So it is with all mere humans, including members of the National Labor Relations Board, whether appointed by an Eisenhower or a Kennedy administration.

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I. Basic Legislation (1935-59)

For those lawyers who have little acquaintance with labor law this survey begins by reviewing some legislation which is rudimentary to this area.

A. Wagner Act

In 1935 Congress passed the National Labor Relations Act, also known as the Wagner Act. This act established the administrative agency known as the National Labor Relations Board, headquartered in Washington with regional offices operating throughout the country. The heart of the act is in section 7, which protects and establishes the right of employees to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing. The act provides in section 8 that certain acts of employers which interfere with section 7 rights are unfair labor practices for which appropriate remedies will issue. The act further establishes a procedure for elections to determine whether or not a labor organization represents a majority of the employees in an appropriate unit for the purposes of collective bargaining.

B. Taft-Hartley Act

The next major piece of labor legislation, passed in 1947, was the Labor Management Relations Act, also known as the Taft-Hartley Act. Title I of the act amended the 1935 National Labor Relations Act. It declared certain practices of labor organizations to be unfair labor practices; increased the size of the Board from three to five members; and separated the prosecuting functions of the Board from the judicial functions and put the former into the Office of the General Counsel. Other titles of the act established: (1) the Federal Mediation and Conciliation Service; a procedure to handle national emergency disputes; and opened up federal courts to suits for breach of contract by or against labor organiza-

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3. At the present time the Board has twenty-eight offices. The Florida regional office is located at Tampa and there are field offices at Jacksonville and Miami.
tions, regardless of the amount in controversy, and without regard to the citizenship of the parties.\textsuperscript{10} The act further provided concurrent jurisdiction in state and federal courts for damage actions arising out of certain types of secondary boycotts, jurisdictional and sympathy strikes or picketing,\textsuperscript{11} and put certain restrictions on payments to employee representatives.\textsuperscript{12}

C. Landrum-Griffin Act

The next major overhaul in our labor laws took place when Congress passed the Labor-Management Reporting and Disclosure Act of 1959, also known as the Labor Reform Law, or the Landrum-Griffin Act.\textsuperscript{13} The act is a direct result of two and one-half years of investigations made by Senator John L. McClellan’s committee on improper activities in the labor-management field. Although the committee investigated many unions and employers, the legislation largely reflects the committee’s concern for the activities of the International Brotherhood of Teamsters.

This act for the first time provides the federal government with a major role in the policing of the internal affairs of labor organizations. It substantially abrogates the common law rules of voluntary associations by giving members effective enforceable rights against the union.\textsuperscript{14} The act is designed to assure members of labor organizations certain rights of democratic procedure in the conduct of the internal affairs of the union. It regulates the use of the trusteeship as a form of control by internationals over locals;\textsuperscript{15} requires that union elections, at all levels, meet certain minimum statutory standards;\textsuperscript{16} and provides that persons with certain felonious or communist backgrounds cannot serve in responsible union positions.\textsuperscript{17}

To prevent corruption, the act prohibits certain monetary payments to unions and further requires reports from unions, employers and labor consultants.\textsuperscript{18} It provides that union officers and agents are to be considered fiduciaries and that they must file reports on conflict of interests.\textsuperscript{19}

further provides that union financial and administrative operations are to be made public by filing full reports. 20

Enforcement of the policies of the act is accomplished in various ways. For violation of some sections the only remedy is by private civil action; 21 violation of other sections may lead to criminal prosecution; 22 and other sections are administered and enforced by the Secretary of Labor 23 and a newly created government agency, the Bureau of Labor-Management Reports. 24

The drafters of the Labor-Management Reporting and Disclosure Act were aware of the confusion that might develop between state and federal authorities when the federal government legislates on a subject previously regulated by the states. In an effort to avoid any judicial misconstruction of the intent of Congress, the drafters specifically stated in several sections whether or not the authority of the states was to be precluded or pre-empted. 25

This awareness of the problems brought about by state and federal authorities both seeking to regulate the same subject matter was not present when the Taft-Hartley Act was passed.

II. Doctrine of Federal Pre-emption

When Congress in 1947 proscribed certain union activities as unfair labor practices, it, to some uncertain degree, pre-empted the authority of the states to regulate union strikes and picketing. The scope of this pre-emption is being resolved on a case by case basis and the path is not always the straightest. In any event, to determine whether the holdings in state court labor cases are still current, at least two dates should be considered: April 20, 1959, the date of the United States Supreme Court's second decision in San Diego Bldg. Trades Council v. Garmon, 26 which dealt with jurisdiction based on subject matter; and November 14, 1959, the effective date of Title VII of the Labor-Management Reporting and Disclosure Act, which relates to jurisdiction based on interstate commerce. 27

It should be borne in mind that the jurisdiction of the Board is based upon two factors both of which must be present: (1) the factual situation must show a subject matter within the scope of the protection or prohibitions of the act (jurisdiction based on subject matter); and (2) the factual situation must also involve an employer whose business volume is adequate to affect interstate commerce as defined by the Board's standards (jurisdiction based on interstate commerce). In such cases the Board has primary and exclusive jurisdiction. For a few years however, it was thought that there could be initial and concurrent court (state or federal) jurisdiction notwithstanding the presence of the above jurisdictional factors, if the remedy being sought was a remedy not provided by the National Labor Relations Board. This idea received considerable encouragement as a result of the Supreme Court's first decision in the Garmon case. However, by the time of the second decision in the Garmon case five Justices were persuaded that rather than allowing initial and concurrent court jurisdiction to exist based upon distinctions pertaining to remedy, it would be better first to get a determination from the National Labor Relations Board concerning whether the subject matter of the case was protected or prohibited by federal law. In that way, thought the five Justices, there would be less conflict between the courts and the NLRB in the administration of federal law. To get the full import of the Court's treatment of these issues, the Garmon cases are presented in the following section in more detail.

A. Jurisdiction: Subject Matter and Remedy

In the Garmon case, a union that did not represent a majority of the employees had asked an employer for recognition and for a union shop contract. The employer refused to grant the union's demands and the union started picketing ostensibly to organize the employees. The employer's business did have an effect upon interstate commerce, but not in sufficient amount to warrant the National Labor Relations Board to exercise its jurisdiction. The state court, however, did take jurisdiction and issued an injunction against the union and awarded damages in favor of the employer. Upon review, the Supreme Court held that since the employer's business did have some effect upon interstate commerce, the state court had no jurisdiction to issue injunctive relief; it is immaterial that the National Labor Relations Board would not exercise its jurisdiction to handle the case.

This interpretation and application of the doctrine of pre-emption was not welcomed for it created a situation in which a legal wrong could continue without appropriate legal remedy being available.

28. This pre-emption of state court jurisdiction did not preclude the state courts from issuing injunctive relief in situations involving violence or threats of violence, even though the subject matter was covered (and prohibited) by the NLRA, as amended.
On the award of damages, the Supreme Court did not invoke the doctrine of pre-emption, but rather by its remand implied that this was a possible area for jurisdiction in the state court. The Court remanded the case for a clarification as to whether the damage award was based upon a violation of federal or local law.

