Louisiana Law Review

Volume 18 | Number 1
The Work of the Louisiana Supreme Court for the 1956-1957 Term
December 1957

The Edge of No-Man's Land - A Definition of the Boundaries of State-Federal Jurisdiction Over Labor Relations

Fred W. Ellis

LOUISIANA LAW REVIEW

LOUSIANA STATE UNIVERSITY LAW SCHOOL

BATON ROUGE 3, LOUISIANA

Subscription per year $5.00 (Foreign $5.50) Single copy $1.25

VOLUME XVIII DECEMBER, 1957 NUMBER 1

COMMENTS

The Edge of No-Man's Land—A Definition of the Boundaries of State-Federal Jurisdiction Over Labor Relations

The regulation of labor relations in the United States since the enactment of the Wagner Act presents a history of expanded federal and decreased state jurisdiction. The recent case of *Guss v. Utah Labor Relations Board*[1] goes a step beyond prior juris-

1. 77 Sup. Ct. 598 (1957). Two other decisions, similar to and based upon the *Guss* decision, were handed down the same day. Amalgamated Meat Cutters v. Fairlawn Meats, 77 Sup. Ct. 604 (1957) and San Diego Bldg. Trades Council v. Garmon, 77 Sup. Ct. 607 (1957). In the *Guss* case, the Board had at first assumed jurisdiction and then, upon amending its standards, declined to proceed further. In the *Amalgamated* case, no effort was made to invoke the Board's jurisdiction, but it was assumed that the Board would have declined jurisdiction over the dispute. An effort was made to invoke the Board's jurisdiction in the *San Diego*

prudence in holding that a state may not regulate labor relations which fall within the jurisdiction of the NLRB, although the NLRB has declined to assert its jurisdiction.[2] The court based its holding on a finding that Congress intended Section 10(a) of the Labor Management Relations Act to be the exclusive means by which a state could regulate subject matter entrusted to the Board. Section 10(a) provides that the Board may cede jurisdiction to a state in certain cases if the state law is consistent with the corresponding provision of the federal statute.[3] Combined with the earlier action of the Board in raising its standards of eligibility for Board jurisdiction,[4] the result of the *Guss* case has been to create a vast no-man's land, free of regulation, federal or state. A major purpose of this paper is to define the edges of that no-man's land by tracing the boundaries of state and federal action. Because the extent of federal power is

case, but the Board dismissed the petition, apparently because the size of the business was too small to meet the jurisdictional standards.

2. The NLRB refused to proceed with the case because of a finding that the business was predominantly local in character, as defined by its revised jurisdictional standards. See NLRB Press Release of July 15, 1954 at 34 L.R.R.M. 75 (1954). The Court dealt with the case on the assumption that the Board's refusal was for "budgetary or other reasons," but intimated that the refusal was for policy reasons, which would bring the case more in line with Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947). That case invalidated state action on the grounds that the NLRB's refusal to certify foremen was a federal policy action and that state certification conflicted with the federal policy. The *Bethlehem* case specifically left open the question of how state powers would be affected when the NLRB's refusal was for "budgetary or other reasons." In *Guss*, the Court relied heavily on the *Bethlehem* case in determining congressional intent behind Section 10(a) of the Taft-Hartley Act, which was enacted shoftly after the *Bethlehem* decision. The Court's reasoning is open to attack insofar as it said that because Congress was aware of the *Bethlehem* case it therefore understood NLRB jurisdiction to be exclusive, even in cases where the NLRB had declined jurisdiction for budgetary or other reasons. In the first place, the *Bethlehem* case merely decided that the state action in question conflicted with federal policy action. Second, the opinion of the Court specifically declared that the case did not decide the question of a declination of jurisdiction by the NLRB for "budgetary or other reasons." "We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised." See 330 U.S. at 775. However, any defects in the reasoning of the *Guss* opinion were cured by the Court's reliance on a Senate Committee Report which plainly implied that Section 10(a) was the exclusive means by which a state might obtain jurisdiction over matters subject to the NLRB's jurisdiction. See 77 Sup. Ct. 598, 602 (1957); S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). An interesting attack on the *Guss* case has been made by a Michigan court. See 40 L.R.R.M. 2616 (1957). The Michigan court refused to decline jurisdiction in the face of the *Guss* case, on the grounds that in order to follow the *Guss* case, the court would have to deprive the plaintiff of property without due process of law. The state court pointed out that the Supreme Court had not passed upon this question in *Guss*, and that therefore *Guss* was not controlling. Other state courts have acquiesced in the *Guss* decision — i.e., Leathercraft Corp. v. Perry, 40 L.R.R.M. 2618 (1957).

