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# Management's Right to Resort to Injunctive Relief and Self-Help in Order to Prevent Trespassory Union Activity: An Examination of *May Department Stores Co. v. Teamsters Union Local No. 743*

## INTRODUCTION

A determination whether an employer may resort to injunctive relief in order to prevent trespass by non-employee union members necessitates a consideration of the federal preemption doctrines that surround the National Labor Relations Act (NLRA).[1] The individual chapters making up Title 29 of the NLRA contain the major labor acts of the twentieth century, each enunciating certain congressional policies designed to protect, through federal jurisdiction, organized labor's efforts to bargain collectively. However, viewed from an historical perspective, they represent a congressional response to a conservative interpretation that had been consistently applied to previous labor legislation by the United States Supreme Court.[2] With the acceptance of collective bargaining, both judicially and congressionally, as a legitimate element in the balance of power between labor and management, the issue of preemption has turned upon which of the congressional policy considerations that formulate the basis of federal preemption should control.

1. Labor Management Relations Act § 1 et seq. as amended 29 U.S.C. § 151 et seq. (1970).

2. The Clayton Act, 29 U.S.C. § 52, ch. 5, was designed to prevent the application of the Sherman Anti-Trust Act against organized labor in the form of injunctive relief. Allan Bradley Co. v. Local Union No. 3 International Brotherhood of Electrical Workers, 325 U.S. 797 (1945). The Norris - La Guardia Act, 29 U.S.C. § 101-115, ch. 6, was a congressional effort to further limit judicial application of injunctive relief against organized labor activities for violations of the Sherman Act despite section 52 of the Clayton Act. United States v. Hutcheson, 312 U.S. 219 (1941). Section 101 of the Norris - La Guardia Act specifically declared injunctive relief was subject to public policy considerations contained within section 102. The NLRA subchapter II of the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (1947) rested squarely upon the Supremacy Clause by declaring labor's right to bargain collectively was founded upon the adverse effects management's denial of that right had upon interstate commerce. 29 U.S.C. § 151 (1970); *see* Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, rehearing denied 351 U.S. 980 (1956).

The most explicit judicial interpretation of congressional intent in enacting the NLRA was that of the United States Supreme Court in its decision in *San Diego Building Trades Council v. Garmon.*[3] In what came to be known as the *Garmon* doctrine, federal preemption was held to be exclusive if the disputed labor activity is or may arguably be, subject to either section 7[4] or section 8[5] of the NLRA.[6]

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the states free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . . At times it has not been clear whether the particular activity regulated by the states was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board.[7]

The judicial rationale behind the *Garmon* doctrine involved a recognition that remedies available within state substantive law may well be in conflict not only with federal substantive law but also between state enforcement and administrative agencies and the National Labor Relations Board (NLRB), the specialized federal agency established to administer the NLRA. In reaffirming the preemption principles laid down in *Garmon*, the Supreme Court stated as follows:

> The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the [NLRA] . . . .
>
> The rationale for preemption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibililty for applying and developing this comprehensive legal system

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3. 359 U.S. 236 (1959).

4. "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 29 U.S.C. § 157 (1970).

5. "It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title, . . . ." National Labor Relations Act, § 8(A)(1) as amended 29 U.S.C. § 158 (a)(1).

6. 359 U.S. at 244.

7. 359 U.S. at 244-245.

> in the hands of an expert administrative body rather than the federalized judicial system.[8]

Whether a non-employee union member may trespass upon management property for the solicitation of management's non-union employees is a question that has been specifically reserved by the Supreme Court,[9] and thus is a marked example of the need for interpretation of congressional intent regarding federal preemption principles applicable in such situations. The obvious conflict exists between the need of the state to insure an adequate remedy for private property owners against unlawful trespass and the federal policy of encouraging employee organization and collective bargaining.