This remand on the damage issue as well as some other holdings of the Court had caused other courts and attorneys to infer that state courts had jurisdiction to award damages when the subject matter was tortious or unlawful under state law. This approach was further premised upon the fact that the federal remedial scheme as administered by the National Labor Relations Board does not provide for any damage remedy to employers or unions. (Back pay is a form of damage remedy issued by the Board, but it is awarded only to remedy the losses of employees.)

It was in this context that the California Supreme Court upon remand set aside the injunction, but sustained the damage award based upon a violation of state law.31

The United States Supreme Court upon its second review of the Garmon case was now ready to pass upon an issue which Justice Frankfurter inferred was not necessary to decide upon the first review: Did the state court have jurisdiction to award damages arising out of peaceful union activity which it could not enjoin? In answering this issue the Court shattered the idea that there was an area for initial state court jurisdiction based upon a damage remedy and held that the state court had no jurisdiction to award damages (or any other remedy) because the applicability of the act to the subject matter first should be determined by the National Labor Relations Board.

Mr. Justice Frankfurter, in a rather lengthy majority opinion, reviewed some of the jurisdictional problems and history involved in state-federal labor relations. He emphasized that the Court has been most concerned with avoiding areas of potential conflict of substantive law, legal remedy or administration. He acknowledged that in the past the Court had concentrated its attention on the subject matter of the dispute rather than the method of regulation or remedy. In stating the Court's holding, he explained that when a case or subject matter is even arguably subject to the

protection or prohibitions of the act, the state and federal courts must yield to the exclusive competence of the National Labor Relations Board. After stating this doctrine, Justice Frankfurter acknowledged that the National Labor Relations Board has no authority to award damages for this type of union activity and is limited to the issuance of injunctive relief; however, this did not alter the Court's rationale that allowing a state court primary jurisdiction to determine the legality of the subject matter, arguably protected or prohibited by federal law, may frustrate national labor policy.

The rationale of a four man concurring opinion written by Mr. Justice Harlan reveals a substantial difference in the approach to the doctrine of pre-emption. The concurring opinion reasoned that the state court damage award should be set aside because the union's activity may be protected under the National Labor Relations Act. On the other hand, the Justices disagreed with the majority opinion in that they saw no need to invoke the doctrine of pre-emption when it is clear that the activity involved is not protected by federal law. A fortiori, the four Justices believed that there is jurisdiction in the state court to issue a damage remedy when activity is specifically prohibited by both state and federal law without initial resort to the National Labor Relations Board. They were of the opinion that the reason for the existence of concurrent jurisdiction rests upon the fact that the remedy provided in the federal act for some types of violations is inadequate. In these circumstances, the four Justices disagreed with the majority that there is any expression of congressional intent in the National Labor Relations Act to pre-empt the authority of the states to issue an effective remedy.

These comments of Justice Harlan strike at the root of the problem so far as the plaintiffs are concerned. His approach is more sympathetic to the necessity of having effective remedies available whenever there is no clear conflict with federal law. The need, at this time, for this approach becomes increasingly clear as one realizes the present sparsity and ineffectiveness of many of the National Labor Relations Board's remedial procedures. Justice Frankfurter on the other hand is more concerned with

33. The concept of "protected" activity refers to the job protection given to employees to engage in activities enumerated in § 7 of the NLRA (see note 75 infra). This concept is not intended to protect activities of employers or unions, as such, a distinction frequently overlooked. The rest of the act is designed to implement these employee rights. To that end, employees are protected against certain employer or union conduct enumerated in §§ 8(a) and (b) of the act which trespasses upon their employment rights or tenure.

The concept of "prohibited" activities refers to activities of employers or unions which are proscribed as unfair labor practices under §§ 8(a), (b) and (e). NLRA as amended by the LMRA § 8(a), 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1958); NLRA as amended by the LMRA § 8(b), 61 Stat. 141 (1947), as further amended by the LMRDA § 704(a), 73 Stat. 542 (1959), 29 U.S.C. § 158(b) (1958), as amended, 29 U.S.C. § 158(b) (Supp. II, 1961); NLRA § 8(e) added by the LMRDA § 704(b), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. II, 1961).

having a unified and centralized system of administration which will minimize the possibility of conflicts. This writer is of the opinion that under the present federal administrative procedures the Court's majority opinion will not discourage wrongdoing and will not contribute to the effective administration of the law, although it will reduce conflicts.

It should also be observed that the Garmon case, all-embracing as its language is, nevertheless leaves questions unresolved. For example, does the Garmon case bar a state court action for damages after the National Labor Relations Board has ruled that the subject is not protected by the federal act? It would appear that the state court jurisdiction may vest after the National Labor Relations Board has first declared that the subject matter is not within the protection of the federal statute. The matter is debatable. But it is obvious that there is state court jurisdiction if the subject matter of the case is neither protected nor prohibited (ergo: not at all covered) by the federal act. However, since the case may "arguably" be within the coverage of the federal act, the state court may require the plaintiff to first obtain a National Labor Relations Board declaration as to whether or not the Board has jurisdiction over the subject matter. Clear as this is, procedurally, there is no way of obtaining such an administrative determination without a full hearing on the merits. There is no procedure to advise parties as to whether or not the Board has jurisdiction over any particular subject matter. A hearing may take months before a decision is rendered and there is no assurance even that a hearing will be held.

If a cause of action concerns activity which arguably may be within the protection of the act (e.g., Justice Harlan thought that minority picketing under the facts of the Garmon case may be protected by the federal act), there is no procedure under the National Labor Relations Act whereby any type of opinion or decision can issue stating whether or not the activity is protected. This is due to the fact that unfair labor practice procedures and hearings (as the name implies) are utilized only when the Office of the General Counsel believes that there is substantial evidence of the commission of unfair labor practices, i.e., prohibited conduct. It is necessary to determine as a preliminary issue whether or not employee activity is protected in order to reach the ultimate issue as to whether or not the employer or union has engaged in prohibited conduct which interfered with the protected employee activity. However, if there is no substantial evidence of an unfair labor practice, there will be no hearing and no declaration as to whether the activity at issue is or is not protected. In such a case there can be no test for the determination of state court jurisdiction.

This writer is of the opinion that one or more Justices of the present five-man majority of the Supreme Court will reconsider the wisdom of the Garmon case and find points on which to distinguish it. This would most
likely occur when the Board’s procedures, as applied to the facts of a particular case would preclude jurisdiction in both the Board and the state courts, thus preventing any effective remedy.

Oddly enough, the same type of fact pattern as existed in the Garmon case again came before the Court for review in an entirely different context. In the Curtis Brothers case,35 there was a minority union picketing for recognition, and the question presented was whether or not the National Labor Relations Act prohibited this conduct. The Board held that this picketing was prohibited. The Supreme Court, not relying on the Board’s expertise as espoused in the Garmon case, held that the Board had improperly extended its jurisdiction to embrace and prohibit that which Congress had not prohibited.

Although the Curtis Brothers decision does not speak in terms of pre-emption, it is appropriate to discuss this case in that connection, because the scope of subject matter which is pre-empted is, of course, co-extensive with the scope of the protection and prohibitions of the act. In particular the Curtis Brothers case held that the Board does not have authority or discretion to prohibit strikes or picketing of which the National Labor Relations Board does not approve. The Board has no right to prohibit picketing even when there was, in the Board’s judgment, no justification for the use of economic pressure. The Court held that to render a strike or picketing unlawful, the objective sought to be accomplished by the use of the economic pressure must be an objective specifically proscribed by the statute.

