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Sanford H. Kadish
Berkeley Law

Ronan E. Degnan

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COMMENT

SOME LIGHT IN THE TWILIGHT ZONE

A Note on *Guss v. Utah Labor Relations Board*

By SANFORD H. KADISH* and
RONAN E. DEGNAN**

On March 25, 1957, the Supreme Court of the United States reversed the Utah Supreme Court in *Guss v. Utah Labor Relations Board*.¹ In so doing the Supreme Court resolved a long undecided and much mooted issue with regard to the power of states to govern labor disputes within an area subject to the jurisdiction of the National Labor Relations Act² but in which the National Labor Relations Board declines to act.

Guss was engaged in manufacturing photographic equipment for the Air Force. In fulfilling his government contract he purchased materials from outside Utah in an amount somewhat less than \$50,000. The United Steelworkers succeeded in organizing his employees and obtained a certification as the bargaining representative from the National Board following a consent election wherein it was recited that Guss was engaged in commerce within the meaning of the federal act. Subsequently the union filed unfair labor practice charges against Guss with the National Board. In the interim, however, the Board promulgated its revised jurisdictional standards substantially increasing the quantity of interstate business required before the Board would assume jurisdiction. On the basis of these new standards, the Board declined to issue a complaint. Thereupon, the union filed substantially the same charges with the Utah Labor Relations Board. It overruled an objection that it was without jurisdiction, found that Guss had committed unfair labor practices as defined in the Utah Act,³ and issued a remedial order. The Utah Supreme Court agreed with the position of the State Board and affirmed.⁴ The United States Supreme Court disagreed. In reversing, the Court held (6-2) that the provisions of section 10(a) of the federal act in authorizing the National Board to cede jurisdiction to a state agency where state law is consistent with the federal law afforded the "exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board."⁵ Hence the refusal of the National Board to assert the jurisdiction it has, for whatever reason, budgetary or policy, does not authorize the state to furnish a remedy parallel to that which the National Board would furnish had it assumed jurisdiction. In two other cases consoli-

* Professor of Law, University of Utah; B.S.S., C.C.N.Y., 1942; LL.B., 1948, Columbia University; Member Utah and New York Bars.

** Associate Professor of Law, University of Utah; B.S.L., 1950; LL.B., University of Minnesota, 1951; Member of Utah, Iowa and Minnesota Bars.

¹ 77 Sup. Ct. 598 (1957).

² 49 STAT. 449 (1935), 29 U.S.C. §§ 151-156 (1946), as amended, 61 STAT. 136 (1947), 29 U.S.C. §§ 151-197 (1952).

³ UTAH CODE ANN. §§ 34-1-1 to 15 (1953).

⁴ *Guss v. Utah Labor Relations Board*, 5 Utah 2d 68, 296 P.2d 733 (1956).

⁵ 77 Sup. Ct. at 602.

dated for argument with the *Guss* case and decided the same day,⁶ the *Guss* principle was applied to vacate injunctions issued by state courts enjoining practices made unlawful by the federal act. Section 10(a), therefore, likewise operates to preclude state judicial action even though it furnishes no means of ceding jurisdiction to state courts.

The *Guss* case is the latest in a long line of decisions reaching back to 1942⁷ dealing with the delicate problem of adjustment of jurisdiction over labor matters as between the National Labor Relations Board, state labor agencies and state courts. The magnitude of this problem, which, since the subsidence of the free-speech picketing issue, has become the most significant constitutional issue in the area of labor law, is a direct consequence of two legal developments, one legislative and one constitutional. The former was the decision of Congress in 1935 to enact a comprehensive scheme of labor relations legislation, the National Labor Relations Act, and to apply it to the furthest limits of its jurisdiction over commerce—to all matters “affecting commerce.”⁸ The latter was the series of holdings of the United States Supreme Court in the 1930’s substantially enlarging the scope of Congressional power to regulate commerce.⁹

