NOTES

LABOR LAW: DAMAGE SUITS AS A MEANS OF CONTROLLING UNION UNFAIR LABOR PRACTICES UNDER THE TAFT-HARTLEY ACT

The Supreme Court has recently handed down two decisions which may result in damage suits becoming a significant method of restraining improper union conduct. The question in each case was whether a state court could award damages to the person injured by the wrongful action of a labor union where that conduct could also be deemed an unfair labor practice under the Labor Management Relations Act of 1947 (Taft-Hartley Act).[1] In *International Ass'n of Machinists v. Gonzales*[2] a union member, claiming expulsion from the union in violation of its by-laws and constitution, brought suit in equity for reinstatement and damages resulting from breach of the contractual relationship between the union and its member.[3] In *International Union, United Automobile Workers (UAW-CIO) v. Russell*[4] a non-union employee who was prevented from working by mass picketing brought an action for damages against the union for its wrongful interference with his lawful occupation. The Supreme Court in each instance, even though it assumed that the union had been guilty of an unfair labor practice for which the injured party might have obtained similar relief from the National Labor Relations Board (NLRB),[5] held that the state court had jurisdiction to award damages for the wrongful conduct of the labor union. The dissent[6] argued in each case that Congress by enacting labor legislation had precluded a state court from exercising jurisdiction over conduct that is an unfair labor practice.

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1. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-97 (1952). Unfair labor practices are prohibited by § 8 of the Taft-Hartley Act. See 61 Stat. 140 (1947), 29 U.S.C. § 158 (1952).

2. 356 U.S. 617 (1958), affirming 142 Cal. App. 2d 207, 298 P.2d 92 (1956).

3. Under California law membership in a labor union constitutes a contract between the union and the member, and a breach of this contract is redressible in damages. 356 U.S. at 618.

4. 356 U.S. 634 (1958), affirming 264 Ala. 456, 88 So. 2d 175 (1956).

5. Upon a finding that the employer has committed an unfair labor practice, the NLRB may order an employee reinstated with back pay if the policies of the Taft-Hartley Act would be effectuated thereby. See 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1952).

6. To each case Chief Justice Warren and Justice Douglas dissented. Justice Black took no part in either decision.

The basic question raised by these decisions is whether persons seeking to restrain union unfair labor practices may now do so by an action for damages in a state court. To answer this question, it is necessary to look closely at those decisions in which the Supreme Court has denied state court jurisdiction over unfair labor practices. Against this background the importance of the two principal cases can be assessed in terms of the question posed.

Acts of Congress are specifically declared to be the "supreme law of the land."[7] Absent legislative intent to the contrary, the Supreme Court has frequently held that, to the extent that Congress has legislated with regard to a specific activity, states are deprived of jurisdiction to act in the same area.[8] State action to be valid must not conflict with the purposes of federal legislation.[9] This is the doctrine of pre-emption.[10]

In the field of labor relations the Supreme Court has applied this doctrine to hold, generally, that states may not interfere with rights protected by federal law,[11] and may not enjoin conduct which Congress has declared to be an unfair labor practice.[12] In terms of pre-emption, the first of these propositions has presented the Court with little difficulty; the second, however, has proved more vexing. In *Garner v. Teamsters Union (AFL)*[13] an employer who had been the victim of peaceful but coercive picketing for union recognition, an unfair labor practice under the Taft-Hartley Act, obtained an injunction from a Pennsylvania court on the ground that the union had violated the state labor act.[14] On review the Supreme Court, noting

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7. U.S. Const. art. VI, cl. 2. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) early gave vitality to the supremacy clause.

8. See, e.g., Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); Francis v. Southern Pacific Co., 333 U.S. 445 (1948); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).

9. Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).

10. The doctrine of pre-emption with regard to federal labor relations has been a frequent subject for writers. See, e.g., Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297 (1954); Isaacson, Federal Pre-emption under the Taft-Hartley Act, 11 Ind. & Lab. Rel. Rev. 391 (1958); Smith, The Taft-Hartley Act and State Jurisdiction over Labor Relations, 46 Mich. L. Rev. 593 (1948).

