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# Trespassory Union Picketing on Private Property: *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*—Bringing State Law to “No-Man’s Land”?

## I. INTRODUCTION

In recent years the location of a picket line has become almost as important as the reason behind the protest. Nowhere is this more evident than in the split among the states on the question of whether trespassory union picketing<sup>1</sup> on management’s private property is actually<sup>2</sup> or “arguably”<sup>3</sup> protected or prohibited by section 7<sup>4</sup> or section 8<sup>5</sup> of the National Labor Relations Act

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1. The term “trespassory union picketing” is used herein to refer to peaceful picketing by labor union members on non-public areas in violation of state trespass laws. Not all picketing on an employer’s private property can be enjoined even if done against the owner’s wishes. “[E]mployees often have the right to engage in picketing at particular locations, including the private property of another.” *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 98 S. Ct. 1745, 1770 (1978) (Brennan, J., dissenting).

2. “When it is *clear* or may be fairly assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.” *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (emphasis added).

3. “When an activity is *arguably* subject to § 7, or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” *Id.* at 245 (emphasis added).

4. Section 7 provides, in part: “Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively 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 . . . .” National Labor Relations Act, § 7 *as amended by* 29 U.S.C. § 157 (1976).

5. Section 8(a)(1) provides, in part: “It shall be an unfair labor practice for an employer—to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7. . . .” 29 U.S.C. § 158(a)(1) (1976). Section 8(b)(4)(D) provides in part that it shall be an unfair labor practice for a labor organization or its agents:

[T]o threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . .

. . . .  
. . . forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

(NLRA).<sup>6</sup> While such labor activity was deemed to be within the exclusive jurisdiction<sup>7</sup> of the National Labor Relations Board (NLRB)<sup>8</sup> by some courts,<sup>9</sup> other states found no pre-emption of their trespass laws by the federal Act.<sup>10</sup> With its latest venture into this "no-man's land,"<sup>11</sup> the United States Supreme Court has attempted to fashion a partial answer to management's dilemma when confronted with trespassory union picketing.

In *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*<sup>12</sup> the Court held that the NLRA *did not* pre-empt a state court's jurisdiction over trespassory picketing by non-employee union members in situations where the union did not file an unfair labor practices grievance<sup>13</sup> with the NLRB. This note

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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.

29 U.S.C. § 158(b)(4)(D) (1976). Section 8(b)(7)(C) provides, in part, that it shall be an unfair labor practice for a labor organization or its agents:

[T]o picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees:

. . . .  
. . . where such picketing has been conducted without a petition . . . [for a representation election] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . .

29 U.S.C. § 158(b)(7)(C) (1976).

6. Labor Management Relations Act § 1 *et seq. as amended by* 29 U.S.C. § 151 *et seq.* (1976).

7. The terms "exclusive" or "primary" jurisdiction refer to the Court's determination in *Garmon* that the NLRA "completely pre-empts state court jurisdiction unless the [National Labor Relations] Board determines that the disputed conduct is neither protected nor prohibited by the Federal Act." *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 98 S. Ct. 1745, 1758-59 (1978).

8. The Board was created in 1947 to carry out the provisions of the NLRA. National Labor Relations Act § 3 *as amended by* 29 U.S.C. § 153 (1976).

9. *E.g.*, *Shirley v. Retail Store Employees Union*, 22 Kan. 373, 565 P.2d 585 (1977); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 17 Cal.3d 873, 553 P.2d 603, 132 Cal. Rptr. 443 (1976), *rev'd.*, 98 S. Ct. 1745 (1978); *Freeman v. Retail Clerks Union Local 1207*, 58 Wash.2d 426, 363 P.2d 803 (1961); *see also* Schachter, *Regulating Trespasses on Private Property: State Injunctive Relief Is the Answer*, 28 LABOR LAW JOURNAL 211, 213-16 (1977); Note, 5 PEPPERDINE L. REV. 153, 160 (1977).

10. *E.g.*, *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill.2d 529, 349 N.E.2d 832 (1976); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964); *see also* Schachter, *supra* note 9; Note, 5 PEPPERDINE L. REV. 153, 160 (1977).

11. The Court first labelled this area of the law a "no-man's land" in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 11 (1957). *Cf.* Chief Justice Burger's reference to a "no-law area." *Taggart v. Weinacker's Inc.*, 397 U.S. 223, 228 (1970) (Burger, C.J., concurring).