The constitutional framework within which decisions are made allocating power between the federal government and the states can be simply stated, although not as easily applied. The fact that the Constitution authorizes Congress to regulate commerce does not of itself preclude state action. Where Congress has not legislated (has not “occupied the field”) states are free to act provided only that state action does not impose an undue burden on or discriminate against interstate commerce, or undermine a need for uniformity therein.¹⁰ Where, on the other hand, Congress has legislated, the effect of the Supremacy Clause (Article VI of the Constitution), is to preclude state action, but only if Congress intends its regulation to be exclusive. Sometimes Congress expressly authorizes state action.¹¹ Sometimes it expressly negates concurrent state power.¹² In the great majority of cases, however, Congress is silent, and the Supreme Court is left to piece out the appropriate intention as best it can, even when none exists. With certain exceptions¹³ this has been the situation in the cases determining whether state action in the area of labor relations is preempted by the National Labor Relations Act. The proliferation of cases in this area, and the subsistence of mooted and unresolved questions withal, underlines the *ad hoc* character of the determinations which have to be made—general constitutional principles are subordinate to case

⁶ *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 77 Sup. Ct. 604 (1957); *San Diego Building Trades Council v. Garmon*, 77 Sup. Ct. 607 (1957).

⁷ *Allen-Bradley Local 1111 v. WERB*, 315 U.S. 740 (1942).

⁸ Sections 2(6) and (7). See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁹ See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 883 (1946).

¹⁰ See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Morgan v. Virginia*, 328 U.S. 373 (1946); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949); *Dean Milk Company v. City of Madison*, 340 U.S. 349 (1951).

¹¹ See, e.g., 59 STAT. 34 (1945), 15 U.S.C. § 1012(a) and (b) (1952), authorizing state regulation of insurance in defined circumstances.

¹² See, e.g., Section 14(a) of the National Labor Relations Act, discussed *infra* at p. 339.

¹³ See discussion *infra* at p. 338.

by case determinations of the appropriate intention in varying circumstances. And in ascertaining intention general principles have likewise not been forthcoming, except perhaps that an intention to exclude state action will be presumed where the state law or remedy is in actual or potential conflict with the federal law — a formulation which restates rather than answers the question.

One category of cases in which the Supreme Court has invalidated the assertion of state authority is that in which the state law was found to invade or qualify a right expressly protected by the federal act. Thus a state law which imposed conditions upon the right to act as union business agents was found to qualify the right of free choice of collective bargaining representatives guaranteed by section 7 of the federal act.¹⁴ And state laws which qualified¹⁵ or prohibited¹⁶ the right to strike in circumstances where section 7 guaranteed that right likewise have fallen. Another such category comprises those cases where the state law dealt with labor practices in a not altogether similar manner as the federal act. Thus the action of a state labor board in permitting unionization of foremen was found in conflict with the then policy of the National Board disapproving organization units of foremen.¹⁷ Likewise, a state board determination of the appropriate collective bargaining unit was invalidated where under the federal law the National Board might have made a different determination.¹⁸ Finally, state laws have fallen which have subjected to regulation and afforded a remedy for labor practices which the federal act regulated and remedied similarly. In this category is the state injunction of a labor practice clearly made unlawful and subject to injunctive relief under the federal act,¹⁹ as well as state prohibition of practices which might be similarly treated by the federal act.²⁰

On the other hand, at least two categories of cases are identifiable in which state control of labor practices "affecting commerce" have been upheld. One includes cases in which the labor practice regulated by state law is outside the scope of the terms of the federal act, which neither prohibits the practice nor protects it. This has been held to be true of mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes;²¹ harassing intermittent and unan-

¹⁴ *Hill v. Florida*, 325 U.S. 538 (1945).

¹⁵ *International Union, UAW v. O'Brien*, 339 U.S. 454 (1950).

¹⁶ *Amalgamated Association v. WERB*, 340 U.S. 383 (1951).

¹⁷ *Bethlehem Steel Co. v. New York SLRB*, 330 U.S. 767 (1947).

¹⁸ *La Crosse Telephone Corp. v. WERB*, 336 U.S. 18 (1949). See also *Utah v. Montgomery Ward*, 233 P.2d 685 (1951) where a state check-off law was found superceded by Section 302 of the Labor Management Relations Act.

¹⁹ *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485 (1953).

²⁰ *Weber v. Anheuser-Busch*, 348 U.S. 468 (1955).