This note will examine a recent Illinois Supreme Court decision, *May Department Stores Co. v. Teamsters Union Local No. 743*,[10] in which it was held that the NLRA had not divested state courts of jurisdiction to hear an employer's request for injunctive relief to prevent trespass by non-employee union members, notwithstanding the fact that the union had filed an unfair labor practice charge with the NLRB. The Illinois Supreme Court based its decision to uphold the application of criminal trespass statutes against non-employee union members upon the following two recognized exceptions to the *Garmon* doctrine: "Where the activity regulated was a merely peripheral concern of the Labor Management Relations Act"[11] or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[12]

The decision is particularly significant in that before the Illinois Appellate Court reversed the circuit court's order granting the injunction,[13] the NLRB regional director notified the union that the Board would refuse to issue a complaint against

8. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 287-288 (1971) (footnote omitted).
9. Amalgamated Meat Cutters, Local 427 v. Fair Lawn Meats, Inc., 353 U.S. 20, 24 (1957).
10. 64 Ill. 2d 153, 355 N.E. 2d 7 (1976).
11. 359 U.S. at 243.
12. *Id.* at 244.
13. May Department Stores Co. v. Teamsters Union Local No. 743, 32 Ill. App. 3d 916, 337 N.E. 2d 299 (1976).

Venture Stores (a subsidiary of May Department Stores) for engaging in an unfair labor practice. Subsequent to the appellate court's decision, the director of the NLRB Office of Appeals affirmed, without a formal hearing on the merits, the regional director's decision. The grounds for the Board's refusal to issue a complaint, as stated in a letter to the union, were as follows: "The evidence is insufficient to show that there were no adequate alternate means by which the Union could identify and contact Venture Store employees particularly in view of the fact that the Union made no attempt to utilize such alternatives. . . ."[14]

It is this author's contention that the Illinois Supreme Court placed an unduly restrictive interpretation on the NLRA, contrary to the clearly expressed congressional policy in favor of peaceful concerted activity as a recognized means of collective bargaining in labor-management relations. Absent a compelling state interest in controlling existing violent conduct, as justification for intervention, the fact situation in *May Department Stores* presents a clear question of the preemption policy considerations that should control a state's assumption of jurisdiction. Furthermore, the alternate means suggested by the NLRB were rendered impractical if not impossible by the physical setting of the site in question. Rather than an urban setting with a single entry and employee residences nearby, the site was a suburban shopping center surrounded by large parking areas open to the public.[15]

The following analysis is premised on the supposition that a doctrine of preemption which provides management with the opportunity to invoke local criminal trespass laws against organized labor is to afford management a remedy which is denied labor. The implications of such a doctrine would seriously distort the balance of power Congress sought to establish between labor and management through the enactment of the NLRA.[16]

## THE APPELLATE COURT DECISION

Venture Stores operates a department store on a block of property bounded on three sides by public sidewalks. The store itself is located at the center of the block and is surrounded by

14. 64 Ill. 2d at 158-59, 355 N.E. 2d at 9.

15. *See* Broomfield, *Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 553-554, (1970); [hereinafter cited as BROOMFIELD].

16. *Id.* at 564-566.

large parking areas to accomodate customer parking. One month prior to the store's opening in March, 1975, the Teamsters Union Local No. 743, sought to persuade Venture employees and prospective employees to join the union. The organizational efforts were made outside the store in adjoining parking areas and were limited to the hours before the store opened and after it closed. Venture filed a complaint for a permanent injunction and a petition for a temporary restraining order to enjoin the union and its representatives from soliciting employees on Venture's premises. The complaint charged that the organizational campaign was carried on despite state and village anti-trespass laws, despite requests that it be stopped and despite the store's posted rule prohibiting solicitational activity for any purpose by either employees or non-employees. Before the opening of court on the morning Venture's petition for the temporary restraining order was to be heard, the union filed an unfair labor practice charge with the NLRB. In response to Venture's complaint, the Union filed a motion to dismiss, alleging that the NLRA had preempted the State's jurisdiction. The Circuit Court of Cook County granted Venture's motion for a preliminary injunction, which by its terms enjoined solicitation on Venture's property but permitted it on adjacent public sidewalks.[17]

In dismissing the order granting the injunction, the appellate court distinguished *People v. Goduto*,[18] where a non-employee's conviction for trespassing on private property for the purpose of distributing union literature was upheld. The defendants in *Goduto* contended that the state court was without jurisdiction to invoke the trespass laws because the NLRA had preempted the jurisdiction of the state court since the disputed labor activity was arguably protected by section 7 or prohibited by section 8 of the NLRA. It was held that the defendant's refusal to desist after requested to do so created an imminent threat of violence since the employer would have to resort to self-help if unable to avail himself of the trespass statute.[19]

However, the court in *Goduto*, relying upon *National Labor Relations Board v. Babcock and Wilcox Co.*,[20] did recognize a

17. 32 Ill. App. 3d at 917, 337 N.E. 2d at 300-01.
18. 21 Ill. 2d 605, 174 N.E. 2d 385, cert. denied, 368 U.S. 927 (1961).
19. *Id.* at 609-610, 174 N.E. 2d at 387.
20. 351 U.S. 105 (1956). In recognizing that an accomodation of property rights and organizational rights is necessary in the context of labor disputes, the

limited right of trespass by union organizers when reasonable alternative means of communication were not available *and* the jurisdiction of the NLRB had been invoked.