3. The NLRB advised the Supreme Court in a brief *amicus curiae* that because of the consistency proviso, it has been unable to consummate any cession agreements with the states. 77 Sup. Ct. 598, 603 (1957).

4. Breeding Transfer Co., 110 N.L.R.B. 493 (1954); NLRB Press Release of July 15, 1954 at 34 L.R.R.M. 75 (1954).

well settled,[5] the more important problem is the extent of state jurisdiction. In view of the storm of dissatisfaction generated by the *Guss* case,[6] another purpose is to point out possible changes in the boundary lines of state-federal jurisdiction.

Basic Principles

The Constitution grants Congress a plenary power to regulate interstate commerce,[7] including the regulation of labor relations affecting interstate Commerce.[8] Whenever a conflict occurs between the congressional regulation of interstate commerce and state action, the supremacy clause of the Constitution causes the state law to fail.[9] However, where there is no direct conflict[10] or in a case where Congress has not exercised its power,[11] the question arises as to whether the federal power is exclusive or concurrent. The answer rests in the intent of Congress.[12] When Congress is silent as to its intent, the courts will determine whether the subject is national or local, and construe the silence of Congress to require exclusive federal jurisdiction over national subjects.[13] An area is national in nature when it requires uniform regulation.[14] An extension of this rule of interpretation holds that when Congress has so occupied the field as to require uniform regulation, the Congress intended its jurisdiction to be exclusive.[15] The application of these principles has resulted in prompt reversals by Congress in cases where the intent of Congress proved to be different from the intent attributed to it by the Supreme Court.[16]

5. Congressional power to regulate interstate commerce is plenary. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The NLRB's standards of eligibility for jurisdiction are in precise terms of dollar volume of interstate inflow or outflow. See note 4 *supra*.

6. Labor, management, state, and congressional leaders all agree on the need to change the effect of the *Guss* case. See 40 L.R.R. 5, 193, 256, 291 (1957).

7. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

8. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

9. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

10. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

11. H. P. Hood & Sons Inc. v. DuMond, 336 U.S. 525 (1949).

12. Cooley v. Port Wardens, 53 U.S. (12 How.) 299 (1851).

13. *Ibid.*

14. *Ibid.* In the *Cooley* case the Court found that there was no need for uniformity and therefore the state had concurrent authority.

15. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

16. Leisy v. Hardin, 135 U.S. 100 (1890), interpreted congressional intent so as to conclude that the states had no power to regulate interstate liquor traffic. Within a few months Congress promptly passed the Wilson Act, which reversed the effect of the decision. See also Whitfield v. Ohio, 297 U.S. 431 (1936) (congressional legislation reversed prior jurisprudence preventing state regulation of interstate commerce in prison-made goods); Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) (congressional legislation authorized states to regulate insurance companies engaged in interstate commerce).

The Effect of Congressional Regulation of Labor Relations

The Supreme Court has declared that the Wagner and Taft-Hartley Acts have not removed the authority of the states to restrain violence,[17] to regulate union security agreements,[18] and to provide damages for tortious conduct.[19] It is less certain, but presumably the states may also regulate harassing bargaining tactics[20] and enforce collective bargaining agreements.[21] Whenever state action would conflict with the federal statute[22] or where the subject is such that Congress intended the Board to have exclusive jurisdiction,[23] the state has no power to act. The earlier cases in which state action was declared invalid were based on findings of conflicts with the federal law.[24] But seeds of judicial concern over the necessity of uniform regulation, as expressed by way of dicta in cases which were decided on findings that particular state action conflicted with the federal law,[25] blossomed into an application of preemption principles, which attribute to Congress an intent to invest the Board with exclusive jurisdiction over the subject matter it is empowered to regulate.[26]

Permissible State Action

The first case dealing with the effect of the Wagner Act on the power of a state to act in labor disputes affecting interstate commerce recognized the power of a state to restrain violence.[27] The case dealt with mass picketing involving the threat or use

17. Allen-Bradley Local 1111 United Electrical Workers v. WERB, 315 U.S. 740 (1942).

18. Local 10, United Assn. of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953); Algoma Plywood and Veneer Co. v. WERB, 336 U.S. 301 (1949).