B. Florida Cases

The most recent applications by Florida appellate courts of the doctrine of pre-emption are found in Wood Lathers Union v. Babcock Co.36 and International Ladies Garment Workers Union v. Scherer & Sons, Inc.37

The Babcock case involved picketing of model homes that had been built by a non-union contractor.38 The petitioner contended that the union sought to have the contractor require its employees to join the union and that this request if acquiesced in would result in a violation of the state right-to-work law.39 The court held that since the picketing was unaccompanied by violence and because the subject matter of the case was arguably an unfair labor practice under the National Labor Relations Act, the state court had no jurisdiction to issue injunctive relief.

35. NLRB v. Drivers Union, 362 U.S. 274 (1960). [This case is referred to as Curtis Brothers.]
36. 132 So.2d 16 (Fla. App. 1961).
37. 132 So.2d 359 (Fla. App. 1961).
In the Scherer case, the appellate court vacated a temporary injunction issued against the enforcement of a contract between a union and apparel manufacturers which provided that the manufacturers could not purchase from non-union suppliers. The court held that although the contract was a violation of Florida law, the state jurisdiction had to yield because it appeared that the activities complained of constituted an unfair labor practice under the National Labor Relations Act.

C. Jurisdiction: Interstate Commerce

Prior to the passage of section 701 of the Labor-Management Reporting and Disclosure Act, there existed a jurisdictional "no-man's land" in labor cases. This phrase refers to a situation in which no injunctive relief would issue from state or federal authorities to remedy a legal wrong. The situation existed in those labor cases such as the Garmon case wherein the employer's business affected interstate commerce, but not in sufficient volume to meet National Labor Relations Board's standards for the exercise of its injunction. In these cases, jurisdiction over the employer's business was, nevertheless, considered to be pre-empted by the federal government to the exclusion of the states. No injunctive relief was available from any forum, and the dispute was said to be in the jurisdictional "no-man's land." The doctrine was applied in the Florida cases of International Hod Carriers v. Heftler Constr. Co. and International Bhd. of Elec. Workers v. Shires.

The situation fortunately has now been remedied. Under section 701 of the Labor-Management Reporting and Disclosure Act, the state court has jurisdiction over labor dispute cases affecting interstate commerce so long as the business does not meet the Board's standards for the exercise of its jurisdiction. To assist any state court or the parties to a state court proceeding to determine whether the business meets the Board's standards for the exercise of its jurisdiction, the Board has now established an advisory opinion procedure which may be invoked by the parties or by the state court. Thus, there is now a provision which enables the determination of the question of whether the employer is engaged in a business of adequate volume to effectuate interstate commerce jurisdiction. However, there is still no expedient procedure available for a determination as to whether the subject matter is within the Board's jurisdiction.

40. See NLRA § 8(e), added by the LMRDA § 704(b), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. II, 1961) which deals with this type of agreement.
41. FLA. STAT. § 542.05 (1961).
43. 116 So.2d 30 (Fla. App. 1959).
44. 123 So.2d 259 (Fla. App. 1960).
III. Union Security

Through the years employers and unions have each developed contractual clauses designed to protect what each considers to be in need of protection; each developed clauses designed to preserve or obtain recognition of that which was in their self-interest. In the case of such union clauses, this article uses the trade parlance term "union security." The term refers to clauses which affect the union's authority over the job or the employees. In this sense, this section includes case law and statutory developments on:

(A) Hot Cargo, Union Label and Subcontracting
(B) Hiring Halls
(C) The Right To Work and The Agency Shop.

A. Hot Cargo, Union Label and Subcontracting

Needless to say, a union's security or power is materially enhanced if a second union working for a secondary employer has the right to refuse to handle goods coming from or going to the primary employer. This is a form of secondary boycott. However, many employers when negotiating their collective bargaining agreements had agreed (and the agreement was not an unfair labor practice) to include a hot goods, struck goods, or hot cargo clause which gives the secondary union just such a right. This was one of the problems that Congress wished to correct in passing section 704(b) (commonly referred to as the "hot cargo section") of the Labor-Management Reporting and Disclosure Act of 1959.47

Similar in purport to the "hot cargo provisions" are the union label clauses which enable the union to have the support of a second union, at a secondary employer's premises, to assist in the establishment of union standards or demands with a primary employer. These clauses exclude from the work content of employees of the secondary employer any work on goods which do not contain a union label.

The maintenance of union standards is also accomplished through subcontractor clauses. These are clauses which permit the primary employer to subcontract work only to other employers who follow union standards.

Each type of clause deals with a very different subject and yet each uses what is essentially the same idea. In each case, the employer's authority

Section 704(b) was an amendment to the NLRA which established § 8(e). 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. II, 1961). This section is also referred to in §§ 8(b)(4)(A) and 10(l) of the NLRA (amended by the LMRDA §§ 704(a), (d), 73 Stat. 542, 544 (1959), 29 U.S.C. §§ 158(b)(4)(A), 160(l), (Supp. II, 1961)) and deals with secondary boycotts and injunctive relief. The section is intended to close up this "loophole" in the statutory design to prohibit secondary boycotts.
to assign, take in, or give out work is restricted. In other words, the common
denominator of hot cargo, union label and subcontracting clauses is that
they, in different ways, entail an agreement between an employer and a
union which limits the parties with whom the employer may do business.
Section 704(b)\(^{48}\) contains language broad enough to cover all of these
situations.\(^{48}\)

The section provides that it is an unfair labor practice for an employer
and a labor organization to enter into an agreement, express or implied,
under which the employer ceases or refrains, or agrees to cease or refrain
from handling, using, selling, transporting or otherwise dealing in the
products of any other employer or to stop doing business with any other
person. As a result of this section it is now illegal for a union to demand
a contractual clause requiring that subcontracting work only be given to a
union shop, because that would require the employer to agree to cease or
refrain from doing business with other (non-union) employers. A strike
to compel the employer to agree to such a clause would be a strike for an
unlawful objective and therefore be enjoinable. The intended effect of
this new section is to remove these clauses from the area of collective bar-
gaining except in those industries specifically exempted by the proviso.\(^{50}\)

A limited exception is provided for agreements made in the construc-
tion industry. The proviso states that the prohibitions of this section do
not apply to agreements in the construction industry relating to contracting
or subcontracting of work “to be done at the site.” Therefore, it would
be proper for a general contractor to agree to use on the project only
subcontractors who have complied with the terms of the agreement between
the general contractor and the unions. On the other hand, it would be
illegal to agree that only goods containing a union label will be purchased
since these goods are fabricated off the site. These goods do not fall within
the proviso which is limited to the contracting or subcontracting of “work
to be done at the site.”

