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Labor Law--Coercion of Recognition--Jurisdiction of State Courts to Enjoin (Goodwins, Inc. v. Hagedorn, 303 N.Y. 300 (1951))

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often leads to the disclosure of the true criminal, and to the exoneration of an innocent suspect.[27]

The wavering status of the exclusionary rule of the *McNabb* case, and the varying interpretations thereof, indicate a need for a clearer definition of its boundaries. By declining to extend the rule to cases involving legal detention on another charge, the Court, it is submitted, correctly delimited its application. The result is commendable; the application of fixed exclusionary rules in cases where the accused is amply protected by constitutional provisions is to be discouraged. As stated by the Court: "An extension of a mechanical rule based on the time of a confession would not be a helpful addition to the rules of criminal evidence." [28]

LABOR LAW — COERCION OF RECOGNITION — JURISDICTION OF STATE COURTS TO ENJOIN.—Plaintiff department store sought to enjoin the defendant labor union from interfering with its business by maintaining picket lines. The alleged purpose of the picketing was to coerce the plaintiff to recognize the defendant as the sole bargaining agent of the plaintiff's employees, even though the defendant had not been certified as such. Under the state law, it would have been illegal for the plaintiff to recognize the defendant in this capacity while there were conflicting claims being asserted by rival unions and when no union had been certified by the National Labor Relations Board.[1]

Special Term dismissed the complaint holding that the subject matter falls within the purview of the National Labor Relations Act, and that jurisdiction is thereby vested exclusively in the federal tribunals. *Held,* reversed. The courts of New York have jurisdiction to enjoin peaceful picketing engaged in to accomplish an unlawful objective. The defendant's acts are not within the scope of the National Labor Relations Act. *Goodwins, Inc. v. Hagedorn,* 303 N. Y. 300, 101 N. E. 2d 697 (1951).

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[27] Inbau, *The Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442, 448 (1948).

[28] Carignan v. United States, 72 Sup. Ct. 97, 102 (1951).

[1] ". . . there is no denying that it would be unlawful for the plaintiff employers to yield to a demand that they recognize the defendant union instead of some rival labor organization as the exclusive bargaining agent . . . in advance of a certification by the National Labor Relations Board in the pending representation proceeding." Goodwins, Inc. v. Hagedorn, 303 N. Y. 300, 305, 101 N. E. 2d 697, 699 (1951); N. Y. CONST. Art. I, § 17, "Employees shall have the right to organize and to bargain collectively *through representatives of their own choosing.*" (italics added); N. Y. LABOR LAW §§ 703, 704(3).

Prior to its amendment in 1947, the National Labor Relations Act guaranteed that "[e]mployees shall have the right to self organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing. . . ." [2] The Act, however, afforded no protection against coercion by labor unions. In fact, such a measure was specifically rejected as inconsistent with the policy of the Act.[3] Hence, the conduct of union activities was left open to state control.[4]

A sharp reversal in the policy of the law took place in 1947 when the Taft-Hartley Act brought a number of unfair labor union practices within the scope of federal authority.[5] Section 7 of the Taft-Hartley Act not only guarantees employees the right to form, join or assist labor organization, but also ". . . *the right to refrain from* any and all such activities. . . ." [6] Section 8(b)(1)[7] declares it to be an unfair labor practice for a labor union to coerce or restrain employees in the exercise of rights guaranteed by Section 7. Thus, the 1947 amendment has given rise to an overlapping of state and federal regulations affecting union activities.

The Taft-Hartley Act provides that the National Labor Relations Board shall have jurisdiction over labor disputes affecting interstate commerce.[8] The problem presented is whether Congress has designedly left open for state control an area over which the states have traditionally exercised jurisdiction, or whether it was the congressional intent to pre-empt the field of labor relations.

Undoubtedly when state and federal law conflict, the federal law is supreme.[9] Thus, where the New York State Labor Board entertained a petition to certify a bargaining agent for supervisory employees at a time when it was the policy of the National Labor Relations Board to refuse that type of petition,[10] the Supreme Court

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[2] 49 STAT. 452 (1935), 29 U. S. C. § 157 (1946).

[3] SEN. REP. No. 573, 74th Cong., 1st Sess., p. 16 (1935). "This erroneously conceived mutuality argument that since employers are to be prohibited with interfering with organization of workers, employees and labor organizations should be no more active than employers in the organization of employees is untenable; this would defeat the very object of the bill."

[4] Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740 (1941) (by implication).