19. United Construction Workers v. Laburnum Construction Corp, 347 U.S. 656 (1954).

20. International Union, United Automobile Workers, AFL v. WERB, 336 U.S. 245 (1949), Mr. Justices Douglas, Black, Murphy and Rutledge dissenting.

21. But see Textile Workers Union v. Lincoln Mills, 77 Sup. Ct. 912 (1957). See text discussion to note 37 *infra*.

22. Hill v. Florida, 325 U.S. 538 (1945).

23. Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953).

24. Amalgamated Assn. of Street, Electric Ry. and Motor Coach Employees v. WERB, 340 U.S. 383 (1951); International Union of United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); La Crosse Telephone Corp. v. WERB, 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945).

25. Amalgamated Assn. of Street, Electric Ry. and Motor Coach Employees v. WERB, 340 U.S. 383, 389, 390 (1951) (dictum). Cf. Note, 11 LOUISIANA LAW REVIEW 470 (1951) which contains an interesting note on the *Motor Coach Employees* case.

26. Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953).

27. Allen-Bradley Local 1111 United Electrical Workers v. WERB, 315 U.S. 740 (1942).

of force. The Court held that the use of violence was not among the rights conferred or protected by the Wagner Act. Another area in which state powers have not been abrogated is the regulation of agreements requiring union membership as a condition of employment. Section 14(b) of the Taft-Hartley Act specifically declares that such union security agreements are not protected by the act when they are in violation of state laws. Prior to the inclusion of this provision in the federal statute, the Supreme Court had reached the same result through an interpretation of the Wagner Act. Section 8(3) of the Wagner Act provided that discrimination in hiring and firing by an employer due to compliance with a union security agreement was not an unfair practice. Because such agreements were neither protected nor prohibited by the act, the states could exercise jurisdiction.[28]

In 1954, the court held that states may provide for recovery of damages for tortious conduct because such action could not conflict with the federal statute due to the fact that Congress provided neither procedure nor remedy for tortious conduct.[29] Although Section 303 of the Taft-Hartley Act provides for the recovery of damages in federal courts for secondary boycott violations, the court reasoned that Congress did not intend to abolish all common law rights. Citing the statutory language "in any other court having jurisdiction of the parties,"[30] the Court suggested that even if the tortious conduct in question were a secondary boycott, Section 303(b) merely provided a uniform rule for recovery, consistent with either state or federal jurisdiction. Congress must have intended by the inclusion of such language that state courts should also have jurisdiction.

There is considerable doubt as to the power of the states to regulate sit-downs, "quickie" strikes, slowdowns, and other concerted harassing tactics that fall short of a conventional strike. The leading decision in this area, the *Briggs-Stratton* case,[31] holds

28. Algoma Plywood and Veneer Co. v. WERB, 336 U.S. 301 (1949). The case arose before the Taft-Hartley Act was enacted, but was decided after the passage of the act.

29. United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954).

30. Section 303(b) of the Taft-Hartley Act reads: "Whoever shall be injured in his business or property by reason of any violation of Subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, *or in any other court having jurisdiction of the parties*, and shall recover the damages by him sustained and the cost of suit." (Emphasis added.)