A further proviso contains a similar exception for agreements made
in the apparel and clothing industry in which the employers are working
on the same goods, or if they are working on the same premises or form an
integrated process of production.\(^{51}\)

\(^{48}\) See note 47 supra.
\(^{49}\) In a recent decision, the reconstituted Board has indicated that it will examine
the scope of prohibition of § 8(e) (NLRA § 8(e), added by the LMRDA § 704(b), 73
majority of the Board found no justification in the statute for the generalization of a trial
examiner that § 8(e) outlawed not only traditional hot cargo clauses in the transportation
industry, but also all similar clauses that “directly or indirectly required an employer to
cease doing business by contract, subcontract, or in any other manner, with any other
\(^{50}\) The Lithographers Union, 130 N.L.R.B. 985 (1961).
\(^{51}\) See International Ladies Garment Workers’ Union v. Scherer & Sons, Inc., 132
B. Hiring Halls

The use of a hiring hall takes on many forms, although generally it is a location maintained by a union wherein unemployed persons register for referrals to jobs. It has been the subject of much comment and criticism—favorable and unfavorable. A hiring hall serves a particular use in short-term employment industries (such as building and maritime) in that there is a central place to find jobs and employees. This is particularly useful to an out-of-town employer coming to an area in search of a large number of craftsmen. At the same time the system enables the union to have a measure of control over job opportunities which materially helps insure adherence by members to the union’s rules and standards.

Although hiring halls presumably operate for the benefit of union members who support them, and therefore operate upon a basis which is discriminatory, the congressional history nevertheless indicates that hiring halls are not intended per se to be proscribed as a means available to an employer to obtain help.

To effectuate the purposes of hiring halls, unions believed it necessary to negotiate clauses requiring employers to use the hiring hall as an exclusive source of employees. This, of course, would preclude an employer from hiring job applicants who applied directly to the employer. In such cases the employer had to refer the job applicant (who might not be a union member in good standing) to the union to register, qualify and obtain a referral. It therefore became necessary in an exclusive hiring hall arrangement for the union to register and refer members and nonmembers alike without discrimination. Although this obviously was a form of encouragement to join or maintain membership in the labor organization, it is to be noted that encouragement (or discouragement) of membership in a labor organization is not an unfair labor practice unless it is accomplished by means of discrimination. Notwithstanding this principle, the National Labor Relations Board was of the view that unfettered control by unions over hiring halls would lead to discriminatory practices. It therefore held that hiring hall arrangements would be legal only if they contained adequate safeguards to assure that the union’s authority would not be abused. Thus, the Board required in the Mountain Pacific, Seattle & Tacoma Chapters, A.G.C. case that exclusive hiring arrangements include explicit provisions that: (1) the selection of applicants for referral shall be without regard to union membership requirements; (2) the employer shall retain the right

So. 2d 359 (Fla. App. 1961) wherein the Florida Third District Court of Appeal applied the doctrine of pre-emption to a fact pattern involving the exception to § 8(e) of the NLRA (see note 40 supra). See text accompanying note 37 supra.

to reject any applicant referred; and (3) the parties shall post for the applicant's inspection all provisions relating to hiring, including these safeguards.

For about three years, the Board sought to enforce these standards upon employers and unions who had hiring hall arrangements. The principal enforcement method used by the Board was its remedy developed in Brown-Olds. As distinguished from the Board's usual remedy in discrimination cases, which was to award back pay to the one or few complainants who were proven to have been discriminated against, the Board ordered, in the Brown-Olds remedy that the employer and/or union (whichever was the respondent) pay back all the dues and fees collected pursuant to the unlawful hiring hall contract which were collected starting from the period of six months prior to the filing of the charges.

The Supreme Court on the same day issued two decisions, one rebuffing the Board on its Mountain Pacific doctrine and the other on its Brown-Olds remedy.

The requirement by the Board that hiring hall contracts include the Mountain Pacific safeguards before the agreement would be considered lawful was held by the Court to be without the Board's authority; by engaging in this practice, the Board was legislating. Since congressional history shows that hiring halls were not per se illegal, the Board could not embroider requirements, which Congress did not intend, onto hiring hall agreements. Furthermore, to prove unlawful discrimination the government must supply specific evidence of a purpose, motive or intent to discriminate or supply sufficient evidence warranting a reasonable inference of such illegal purpose, motive or intent and further show that the purpose of the discrimination is to encourage or discourage union membership.

In the same vein, the Court thought that the Brown-Olds remedy was punitive, rather than remedial and therefore beyond the authority of the Board. And again, the reason why the Board exceeded its authority was related to a lack of evidence. Specifically, the Court stated that there was no evidence that monies which were to be reimbursed to the members were coerced by or resulted from the illegal practice in the case. There was no evidence that the employees were coerced into joining or were kept from quitting the union because of the illegal arrangement. The Court reasoned that in circumstances in which the proposed remedy is not related in cause

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54. United Ass'n of Journeymen & Apprentices of Plumbing, Local 231, 115 N.L.R.B. 594 (1956). [This case is referred to as Brown-Olds.]
57. Local 60, Carpenters Union v. NLRB, 81 Sup. Ct. 875 (1961).
and effect nor in financial value to the unfair labor practice involved, the remedy is punitive and beyond the Board's authority.\(^{59}\)

C. The Right to Work and The Agency Shop

The substantive law issue in Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n,\(^{60}\) presently upon review before the Florida Supreme Court, is whether or not the Florida right-to-work provision\(^{61}\) proscribes any agreement which requires an employee, as a condition of employment, \textit{either} to join the union and pay initiation fees and dues \textit{or else} not to join the union, but nevertheless pay an amount of money presumably the equivalent of dues and fees. A clause providing for this arrangement is called an "Agency Shop" clause.

The clause is resorted to by unions in Florida and in some other right-to-work states because in these states employment cannot be conditioned upon membership in a labor organization. More specifically, section 12 of the Declaration of Rights of the Florida Constitution provides:

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.

It is to be noted that Florida was the first state to pass a right-to-work law, the constitutional amendment having been ratified in 1944. Florida's choice of language was terse. As other state legislatures thought about the problem, they embellished upon the basic idea of the right-to-work statute and enumerated in more detail what was prohibited. The distinction in language between subsequent statutes of other states which prohibit the conditioning of employment upon the compulsory payment of money as well as membership in a union, and the language of the Florida statute may be a distinction in scope of prohibition; on the other hand, the distinction in language may merely be the result of more careful draftsmanship which comes after the passage and criticism of original legislation.\(^{62}\)

Obviously, the right-to-work requirement can be interpreted merely to

\(^{59}\) Local 60, Carpenters Union v. NLRB, 81 Sup. Ct. 875 (1961).
\(^{60}\) Fla. 3d Dist. Ct. App. No. 61-7, Sept. 14, 1961. The court on motion of the appellee entered an order staying its mandate and transferring the cause to the Supreme Court of Florida, it having been made to appear that the supreme court had original appellate jurisdiction. The order further noted that if the supreme court takes jurisdiction, then the mandate shall stand vacated without further order.
\(^{61}\) Fla. Const. Decl. of Rights § 12.
\(^{62}\) See, \textit{e.g.}, UTAH CODE ANN. § 34-16 (Supp. 1961).
bar conditioning or abridging employment upon literal “membership or non-membership,” or it can be interpreted in a broader fashion to bar conditioning or abridging of employment upon factors directly or indirectly related to membership or nonmembership, such as in the case at bar, the payment by nonmembers of agency shop fees. It was the broader approach which was taken by the Florida Third District Court of Appeal in its 1961 decision.63

In a different, but interesting context, the National Labor Relations Board has had several opportunities to interpret the meaning of the word “membership” and in each case gave it a broad interpretation.64 One of the reasons for this was that the congressional history of the Taft-Hartley Act shows that when the act says that employment can be conditioned upon membership in a labor organization,65 what Congress really intended as the condition was not literal membership, but rather the tendering of uniform and reasonable initiation fees and periodic dues. This interpretation followed from the fact that the federal act and its congressional history reveal an acceptance and adoption of the unions’ “free rider” argument.