²¹ *Allen-Bradley Local 1111 v. WERB*, 315 U.S. 740 (1942). This case was decided under the National Labor Relations Act of 1935. Section 8(b)(4)(1) of the amended act, however, makes those activities union unfair labor practices. If the rationale of *Allen-Bradley* is that those practices were then ungoverned by the federal act, a contrary result would be reached under the amended federal act. Justice Frankfurter so puts it: "The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection." *Weber v. Anheuser-Busch*, 348 U.S. 468, 477 (1955). Justice Jackson, however, has found another rationalization as fully applicable to the amended as to the unamended act:

nounced work stoppages;²² and (under the Wagner Act) maintenance of membership clauses in collective bargaining agreements.²³ The other kind of case in which state power has been upheld is where state law subjects a labor practice to the same substantive regulation as the federal act, but affords a wholly different remedy. Thus it has been held that a state may validly award damages in tort for a labor practice made unlawful but subject only to prohibition by the federal act.²⁴

In the above cases the Court was obliged to adjust federal and state power over labor matters by piecing out an unexpressed intent from a federal act. In portions of the act, however, Congress has expressly directed itself to the problem of state power, although with varying degrees of clarity. One such instance concerns union security agreements. Section 8(a)(3) exempts defined union shop clauses from the general prohibition against discrimination on the basis of membership or non-membership in a labor union. Section 14(b), however, expressly validates the application of any state or territorial law which prohibits union security provisions not prohibited by 8(a)(3). The significance of this provision is apparent from the upholding of state right-to-work legislation²⁵ as contrasted with its invalidation when applied to railway labor governed by the Railway Labor Act, which contains no such provision.²⁶ Another instance of explicit Congressional attention to state power is contained in section 14(a). In section 2(3) Congress excluded supervisors from the definition of the term "employee" and hence from the protection of the act. In section 14(a) it expressly vetoed the application of state law by providing that no employer be compelled to deem individuals defined as supervisors by the federal law as employees "for the purposes of any law, either national or local, relating to collective bargaining." The remaining provision of the federal act which addresses itself to the problem of concurrent state power, although with considerably greater ambiguity, is section 10(a), the provision finally given definition in the *Guss* case.

The gist of section 10(a), as interpreted, is that only the labor policy expressed in the federal act may be applied to labor relations which "affect commerce." Much of that application is to be achieved, of course, by the first-hand operation of the National Board. In given circumstances, however, it might be achieved through the machinery of a state agency administering a substantially parallel state labor policy — when the National Board is satis-

"Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' [Allen-Bradley] Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority." *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 488 (1953).

²² *International Union, UAW v. WERB*, 336 U.S. 245 (1949).

²³ *Algoma Plywood & Veneer Co. v. WERB*, 336 U.S. 301 (1949). The same result would follow under the amended act by virtue of the express authorization contained in Section 14(b).

²⁴ *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954).

²⁵ *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

²⁶ *Railway Employees' Department, A.F.L. v. Hanson*, 351 U.S. 225, 232 (1956): "A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of the federal law upon it and by force of the Supremacy Clause of Article VI of the Constitution would not be made illegal nor vitiated by any provision of the laws of a state."

fied that state policy sufficiently resembles its own, it may cede to the state agency some of the Board's jurisdiction. Absent such a cession agreement, it is no justification for state action, judicial or administrative, that it does in fact coincide with results which would be reached if the National Board had elected to act. So interpreted, the object of section 10(a) would appear to be to induce the creation of state policy along federally approved lines, and thereby accomplish a measure of return to state control of labor relations thought to be peculiarly local in character. The fact is that no cession agreements have been negotiated, and there has been no discernible state trend toward conformity with federal policy. The result of *Guss*, therefore, is a paradox; the intent to return to the states matters thought appropriate for their control has been frustrated, and matters thought appropriate for control by either government are now in fact governed by neither.

The decision in *Guss* and its companion cases presents difficult choices to all of the law-making bodies concerned with labor relations — state legislatures, state courts and labor agencies, the National Board and the Congress.