11. Hill v. Florida, 325 U.S. 538 (1945). But state action pursuant to its police power is not pre-empted by federal law unless the intention of Congress to do so is clearly manifested. See note 20 infra.

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

13. 346 U.S. 485 (1953).

14. The state equity court's opinion is reported at 62 Dauph. Co. Rep. 339 (1951). The injunction was later reversed by the Pennsylvania Supreme Court. See 373 Pa. 19, 94 A.2d 893 (1953).

that the provisions of the state and federal statutes concerning unfair labor practices were substantially identical and emphasizing that Congress had specifically empowered the NLRB to prevent acts of this type, held that a state could not enjoin under its own labor statute conduct made an unfair labor practice by federal law. That a state might restrain conduct which the federal agency could find unobjectionable raised a potential conflict with federal law which the Court found intolerable.[15] The rule of the *Garner* case was later extended in *Weber v. Anheuser-Busch, Inc.*,[16] in which the Court held that a state could not use a restraint of trade statute to enjoin union action which might reasonably be deemed an unfair labor practice, and in *Guss v. Utah Labor Relations Bd.*,[17] in which it determined that states lacked jurisdiction to prevent unfair labor practices even in those instances when the NLRB refused to act because of its self-imposed jurisdictional limitations.[18] By the latter decision the *Garner* rule was extended to create a "no-man's land" of labor relations.

The doctrine of pre-emption is not, however, all inclusive. Even in *Garner* the Court noted that the Taft-Hartley Act left some powers to the states and did not indicate that Congress intended to deprive the states of their traditional police and criminal jurisdiction.[19] Despite the scope of federal labor legislation, the Court has consistently held that states may prevent violence, destruction of property, or obstruction of public streets and highways even where an unfair labor practice is involved.[20] Thus, mass picketing and related activities can be regulated by the states under their police powers as well as by the NLRB. Furthermore, the Court decided in *United*

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15. 346 U.S. at 488-91, 498.

16. 348 U.S. 468 (1955).

17. 353 U.S. 1 (1957).

18. Although Congress, in giving the NLRB power to prevent anyone from engaging in an unfair labor practice, intended to exhaust its powers under the commerce clause, see definition of the term "affecting commerce" in the Taft-Hartley Act, 61 Stat. 138 (1947), 29 U.S.C. § 152(7) (1952), the Board has refused to exercise its full jurisdiction and has imposed upon itself certain jurisdictional limits. See 26 L.R.R.M. 50 (1950); 34 L.R.R.M. 75 (1954); 39 L.R.R.M. 44 (1957); 42 L.R.R.M. 89 (1958). The Supreme Court has never ruled directly on the validity of the Board's refusal to fully exercise its powers.

19. 346 U.S. at 489.

20. Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); United Automobile Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

A state also has jurisdiction over matters outside the scope of federal labor legislation. Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949); International Union, United Automobile Workers, AFL v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

Constr. Workers v. Laburnum Constr. Corp.[21] that a state could award damages against a labor union in a tort action despite the fact that the conduct complained of was an unfair labor practice. In that case a contractor, who had been driven by coercion and threats of violence from the "territory" of defendant union after he refused to force his employees to join that organization, was awarded compensatory and punitive damages for the union's wrongful interference with his contractual relations. However, the presence of violence and the fact that the NLRB afforded a person in complainant's position no relief[22] left three questions unanswered by the *Laburnum* case. Was jurisdiction of the state court affirmed merely as another manifestation of those previous decisions in which the Court established that states could restrain violent and coercive unfair labor practices which threatened the public peace? Was the award of damages upheld only because Laburnum could have obtained no relief if state jurisdiction was denied? Or did the *Laburnum* case simply, and broadly, hold that the Taft-Hartley Act did not exclude states from awarding damages to the person injured by the tortious conduct of a labor union even though that conduct was also an unfair labor practice? These questions were debated[23] and remained unanswered until the *Gonzales* and *Russell* decisions indicated that the broad rule was the one established. In each case there was the possibility that the NLRB could have afforded some relief to the injured person, insofar as that agency is empowered to award back pay to an employee who

21. 347 U.S. 656 (1954).