31. International Union, United Automobile Workers, AFL v. WERB, 336 U.S. 245 (1949), Mr. Justices Douglas, Black, Murphy, and Rutledge dissenting.

that the states may "mark the limits of tolerable industrial conflict in the public interest," a statement that seems inconsistent with other statements by the Court.[32] In the *Briggs-Stratton* case, Wisconsin's action in granting a cease and desist order against frequent, unscheduled union meetings during working hours was upheld by the United States Supreme Court on the ground that the activity was neither protected nor prohibited by the federal act. "Congress designedly left open an area for state control" and the "intention of Congress to exclude States from exercising their police power must be clearly manifested."[33] The Court arrived at this conclusion in the face of express language in the federal statute which clearly called for an opposite result. Section 7 of the Wagner and Taft-Hartley Acts protects the employees' right to engage in concerted activity for the purpose of collective bargaining. The right to strike, protected by Section 13, was interpreted as meaning the right to legally strike and the Court then presumed that the states could determine the legality of the strike or strike methods. This was done even though the language of Section 501(2) defines the word "strike" as including "*any* concerted slow-down or other concerted interruption of operations by employees." (Emphasis added.) The majority opinion circumvented this statutory language by declaring that Section 13 did not modify existing law as to the right to strike, but was merely placed in the statute to insure that the interpretation of the statute would not modify whatever right to strike might exist under other laws. Nothing in the legislative history was cited to support this opinion, except for a footnote quotation of a House Conference Report which accompanied the bill.[34] The report stated in substance that Section 7's protection of "concerted activities" did not extend to unlawful and improper concerted activities, but all of the references to such activities dealt with unlawful activities *as determined by the NLRB, not as determined by state authority.* Furthermore, the report made no reference to Sections 13 and 501(2), the language of which was directly in point and could not have been weakened by the contents of the report. The validity of the opinion is also questionable in that the conduct involved occurred

32. *Id.* at 253. But see International Union of United Automobile Workers v. O'Brien, 339 U.S. 454, 457 (1950) (dictum): "Congress occupied this field and closed it to state regulation." See also Amalgamated Assn. of Street, Electric Ry. and Motor Coach Employees v. WERB, 340 U.S. 383, 389, 390 (1951).

33. 336 U.S. 245, 253 (1949), quoting Allen-Bradley Local 1111, United Electrical Workers v. WERB, 315 U.S. 740, 749, 750 (1942).

34. *Id.* at 260.

before enactment of the Taft-Hartley amendments, which conceivably may have made the conduct a failure to bargain in good faith on the part of the union and subject to the exclusive jurisdiction of the Board under the Taft-Hartley Act. However, the Court stated that its opinion was based upon both the Wagner Act and the 1947 amendments, but it did not really consider the construction of the preceding sentence. In view of the closeness of the decision,[35] its logical fallacies and its inconsistency with the line of jurisprudence that places such great emphasis on the necessity of uniform regulation of labor disputes affecting interstate commerce, one would think that the case would have been overturned by now. However, in a case which presented such an opportunity, the Court at first granted and then withdrew certiorari.[36] Thus, doubts concerning the present validity of the decision are unresolved.

An area in which some states have regulated labor relations may have been preempted by a recent decision of the Supreme Court, which held that Section 301 of the Taft-Hartley Act, providing federal enforcement of collective bargaining contracts, creates federal substantive law.[37] The case involved an agreement to arbitrate. Having held that such an arbitration agreement is substantive federal law, the next logical step would be for the Court to declare that Congress has occupied the field for enforcement of collective bargaining agreements, and that the states have no power to act therein. Due to the emphasis the jurisprudence has placed on the necessity of uniform labor laws, it would seem that there is reason to conclude that Congress intended the federal jurisdiction to be exclusive. At least one state court has rejected this argument against its enforcement of a collective bargaining agreement.[38] Thus, until such time as the question is resolved by the federal courts, the states will very likely continue to consider the area as subject to state jurisdiction.

An interesting procedural problem has been handled by the Supreme Court in such a way that, while those state actions which have been preempted or which are in conflict with the

35. Justices Black, Douglas, Murphy and Rutledge dissented.

36. Textile Workers Union v. NLRB, 227 F.2d 409 (D.C. Cir. 1955), certiorari granted, 350 U.S. 1004 (1956), and later denied, 352 U.S. 864 (1956).