The implied plea of section 10(a), both on its face and as interpreted in *Guss*, is that the states bring their labor policies into line with the federal labor law. Even if state legislatures were inclined to do so, the earliest possible time at which it could be accomplished is several years hence. But quite clearly there is no such general inclination. The industrial and highly unionized states of the North and East which have achieved through "little Wagner acts"²⁷ and "little Norris-LaGuardia acts"²⁸ a general state policy favorable to union organization will be hesitant to move toward the more restrictive provisions of the Taft-Hartley Act. So also the developing industrial states of the South and West will be reluctant to surrender their greatest lure to industry seeking new location — a docile and unorganized labor market — by bringing their restrictive organizational legislation into conformity with the more protective provisions of the federal act.²⁹ In view of the broadened sweep of the preemption doctrine announced in *Guss*, which displaces all state law "affecting commerce," federal policy will now receive a more respectful hearing in state legislative halls. But progress in this quarter must be expected to be slow and halting.

State court judges will view the *Guss* doctrine with a helplessness greater in degree, but not different in kind, from that which has confronted them since enactment of the original federal act. Were it clear that this case wholly precluded state action, they would have at least the solace that since they could do nothing at all, they could do nothing wrong. But a wholly new line-drawing process must be faced. In one area of what has been deemed before now to be permissible state action there is clear change. If the particular industry in question is one over which the Board has at some time or other exercised jurisdiction, state action is now prohibited. This is the central

²⁷ See, e.g., MASS. ANN. LAWS c. 150A, §§ 1-12, as amended (Supp. 1956); N.Y. LAB. REL. ACT §§ 700-716; UTAH CODE ANN. § 34-1-1 through 34 (1953) as amended; Smith and Delancey, *The State Legislatures and Unionism*, 38 MICH. L. REV. 987 (1940).

²⁸ See, e.g., UTAH CODE ANN. § 34-1-25 (1953).

²⁹ Compare 15 VERNON'S TEX. CIV. STAT. § 5154(f) (3) (Supp. 1956) with section 9 of the Labor Management Relations Act, 29 U.S.C. § 159 (1952).

and crucial holding of both *Guss* and *Fairlawn Meats*. Yet clearly there is a remaining area of state jurisdiction — commercial activity which does not “affect commerce” and therefore is not preempted by the federal act.³⁰ Theoretically, this area is also beyond the reach of Congressional exercise of the commerce power. But it remains almost wholly undefined. After some preliminary skirmishing on its borders when the Wagner Act was first adopted, the ground of controversy shifted elsewhere. It now must go back, and it will assume quite different proportions. During the thirties, the question was “Is this *kind* of activity (mining, manufacturing, etc.) commerce?”³¹ Now it must be “Is this *quantum* of activity commerce?”

When the question before the state court was “Will the National Board act in this particular dispute?” the conclusion of the Board was final; the state judge might feel strongly that it should not, but under the prevailing view a Board decision (in the form of a complaint issued by the Regional Counsel) put the issue at rest.³² Occasionally a court was faced with a more doubtful question when it had to conclude from prior Board decisions whether action was likely, but this problem was simplified by the announcement of “yardsticks” expressing in dollar standards when the Board would assume jurisdiction.³³ The question henceforth seems to involve no such deference to agency judgment. The state judge is at least as qualified as Board officials to determine what “affects commerce” and is thus beyond state reach, and what does not and is thus within state control. He can ignore Board determinations, and he can decline to follow any precedent the Board may establish. He may be less cavalier in his treatment of federal judicial determinations of those same questions, but he ordinarily will be no more obligated by a federal Court of Appeals determination than that Court of Appeals is by his. Final correction of his mistaken judgment must come from the Supreme Court itself, and because of the essentially factual character of such determinations the precedent value of the decisions will be relatively slight. It is an axiom of labor law that temporary injunctions seldom need to be made permanent because their object is accomplished before the time arises, and the full futility of the long process of certiorari is apt here to be realized.

One of the almost certain results of the *Guss* decision is a new spurt of activity in a field that seemingly had been laid to rest. This is the device of short-cutting the ordinary appellate process by going directly to a lower federal court seeking an injunction against exercise of the state judicial power. In *Amalgamated Clothing Workers v. Richman Brothers*³⁴ the Supreme Court held flatly that a federal district court had no jurisdiction to issue an injunction against state court intervention in a labor dispute within the preempted

³⁰ In addition to this, of course, state court activity is still permissible without regard to whether or not the National Board has jurisdiction when (1) the remedy given is not one which conflicts with or attempts to supplement a federal remedy for federally prohibited activity, and (2) when the activity in question is neither protected nor prohibited by the federal act. See text at pp. 337–38 *supra*.