22. The NLRB has no power to award damages to an employer injured by an unfair labor practice. See 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1952). Since Laburnum had withdrawn from the contract, he no longer had an interest which could be protected by an injunction.

23. Several states have not limited jurisdiction to award damages to situations involving violence. See Benz v. Compania Naviera Hidalgo, S.A., 233 F.2d 62 (9th Cir. 1956); International Sound Technicians v. Superior Court, 141 Cal. App. 2d 23, 296 P.2d 395 (1956); Denver Bldg. & Constr. Council v. Shore, 132 Colo. 187, 287 P.2d 267 (1955); Selchow & Righter Co. v. Damino, 146 N.Y.S.2d 874 (Sup. Ct. 1955); Benjamin v. Foidl, 379 Pa. 540, 109 A.2d 300 (1954); Dallas Gen. Drivers v. Wamix, Inc., 281 S.W.2d 738 (Tex. Civ. App. 1955). Various writers, however, have regarded violence as the primary jurisdictional fact in the Laburnum case. See Bernstein, Complement or Conflict: Federal Jurisdiction in Labor Management Relations, 3 How. L.J. 191, 214 (1957); Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A.B.A.J. 415, 419 (1956); Isaacson, Federal Pre-emption under the Taft-Hartley Act, 11 Ind. & Lab. Rel. Rev. 391, 396 (1958); Note, LMRA Held Not to Pre-Empt Jurisdiction to Grant Damages for Common Law Torts Involving Violence, 54 Colum. L. Rev. 1147 (1954).

For general discussion of the significance of the Laburnum decision see Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473, 486-88 (1958) (dissenting opinion); Wollett, Taft-Hartley and State Power to Regulate Labor Relations, 30 Wash. L. Rev. 1, 5-9 (1955).

has been prevented from working by an unfair labor practice.[24] In neither case did the Court rely on the presence or absence of violence or coercive union conduct as the basis for its decision. Rather, in both decisions the Court relied on *Laburnum* to establish the broad proposition that, regardless of the availability of partial relief from the NLRB and regardless of whether or not the state could enjoin under its police power the conduct complained of, there is no indication that Congress intended by the Taft-Hartley Act to pre-empt state jurisdiction to award damages to the person injured by tortious union action merely because it happens to be an unfair labor practice.[25]

This is not to suggest that federal labor legislation may be disregarded in determining whether a state court has jurisdiction over particular union conduct. It is obvious that a state may not by an award of damages, or otherwise, interfere with rights protected by the Taft-Hartley Act.[26] Thus, before a state may exercise jurisdiction over a labor union in a suit for damages, it must determine that the acts complained of are not protected by federal law. Because in most instances it would appear that conduct not protected by the Taft-Hartley Act is proscribed by it,[27] the jurisdictional prerequisite to an award of damages will generally be a decision by the state court, at least by inference, that the union is guilty of an unfair labor practice.

This tacit acknowledgment of the Court which was involved in holding that a state court has jurisdiction to award damages for the wrongful conduct of a labor union might appear inconsistent with the result reached in the *Garner* decision. The effect of that case was to withdraw from the states the power to decide whether given conduct was an unfair labor practice.[28] It would seem that what was denied the states in the former decision was returned in the principal cases. On analysis, however, the apparent inconsistency is resolved. The power to make this decision was withdrawn from the states in *Garner* not merely because the states and the federal agency might

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24. See note 5 supra.

25. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 621 (1958); International Union, United Automobile Workers (UAW-CIO) v. Russell, 356 U.S. 634, 646 (1958).

26. Hill v. Florida, 325 U.S. 538 (1945). Section 7 of the Taft-Hartley Act defines the rights of employees protected by that statute. See 61 Stat. 140 (1947), 29 U.S.C. § 157 (1952).