> Congress has given union organizers the right to go on company property under certain circumstances and has provided a procedure for determining and enforcing this right. The union has failed to follow the procedure that Congress has provided. We are unwilling to hold that the State courts are divested of jurisdiction, *not because Congress has preempted the area, but because of the course the union organizers have followed.*[21]

The appellate court in *May Department Stores* regarded the union's failure to invoke the NLRB in *Goduto* as a "conclusive" distinction.[22] However, they also cite the following passage from *Babcock and Wilcox Co.* as a further restriction on state jurisdiction: " '[T]he determination of whether there are no other reasonable alternate channels of communication with employees or the no solicitation rule is being unfairly applied is committed primarily to the National Labor Relations Board [*citation*] . . . and we have no jurisdiction to determine such questions.' "[23]

The appellate court's citation of the preceeding passage from *Babcock and Wilcox Co.*, as well as its distinction of the procedures followed by the union in *Goduto* is illustrative of the confusion that exists in regard to the NLRA's preemptive scope and effect upon state substantive law and procedure. The appellate court left undecided the important issue of whether petition of the NLRB is, in fact, a conclusive distinction, or whether the NLRA preempts state jurisdiction before petition to the Board when the activity in question is, or may arguably be, subject to either section 7 or section 8 of the NLRA. The latter alternative would seem to be the proper conclusion since that approach would be consistent with allowing the Board to accomodate the respective rights of the parties in the first instance.[24]

In such situations the nature of preemption itself necessitates a conclusion that preemption attaches before, and is dependent upon, an initial determination by the NLRB. If not, preemption, regardless of the activity involved, would be dependent upon the mere administrative act of filing an unfair practice charge with the NLRB. Furthermore, the petition to the Board would

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Court in *Babcock and Wilcox Co.*, held preemption proper since the determination of the proper adjustment must rest with the NLRB in the first instance. 351 U.S. at 112.

21. 21 Ill. 2d at 614, 174 N.E. 2d at 389 (emphasis added).
22. 32 Ill. App. 3d at 921, 337 N.E. 2d at 303.
23. *Id.* at 921, 337 N.E. 2d at 304.
24. *See* 351 U.S. 105, 112, *supra* note 20.

have to be filed prior to the complaint seeking relief in the state court. The final determination as to whether or not state jurisdiction is preempted would therefore revolve around the outcome of a race by the union to the NLRB and management to the local state court.

It was precisely that fact situation which occurred in the instant case and as a result prompted the Illinois Supreme Court to state as follows:

> As a practical matter, acceptance of the appellate court's reasoning would result in the emasculation of the *Goduto* principal since a union could then unilaterally divest the court of jurisdiction by the mere filing of a charge regardless of its merit.[25]

The rationale behind the creation of the NLRB is clearly contrary to any interpretation of the NLRA that would hold state substantive law controlling in the absence of affirmative action by one party in petitioning the Board.[26] To hold otherwise would in effect render all rights guaranteed under the NLRA dependent upon their assertion before the Board rather than the congressionally intended result that they serve as a backdrop between labor and management, guaranteeing balance and the exercise of good faith.

Thus, although both *Garmon* and the appellate court held federal jurisdiction to be exclusive[27] once preemption attaches, the appellate court, in its distinction of *Goduto* and reliance on *Babcock and Wilcox*, failed to reach a consistent or conclusive determination of the primary issue considered on review by the Illinois Supreme Court. Stated in context, the issue before the Illinois Supreme Court was whether preemption attached before or after the NLRB was petitioned by the union.[28]

25. 64 Ill. 2d at 163; the court's reference to the *Goduto* principal is not in reference to the distinction between filing and not filing a complaint with the Board but to the following earlier statement in the opinion: "We adhere to the holding of *Goduto* that under the *Garmon* doctrine the States are not preempted from jurisdiction of a tresspass action involving non-employee union organizers." *Id.* at 163.

26. *See* note 8, *supra*, and accompanying text.

27. 32 Ill. App. 3d at 922, 337 N.E. 2d at 305.