³¹ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

³² In the *Guss* case itself the Regional Director had declined to issue a complaint because the volume transacted fell below the current jurisdictional minimums.

³³ See text at pp. 343–44 *infra*.

³⁴ 348 U.S. 511 (1955).

area when the request for such an injunction issued from a private party; the Judicial Code prohibits the enjoining of state court proceedings “. . . except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”³⁵ Perhaps a slightly different case is presented when the request for injunction in the federal court emanates from Labor Board officials, since in *Capitol Service v. NLRB*³⁶ such an injunction did issue to vacate a California state court injunction. Two grounds, one legal and one practical, indicate that little aid to either union or employer can be found in this procedure. The legal point is that in *Capitol Service* the injunctive power of the federal district court had been invoked by the Regional Director under section 10(1)³⁷ of the national act, so that it could truly be said that the injunction was “in aid of its jurisdiction”; no exception exists for federal injunctions to protect the jurisdiction of the National Board itself. The practical ground is even more compelling. *Capitol Service* involved an attempt by the Regional Counsel of the Board to protect a jurisdiction which he wished to exercise and in fact was exercising; it is highly improbable that he will be as alert to avoid state encroachment upon a dispute which is preempted by *Guss* but which nevertheless is one the National Board is unwilling to take.

Still another problem faces state courts in those areas where the National Board has consistently declined to exercise jurisdiction. Not all such refusals have been based upon the “budgetary and personnel” grounds assigned for the yardsticks. From its inception, the Board has declined to accept cases involving admittedly high dollar volumes on the ground that the activity or industry was “local” in character despite its effect upon interstate commerce. Notable are the hotel³⁸ and local transportation³⁹ industries. The principal reason assigned — “local character” — might be thought to involve a Board determination that the industry is not within the commerce power, and a state court might be excused if it accepted this view.⁴⁰ Yet courts may well conclude otherwise, with the effect that industries never before involved in the machinery of the national act would be withdrawn from the only form of regulation they have ever known.⁴¹

Prior to *Guss*, state supreme courts had evolved in a groping way a reasonably satisfactory and workable test of their jurisdiction — if the federal government had not occupied the field, the states could. This test has largely been

³⁵ 28 U.S.C. § 2283 (1952).

³⁶ 347 U.S. 521 (1954).

³⁷ 61 STAT. 146, 29 U.S.C. § 160(e) (1952). This section provides that the Board officials shall seek district court injunctions against some narrowly defined union unfair labor practices. And it is only at Board instance that such injunctions may issue. *Amalgamated Ass'n v. Dixie Motor Coach Corp.*, 170 F.2d 902 (8th Cir. 1948).

³⁸ Hotel Association of St. Louis, 92 N.L.R.B. 1388 (1951).

³⁹ *Yellow Cab Co. of California*, 90 N.L.R.B. 1884 (1950); *Duke Power Co.*, 77 N.L.R.B. 652 (1948). For a general discussion by the Board of its jurisdictional policies, see 16th ANN. REP. OF THE NLRB 15-39 (1951).

⁴⁰ The Supreme Court of Nevada did so react to the Board's rulings on the hotel industry in *Building Trades Council v. Bonito*, 71 Nev. 84, 280 P.2d 295 (1955): “Accepting as the intent of Congress the interpretation of the NLRB itself, the dispute with which we are here concerned falls within a field which the federal government has declined to occupy.”

⁴¹ Cf. Note, 65 YALE L.J. 86, 89 (1955).

destroyed, since now they must look to an obscure expression which was almost wholly without content when enacted and which since that time has acquired meaning only in directions irrelevant for present purposes. The suggestion that all is "commerce" which is not *de minimis*⁴² is virtually the only guide presently available. There is one very practical reservation, however; the ultimate cost of pursuing the problem to the Supreme Court of the United States will prove far too heavy a burden for those smaller businesses which are in the borderland of "commerce," just as it will usually be of too little interest to the unions involved when the decision goes against them. The net result in actual operation is that the question of what is "commerce" is apt to begin and end in the state trial courts and labor boards, with the parties involved accepting the decisions made not because they are right but because they are not worth contesting.