12. 98 S. Ct. 1745 (1978).

13. The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its

will examine the pre-emption issues raised by *Sears, Roebuck* and discuss whether the decision is destined to be narrowly construed according to its restrictive set of facts, or whether the Court has begun to usurp the NLRB's primary authority over labor controversies by allowing an application of state trespass laws in this "no-man's land."

## II. FACTS OF THE CASE

In October of 1973 the San Diego County District Council of Carpenters (Union) learned that Sears, Roebuck and Co. (Sears) was having carpentry work done in its Chula Vista, California department store. Two business representatives of the Union visited the location and found non-Union dispatched carpenters performing the labor. The representatives met with the manager of the store and asked him to honor the terms of a master agreement between the Union and the Building Trades Council of San Diego (which required the exclusive use of Union-dispatched carpenters for the type of work Sears was having done), or to subcontract the work to a contractor who would do so. Upon the store manager's failure to meet the Union's demands, Union-sanctioned picketing of the department store began.<sup>14</sup>

The picketing was peaceful and orderly at all times<sup>15</sup> and, although conducted on Sears' private property, the patrolling was conducted in areas where the store had previously allowed various groups to solicit and to distribute literature.<sup>16</sup>

After the Union refused to comply with Sears' demand to remove the pickets from store property, Sears obtained a temporary restraining order from the Superior Court of San Diego County.

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contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of facts constituting the alleged unfair labor practices.

NLRB Statements of Procedure 29 C.F.R. § 101.2 (1972).

14. Sears has an "open shop"; *i.e.*, there are no union employees working for the company. Consequently, the picketing was done entirely by non-Sears personnel.

15. Had the picketing been violent or raised the threat of violence the state courts could unquestionably halt the Union's activity. *See Automobile Workers v. Russell*, 356 U.S. 634 (1958) (violence); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (threats of violence).

16. 98 S. Ct. at 1772 n.11.

The order enjoined the pickets from patrolling on the non-public areas belonging to the department store.<sup>17</sup> The Union immediately withdrew its pickets to the public sidewalks surrounding the Sears' parking lot. There the pickets continued their patrolling until the Union decided that they were having little impact so great a distance from the store.<sup>18</sup> Thereafter, the superior court granted a preliminary injunction against further Union patrols on Sears' private property. The injunction did not, however, preclude the Union from picketing on the public sidewalks surrounding the store.<sup>19</sup>

California's Fourth District Court of Appeal affirmed the superior court's order.<sup>20</sup> Relying on an exception to the pre-emption doctrine enunciated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon*,<sup>21</sup> the court of appeal ruled that the Union-sanctioned picketing affected Sears' private property rights, an area "deeply rooted in local feeling and responsibility."<sup>22</sup> The court held that, in the absence of clearly expressed congressional intent to pre-empt state jurisdiction,<sup>23</sup> the continuing trespass could be enjoined.

The California Supreme Court disagreed and reversed the restraining order.<sup>24</sup> The court declared that state jurisdiction was pre-empted by the NLRA because the picketing was both arguably prohibited under section 8 of the Act as unlawful recognitional picketing,<sup>25</sup> and arguably protected by section 7 of the Act as picketing to enforce area standards for the employment of carpenters.<sup>26</sup>

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17. *Id.* at 1750.

18. Contrary to the Union's contention, Sears claimed that some delivery and repairmen refused to cross the picket line on the public sidewalk. 98 S. Ct. at 1750 n.2.

19. *Id.* at 1750.

20. 52 Cal. App.3d 690, 125 Cal. Rptr. 245 (1975).

21. 359 U.S. 236 (1959). In *Garmon* the Court reversed a California court's award of damages against a union which had engaged in tortious conduct in violation of state law. The Court found the union's activity "arguably" within the scope of § 7 or § 8 of the NLRA and thus pre-empted the state court's decision.

22. 98 S. Ct. at 1750, quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

23. *Id.*

24. *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 17 Cal.3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976), *rev'd.*, 98 S. Ct. 1745 (1978).

