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Joseph Di Fede

PROBLEMS OF FEDERAL-STATE JURISDICTION IN LABOR-MANAGEMENT DISPUTES

JOSEPH DI FEDE

RECENT decisions of the Supreme Court of the United States have created a vast "no-man's land" in which thousands of labor disputes are subject to neither federal nor state regulation; in which the parties have no forum available for the peaceful resolution of their disputes; and in which activities unlawful under both federal and state law are regulated by neither. Obviously, the existence of such an area, in which the parties to labor disputes have no forum, relegate them to the use of industrial and economic warfare, a result contrary to the public policies and best interests of the nation and of the states.

In this article, I will treat, briefly, (1) the events which led to the "no-man's land", (2) the extent and nature of the "no-man's land", (3) complexities and inequities of the "no-man's land", (4) available procedures to narrow the limits of the "no-man's land", and (5) proposed legislative remedies.

I. EVENTS WHICH LED TO THE "NO-MAN'S LAND"

THE National Labor Relations Board has power to investigate controversies concerning representation of employees and to prevent any person from engaging in specified unfair labor practices. The National Board's jurisdiction extends to all labor disputes affecting interstate commerce.[1] The National Labor Relations Act defines the term *affecting commerce* as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[2]

The National Labor Relations Board, likewise, has power, in its discretion, to decline jurisdiction over labor disputes which, while within its statutory reach, do not affect interstate commerce sufficiently to warrant the exercise of federal power.[3] In 1950 and 1954, the National Board established jurisdictional standards under which

Joseph Di Fede is Chairman of the New York State Labor Relations Board and Professor of Law, New York Law School.

1 National Labor Relations Act § 9-10, 49 Stat. 452 (1935), *as amended* 61 Stat. 140 (1947), 29 U. S. C. § 157 (1952).

2 *Ibid*, § 2 (7).

3 N. L. R. B. v. Denver Building Trades Council, 341 U. S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1953) 15 N. L. R. B. ANN. REP. 5-7 (1950).

it declines to exercise jurisdiction over many labor disputes affecting interstate commerce, on the ground that such disputes are predominantly local in character.[4]

In 1937 the National Board and the New York State Labor Relations Board reached an understanding as to the practical allocation of cases between them.[5] By that agreement, the Boards, in substance, divided the field so as to leave to the National Board the interstate industries, while leaving predominantly local and borderline situations to the State Board.

The two Boards continued to operate under this agreement for almost ten years. That entire period was characterized by harmonious relations and complete cooperation. Similar arrangements were in effect between the National Board and other state agencies.

In 1947, the decision of the Supreme Court in the *Bethlehem Steel* case, *supra,* raised some doubt as to the validity of such agreements. In order to eliminate any doubt as to their propriety, a provision was inserted in Section 10(a) of the Taft-Hartley Act (29 U.S.C. § 141, et seq.), authorizing the National Board to cede jurisdiction over local matters to state boards, "unless the provision of the state or territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith." Unfortunately, this proviso, which was enacted to enable state action, has hindered rather than encouraged collaboration between the National and state boards. This has resulted, in large part, from the statutory requirement of consistency, which, in the past, has been interpreted to leave the National Board little discretion to enter into cession agreements with state agencies.

The effect of Section 10(a), however, has not been limited to eliminating cession agreements. The section also is the basis of the recent Supreme Court decisions in the *Guss* and related cases,[6] that state courts and state boards may not act, even where the National Board declines jurisdiction. This preclusion of all state power stems from the Supreme Court's holding that Section 10(a) provides the sole

[4] 19 N. L. R. B. ANN. REP. 2-5 (1954).

[5] Bethlehem Steel Co. v. N. Y. S. L. R. B., 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947).

[6] Guss v. Utah Board, 353 U. S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601 (1956); San Diego B. T. C. v. Garmon, 353 U. S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618 (1957); Amalg. Meat Cutters v. Fairlawn, 353 U. S. 20, 77 S. Ct. 604, 1 L. Ed. 2d 613 (1957).

means by which jurisdiction may be transferred to, or exercised by, the states.

At present, therefore, the situation is this: the National Labor Relations Board has exclusive jurisdiction over labor disputes affecting interstate commerce; the National Board has not ceded jurisdiction to any state or Territorial agency; and both state boards and state courts are without jurisdiction to act even in those cases in which the National Board declines jurisdiction on the very ground that the matters involved are predominantly local in nature and do not warrant the exercise of federal power.