27. Although there is a third classification of union conduct under federal law, i.e., that which is neither protected nor proscribed, but is unregulated by the Taft-Hartley Act, see International Union, United Automobile Workers, AFL v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949), it would seem likely that most union conduct complained of in tort actions for damages would not fit into this third category.

28. See Isaacson, Federal Pre-emption under the Taft-Hartley Act, 11 Ind. & Lab. Rel. Rev. 391, 395 (1958).

disagree as to what constitutes an unfair labor practice, but because of the possibility that, having reached an opposite conclusion, a state might enjoin conduct which the NLRB would leave undisturbed.[29] This was the "conflict of remedies" of which the Court spoke.[30] What the principal cases say in effect is that there is no objection to a state deciding that given acts constitute an unfair labor practice in an action where the remedy sought is one which the NLRB has no power to grant. The Court has in these cases drawn a distinction between a remedy which is aimed at controlling unfair labor practices and a remedy which has as its primary purpose compensation for improper union conduct.

There remains to be considered the significance of the principal cases in terms of the basic question they pose, i.e., whether union unfair labor practices can now be restrained by bringing damage suits in state courts. Since *Guss v. Utah Labor Relations Bd.*[31] prevents employers who are too small to come within the jurisdictional limitations of the NLRB from enjoining this union conduct, these decisions will no doubt encourage small employers to pursue damage actions as a substitute for the remedy they have been denied.[32] What the attitude of the Supreme Court to this anticipated development will be is difficult to predict. A broad reading of the Court's decision in *Garner* would suggest that any attempt to directly control improper union action by a state award of damages is pre-empted by federal law, since that is the function of the NLRB. However, by its affirmance of punitive damages in *Russell* and *Laburnum,* the Court has already indicated that it is unwilling to draw a distinction between damages which compensate and those which seek to punish and therefore control future union conduct.[33] It might appear that "conflict

29. Garner v. Teamsters Union (AFL), 346 U.S. 485, 488-89 (1953).

30. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 665 (1954).

31. 353 U.S. 1 (1957).

32. Since the Laburnum case, employers have in several instances sought damages for injury caused by improper union conduct. See Denver Bldg. & Constr. Trades Council v. Shore, 132 Colo. 187, 287 P.2d 267 (1955); United Constr. Workers v. New Burnside Veneer Co., 274 S.W.2d 787 (Ky. 1955); Selchow & Righter Co. v. Damino, 146 N.Y.S.2d 874 (Sup. Ct. 1955); Benjamin v. Foidl, 379 Pa. 540, 109 A.2d 300 (1954); Wortex Mills v. Textile Workers Union, 380 Pa. 3, 109 A.2d 815 (1954); Baumgartner's Electric Constr. Co. v. DeVries, 91 N.W.2d 663 (S.D. 1958); Dallas Gen. Drivers v. Wamix, Inc., 281 S.W.2d 738 (Tex. Civ. App. 1955).

33. There was no mention of punitive damages in the Laburnum case and in the Russell case the Court gave little credit to the assertion that a distinction should be drawn between compensatory and punitive damages for the purpose of determining jurisdiction. See 356 U.S. at 646. But see dissenting opinion in Russell to the effect that punitive damages are a serious restraint on union conduct. 356 U.S. at 652.

of remedies" is to be read to its full extent and that the Court is not concerned with the inherent clash between the broad rationale of the *Garner* decision and an award of punitive damages. But, despite the inference that the Court is concerned only with preventing an identical state and federal remedy from bearing on the same conduct, it is suggested that where the purposes of federal and state action are fundamentally the same there is an inherent conflict with federal labor legislation regardless of the form of the remedies involved.[34] In this respect, the Court's affirmance of punitive damages in the *Laburnum* and *Russell* decisions may indicate nothing more than its willingness to distinguish between punitive and compensatory damages for the purpose of determining jurisdiction.