[5] 61 STAT. 140 (1947), 29 U. S. C. A. § 158(b) (Supp. 1951) (Taft-Hartley Act); COX, CASES ON LABOR LAW 487, 488 (2d ed. 1951).

[6] 61 STAT. 140 (1947), 29 U. S. C. A. § 157 (Supp. 1951) (Taft-Hartley Act) (italics supplied).

[7] 61 STAT. 141 (1947), 29 U. S. C. A. § 158(b)(1) (Supp. 1951) (Taft-Hartley Act).

[8] 61 STAT. 146 (1947), 29 U. S. C. A. § 160(b) (Supp. 1951) (Taft-Hartley Act). "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any labor practice (listed in section 8) affecting commerce."

[9] U. S. CONST. Art. VI.

[10] Boeing Aircraft Co., 51 N. L. R. B. 67 (1943); Maryland Drydock Co., 49 N. L. R. B. 733 (1943). The national policy was subsequently changed. Packard Motor Car Co., 64 N. L. R. B. 1212, 1214 (1945).

held that the New York courts were without power to act.[11] It is clear, in this instance, that exclusive jurisdiction is vested in the federal courts.

A second problem arose in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*[12] where the federal and state laws were consistent. Here the state board was permitted to maintain jurisdiction to enjoin an employer and union from giving effect to a maintenance-of-membership clause, an identical power[13] granted to the national board.[14] One year later, however, in *Wisconsin Employment Relations Board v. Plankinton Packing Co.*,[15] a similar case was presented to the Wisconsin courts over which they retained jurisdiction on the strength[16] of the *Algoma* case. On appeal to the United States Supreme Court, the decision was reversed,[17] but no opinion was rendered. The impact of the *Plankinton* case is thus left in considerable doubt. While attempts have been made to distinguish the cases,[18] the latter decision has been thought to effectively nullify the holding in the *Algoma* case,[19] once again vesting sole jurisdiction in the federal courts and in the national board.

A third situation arose in *International Union, UAW v. Wisconsin Employment Relations Board*,[20] where it was held that the state may exercise jurisdiction over disputes arising from union activities that are not covered by the Taft-Hartley Act.[21] The Court,

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[11] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947). Although this case reached the New York Court of Appeals (295 N. Y. 601, 64 N. E. 2d 350) after the national policy had changed (August, 1945), the Supreme Court only took into consideration the national policy that had existed when the action was first commenced. It was not until May, 1945 that the *Bethlehem* case reached the Appellate Division. New York State Labor Relations Board v. Bethlehem Steel Co., 269 App. Div. 805, 56 N. Y. S. 2d 195 (1945).

[12] 336 U. S. 301 (1949). *But cf.* La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949).

[13] 61 STAT. 140 (1947), 29 U. S. C. A. § 158(a)(3) (Supp. 1951) (Taft-Hartley Act).

[14] See note 8 *supra*.

[15] 255 Wis. 285, 38 N. W. 2d 688 (1949).

[16] *Id.* at 692. "Every argument made by the Company and the Union in support of their contention that the State Board was without jurisdiction is answered adversely to them by the opinion of this court in Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co., 1948, 252 Wis. 549, 32 N. W. 2d 417, affirmed 1949, 336 U. S. 301. . . . No useful purpose would be served by reiterating here what was so well said there."

[17] Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U. S. 953 (1950).

[18] 34 MARQ. L. REV. 291, 294 (1951).

[19] Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 220-221 (1950).

[20] 336 U. S. 245 (1949).

[21] The case involved an attempt by the union to compel recognition of a collective bargaining agreement by calling repeated and unannounced work stoppages. This novel form of union coercion is not one of the specifically enumerated unfair labor practices listed in Section 8(b). It was not con-

however, was careful to limit its holding by pointing out that the federal board was without power to act ". . . because it is the *objectives* only and not the *tactics* of a strike which bring it within the power of the Federal Board." [22] Clearly, when the *tactics* of a strike are illegal, the activity is unprotected from state action by the Taft-Hartley Act and may be enjoined by the state under its police power.[23] On the other hand, where the *tactics* are not illegal, as in the case of peaceful picketing, the state courts are without jurisdiction since Congress has ". . . occupied this field and closed it to state regulation." [24]

In the principal case, the *tactics* employed were not illegal. Since no strike was in progress and no bargaining representative certified, the activity did not come within any of the unfair labor practices listed in Section 8(b). But this does not mean that the activity does not come within the intendment of the Act. In Section 14(b),[25] Congress expressly provided that nothing in the Act authorizing union shops shall be construed as validating such agreements in any state where they are prohibited. It is thus evident that in at least some instances in which Congress wanted the state law to be supreme, it expressly stated that the provisions of the Act would be transcended by the over-riding state statute.[26] Is it possible to infer therefrom a congressional intent to preclude state regulation in those situations not otherwise excepted?