25. "Recognitional picketing" is an attempt by a union to cause an employer "to recognize or bargain with" that union and to compel the employer to make concessions or modifications in its personnel decisions. See GORMAN, BASIC TEXT ON LABOR LAW 225 (1976) [hereinafter cited as GORMAN]. Section 8(b)(7)(C) of the NLRA requires that a petition for representation be filed within 30 days of the start of recognitional picketing. 29 U.S.C. § 158(b)(7)(C) (1976).

26. Picketing to enforce area standards is a union measure to pressure management into improving "substandard" economic or working conditions, or to pre-

The court distinguished the holdings by courts of other states<sup>27</sup> which found no pre-emption of state trespass laws by the NLRA,<sup>28</sup> and instead chose to follow its previous holding in *Musicians Union Local No. 6 v. Superior Court*<sup>29</sup> where it stated that, in the absence of some danger to public health or safety, state courts were without jurisdiction to enjoin peaceful picketing, whether trespassory or nontrespassory.<sup>30</sup> The California Supreme Court found no such danger in *Sears, Roebuck*.

### III. THE UNITED STATES SUPREME COURT DECISION

On May 15, 1978 the California Supreme Court's judgment was reversed by the United States Supreme Court in a plurality opinion written by Mr. Justice Stevens.<sup>31</sup> The Court addressed the question left unanswered in a previous decision:<sup>32</sup> whether the NLRA pre-empted state jurisdiction over trespassory union picketing which was arguably protected or prohibited by the federal Act.

The plurality's five-part decision first examined the "arguably prohibited" finding of the California Supreme Court. Though the Union-sanctioned picketing *was* arguably prohibited by section 8, wrote Justice Stevens, the controversy presented to the San Diego Superior Court was the location of the picketing, not whether the objectives of the protest were unlawful.<sup>33</sup> Thus, the superior court's enforcement of a state trespass law did not give rise to a realistic threat of state interference with the NLRB's primary jurisdiction.

If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work reassignment objective . . . . Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective prescribed by federal law was irrelevant to the state claim.<sup>34</sup>

Perhaps even more significantly, however, the Court was unable to find sufficient justification for federal pre-emption in the

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vent the employer from undermining area employment standards by maintaining low personnel or labor requirements. See GORMAN, *supra* note 25, at 225-26.

27. See generally note 10 *supra*.

28. 17 Cal.3d at 906 n.8, 553 P.2d at 613 n.8, 132 Cal. Rptr. at 453 n.8.

29. 69 Cal.2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968).

30. 17 Cal.3d at 903, 553 P.2d at 611, 132 Cal. Rptr. at 451.

31. 98 S. Ct. 1750.

32. *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957).

33. 98 S. Ct. at 1758.

34. *Id.*

“arguably protected” nature of the picketing. Noting that the Union’s failure to go to the NLRB after Sears had ordered the pickets from its private property left the department store without a Board remedy,<sup>35</sup> the Court carved out a new exception to the Board’s primary jurisdiction:

We are therefore persuaded that the primary jurisdiction rationale does not provide a *sufficient* justification for pre-empting state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so.<sup>36</sup>

The plurality recognized that to deny management a state remedy in cases where the union refused to go to the Board would force the private property owner to endure the trespass indefinitely or to risk a violent confrontation by attempting to remove the pickets himself.<sup>37</sup> Thus, the Court fashioned a limited solution to this dilemma by enabling the landowner (management) to seek state judicial intervention to determine whether the location, but not the legitimacy of the picketing itself, violated state laws.

In his concurring opinion, Justice Blackmun agreed with the Court that Sears should be allowed a state remedy.<sup>38</sup> He limited his support, however, to situations where the Union has not filed an unfair labor practice allegation with the NLRB.<sup>39</sup>

Though concurring with the plurality, Justice Powell disagreed with Justice Blackmun in his separate opinion.<sup>40</sup> Powell was not impressed with the suggestion that the filing of a complaint with the Board was a talisman that immediately pre-empted state jurisdiction.<sup>41</sup> Stressing that “no man’s land’ prevents all recourse to the courts,” and that it invited self-help measures, Justice Powell belittled any attempt to read into the NLRA any congressional authorization for an employer to “endure the creation of a temporary easement” on his private property.<sup>42</sup> Such an “easement” would be even more difficult to accept in situations where, as in *Sears, Roebuck*, non-employees were doing the picketing.