37. Textile Workers Union v. Lincoln Mills, 77 Sup. Ct. 912 (1957).

38. The New York Supreme Court has rejected the argument that the *Lincoln Mills* case meant that enforcement of collective bargaining contracts was preempted by Congress. *In re* Steinberg, 40 L.R.R.M. 2619 (1957).

federal law may be ultimately declared invalid, the state nonetheless can effectively, though perhaps illegally, take action. The Court has held that private parties cannot file actions in federal courts to have illegal state action enjoined.[39] Only the NLRB may file such an action, and if it chooses not to do so, the affected private litigants must follow the normal, time-consuming appeal channels to have the state action declared invalid in the federal courts. In many labor disputes where time is of the essence, immediate access to the federal courts is necessary as in the case of a state injunction against striking. Once the strike is broken, there is very little real relief that can be given on appeal by dissolving an injunction which has already achieved its purpose.[40]

State Action Invalidated Due to Conflict with the Federal Statute

In 1945, the provisions[41] of the Wagner Act which protected employees' rights to collective bargaining were interpreted as protecting these rights from interference by state governments. A state statute imposing requirements upon collective bargaining agents which carried the sanction of loss of status as bargaining representative was held to be an interference with the "full freedom" guaranteed by the Wagner Act in the selection of bargaining representatives.[42] State powers were curtailed even further by the 1947 *Bethlehem Steel* case.[43] The NLRB had refused to certify foremen as a bargaining unit or to exercise jurisdiction over them. The Supreme Court in effect considered this negative act as federal action. State action to the contrary in certifying a bargaining unit of foremen conflicted with the federal policy, thereby invalidating the state action. The 1949 case of *Lacrosse v. Wisconsin*[44] held that the state lacked jurisdiction even when the conflict with federal action was only potential. The Wisconsin statute provided a method of certifying craft bargaining units, whereas the federal statute left the matter to the discretion of the NLRB. Therefore, if the NLRB had

39. Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511 (1955).

40. This was pointed out in a strong dissent by Justice Douglas, Chief Justice Warren and Justice Black concurring in the dissent. *Id.* at 524.

41. 49 Stat. 449, § 7, 29 U.S.C. § 157 (1935).

42. Hill v. Florida, 325 U.S. 538 (1945).

43. Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947).

44. 336 U.S. 18 (1949).

jurisdiction, but had neither exercised nor refused to exercise it, there was nevertheless a potential conflict with federal regulation that would preclude state intervention. A 1950 case[45] indicated by way of dicta that Congress had so fully occupied the field of peaceful strikes and picketing that all state action was preempted, but the case really turned on a conflict between the state and federal provisions.

In cases where the Board has refused to prohibit an alleged unfair labor practice by finding that the facts did not constitute an unfair practice under the federal statute, a state may not act[46] because the subject matter of collective bargaining falls under the protection clause of the federal statute when there are no express prohibitory provisions.[47] Section 7 of the Taft-Hartley Act protects the right of employees to engage in concerted activities for the purpose of collective bargaining. It makes no difference that the state action is on grounds not specifically or directly intended to affect labor disputes, such as the violation of a restraint of trade statute.[48] Except in cases of violence,[49] it does not matter how great the interest of the state may be, nor how seriously endangered the welfare of its people may be.[50] By way of dicta in a case involving intervention in a labor dispute that threatened the interruption of vital public utility service, the Court stated that Congress intended that the jurisdiction of the Board should be exclusive in disputes affecting interstate commerce.[51] But the case actually turned on a finding that the state action conflicted with the federally protected right to strike.[52]

State Action Invalidated on Ground of Exclusive Federal Jurisdiction

In much of the jurisprudence commented upon above there ran a vein of judicial feeling that the regulation of labor disputes affecting interstate commerce is an area in which uniform

45. International Union of United Automobile Workers v. O'Brien, 339 U.S. 454 (1950).
46. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).
47. *Id.* at 478-80; United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956).
48. *Id.* at 480.
49. Allen-Bradley Local 1111, United Electrical Workers v. WERB, 315 U.S. 740 (1942).
50. See Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees v. WERB, 340 U.S. 383 (1951).
51. *Id.* at 389-90.
52. *Id.* at 398-99.