The free rider argument should be explored because it is built upon a premise which is binding upon unions in Florida and in all other states notwithstanding right-to-work laws.

The free rider argument starts from the legal premise that under federal law the union chosen by a majority of employees is the exclusive representative for all the employees in the unit66 and must bargain for all the employees without discrimination based upon factors of membership or nonmembership. The union argument proceeds to reason that since the law requires that the benefits of collective bargaining extend to all employees in the unit and that since the union’s expenses are incurred for the benefit of all employees, it is only fair that all employees defray the expenses; that those employees who do not help defray the expenses are looking for a “free ride” and unfairly cast an economic burden upon the union members.

Congress in 1947 accepted the argument and gave the exclusive majority representative the right to compel support from all employees within the collective bargaining unit.67

Congress at the same time that it adopted the “free rider” logic into the federal act also provided that the states have a right to establish their

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63. See note 60 supra.
64. General Motors Corp., 133 N.L.R.B. No. 21 (Sept. 29, 1961).
own law (that is to say, the issue is not pre-empted) on this subject. Specifically, section 14(b) of the Taft-Hartley Act provides:

Nothing in this Act 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.

Under the encouragement of section 14(b) there are right-to-work laws in nineteen states. The argument in support of these statutes places more of a premium upon individual rights and gives less weight to the rights of the group (presumably a majority group). The argument presumes that the individual’s rights to avoid compulsory association should be paramount to group rights arising out of collective bargaining. The argument proceeds to reason that the union as a majority representative has legal responsibilities and costs that it and its members freely and voluntarily assumed; that the concept of majority rule contained in the federal act should not be used to involuntarily cast upon the minority a cost burden that they have not desired nor chosen to assume; that the idea of the non-joiner reaping benefits is a speculative idea since there may or may not be benefits derived; and finally that the individual should have a legal right to work without having to extend support by membership, money, or in any other way to an organization which he may oppose.

The underlying presumption of our federal statute is that the national economy will be improved if workers are protected in their rights to engage in collective bargaining. To effectuate this end, the federal law subordinates individual rights when they clash with those principles necessary to collective bargaining; yet, at the same time there are some individual rights which are preserved. The area for the preservation of individual rights is resolved on a case by case basis by the exercise of judicial discretion based upon many factors including the language of the statute and the intent of the legislature.

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69. This argument presumes that employees who do not want to pay for collective bargaining are only those who are opposed to the union. This is not necessarily so. Frequently the desire of an employee not to pay for collective bargaining is the result of the fact that he cannot afford to pay out any money that he is not legally obligated to pay; and this type of employee may well have voted for or otherwise helped bring in the union.
71. Note that the employee has an individual and qualified right to refrain from concerted activity or collective bargaining and a similarly individual and qualified right to present his own grievances to the employer. NLRA as amended by the LMRA §§ 7, 9(a), 61 Stat. 140, 143 (1947), 29 U.S.C. §§ 157, 159(a) (1958). Note also the distinctions drawn by the United States Supreme Court between individual employee rights vis-a-vis union rights under collective bargaining agreements in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).
Insofar as the language of the Florida Constitution is concerned, the proviso, it can be argued, prohibits any construction of it which would prohibit employees from bargaining collectively through their union for a clause requiring agency fees from nonmembers. The contention would be that to remove this subject matter from the scope of collective bargaining would be an abridgement of the employees' collective bargaining rights and therefore an expressly prohibited construction and extension of the constitutional right-to-work provision.

On the other hand, if the probable intent of the draftsmen and state legislators who advocated and passed this legislation is given more weight than the exact meaning of each word, including the limitations of the proviso, then it can be argued that the agency shop arrangement is within the contemplated and intended meaning of the word "membership" and therefore prohibited by the statute.

The Florida Supreme Court will have an opportunity when interpreting the Florida statute to clarify the public policy of this state. It should be recognized that each side of the issue has equity and logic, and that indeed is what makes the issue difficult for judicious decision.

IV. STRIKES, PICKETING AND BOYCOTTS

A. Picketing for Organization or Recognition Purposes

1. CURTIS BROTHERS

The importance of the Supreme Court's holding in the Curtis Brothers case is that it declared that the Board has no discretion or authority to proscribe peaceful picketing or strikes which are not otherwise expressly proscribed.

The exact question presented to the Court was whether peaceful picketing by a union, which did not represent a majority of the employees, to compel recognition as the employees' exclusive bargaining agent was conduct which restrained or coerced the employees in the exercise of rights guaranteed in section 7, and thus an unfair labor practice under section

72. "[P]rovided, 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." FLA. CONST. DECL. OF RIGHTS § 12.
73. Bills were introduced in the Florida Legislature (S.B. 891, H.B. 2023, 1961 Sess., Fla. Legislature) designed to spell out the public policy of the state and implement the right-to-work legislation. The bills died in committee.
74. NLRB v. Drivers Union, 362 U.S. 274 (1960). [This case is referred to as Curtis Brothers.]
75. "Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except
8(b)(1)(A) of the Taft-Hartley Act.\textsuperscript{78} The following are the background facts: the collective bargaining negotiations were followed by a strike during which replacements were hired; a National Labor Relations Board election was held and the picket line withdrawn after the union lost the election twenty-eight to one; another picket line was subsequently established with signs containing language addressed to the public and to the employees. Notwithstanding the purported informational and organizational purpose of the picketing, the Board concluded that the real purpose of the picketing was to compel recognition. The Board entered a cease and desist order.\textsuperscript{77}

After the Supreme Court granted certiorari, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 which added the new section 8(b)(7) to the National Labor Relations Act\textsuperscript{78} covering this type of a problem. The Board contended in its argument to the Court that the new section 8(b)(7) \textit{supplemented} the power already conferred by section 8(b)(1)(A).

The Board argued, in effect, that picketing causes economic harm to the employer; that when the employer's business is thus harmed, it results in a threat to the continued employment security of the employees and therefore picketing constitutes an economic restraint and coercion upon employees. The Board had to reason further, however, before concluding that the restraint and coercion were the type proscribed by section 8(b)(1)(A). The Board went on to argue that since the purpose of the picketing was to cause the employer to grant recognition to a minority union, it sought to have the employer engage in an unlawful practice which would have deprived employees of their statutory right to be represented by a representative of their own choosing and of their right to refrain from the exercise of this and other rights enumerated in section 7 of the act. In these circumstances, the Board contended, there was no legal justification for the economic pressure directed against the employer by the picketing; \textit{ergo}, the picketing was in violation of section 8(b)(1)(A).

The Board's construction of section 8(b)(1)(A) if upheld, would have left it with considerable discretion to outlaw those union practices which involve economic pressure and which in the Board's judgment sought


\textsuperscript{77} 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958). This section provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . ." 

\textsuperscript{78} Teamsters Union, 119 N.L.R.B. 232 (1957).

to accomplish objectives which were contrary to national labor policy as understood and construed from the framework of the act generally. It would have given the Board an authority to fill out the details which Congress found it most difficult to do. The labyrinth of factual patterns which might be spun by different unfair labor practices can never be effectively and fully dealt with unless the administering authority, be it the Board or a labor court, has wide discretion.