Any discussion of action which may be taken by state courts or legislatures in response to *Guss* must be limited by the realization that the problem exists because of federal action and that true solutions rest in the hands of the federal government. *Guss* arose because of a long-standing policy of the National Board to decline the exercise of certain jurisdiction which admittedly was available to it. From the inception of the Act until 1950 this restraint was exercised on a more or less piece-meal basis.⁴³ In that year the Board announced that experience warranted the establishment of certain guides or "yardsticks" which would exclude a substantial volume of cases from its processes.⁴⁴ The change in composition of the Board during 1953 and 1954 resulting from the change from Democratic to Republican administration⁴⁵ presaged yet further withdrawal of the Board from its permissible range of operation.⁴⁶ The reasons assigned for adopting revised standards in 1954 related to budget and personnel, and the majority specifically repudiated any idea that judgments about the desirability of relegating such matters to the states entered into its determination.⁴⁷ But the dissent of Member Murdock and the public utterances of Chairman Farmer⁴⁸ seem to make clear that even if desirability of local control was not a factor, the majority proceeded upon the assumption that restraint upon their part would not create a jurisdictional void and that state courts and agencies would be free to absorb the disputes thus relinquished. That assumption has now been shattered and it seems unquestionable that the National Board will be obliged to reassess its standards in a new perspective.

It is not inconceivable that the National Board may be legally obliged to reassess its standards. It has long been assumed by the Board and by the

⁴² *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939); see Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

⁴³ See 16th ANN. REP. OF THE NLRB 15-39 (1951).

⁴⁴ See *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635 (1950); 26 LAB. REL. REP. (Ref. Man.) 50 (1950).

⁴⁵ Note, *The "Eisenhower" Board: Taft-Hartley Under a Republican Administration*, 4 UTAH L. REV. 380 (1955).

⁴⁶ *Ibid.*; NLRB Press Release, June 30, 1954; NLRB Press Release No. R-449, July 15, 1954; see Note, 50 NW. U.L. REV. 190 (1955).

⁴⁷ *Breeding Transfer Co.*, 110 N.L.R.B. 493, 497 (1954).

⁴⁸ Extracts from public addresses of the chairman were quoted in the dissent in the *Guss* case.

courts which review it that discretion to decline the exercise of its utmost power does exist. The first General Counsel, Robert Denham, took a contrary view and issued complaints in any case "affecting commerce." The Board just as promptly dismissed those it chose not to hear. This dispute reached a Court of Appeals in *Haleston Drug Stores v. NLRB*,⁴⁹ where the Board's dismissal was upheld. Certiorari was denied, possibly for the reason that Denham had resigned and the new General Counsel and the Board announced that they had reached an accord on jurisdictional policy. That accord has continued to this day, minimizing the circumstances⁵⁰ in which the issue of compulsory exercise of the Board's jurisdiction could properly be raised. The Supreme Court once inferentially approved the Board's restraint,⁵¹ but in the *Guss* case apparently thought it worth noting that the question has not finally been resolved.⁵²

Thus in considering a downward revision of jurisdictional standards the Board must consider the effect of two forces. One is the wisdom of shouldering some of the burden of proceedings now necessarily surrendered by the states; the other is the possibility that no choice exists at all and that it must consider and decide all disputes within its potential power.

Another possible avenue of approach open to the Board is a reconsideration of the possibility of cession agreements with those few states which now have labor relations boards. As *amicus*, the Board informed the Supreme Court in the *Guss* case that negotiation of such agreements had proved impossible because state policies in existence were not sufficiently in accord. Yet it seems probable that attempts to find accord were less earnest when the assumption was that mere relinquishment of jurisdiction constituted a practical cession to states in any event. Now that the assumption has proven false, more serious attempts to find accord may be made. Similarly, state boards may evidence an attitude of cooperation not found when the result of refusal to accede to federal policy was that they applied their own policy in any event. It also seems probable that the avenue of piece-meal cession has been inadequately explored; section 10(a) seems to contemplate not only total cession of jurisdiction over an industry but cession over "any cases in any industry . . . unless the provision of the State . . . statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act. . . ." Although the total of Utah labor law may not coincide with the federal, it seems clear that the concept of refusal to bargain collectively involved in the *Guss* case itself is sufficiently similar in both acts to warrant a cession on that narrow base.⁵³ Even larger areas of similarity might be found upon further examination; for instance, standards governing representation proceedings under the New York "little Wagner

⁴⁹ 187 F.2d 418 (9th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951); see Note, 64 HARV. L. REV. 781 (1951).