regulation is required. In some of the cases wherein state action was invalidated on findings of conflict with the federal statute, the Court, by way of dicta, declared that Congress intended to occupy the field exclusively.[53] Therefore, the 1951 case of *Garner v. Teamsters Union*[54] should have come as no surprise. The state statute was identical to the Labor Management Relations Act, precluding all possibility of finding a conflict in the substantive rules of law. The Court squarely held, for the first time, that Congress intended to vest the Board with exclusive jurisdiction over the subject matter entrusted to it by the Labor Management Relations Act. The Court reasoned that the diversity of tribunals attendant upon allowing a state to exercise concurrent jurisdiction would lead to a lack of uniformity and potential conflict, and that Congress could not have intended such a result. The *Garner* holding was strengthened by a later case in which it was held that the mere allegation that a federal right has been violated automatically deprives a state court of jurisdiction.[55] *Guss v. Utah* has extended the principle of exclusive federal jurisdiction even further, in that it holds that a state may not act even when the Board's jurisdiction is dormant and unexercised for budgetary or other reasons, except insofar as the Board may cede jurisdiction to the states under Section 10(a). Because *Guss* extends the principle established by *Garner*, one might think that the court would have relied upon *Garner* in its rationale of the *Guss* decision. However, the decision was based not upon *Garner*, but upon an interpretation of the legislative history of Section 10(a), which led to the conclusion that Section 10(a)'s provision, authorizing the Board to cede jurisdiction in certain cases to states when state law is consistent with applicable federal provisions, is the exclusive means by which states may exercise jurisdiction over subject matter entrusted to the NLRB.[56]

The Boundaries as Defined by the Jurisprudence

In summarizing the jurisprudence, a definition of the bounaries of federal and state jurisdiction is possible. Permissible

53. The most notable example was contained in International Union of United Automobile Workers v. O'Brien, 339 U.S. 454, 457 (1950), wherein it was said "Congress occupied this field and closed it to state regulation." See also Amalgamated Assn. of Street, Electric Ry. and Motor Coach Employees v. WERB, 340 U.S. 383, 390 (1951).

54. 346 U.S. 485 (1953).

55. Local 25, International Brotherhood of Teamsters v. New York, N.H. & H.R.R., 350 U.S. 155 (1956) (allegation in state court that Taft-Hartley Act was violated deprives state of jurisdiction).

56. See note 2 *supra*, which contains an analysis of the Court's rationale.

state action goes as far as intervention in violence, the regulation of union security agreements, and the provision of remedies for tortious conduct. The state line may also extend as far as the enforcement of collective bargaining contracts and intervention in the use of harassing or unfair bargaining tactics. But this is less certain. The federal boundary, although Congress may change it at will, has two limits. One is the self-imposed jurisdictional standards of the NLRB and prevents federal action. Another limit arises at the point where the NLRB is empowered by the Taft-Hartley Act to exercise jurisdiction. This is the point where federal jurisdiction meets the state line and state action is excluded. Between the two federal lines there is a no-man's land, free of all regulation.

Filling the Gap

All who have expressed themselves agree that the gap should be filled.[57] Proposed solutions follow two lines. One approach is that the Board can and should rectify the situation. Another method would have Congress handle the problem.

A solution by board action. Lawyers of the AFL-CIO have proposed that the solution should rest with the Board.[58] They point out that the Board could substantially fill the gap by lowering its jurisdictional requirements to include smaller enterprises and by giving a broader interpretation to the consistency proviso of Section 10(a). It is submitted that this approach is neither as workable nor as complete as would be a solution through congressional action. It is doubtful that the Board will or should revise its standards downward to the full extent of the commerce power. There will always be businesses so small or local in character as to dissuade the NLRB from including them in its jurisdictional standards for budgetary or administrative considerations.[59] In view of the restricted manner in which the Court has treated Section 10(a) and the general tendency of the jurisprudence to deny jurisdiction to a state in the interest of uniformity, it is doubtful that the Court would sustain a liberal interpretation by the Board as to whether a state statute is con-

57. Labor, management, state and Congressional leaders all agree on the need to change the effect of the *Guss* case. See 40 L.R.R. 5, 193, 256, 291 (1957).

58. 40 L.R.R. 6 (1957).