Justices Stewart and Marshall joined Justice Brennan in his dissent.<sup>43</sup> Calling the case a classic for pre-emption,<sup>44</sup> Justice Brennan minimized the effect the trespassory picketing had on Sears. Since the Union’s activity was arguably protected as ei-

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35. *Id.* at 1760.

36. *Id.*

37. *Id.*

38. *Id.* at 1763 (Blackmun, J., concurring).

39. *Id.* at 1764.

40. *Id.* at 1765 (Powell, J., concurring).

41. *Id.*

42. *Id.* at 1766.

43. *Id.* (Brennan, J., dissenting).

44. *Id.* at 1772.

ther area standards or recognitional picketing, the dissent argued that the NLRA pre-empted state jurisdiction regardless of the constraints placed on Sears.<sup>45</sup>

Furthermore, wrote Justice Brennan, "the denial to the employer of a remedy is an entirely acceptable social cost for the benefits of a pre-emption rule that avoids the danger of state-court interference with national labor policy."<sup>46</sup> Nor, according to the dissent, was Sears' interest in keeping the pickets off its private walkways and on the public sidewalks a very strong one.

The picketing was confined to a portion of Sears' property which was open to the public and on which Sears had permitted solicitations by other groups. Thus, while Sears to be sure owned the property, it resembled public property in many respects.<sup>47</sup>

Labelling the decision an "unfortunate" one, Justice Brennan suggested that adherence to the *Garmon* pre-emption tests<sup>48</sup> would help avoid much of the confusion and uncertainty that *Sears, Roebuck* was sure to cause.<sup>49</sup>

#### IV. PRE-EMPTION: A HISTORICAL PERSPECTIVE

In the two decades since *Garmon*<sup>50</sup> was handed down, the courts have repeatedly encountered pre-emption<sup>51</sup> of state action

45. *Id.* at 1773.

46. *Id.*

47. *Id.* at 1772 (footnote omitted).

48. See notes 2 and 3 *supra* and accompanying text.

49. 98 S. Ct. at 1778.

50. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); see note 21 *supra*.

51. U.S. CONST. art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the *supreme* Law of the Land; . . . any thing in the Constitution or Laws of any State to the contrary notwithstanding." (Emphasis added). Commonly referred to as the Supremacy Clause, this section allows for the pre-emption of any state law which conflicts with a federal law. However, the federal courts do *not* have an inherent power to enjoin state court proceedings seeking an injunction against picketing merely because such proceedings interfere with a protected federal right or invade an area pre-empted by federal law. *Atlantic Coast Line R.R. Co. v. Locomotive Engineers*, 63 Lab. Cas. ¶ 10,931 (1970). The action is permitted only where it is necessary to aid in the federal court's jurisdiction or to protect its judgment. *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

The National Labor Relations Act (29 U.S.C. § 151 (1970)) and the Labor Management Relations Act (29 U.S.C. § 141 (1970)) were passed to protect organized labor's efforts to bargain collectively. See *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270 (1955), *reh. denied* 351 U.S. 980 (1956); Note, 5 PEPPERDINE L. REV. 153 n.2. Under these Acts, if the question before the courts concerns NLRB jurisdiction against state court interference, the NLRB must initiate the action. *Amalgamated Clothing Workers v. Rickman Brothers*, 348 U.S. 511



by the NLRB. A constant flux of judicial ideas has flooded the law with inconsistent theories and approaches.<sup>52</sup> All, however, have served to reinforce the basic premise that "the day of pre-emption has come."<sup>53</sup>

Traditionally, two basic principles have grounded pre-emption holdings.<sup>54</sup> Any time there exists a potential conflict between substantive provisions of federal and state law, the Court will usually nullify the latter and uphold the former. Alternatively, the existence of a potential conflict between state enforcement groups and specialized federal agencies leads to an examination by the Court of the designated purpose of each. This determination qualifies the agencies for either co-existence or results in preclusion of state action by federal law. The NLRB is an independent federal agency established under the NLRA.<sup>55</sup> Therefore both principles may be applicable in examining the jurisdiction and authority of the Board, in light of state laws and state agencies.

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(1955); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954). See Cox, *Labor Law Pre-emption Revisited*, 85 HARV. L. REV. 1337 (1972); Broomfield, *Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552 (1970).