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sidered a "concerted activity" within the meaning of Section 7. See notes 5 and 6 *supra.*

[22] International Union, UAW v. Wisconsin Employment Relations Board, 336 U. S. 245, 263 (1949). (Italics added.)

[23] Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740 (1941) (strikers were disorderly and violent).

[24] International Union, UAW v. O'Brien, 339 U. S. 454, 457 (1950); Amalgamated Association of Street Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U. S. 383 (1951).

[25] 61 STAT. 151 (1947), 29 U. S. C. A. § 164(b) (Supp. 1951) (Taft-Hartley Act). "Nothing in this subchapter shall be construed as authorizing the . . . application of agreements requiring membership in a labor organization . . . in any State or Territory in which such . . . application is prohibited by State or Territorial law."

[26] *Cf.* Amalgamated Association of Street Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U. S. 383 (1951), "When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued . . . but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board,* 330 U. S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." *Id.* at 397, 398.

It is submitted that it is. Certainly, "[s]ilence under such circumstances is not tantamount to creating an exception in a field otherwise pre-empted by the Congress." [27] Moreover, an interpretation of the Labor Act provision favoring maximum assumption of jurisdiction by the federal tribunals would have the socially desirable effect of developing uniform nation-wide standards of permissible behavior.

TORTS—RECOVERY FOR PRENATAL INJURY.—Plaintiff, born alive despite negligent injuries sustained during his ninth month *en ventre sa mere,* sued for damages.[1] Defendant moved to dismiss the complaint for failure to state a cause of action. Special Term granted defendant's motion; the Appellate Division affirmed by a divided court.[2] *Held,* reversed. When a viable fetus,[3] later born alive, has been negligently injured, a suit for damages will lie.[4] *Woods v. Lancet,* 303 N. Y. 349, 102 N. E. 2d 691 (1951).[5]

Recovery of damages for prenatal injuries was not one of the common law tort actions.[6] It was denied because of the lack of

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[27] Goodwins, Inc. v. Hagedorn, 303 N. Y. 300, 309, 101 N. E. 2d 697, 702 (1951) (dissenting opinion of Dye, J.). For further discussion of the principal case, see Petro, *The Developing Law,* 2 CCH LABOR L. J. 8 (Dec. 1951) (approving the result). *But cf.* Wilkes Sportswear, Inc. v. International Ladies Garment Workers Union, 29 L. R. R. M. 2300 (1952). See also Sandler, *Minority Picketing for Recognition in New York State,* 127 N. Y. L. J. 1094, col. 3 (Mar. 19, 1952).

[1] The suit was brought in the infant's name by its guardian *ad litem.*

[2] The dissent refused ". . . to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified." 278 App. Div. 913, 914, 105 N. Y. S. 2d 417, 418 (1st Dep't 1951).

[3] ". . . we confine our holding in this case to prepartum injuries to such viable children. . . . This child, when injured, was in fact, alive and capable of being delivered and of remaining alive, separate from its mother." 303 N. Y. 349, 357, 102 N. E. 2d 691, 695 (1951).

[4] Judge Lewis dissented, Judge Conway joining, on the ground that this remedy, if granted, should come from the legislature, not from the courts.

[5] This writer believes that the Court of Appeals' opinion in the instant case is so complete that a protracted study of the previous law regarding prenatal injuries is unnecessary. The arguments for denying recovery, based on lack of precedent and on the difficulty of proof, are also covered by the Court. But the Court expressly refused to deal with the "purely theoretical" objection that an unborn infant has no existence separate from its mother. "We need not deal here with so large a subject." This writer believes that the separate identity of the embryo and fetus should be the *only* ground for granting recovery; for that separate entity is a person, and as such should be accorded the protection of tort law.

[6] *Accord,* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884); *cf.* Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Butler v. Manhattan Ry., 143 N. Y. 417, 38 N. E. 454 (1894); see 4 RESTATEMENT, TORTS § 869 (1939); Note, 10 A. L. R. 2d 1059, 1060 (1950).