Although the Supreme Court acknowledges the Board's authority in this regard insofar as construing certain parts of the law are concerned, the Court pointed to the congressional history and to section 13 of the statute and concluded that the Board had no authority to outlaw lawful strikes or picketing. The Court stated that section 8(b)(1)(A) gave the Board no authority to limit peaceful picketing even if for objectives which it thinks should be unlawful, and that the Board's authority to interfere with, impede or diminish the right to strike or to affect the limitations or qualifications on that right exists only when this authority is specifically provided.

The Court then went on to point out that the subsequently enacted section 8(b)(7) covers the subject and contains specific provisions and limitations which will be the guideposts for determining the legality of peaceful picketing for purposes of recognition.

2. SECTION 8(b)(7)

The new section 8(b)(7) referred to by the Supreme Court in the Curtis Brothers case is intended to discourage an uncertified union from resorting to picketing as a method of forcing or requiring employees to organize or to compel an employer to recognize the union as the representative of the employees. However, in seeking to accomplish this objective Congress did not intend to prohibit, in certain circumstances, a union from picketing to advise the public truthfully (including consumers) that an employer does not employ members of, or have a contract with a labor organization. This latter type of picketing is frequently referred to as "informational picketing."

The section is susceptible to many and opposing interpretations. The Board decisions which previously issued are now being re-examined by the new Board members appointed by the present administration.

79. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualification on that right." LMRA § 13, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958).
80. See note 78 supra.
81. International Hod Carriers' Union, 130 N.L.R.B. 587 (1961) holds that picketing for recognition is prohibited by § 8(b)(7)(C) (NLRA § 8(b)(7)(C) added
One of the difficulties in interpreting and applying the section arises from the fact that even informational picketing has as part of its objective, at least in some degree or in the long run, obtaining recognition from the employer. This is true except in the rarest of situations, e.g., grudge picketing designed not to correct that which is being complained of by the picketing, but rather to cause economic ruin. Most cases in which the language on the picket sign is "informational" rather than directed toward organizational or recognition purposes, have as part of the fact pattern some evidence to indicate that if the union were granted recognition and a contract, the picketing would be terminated.

The type and quantum of evidence which will be required to prove the prohibited or privileged status of the picketing will have a tremendous bearing upon whether the congressional intent will be effectuated.

When the picketing is for the purpose of forcing employees to organize or to compel the employer to recognize the union as the representative of the employees, this picketing is unlawful unless a petition is filed within a reasonable time; in this event an "expedited" election procedure is provided. The intent of the section is to provide the employer with a quick method of determining whether or not he should recognize the union. The section is not designed to encourage unions to picket so as to get a faster election than is provided for through the usual election procedures.

To appreciate how the statute is designed to discourage picketing for recognition or organizational purposes, reference should be made to the impact of the Board's rules under section 9(c)(3) concerning eligibility to vote in elections which determine union representation.

Section 9(c)(3) is used in any economic strike situation including those which occur as a result of, or as a part of, section 8(b)(7) picketing. In these cases, the general rule is that the employer has the right to hire

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by the LMRDA § 704(c), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7)(C) (Supp. II, 1961)) even though the union represents a majority of the employees even though the employer engaged in unfair labor practices. See also Chefs Union, 130 N.L.R.B. 543 (1961).

Local Joint Executive Bd. of Hotel & Restaurant Employees Union, 130 N.L.R.B. 570 (1961) holds that picketing of the public entrance of a cafeteria with signs asking the public not to patronize does not come within the "publicity" exception because the union also had recognition as an object or purpose of the picketing.

Teamsters Union, 130 N.L.R.B. 558 (1961) holds that picketing to force the employer to bargain with the union is a violation of § 8(b)(7)(C) even assuming that recognition had been granted.

82. 29 C.F.R. §§ 102.73-82 (Supp. 1961).


84. The term "economic strike" designates a strike not caused or prolonged by unfair labor practices of the employer. It is to be distinguished from an unfair labor practice strike (wherein the employer may not on a permanent basis hire replacements for the strikers).
permanent replacements for the strikers. The replacements usually will vote against the union. The strikers, on the other hand, after putting up with the hardships of the strike may not be around to vote. The striker will not be eligible to vote if he obtains other permanent employment or if his job is abolished, or if he has been discharged for nondiscriminatory reasons.\(^5\) The determination of some of these eligibility issues is made through the Board's challenged ballot procedure, and in that respect the "expedited" election procedure may be prolonged. However, if the employer can resist the picketing pressure for the period required to get a final determination from the election procedures, the frequent result of section 8(b)(7) cases will be that the minority union will be shown to have represented merely a minority, and the majority union may have lost its majority because of the eligibility of the replacement employees.

3. **Florida Law**

The Florida labor law covering picketing is found in a line of cases cited and applied in *Fontainebleau Hotel Corp. v. Hotel Employees Union*.\(^6\) Although this state law will have limited application in light of the subsequently developed doctrine of pre-emption, it is nevertheless interesting to note the entirely different approach taken by the state law vis-a-vis the federal approach found in section 8(b)(7). For example, the state law does not distinguish between "informational" picketing and other types; nor is any election procedure available. The state law provides that picketing is unlawful unless certain conditions precedent have been fulfilled:

1. The union must, prior to the picketing, establish to the employer by evidence of a substantial character that it represents a number of his employees.\(^7\)
2. A union must, prior to picketing, advise the employer of the object to be accomplished by the picketing and there must be an honest and forthright attempt by the union to bring about negotiations.
3. There must be a bona fide labor dispute between the employer and his employees.
4. A union must, prior to picketing, afford to the employer a fair opportunity to engage in negotiation.

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86. 92 So.2d 415 (Fla. 1957), rev'd on other grounds sub nom., Hotel Employees Union v. Sax Enterprises, 358 U.S. 270 (1959).
87. Language in *Fontainebleau* and the predecessor cases implies or indicates that Florida does not follow the doctrine of "exclusive majority representation" which is a cornerstone of federal labor law; however, the issue has not been squarely presented to the court.
In *Plager Bros. Brake Serv., Inc. v. Local 320, Int'l Bhd. of Teamsters*, the Third District Court of Appeal issued a "per curiam affirmed" opinion sustaining the refusal of the circuit court to issue a temporary injunction. The facts of the case, as set forth in the dissent of Judge Carroll, establish that the union did not comply with the conditions precedent to lawful picketing as laid down by the Florida Supreme Court in the *Fontainebleau* and predecessor cases. Of course, the lack of any opinion written by the majority makes it impossible to comment upon what rationale caused it to disagree with Judge Carroll. It is clear, however, that the law cited in the dissent is the ruling case law of Florida.

B. Secondary Boycotts

1. THE LOOPHOLE AND THE AMENDMENTS

The 1947 Taft-Hartley Act made it an unfair labor practice for a union to induce or encourage employees to strike when the objective is to force any employer to cease doing business with any other person. This prohibition is found in section 8(b)(4) which is commonly referred to as the secondary boycott section. The purpose of the section was to shield unoffending employers and others from pressures in controversies which were not of their own making. Notwithstanding this purpose, the only proscribed method of accomplishing the boycott was by inducement or encouragement of secondary employees to stop work. It was not unlawful for a union to threaten or coerce a secondary employer directly to cease doing business with the primary employer with whom the union had a dispute. This interpretation of the section flowed from a literal application of the statute. The interpretation, or the statute itself, contained this "loophole" which the 1959 amendment was intended to close.