⁵⁰ Cf. *Joliet Contractors Ass'n v. NLRB*, 193 F.2d 833 (7th Cir. 1952), in which the court admitted the existence of discretion but held that refusal to take jurisdiction was, under the peculiar facts presented, an abuse of that discretion.

⁵¹ *NLRB v. Denver Building Council*, 341 U.S. 675, 684 (1951).

⁵² 77 Sup. Ct. 598, 599 (1957).

⁵³ Compare UTAH CODE ANN. § 34-1-8(1)(d) (1953) with 29 U.S.C. § 158(5) (1952).

Act”⁵⁴ seem sufficiently parallel to the federal provisions so that nearly all problems of representation in the smaller industries of that state could be surrendered to the New York Board. So far as concerns differing interpretations of parallel state laws, which under section 10(a) would appear to preclude cession, it is not beyond possibility that the National Board might propose and the state board might accept a commitment by the state board to follow federal rather than state interpretation and policies in the ceded case. The legality of such cession agreements might be directly and more expeditiously tested in the federal district courts through actions by the parties affected for declaratory judgment and injunctive relief against alleged actions by the National Board in negotiating cession agreements beyond its power. The doctrines of the *Richman* and *Capitol Service* cases would not necessarily preclude preliminary relief in such cases.

Unfortunately, however, no real solution to the problem can be sought through such measures in the light of present state law. Total success from such negotiation could result in only twelve cession agreements, unless state legislatures join earnestly in the quest for accord along these lines.

The problem presented to the Congress by the *Guss* decision is one not new to it. The several attempts to anticipate the present problem have ended in failure,⁵⁵ none of the proposals to delete or modify section 10(a) having succeeded in getting to the floor of either house. Doubtless the pressure will now become more urgent. A prime difficulty is that there will be a countervailing increase of contrary pressure. Although the practical thrust of the current development is not in any specific direction nor uniformly upon any group, it seems likely that the unions in developed industrial areas, well organized and politically potent, will resist any attempt at Congressional solution just as they will resist any effort in state legislatures to create “little Taft-Hartley Acts.” By and large they no longer need the assistance of labor boards, state or federal, in their organizing campaigns or in attaining their objectives. If the present state of affairs is that state courts and boards cannot act and that the National Board will not act, they will have little complaint.

At least one bill⁵⁶ has already been introduced which would restore state power without directly amending the Labor Act. This would be done by amending the Administrative Procedure Act⁵⁷ to allow state agencies or courts to exercise jurisdiction over any matter involving the regulation of commerce when a federal agency has declined to exercise jurisdiction. An even wider proposal introduced in the 84th Congress may become the subject of revived interest. Prompted by *Pennsylvania v. Nelson*,⁵⁸ which held that

⁵⁴ NEW YORK LAB. REL. ACT § 705.

⁵⁵ See S. 2650, 83rd Cong., 2d Sess. § 6(b)(1) (1954); S. 1264, 83rd Cong., 1st Sess. § 2 (1953).

⁵⁶ S. 1933, 85th Cong., 1st Sess. (Apr. 29, 1957). The bill has been committed to the Committee on the Judiciary. One may speculate that not the least of the reasons prompting the form of the bill will be strategy rather than desired scope of amendment; a bill amending the Administrative Procedure Act goes to the Committee on the Judiciary, whose members may be somewhat more sympathetic to its objects than would members of the Committee on Labor and Public Welfare.

⁵⁷ 60 STAT. 237 (1946), 5 U.S.C. § 1001 et seq. (1952).

⁵⁸ 350 U.S. 497 (1956).

the federal sedition laws preempted that field to the exclusion of parallel Pennsylvania laws, the bill proposed enactment of a standard of statutory interpretation which would reject federal preemption in any case in which the statute in question did not expressly declare for preemption.⁵⁹

Perhaps an easier way out for the Congress, and one which would create less dogged resistance, would be to increase the budget of the National Board to the point where abstention on monetary grounds would no longer be defensible. An unpopular plea in a period when the federal budget is under heavy attack and when expansion of federal activity is highly suspect, this nevertheless may prove to be the course of least resistance.

⁵⁹ S. 373, 84th Cong., 2d Sess. (1955).

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