52. The Court does not merely set out black and white principles based upon the existence of federal law, rather it examines the reason and necessity for state action. See *Farmer v. Carpenter*, 430 U.S. 290, 300 (1977): "[T]he cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation."

The state courts themselves are diversified in their approaches to granting injunctive relief. See, e.g., *Rosenberg, Inc. v. Doe*, 31 Lab. Cas. ¶ 70,324 (N.Y. Sup. Ct. 1956) (picketing to compel breach of valid union contract); *Metropolis Country Club v. Lewis*, 114 N.Y.S. 2d 620, 202 Misc. 368 (1952) (picketing which misleads the public and compels an employer to force his workers to join a union); *General Teleradio Inc. v. Manuti*, 133 N.Y.S.2d 362, 284 AD 400 (1954) (picketing violative of a federal law other than the NLRA); *Anchorage, Inc. v. Waiters & Waitresses Union, Local 301*, 383 Pa. 547, 119 A.2d 199 (1956) (organizational picketing for unreasonable period of time); *Hearn Dept. Stores, Inc. v. Livingston*, 125 N.Y.S.2d 187, 282 AD 480 (1953) (picketing where violence involved).

For areas in which state action was not taken, see *Galler 7 Up Bottling Co. v. Slurzberg*, 27 N.J. Super. 139, 99 A.2d 164 (1953) (product picketing); *Kidde Mfg. Co. v. United Electrical Radio & Machine Workers, Local 437*, 27 N.J. Super. 183, 99 A.2d 210 (1953) (employer unlawfully withheld vacation pay).

53. Address by Stanley Schair, ABA National Institute on Developing Labor Law, (March 1, 1977), reprinted in *THE DEVELOPING LABOR LAW*, ed. by Francis Penn and Laurel Black (1978).

54. *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

55. See notes 6 and 8 *supra*. Congress sought a means of uniformity and therefore prescribed for the Board "a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order," thereby seeking "to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953).

One school of thought maintains that the mere formation of the NLRB is grounds for pre-emption of state regulation.<sup>56</sup> However, there exist certain exceptions to such an automatic preclusion of a state's judicial and administrative powers.

[B]ecause Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation the Court has been unwilling to declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions.<sup>57</sup>

The first exception concerns the Court's inability to discern a congressional intent to regulate the area. The primary judicial interpretation of congressional intent in enacting the NLRA came in *San Diego Building Trades Council v. Garmon*.<sup>58</sup> Although the decision held federal jurisdiction to be exclusive if the disputed labor activity is or may "arguably" be covered under either section 7 or section 8 of the NLRA,<sup>59</sup> it also set out two areas in which such pre-emption is to be questioned. If the activity involved is either a matter of deep local concern<sup>60</sup> or a matter which the Labor Management Relations Act<sup>61</sup> only peripherally touches,<sup>62</sup> the congressional intent is not automatically evaluated to preclude state action.

The second major exception concerns the regulation of criminal or tortious violence, or the threat thereof.<sup>63</sup> These activities must be controlled on a local level to be effective. An employer cannot wait several months for the Board to make a determination if his person or property is under threat of harm.

The final exception in this area concerns the implementation of a strong federal policy by state or federal courts, regardless of the Board's jurisdiction. Actions to enforce collective bargaining agreements exemplify federal policy, under the NLRA, which must be upheld by the state courts.<sup>64</sup>

56. GORMAN, *supra* note 25, at 768.

57. *Farmers v. Carpenters*, 430 U.S. 290, 295-96 (1977).

58. 359 U.S. 236 (1959).

59. *Id.* at 244.

60. *Id.* at 247.

61. 29 U.S.C. § 141 *et seq.* (1976).

62. 359 U.S. at 243.

63. GORMAN, *supra* note 25, at 768.

64. Congress has created exceptions to the Board's exclusive jurisdiction in addition to those developed by the judiciary. Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, *as amended by* 29 U.S.C. § 187 (1976), authorizes anyone injured in his business or property by activity violative of Section 8(b)(4) of the NLRA, 61 Stat. 140, *as amended by* 29 U.S.C. § 158(b)(4) (1976), to

## V. THE SIGNIFICANCE OF THE ISSUE DECIDED BY THE COURT

In *Sears, Roebuck*<sup>65</sup> the Court addressed the issue of trespassory picketing by non-employee Union members on Sears' private property.<sup>66</sup> Therein lie two crucial points of consideration: those who were picketing were non-employees, and the location of the picketing was on private property.