59. Chairman Boyd Leedom testified at a recent hearing on the Ayres Bill that the Board has never exercised the full extent of its jurisdiction. The House Labor Subcommittee intimated that there might be legislation introduced to require the Board to exercise its full jurisdiction. See 40 L.R.R. 291 (1957). However, this is highly speculative.

sistent with the federal provisions. However, as a stop-gap measure, it would seem that the AFL-CIO proposal would be a desirable palliative until Congress can appraise and cope with the problem. At a recent congressional hearing, Chairman Boyd Leedom of the NLRB indicated that the Board might take such action if Congress does not act promptly.[60]

Proposed solutions by Congress. Several proposals are awaiting congressional action. The United States Chamber of Commerce suggests that Congress should enact a blanket declaration of intent to the effect that no congressional act should be interpreted as superseding state laws, unless such intent is expressly stated.[61] Congressman Smith of Virginia has sponsored a bill along these lines,[62] which has been opposed by the Justice Department.[63] Another bill, by Congressman Ayres of Ohio, would amend the Taft-Hartley Act so as to permit states to assume jurisdiction over disputes over which the NLRB would decline to exercise jurisdiction.[64] Senator Watkins of Utah has sponsored a proposal to amend the Administrative Procedure Act to give states jurisdiction where any federal agency declines to act.[65] The Watkins and Ayres Bills would clear up any doubts as to the authority of the Board to decline to assert jurisdiction by specifically granting such powers when, in the agency's opinion, the effect on interstate commerce is not sufficient to warrant the exercise of federal jurisdiction. Senator Ives of New York would also authorize the Board to decline jurisdiction, and grant jurisdiction to the states automatically in such cases.[66] But the Ives Bill would go a step further, in that it would allow the Board to make cession agreements with the states even where interstate commerce is substantially affected, presumably in areas where the Board might also retain concurrent jurisdiction. The cession provision would repeal the present restrictions of Section 10(a) and makes no mention of any necessity of consistency between state and federal laws. The Ives Bill is in the form of an amendment to the Taft-Hartley Act.

60. *Ibid.*
61. *Id.* at 292.
62. H.R. 3, 85th Cong., 1st Sess. (1957). The bill was inspired by the use of the preemption doctrine in a sedition case. However, its provisions would apply to all types of situations in which the courts might have occasion to determine whether the Congress intended to exercise concurrent or exclusive jurisdiction. It would create a presumption that in the absence of an express declaration of intent, concurrent jurisdiction was intended.
63. See 40 L.R.R. 7 (1957).
64. H.R. 6432, 85th Cong., 1st Sess. (1957).
65. S. 1933, 85th Cong., 1st Sess. (1957).
66. See S. 1772, 85th Cong., 1st Sess. (1957).

Recommendations

It is submitted that a synthesis of the Ives and Watkins Bills would be the better solution of the problem. By casting legislation in the form of an amendment to the Administrative Procedure Act, gaps in other areas of administrative law would be prevented. The Ives proposal to allow the Board to cede jurisdiction to the states even where commerce is substantially affected would do away with the one-sided emphasis on the desirability of uniform regulation and recognize that there are sometimes considerations of far greater importance than the effect on interstate commerce. The "effect on commerce" approach to the finding of congressional intent has lacked balance in that it has failed to give adequate attention to the degree to which local or state interests are impaired. The complexities of labor relations and other matters entrusted to administrative agencies because of the need for flexible administration warrant administrative determination of whether a specific subject is primarily of national or local concern. Reasonable standards could be formulated to avoid the anomalous conditions resulting from judicial interpretation of legislative intent.[67]

Because of the political problems and delays involved in congressional action, it should be recognized that the probabilities of amending either the Taft-Hartley Act or the Administrative Procedure Act in the near future are not great. Therefore, the NLRB should provide a temporary solution by lowering its jurisdictional standards and attempting to enter into cession agreements with the states.

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67. Treatment of the problem through the interpretation of Congressional intent, when Congress in fact could not have thought of the multitude of situations that may arise, has led to some odd results which suggest that proper recognition of legitimate state interests has been absent. The Court has found that Congress has "intended" that a state may act against minor physical violence in labor disputes affecting commerce. Allen-Bradley Local 1111, United Electrical Workers v. WERB, 315 U.S. 740 (1942). But yet Congress did not "intend" that a state may act in a dispute that threatened to stop vital public utility service affecting the health and welfare of a large segment of its population. Amalgamated Assn. of Street, Electric Ry. and Motor Coach Employees v. WERB, 340 U.S. 383 (1951). The degree to which interstate commerce is affected may be the same in both cases.