28. The Illinois Supreme Court correctly stated the issue as follows: "The primary issue to be considered is whether the Circuit Court was without jurisdiction to enter the temporary injunction prohibiting the ongoing trespass by the union." 64 Ill. 2d at 159, 355 N.E. 2d at 9.

## THE DECISION OF THE ILLINOIS SUPREME COURT

It must be observed initially that the Supreme Court of the United States has never fully addressed the subject of concerted trespass by organized labor. Without the authority of a controlling opinion to rely upon, the respective states have, at their pleasure, found trespassory union activity either within or without the preemption doctrine enunciated in the *Garmon* decision.[29] The decision of the Illinois Supreme Court is illustrative. In *Taggart v. Weinacker's Inc.*,[30] an opinion quoted at length by the Illinois Court, Mr. Chief Justice Burger, concurring, specifically rejects any contention that the States are preempted from applying state trespass laws in order to prevent trespass on an employer's premises.[31] The fact that the NLRB was or was not petitioned is immaterial as it was also to the Illinois Supreme Court which found the "Chief Justice's observations highly persuasive."[32] The argument of the Illinois Supreme Court and Mr. Chief Justice Burger is as follows: if an activity is arguably subject to section 7, and therefore preempted by the NLRA, the fact of preemption creates an artifical area of "no-law" since in the absence of an unfair labor practice by the union, management is powerless to petition the NLRB to prevent an illegal trespass upon its premises.[33]

The Chief Justice contends that in order to avoid the creation of such a "no-law" area Congress intended the rights guaranteed under section 7 of the NLRA to be construed as enacted against the backdrop of state trespass laws.

29. *See* Sears, Roebuck and Company v. San Diego County District Council of Carpenters, 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976). (NLRB never invoked, following *Garmon* test of arguably subject to section 157, where concerted activity is peaceful); 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 tresspass 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, 378 S.W. 2d 766 (1964) (follows *Goduto*); 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 tresspass, even assuming the presence of the necessary federal jurisdictional requirements, citing *Goduto*); Freeman v. Retail Clerks Union Local No. 1207, 363 P. 2d 803 (Wash. 1961) (action for tresspass by a shopping center owner against a labor union held arguably subject to NLRA, thus depriving state court of subject matter jurisdiction).

30. 397 U.S. 223 (1970).

31. *Id.* at 227-28, (Burger, C.J., concurring).

32. 64 Ill. 2d at 161, 355 N.E. 2d at 10.

33. 397 U.S. at 228, (Burger, C.J., concurring); *See* BROOMFIELD, *supra* note 15 at 555.

> Rather, [Congress] has acted against the backdrop of the general application of State trespass laws to provide certain protections to employees through § 7 of the NLRA [citation]. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area.[34]

The Illinois Supreme Court basically followed the same structural analysis but erred critically by defining its reasoning in terms of the *Garmon* doctrine. In holding that a state's trespass laws fall within certain recognized exceptions to the *Garmon* doctrine,[35] it in effect recognized that the activity in question (trespassory union solicitation) was arguably subject to section 7 of the NLRA and thus within the scope of federal preemption.

The distinction is important since under the approach taken by the Chief Justice, the danger of a "no-law" area falls at a point before those rights guaranteed under section 7 come into play. The consequent result is that all union trespassory activity would be outside the scope of federal preemption and thus subject to state anti-trespass laws. To reach that conclusion it would be necessary to assume that Congress was unaware of the possible power management possessed in securing injunctive relief from the State courts in such situations.

This author contends that a workable approach can be found if the NLRA is interpreted as classifying a union's trespass despite a no solicitation rule by management, as a labor dispute not preceeding, but falling between the narrow confines of section 7 and section 8. State assumption of jurisdiction would then become possible only where the nature of the union's response to management's ban on solicitation subjected it to the existing exceptions under the *Garmon* doctrine.

Utilizing the preceeding approach would avoid the dangers recognized by the Chief Justice as well as take into consideration possible unfair labor practices by management which may in effect render the union's trespassory activity necessary per the *Babcock and Wilcox Co.* decision.

In its recognition that a state's trespass laws fall within the existing exceptions to the *Garmon* doctrine, the Illinois Su-

34. 397 U.S. at 228, (Burger, C.J., concurring).
35. *See* notes 11 and 12, *supra* and accompanying text.

preme Court follows basically the same approach. It is their analysis and conclusion in relation to those exceptions to which this note takes exception.