The loophole was closed by providing that it is unlawful for a labor organization to threaten, restrain or coerce any person when an objective of this activity is to cause any person to cease doing business with any other person. The statute is much stronger in its application to union efforts addressed to employees to engage in secondary boycotts. The union need not go so far as to use means which may be characterized as a "threat, restraint or coercion." Specifically, the union cannot use, in the course of a person's employment, means which induce or encourage any stoppage of work to achieve a secondary boycott. On the other hand, a union is permitted to induce and encourage a secondary employer or his higher level

88. 121 So.2d 36 (Fla. App. 1960).
89. NLRA as amended by the LMRA § 8(b)(4), 61 Stat. 141 (1947).
supervisor\textsuperscript{91} to cooperate \textit{voluntarily} and cease doing business with a primary employer.

Concerning picket lines, it is to be noted that the current Board does \textit{not} construe the mere presence of a picket line at a secondary employer's premises to be an illegal inducement or encouragement of employees to make "common cause" with it and refrain from working behind it.\textsuperscript{92} But the Board has held such a picket line to be a prohibited form of coercion and restraint.\textsuperscript{93}

Concerning the union's right to appeal to the public, including consumers and union members, to boycott the primary employer's product, this boycott may not be accomplished by picketing at the secondary employer's premises. This picketing is expressly prohibited by a new proviso to section 8(b)(4). The proviso does, for reasons which may have involved constitutional considerations, conditionally permit other informational activity short of picketing such as the union's use of handbills, unfair lists, newspaper advertisements and radio broadcasts.\textsuperscript{94}

2. AT PRIMARY PREMISES

Union activity designed to accomplish a secondary boycott is prohibited by section 8(b)(4) even if the activity occurs at the primary premises, but this does not mean that any of the primary means which unions have traditionally used to press their demands on employers are prohibited.\textsuperscript{95} There must be an accommodation of the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."\textsuperscript{96} The Board has through the years made the accommodation by usually regarding the primary premises as a sanctuary so far as the legality of peaceful picketing was concerned notwithstanding the existence of an object to stop employees of secondary employers from doing their work.\textsuperscript{97}

\begin{itemize}
\item \textsuperscript{91} Certain words in section 8(b)(4)(i) of the NLRA, as amended by the LMRDA § 70(a), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(i) (Supp. II, 1961) indicate that a union cannot induce or encourage supervisors to stop work where an object is to force an employer to cease doing business with another employer. The indication arises out of the fact that a union cannot induce or encourage "any individual employed by any person" to stop work for a proscribed object. Literally, supervisors fall within the meaning of those words. However, the Board after examining the congressional history holds that such inducement or encouragement is unlawful only if addressed to a supervisor who is more closely aligned with rank and file employees than with management. Teamsters Union, 130 N.L.R.B. 1438 (1961).
\item \textsuperscript{92} Perfection Mattress & Spring Co., 129 N.L.R.B. 1014 (1961) (reversed in part by Upholsterers Union, 132 N.L.R.B. No. 2 (July 11, 1961)).
\item \textsuperscript{93} Upholsterers Union, 132 N.L.R.B. No. 2 (July 11, 1961).
\item \textsuperscript{94} Ibid.
\item \textsuperscript{95} N.L.R.B. v. International Rice Milling Co., 341 U.S. 665 (1951).
\item \textsuperscript{97} United Elec. Workers, 85 N.L.R.B. 417 (1949).
\end{itemize}
By contrast, the past two years reveal an increased emphasis on the "objective" behind union picketing rather than looking so much at the geography or premises involved. The new trend of thinking can be found in the McJunkin case which enunciated a "totality of effort" concept and the General Electric case which dealt with a "reserved gate."

It is problematical whether the reconstituted Board will adhere to the doctrine of the McJunkin case; however, unless and until the Board reverses the doctrine, the case constitutes an important interpretation of secondary boycott law which, in certain circumstances, declares primary picketing to be unlawful.

In the McJunkin case the Teamsters Union was not successful in organizing the employees of a pipe distributor. The union then resorted to various tactics which indicated to the Board that the "total efforts" at organizing the primary employees were through secondary boycott pressures. The union wrote letters to several trucking companies advising them of the dispute with the McJunkin Corporation and reminded the secondary employers of the hot cargo clauses in their contracts which provided that the secondary employees need not handle McJunkin's hot goods. Of the ten entrances to McJunkin's property, the union picketed only a trucking entrance not generally used by the primary employees. Employees of neutral truckers were told on three occasions by union representatives at the primary premises not to pick up or deliver and on one occasion these remarks occurred at the terminal of a secondary or neutral trucker.

The Board held the picketing at the primary premises unlawful, because the union's entire course of conduct was directed toward inducement and encouragement of employees of neutral employers not to handle McJunkin's goods. The Board stated if the totality of the union's efforts is intended to accomplish a proscribed objective (a secondary boycott) by inducement of secondary employees, then each particular inducement (including those that occurred at the primary premises), being a component part of that total effort, must be adjudged unlawful.

The "reserved gate" doctrine of the General Electric case is different from the McJunkin case because, inter alia, in the General Electric case there was a secondary employer on the primary premises and part of the primary premises was set aside for the exclusive use of the secondary

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98. Teamsters Union, 128 N.L.R.B. 522 (1960). [This case is referred to as McJunkin.]
100. The majority of the court of appeals refused enforcement of part of the Board's order and held that peaceful primary picketing and its normal incidents cannot be forbidden though the union has acted illegally elsewhere. Teamsters Union v. NLRB, 48 L.R.R.M. 2598 (1961).
employer. Specifically, General Electric reserved one of its five gates leading into the plant for the exclusive use of independent contractors, their employees and suppliers. Appropriate notices were posted. The independent contractors were doing a variety of tasks including construction on new buildings, installing and repairing of ventilation and heating equipment and general maintenance work. The striking union which represented General Electric's 7,000 employees nevertheless picketed all the gates including the reserved gate. The Board found the picketing of the reserved gate unlawful in that the union's object in picketing the reserved gate was to encourage employees of independent contractors to refuse to work and thereby cause their employers to stop doing business with General Electric.\footnote{In a later case the Board held that the reserved gate doctrine applied even where the gate had been set up after the picketing had started. Chemical Workers Union, 126 N.L.R.B. 905 (1960), overruling In the matter of United Elec. Workers, 85 N.L.R.B. 417 (1949).}

When the Supreme Court reviewed the case,\footnote{Local 761, Int'l Union of Elec. Workers v. NLRB, 81 Sup. Ct. 1285 (1961).} it held that the Board correctly interpreted the statute by limiting the picketing to gates other than the reserved gate. The Court approved these controlling considerations:

1. There must be a separate marked gate exclusively used by employees of neutral secondary employers.
2. The work done by the men who use the gate must be unrelated to the normal operations of the employer.
3. The work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing these operations.

The Supreme Court cautioned, however, that this doctrine cannot be used as an invasion on traditional primary activity of appealing to neutral secondary employees whose work aids the employer's everyday operations. It was on this latter point that the case was remanded, for the record showed some (but not how much) use of the separate gate by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric.