"Stranger picketing"<sup>67</sup> has consistently been justified on a first amendment freedom of speech basis.<sup>68</sup> However, in *Sears, Roebuck*, the Court weighed the interests of the property owner against those of the Union, and found the comparative significance of the latter's interests to be wanting. The injunction granted by the state superior court did not prevent the Union from picketing, but rather, it merely precluded the Union from patrolling on Sears' private property.<sup>69</sup> The court made no attempt to determine the value of such picketing once it was removed from the department store's doorstep.

The initial premise of the Supreme Court was that the "union's picketing on Sears' property after the request to leave was a con-

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recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. See *Teamsters v. Morton*, 377 U.S. 252 (1964). Section 301 of the LMRA, 29 U.S.C. § 185 (1976), authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). Section 14(c)(2) of the NLRA, as added by Title VII, § 701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 164(c)(2) (1976), permits state agencies and state courts to assert jurisdiction over "labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." *Farmer v. Carpenters*, 430 U.S. at 297.

65. 98 S. Ct. 1745 (1978). This is the first time the Court has fully addressed the subject of concerted trespass by organized labor. See *Musicians Union Local No. 6 v. Superior Court*, 69 Cal.2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968) (NLRB never invoked, injunction held improper under law of trespass or otherwise, as an exercise of the power reserved to the states to insure public health or safety); *People v. Bush*, 39 N.Y.2d 529, 349 N.E.2d 832 (1976) (NLRB never invoked, held: "where private property is involved, union rights under section 7 are limited and must be made clear on its initiative in advance." *Id.* at 538, 349 N.E.2d at 838); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964); *Moreland Corporation v. Retail Store Employees Union Local No. 444*, 16 Wis.2d 499, 114 N.W.2d 876 (1962) (held: states have jurisdiction to enjoin trespass, even assuming the presence of the necessary federal jurisdictional requirements); *Freeman v. Retail Clerks Union Local No. 1207*, 57 Wash.2d 426, 363 P.2d 803 (1961) (action for trespass by a shopping center owner against a labor union held arguably subject to NLRA, thus depriving state court of subject matter jurisdiction).

66. 98 S. Ct. at 1758.

67. The term "stranger picketing" applies whenever non-employees are involved.

68. See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *AFL v. Swing*, 312 U.S. 321 (1941); *Bakery & Pastry Drivers Union v. Wohl*, 315 U.S. 769 (1942); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943).

69. 98 S. Ct. at 1746.

tinuing trespass in violation of state law."<sup>70</sup> At no time was there an assertion that the picketing itself was illegal. However, if the question had been before the Board, the legality, not the location, would have been the primary issue addressed. The interests involved must be carefully scrutinized because "the decision to preempt . . . state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of permitting the state court to proceed."<sup>71</sup>

NLRB consideration<sup>72</sup> is invoked by the filing of an unfair labor practices charge. Since Sears had no grounds upon which to file a charge with the Board, and the Union chose not to do so, Sears was left without a method of obtaining a ruling from the Board. Sears had three options: 1) allow the picketing on their private property; 2) forcefully evict the pickets; or 3) seek the protection of the state trespass laws. The Court evaluated each of these and concluded that Sears had only one viable alternative—to ask for relief from the state courts.<sup>73</sup>

Historically, picketing has been protected, or arguably protected, by section 7 of the NLRA, as well as prohibited, or arguably prohibited, as an unfair labor practice under section 8.<sup>74</sup> Any finding by the Board of actual protection of an activity results in pre-emption of any state action.<sup>75</sup> However, the title of "arguably protected" grants to the Board primary jurisdiction to determine such protection.<sup>76</sup> Alternatively, the state court could be allowed the task of making the determination,<sup>77</sup> but such an approach has

70. *Id.* at 1751. This was the first time since the passage of the Wagner Act in 1935 that the Court has attempted to decide "whether a state court has power to enforce local trespass laws against a union's peaceful picketing." See *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20, 24-25 (1956); *Cf. Taggart v. Weinacker's, Inc.*, 283 Ala. 171, 214 So.2d 913 (1968), *cert. granted* 396 U.S. 813 (1969), *cert. dismissed* 397 U.S. 223 (1970).