In *Garmon* the Supreme Court cites *Association of Machinists v. Gonzales*[36] as its only authority for the state's ability to assume jurisdiction in matters of peripheral concern to the NLRA.[37] *Gonzales* involved an action against the union for breach of contract in the expulsion of a union member who sought restoration of his membership and damages for his alleged illegal expulsion. The Supreme Court held preemption did not occur since the "subject matter of the litigation . . . was the breach of contract governing the relations between [Gonzales] and his union" and did not concern itself with the union-caused employer discrimination that the NLRA was designed to prevent.[38]

The validity of the *Gonzales* exception as authority for the Illinois Court is questionable for three reasons. First, the fact situation in *Gonzales*, a dispute between a union and union member, justified the Court in labeling the dispute as a peripheral concern of the NLRA. The present fact situation is completely inapposite. Second, the two subsequent Supreme Court decisions referring to the *Gonzales* exception[39] have each involved disputes between a union and its members, and third, in both *Journeymen Local 100 v. Borden*[40] and *Iron Workers Local 207 v. Perko*,[41] the Supreme Court narrowed the exception announced in *Gonzales* and held each case was arguably either an unfair labor practice or activity protected under section 7 and thus state jurisdiction was preempted by *Garmon*. In *Perko*, the Court distinguished *Gonzales* as follows: "[A]s in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and *was not directed to internal union matters*."[42]

The second exception announced in *Garmon* is as follows: "[W]here the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Con-

36. 356 U.S. 617 (1958).
37. 359 U.S. at 244 n.2.
38. 356 U.S. at 621-622.
39. Journeymen Local 100 v. Borden, 373 U.S. 690 (1963); Iron Workers Local 207 v. Perko, 373 U.S. 701 (1963).
40. 373 U.S. 690 (1963).
41. 373 U.S. 701 (1963).
42. 373 U.S. at 705 (emphasis added); Come, *Federal Preemption of Labor Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435-1436 (1970).

gress had deprived the states of the power to act."[43] The cases cited by the court in *Garmon*[44] and subsequent case law applying this exception[45] have made it clear that the exception deals with massive threats of violence or actual violence.[46]

The Supreme Court of Illinois found an imminent threat of violence due to the fact that the NLRB was powerless to afford Venture a remedy absent an unfair labor practice by the union, and was therefore left only the remedy of self-help if not able to rely upon the trespass statutes.[47] However, the instant fact situation makes clear there was no violence or threat thereof. The mere possibility of violence has never before been held sufficient to warrant state assumption of jurisdiction where the concerted activity in question "shows no signs of presently becoming violent and which does not physically interfere with the employer's operations or other's access to his place of business."[48]

The Supreme Court of California has, on two occasions, addressed the issue of peaceful concerted activity on private property as justification for the state's assumption of jurisdiction.[49]

43. 359 U.S. at 244 n.2.

44. International Union, United Automobile, Aircraft and Agriculture Implement Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of harm to body and property of non-striking employees); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (injunction upheld in relation to violence and obstruction of entrances and exits of employers premises, reversed in relation to all peaceful activity); United Automobile, Aircraft and Agriculture Implement Workers v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956) (mass picketing resulting in obstruction to plant entrance and exit, interference with use of public roads, and threats of physical injury to non-striking employees and their families); United Construction Workers v. Laburnum, 347 U.S. 656 (1954) (sustained award for damages under state tort law for violent conduct. The Court in *Garmon* noted "in *Laburnum* this court expressly phrased its grant of certiorari to include only the limited question of the State's jurisdiction to award damages '[i]n view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners' (citation omitted)." 359 U.S. at 247 n.6.

45. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (brandishing of weapons).

46. *See* Broomfield, *supra* note 15 at 559-60.

47. 64 Ill. 2d at 162, 355 N.E.2d at 10-11; Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1362-1363 (1972).

48. BROOMFIELD, *supra* note 15 at 565-566.

49. Sears, Roebuck and Company v. San Diego County District Council of Carpenters, 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976); Musicians Union, Local No. 6 v. Superior Court, 69 Cal. 2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968).