C. Jurisdictional Disputes

In 1947, the Congress wrote into the National Labor Relations Act section 8(b)(4)(D),\footnote{NLRA as amended by LMRA § 8(b)(4)(D), 61 Stat. 141 (1947), as further amended by the LMRDA § 704(a), 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(D) (1958), as amended, 29 U.S.C. § 158(b)(4)(D) (Supp. II, 1961).} commonly referred to as the jurisdictional disputes section. Its language is broad; specifically, it is an unfair labor practice for a labor organization to induce or encourage employees to strike when an object of this activity is to force an employer...
to assign particular work to employees in a particular trade, craft or class, rather than to employees in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

Congress further provided a preliminary step in section 10(k) which states that before passing on the unfair labor practice charge, the National Labor Relations Board must first "hear and determine the dispute," unless the parties "have adjusted or agreed upon methods of voluntary adjustment of the dispute."

Prior to the Supreme Court's decision in the Columbia Broadcasting System case, the Board normally confined itself in a section 10(k) hearing to determine whether the employer's assignment of the work violated any Board order, certification or collective bargaining contract. If there was no violation, the Board would sustain the employer's right to assign the work as he did by holding that the union was not entitled to strike or picket to force the re-assignment of disputed work. The Board however, would not make any affirmative award of the disputed work. Frequently, these 10(k) hearings determined nothing of any substantial value, for several reasons, including the fact that the disputed job frequently was completed by the time the 10(k) decision came down. In any event, the Board's approach assured the employer the right to make his own work assignment as long as he was not violating a Board certification or a collective bargaining contract. The Board's approach was repudiated by the Supreme Court in the Columbia Broadcasting System case.

The Supreme Court, in a rare unanimous opinion, held that the requirement of section 10(k) for the Board to "hear and determine the dispute" requires a decision that one or the other of the competing groups is entitled to the work in question and requires the Board to make an affirmative award of the work.

It is true that this forces the Board to exercise under § 10(k) powers which are broad and lacking in rigid standards to govern

105. NLRB v. Radio & Television Broadcast Eng'rs Union, 364 U.S. 573 (1961) [This case is referred to as Columbia Broadcasting System.]
106. Concurrent with the 10(k) proceedings, the NLRB may seek a United States district court injunction under § 10(l). NLRA as amended by the LMRA § 10(l), 61 Stat. 149 (1947), as further amended by LMRDA § 704(d), 73 Stat. 544 (1959), 29 U.S.C. § 160(l), as amended, 29 U.S.C. § 160(l) (Supp. II, 1961). Section 10(l) was the most forceful part of the Board's procedure in handling jurisdictional disputes. Quite apart from the Board procedures, the LMRA § 303(b), 61 Stat. 158 (1947), 29 U.S.C. § 187(b) (1958) provides for a private damage action which may be brought upon an §(b)(4)(D) type violation. (See note 103 supra.)
their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.107

The Columbia Broadcasting System case construes the statute to give the Board a broad power to arbitrate jurisdictional disputes. The potential effects of this case are profound and will most surely tax the Board’s wisdom.

V. COLLECTIVE BARGAINING (Tactics and Good Faith)

Through the years there has been much litigation concerning the methods and tactics employers and unions could legitimately use in collective bargaining to pressure the other into agreement. Although the Board has at different times condoned or condemned certain bargaining tactics of employers and unions, the Board’s authority in this field and its view of the government’s role in collective bargaining must be re-examined in light of the Supreme Court decision in NLRB v. Insurance Agent’s Int’l Union.108

The Prudential Insurance Company and the Insurance Agent’s Union were bargaining over the terms of a modification of an expired collective bargaining agreement. The union, in order to put economic pressure on the company, engaged in various activities, which in large measure were unprotected. The employees, among other things, refused to solicit new business, or to comply with reporting, clerical and other procedures and duties, reported late to offices, absented themselves from business meetings, and at times picketed and solicited customers’ signatures on petitions directed to the company. The good faith of the union’s conduct at the bargaining table was not questioned.

The Board held that the union, by resorting to these unprotected activities, was per se bargaining in bad faith. The court of appeals refused enforcement of the Board’s order, and the Board requested certiorari from the Supreme Court.

The Supreme Court thought that the Board took an erroneous view

of collective bargaining. The Court held that "there is simply no inconsistency between the application of economic pressure and good faith collective bargaining."109 This is true, even though the economic pressure tactics are unprotected or may be subject to public disapproval or are not traditional. The Board is not to be an arbitrator of the sort of economic weapons the parties may use. In determining whether or not an employer or union acts or bargains in good faith, the Board errs in inferring bad faith merely because of the use of on-the-job harassing tactics. The Court goes on to state that although the Board has the power to prohibit a stratagem or device to evade the policies of the act, even when the stratagem or device is not expressly prohibited, this was not the Board's approach in this case. It is clear here that the Board has moved into a new area of regulation which Congress has not committed to it.

Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.110

VI. ARBITRATION

Ever since the Supreme Court declared that the federal courts have jurisdiction, under section 301 of the Taft-Hartley Act,111 to order specific performance of arbitration agreements contained in collective bargaining contracts,112 litigants have increasingly been arguing about the extent of the court's authority to determine whether the underlying grievance or dispute, in each case, is arbitrable, and how far the court should inquire into the merits of the grievance to determine the issue.

The question was dealt with in two recent decisions of the Supreme Court.113 A third decision, issued on the same day, dealt with the enforceability and the requirements of the arbitrator's award.114 The Court held,

109. Id. at 494.
110. Id. at 489.
111. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, 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." LMRA § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).
in an opinion written by Justice Douglas,\(^{115}\) that in actions under section 301 for specific performance of agreements to arbitrate, the function of the courts should be limited to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by contract, and that the courts should not undertake to determine the merits of the grievance under the guise of interpreting the arbitration clause of the contract. The Court stated that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."\(^{116}\) The Court explained further that the courts have no right to weigh the merits of the grievance, or to consider whether there is equity in the claim or whether there is particular language in the contract that will support the claim; for it was the arbitrator's judgment, not the court's, that was bargained for in these matters.

The dissent of Justice Whittaker\(^{117}\) emphasized that the majority opinions written by Justice Douglas used broader language than was warranted and established new concepts of law; that rather than have presumptions in favor of the jurisdiction of the arbitrator to decide arbitrability, the test in ordering arbitration should be: Did the parties in their contract manifest by plain language their willingness to submit the issue in controversy to the arbitrator? If so, then the arbitrator has exclusive jurisdiction of the issue, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by an arbitrator of pretended powers actually never conferred.

A concurring opinion emphasized that the arbitration promise is itself a contract and that parties are free to make that promise as broad or as narrow as they wish, and that the wording of that promise determines whether the parties have agreed to arbitrate the particular dispute and also indicates the extent to which the courts may or may not make an examination into the merits.

There is no doubt that these Supreme Court decisions have contributed much to facilitate and expedite the arbitral process. However, in arguing a close case it should be relevant to point out that Justice Douglas' broad language is not supported by a majority of the Court.\(^{118}\)

\(^{116}\) Id. at 582-83.
\(^{117}\) Id. at 585.
\(^{118}\) Justice Black took no part; Justice Whittaker dissented, and Justice Frankfurter joined in the observations contained in the concurring opinion of Justices Harlan and Brennan.