A definite answer to the question posed by the principal cases may be given when the Supreme Court renders a decision in *San Diego Bldg. Trades Council v. Garmon*,[35] now before it a second time.[36] In that case a California court issued an injunction and awarded damages against a labor union which picketed for recognition and to force the employer to enter into a union shop contract. The picketing was carried on without violence, but, because the union represented only a small portion of Garmon's employees, it could reasonably have been considered an unfair labor practice.[37] The Supreme Court reversed the injunction and remanded the award of damages for further consideration.[38] On remand the state court, noting that it had to decide whether damages were authorized under California law for this particular conduct, held that the union violated a state labor statute, that this violation constituted a tort, and thereby affirmed.[39] It is the basis by which union action was declared wrongful that presents the Supreme Court with the question of whether damage suits can be employed to control union conduct. Since the activity complained of could be an unfair labor practice under the Taft-Hartley Act, the question, stated directly, is whether a state, by finding a violation of its labor statute, may determine that an unfair labor practice is a tort for the purpose of awarding damages. To answer this question

34. In those cases in which state action over an unfair labor practice has been upheld by the Court the purpose of state action was not to control union conduct. See, e.g., United Automobile Workers v. Wisconsin Labor Relations Bd., 351 U.S. 266 (1956) (maintain public safety and remove obstructions from the streets); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (compensation for injuries suffered). In these cases the form of remedy was not material to the Court's affirmance of jurisdiction.

35. 49 Cal. 2d 595, 320 P.2d 473, cert. granted, 357 U.S. 925 (1958).

36. The first decision was reported at 353 U.S. 26 (1957).

37. See § 8(b)(1)(A) of the Taft-Hartley Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

38. 353 U.S. 26 (1957).

39. 49 Cal. 2d 595, 320 P.2d 473 (1958).

in the affirmative would mean that a state can accomplish by indirection the result which the *Garner* decision precluded it from attempting directly. The Court in the principal cases did not go to this extreme. In *Russell* and *Gonzales* it said in effect that a union which has committed a tort, as defined by laws of general application, may be sued for damages *despite the fact* that the conduct was also an unfair labor practice. Basic to the Court's reasoning was the conclusion that Congress had not clearly indicated an intention to preempt traditional state power to award damages for wrongful conduct *simply because* the wrongdoer was a labor union.[40] To affirm the California decision in the *Garmon* case the Court would have to extend these propositions to read that a state has jurisdiction to award damages *solely because* an unfair labor practice was committed and the wrongdoer was a labor union. At least by indirection, this would allow states to control union conduct. Since the broad holding of *Garner* appears to be that a state lacks jurisdiction to exercise this control, it is believed that the decision of the California court will be reversed.[41]

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40. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 621 (1958); International Union, United Automobile Workers (UAW-CIO) v. Russell, 356 U.S. 634, 646 (1958). See also United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 669 (1954).

41. Assuming the Garmon case will be reversed on the above reasoning, the question would be presented of whether or not a state's jurisdiction to award damages to one injured by union conduct would extend to include conduct found to be tortious under the prima facie tort theory rather than under one of the cognate torts of interference with contractual relations or interference with lawful occupation. In some states, the intentional infliction of injury upon another without justification is actionable as a prima facie tort. See Forkosch, An Analysis of the "Prima Facie Tort" Cause of Action, 42 Cornell L.Q. 465 (1957); Note, Recent Developments in the New York Law of Prima Facie Tort, 32 St. John's L. Rev. 282 (1958). E.g., in Reinforce, Inc. v. Birney, 308 N.Y. 164, 124 N.E.2d 104 (1954), an employer brought an action for damages against a labor union under a theory of prima facie tort.

A "prima facie tort" would certainly be a tort of general application, and would not necessarily impose liability solely on the ground that the union's conduct constituted an unfair labor practice; thus, objections which may be found to the holding of the California court in the Garmon case would be overcome. Such a theory might, however, be employed primarily to prevent unfair labor practices, in which event the problem of a conflict between federal labor policy and state policy effectuated by damage suits would be presented. See note 34 supra and text supported thereby. It is suggested that should the Court find that this conflict was presented, it would hold that the state lacked jurisdiction to award damages in such actions.