In each case the NLRB had not been invoked, and in each the Court held that peaceful labor picketing arguably subject to section 7 or 8 of the NLRA may not be enjoined solely because the disputed activity constitutes a trespass on private property.[50] Both decisions recognized that the need for accomodation between private property rights and those rights guaranteed under the NLRA are, in the absence of actual violence or threats thereof, subject to the NLRB in the first instance. Furthermore, the availability of injunctive relief to management before a determination by the NLRB would not serve to protect the public safety when the disputed trespass was peaceful, but in fact protect the private right of the property owner to post its property.[51] Realizing that the injunction so used would afford management a remedy denied labor and thereby affect the economic struggle between the two parties, the California court stated as follows: "It is for the Board, however, to determine whether and how to protect a party against activities that the Act 'arguably' protects or prohibits."[52]

To better understand the opposite conclusions reached by the California and Illinois Supreme Courts requires an examination of the rationale behind the violence exception to the *Garmon* doctrine as well as the exclusive nature of federal preemption. That analysis will hopefully lead the reader to the conclusion that the correct approach is that taken by the California Supreme Court.

The rationale behind *Garmon's* second exception lies within the inherent police power of the states to preserve domestic peace and insure public safety.[53] Trespass laws have traditionally been designed to insure that peace by eliminating the need for the property owner to resort to self-help.[54] However, the United States Supreme Court has recognized that in the context of labor disputes private property rights are not absolute.[55] The Court's most recent restatement of that position came in *Hudgens v. N.L.R.B.*,[56] where the Court stated as follows:

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50. 17 Cal. 3d at 904, 553 P.2d at 612, 132 Cal. Rptr. at 446; 69 Cal. 2d at 710-11, 447 P.2d at 324, 73 Cal. Rptr. at 212.

51. 69 Cal. 2d at 712, 447 P.2d at 324, 73 Cal. Rptr. at 212; 17 Cal. 3d at 904, 553 P.2d at 611-612, 132 Cal. Rptr. at 451-452.

52. 69 Cal. 2d at 712, 447 P.2d at 324; 17 Cal. 3d at 904, 553 P.2d at 612 (citing quotation with approval).

53. *See* note 44 *supra*; *See, e.g.*, Teamsters Local 24 v. Oliver, 358 U.S. 283, 297 (1959).

54. 21 Ill. 2d at 608-09, 174 N.E. 2d at 387.

55. 351 U.S. at 112; Hudgens v. NLRB, 424 U.S. 507, 522 (1976).

56. 424 U.S. 507 (1976); *see* Central Hardware Co. v. NLRB, 407 U.S. 539, 544 (1972).

> The *Babcock and Wilcox* opinion established the basic objective under the Act: accomodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other [*footnote omitted*] . . . ." *In each generic situation, the primary responsibility for making this accomodation must rest with the Board in the first instance.*[57]

The fact situations in both *Babcock and Wilcox Co.* and *Central Hardware Co. v. N.L.R.B.*,[58] affirming *Babcock and Wilcox Co.*, were specifically distinguished from those in *Hudgens*, directly preceeding the Court's language quoted above.[59] The Court recognized those differences "may or may not be relevant in striking the proper balance."[60]

Because the Court followed its recognition that varying factual situations may well lead to different results with explicit interpretations of both *Babcock and Wilcox Co.* and the NLRA as requiring the NLRB to accomodate property rights and those guaranteed under the NLRA in the first instance, a strong argument may be made that federal law preempts state assumption of jurisdiction regardless of whether or not the NLRB has been petitioned. When the disputed activity is arguably subject to either section 7 or 8, the rights of the individual parties would be dependent upon the Board's determination of what a proper balance should be according to variations in factual circumstances. The Board's findings as to what constitutes a proper accommodation would then be subject to review through the administrative procedures established by the NLRA.[61]

If establishing a balance between labor and management is the federal objective of the NLRA, interference by the states

57. *Id.* at 522 (emphasis added).

58. 407 U.S. 539 (1972).

59. In *Hudgens*, the union filed an unfair practice charge with the NLRB against the owner of a shopping center whose general manager threatened to arrest union employees who were engaging in peaceful picketing of one of the owner's tenants, a retail store located in the center. The pickets were employees of the retail owner's warehouse which was not located in the shopping center. The Board upheld the charges and the shopping center owner petitioned for review.

60. 424 U.S. at 522. The Court made reference to three distinctions. First, the disputed conduct involved lawful economic strike activity, not organizational activity; second, the section 7 activity was not carried on by outsiders (although they were not employees of the store located within the shopping center); and third, since the owner of the picketed store was a tenant at the center, the property rights infringed upon were not his but those of the owner of the center.