71. *Vaca v. Sipes*, 386 U.S. 171, 180 (1967).

72. See notes 13 and 55 *supra*.

73. The Court noted that:

Since the Union's conduct violated state law, Sears legitimately rejected the first option. Since the second option involved a risk of violence, Sears surely had the right—perhaps the duty—to reject it. Only by proceeding in state court, therefore, could Sears obtain an orderly resolution of the question whether the Union had a federal right to remain on its property.

98 S. Ct. at 1760.

74. See notes 4 and 5 *supra*.

75. See note 2 *supra*.

76. See note 3 *supra*.

77. It is possible in areas of stranger picketing (see note 67 *supra*) that a rul-

been viewed by many as an inadequate means of protecting federal rights.<sup>78</sup>

In *Hudgens v. National Labor Relations Board*<sup>79</sup> the Court held that a shopping center was private property and that no constitutional right<sup>80</sup> existed to picket there. However, the Court remanded to the Board for a determination of whether such a right is statutorily protected under section 7 of the NLRA. The Court was unwilling to allow the state court determination to stand alone. The Board invoked a balancing test, as provided for in *Babcock v. Wilcox Co.*,<sup>81</sup> between the protected union activity and the private property rights of the owner, and concluded that the union had no other "reasonable access to the employer's customers."<sup>82</sup> In addition, the Board held that the infringement upon the property rights of the owner, who was not a party to the dispute, "did not strip the picketing of the statutory protection."<sup>83</sup>

The Court in *Sears, Roebuck*<sup>84</sup> did not have the option to remand to the NLRB for a determination of section 7 protections. The Union had an opportunity to invoke the Board's opinion and chose not to do so. The Court interpreted that action to be a fulfillment of any protection owed to the Union and upheld the state court determination. In so doing it concluded that, in any event, a "trespass is far more likely to be unprotected than protected."<sup>85</sup>

The Court examined the primary jurisdiction<sup>86</sup> theory in light of the "arguably protected" status of the picketing. In most instances when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. However, this rationale does not extend to cases in which the employer has no reasonably acceptable method of acquiring the jurisdiction of the Board or inducing the Union to invoke such jurisdiction.<sup>87</sup> Sears had no such means of acquiring a Board decision. Beyond this, the issue which Sears asked the state court to decide would

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ing by the Board will be unattainable. Therefore, some members of the Court have urged that state action be pre-empted only when the activities are *actually* protected. See the concurring opinion of Mr. Justice White in *Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).

78. GORMAN, *supra* note 25, at 770.

79. 424 U.S. 507 (1976). See W.S. Rudolph, *Shopping Center Picketing: The Impact of Hudgens v. NLRB*, 45 GEO. WASH. L. REV. 812 (1977).

80. The constitutional right involved was the first amendment protection of free speech.

81. 351 U.S. 105 (1956).

82. [1977-78] NLRB Decisions (CCH) ¶ 18,290.

83. *Id.*

84. 98 S. Ct. 1745.

85. *Id.* at 1761.

86. See note 7 *supra*.

87. 98 S. Ct. at 1760.

not have been reached by a Board decision.<sup>88</sup>

Unfair labor practices as prohibited under section 8 of the NLRA entail activities concerning picketing.<sup>89</sup> However, none of the subsections reach the issue in this case. There was no attempt by Sears to use either force or illegal means to disband the picketing. Rather, it chose to use the only viable means of self-help available—injunctive relief from the state courts.

## VI. CONCLUSION

There is no definitive statement to be found which delineates what the Union hoped to accomplish in its stranger picketing of Sears' open shop, beyond the pressuring of Sears to use Union members. In a free enterprise system, the "shop-keeper" should be free to run his own shop as he chooses. One method of accomplishing this is to avoid depriving the owner of the right to control his own property.

*Sears, Roebuck* casts a glimmer of light into "no-man's land." However, the overall effect of the case will be limited because the decision itself was restricted to a particular set of facts: a non-union shop being picketed on its own property by non-employees to coerce the use of union members. In the future, therefore, it is likely the Court will continue to apply the basic theories and to balance the interests involved in picketing on private property until it is clear whether the state courts or the NLRB will have the final word.

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88. *Id.* at 1758.

89. Section 8(b)(7)(C); *see* note 5 *supra* and accompanying text.