61. 29 U.S.C. §§ 151-168 (1970).

would seemingly be precluded. Absent a compelling state interest, such as the violence exception recognized in *Garmon*, state jurisdiction to grant a remedy in the first instance would be preempted. As the Court in *Garmon* noted: "*since remedies form an ingredient of any integrated scheme of regulation, to allow the state to grant a remedy here which has been witheld from the [NLRB] only accentuates the danger of conflict.*"[62]

If it is true that preemption exists before the NLRB is petitioned, it may also be true, as a necessary corollary thereof, that management is denied the right to resort to self-help in cases of peaceful concerted activity that does not interfere with regular business operations. If not denied, in each instance of trespass, management would legally be entitled to forceably remove non-employees from his property without seeking a determination from the NLRB in the first instance. The following construction adopted by the Illinois Supreme Court presents even graver dangers: "We do not consider the mere filing of a charge by the union to be sufficient to divest the State courts of the jurisdiction which otherwise results from the exceptions listed in *Garmon*."[63] The Illinois court continues with an unduly restrictive interpretation of *Babcock and Wilcox Co.*, especially in light of *Hudgens*, and in effect sanctions the resort to violence: "*Babcock and Wilcox Co.* stands for the proposition that employers may validly deny non-employee organizers access to company property unless it is shown that the union had no other reasonable means to communicate with the employees."[64] And thus, the pivotal issue of preemption which turns upon the recognition of accommodation made necessary by the *Babcock and Wilcox Co.* decision is ignored.

If and when actual violence does occur due to management's resort to self-help, injunctive relief would then be appropriate, and if the union failed to petition the Board, an arguably unfair labor practice would be enforced through the exercise of state jurisdiction. The alternatives for the union are wholly unsatisfactory in this situation. If the union does petition after the initial violent clash and is granted injunctive relief from the Board, the employer is prevented only from further resort to self-help. If the union is denied access because the Board determines there are adequate alternate means available, the initial acts of violence are in effect held justified. The consequences to

62. 359 U.S. at 248 (emphasis added).
63. 64 Ill. 2d at 163, 355 N.E. 2d at 11.
64. *Id.* at 164, 355 N.E.2d at 11.

organized labor relations are too great to allow such a course of events.

A more peaceful result would follow if, as the California Supreme Court held, the state courts are preempted even before the initial determination by the NLRB. However, peace is insured only if management is also denied the right to resort to self-help. The proper procedure to be followed during the interim period would then seem to be that of the shopping center owner in *Hudgens*. Management, as well as labor, should be required to shoulder the burden of pursuing peaceful administrative remedies and procedures available through the NLRB. Both the Illinois appellate and Supreme Courts placed too great an emphasis upon union responsibility in making initial contact with the NLRB before any reciprocal obligations attached to the employer.

### The Significance of the Board's Refusal to Issue a Complaint

In the present case the primary evil involved is not the Board's refusal to issue a complaint. The union was bound to desist by that decision and is afforded procedures for review by the NLRA. Fault lies, if at all, with the Illinois Circuit Court's issuance of an injunction prohibiting the trespassory activity by the union. As the California Supreme Court noted, injunctive relief in such situations protects, through local trespass laws, an arguably unfair labor practice at the expense of labor's section 7 rights. It is exactly for that reason that it is necessary for the NLRB to determine initially the proper accomodation between the individual parties. Interference by the state precludes the possibility of that accomodation and grants management an advantage Congress intended to deny.

The fact that the Board failed to issue a complaint was significant in that it seemingly justified the Illinois Supreme Court in its conclusion that the *Babcock and Wilcox Co.* and *Hudgens* decisions permit management to post its property before any determination by the NLRB to the contrary. Following that reasoning, preemption before petition to the Board is precluded since management is entitled to resort to self-help in order to enforce its ban of trespassory solicitation. Recognition of self-

help as a legitimate remedy made it possible for the Illinois Supreme Court to justify the circuit court's assumption of jurisdiction per the violence exception to the *Garmon* doctrine. The final and major significance of the Board's failure to issue a complaint will be labor's future inability in the state of Illinois to exercise its section 7 rights whenever union trespass is involved.

To say that non-employee union organizers must first petition the NLRB in order to enter an employer's premises posted against solicitation, is to support in the first instance an arguably unfair labor practice with the aid of state substantive law. The entire thrust of the NLRA was to preempt the states from asserting any such influence in labor-management relations.

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