Up to 1947, State Labor Relations Boards had asserted jurisdiction in some labor-management disputes affecting interstate commerce under the doctrine of concurrent jurisdiction as enunciated by the highest courts of New York and Wisconsin in the *Davega* and *Rueping* cases.[7] But in 1947 and 1949, the Supreme Court of the United States overruled these decisions in two cases involving representation proceedings conducted by state boards. Its decisions, based on "potentials of conflicts", struck down the theory of concurrent jurisdiction under which all states previously had acted.[8]

The doctrine of pre-emption was extended to cases involving unfair labor practice proceedings in the subsequent case of *Plankinton Packing Co.* v. *Wisconsin Board,* where the United States Supreme Court again reaffirmed its rulings in the *Bethlehem* and *La Crosse* cases that where the employer's operations affect interstate commerce, and the National Labor Relations Board would take jurisdiction, the states are not permitted to process such matters.

Thereafter, the Supreme Court in *Garner* v. *Teamsters*[9] extended its doctrine of pre-emption to court injunctions against picketing by unions. In what has become the leading case on this subject, the Supreme Court upheld a decision of Pennsylvania's highest court which vacated a lower court injunction against picketing by a minority union, the purpose of which allegedly was to force the employer to compel his employees to join that union. The court stated in that decision that ". . . the reasons for excluding state administrative

[7] Davega-City Radio, Inc. v. N. Y. S. L. R. B., 281 N. Y. 13, 22 N. E. 2d 145 (1939); Wisconsin Employment Relations Board v. Rueping Co., 228 Wis. 473, 279 N. W. 637 (1938).

[8] Bethlehem Steel Co. v. N. Y. S. L. R. B., note 5, *supra*; see also: La Crosse Telephone Corp v. Wisconsin E. R. B., 336 U. S. 18, 69 S. Ct. 379, 93 L. Ed. 463 (1949).

[9] 346 U. S. 485, 74 S. Ct. 461, 92 L. Ed. 228 (1953).

bodies from assuming control of matters expressly placed within the competence of the federal Board also excludes state courts from like action."

The Supreme Court took another long step in the application of the pre-emption doctrine in *Weber* v. *Anheuser-Busch,*[10] decided March 28, 1955. There, the employer had obtained an injunction against picketing on the ground that its purpose was unlawful under the state anti-trust laws. In support of state jurisdiction, the employer contended that the relief was granted, not for any reason having to do with labor relations, but under a state law of general application dealing with restraints of trade. The Supreme Court rejected the argument and held that "where the facts reasonably bring the controversy within the sections [of the Taft-Hartley Act] prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."[11]

The full impact of the doctrine of pre-emption became apparent in the three decisions by the Supreme Court, issued March 25, 1957. All three cases presented the question whether a state may assert jurisdiction over labor disputes affecting commerce, where the National Board declines jurisdiction because of the predominantly local nature of the controversy. The first case, *Guss* v. *Utah Labor Relations Board,*[12] involved an employer's refusal to bargain with a union which represented a majority of the employees in an appropriate unit. The other cases, *Amalgamated Meat Cutters Union* v. *Fairlawn Meats, Inc.,*[13] and *San Diego Building Trades Council* v. *Garmon*[14] were appeals from state court injunctions against picketing by non-representative unions for recognition and a contract including a union security clause. In each case, the Supreme Court held that the state board and courts were without jurisdiction, even though the National Board would not act.

The real significance of these three decisions lies in the fact that

[10] 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 846 (1954).

[11] *Id.* at 481, 75 S. Ct. at 492, 99 L. Ed. at 858; *compare* Giboney v. Empire Storage Ice Co., 336 U. S. 490, 71 S. Ct. 898, 95 L. Ed. 1184 (1951), where no question of affecting interstate commerce was presented.

[12] *Supra,* note 6.

[13] *Supra,* note 6.

[14] *Supra,* note 6.

the Supreme Court of the United States recognized that its decisions would create a vast "no-man's land" where the National Board will not, and the states cannot assert jurisdiction over labor disputes in cases affecting commerce. The court, however, stated that this problem is not one for judicial intervention, but that the power to eliminate the "no-man's land" lies with Congress.[15]

II. EXTENT AND NATURE OF THE "NO-MAN'S LAND"

THE "no-man's land", thus created, is bounded on one side by the National Board's jurisdictional standards, and on the other by the furthest reach of the federal power over interstate commerce.

The extent of the unregulated area cannot be determined precisely, but it is significant, in this regard, that 90% of the business enterprises throughout the country employ less than 20 persons.[16] Although the National Board's standards are framed in terms of dollar volume of business, there is an obvious correlation between gross revenue and number of personnel.

It has been estimated that 25% of the non-agricultural labor forces are employed in businesses over which the National Board does not assert jurisdiction (ROSENTHAL, EXCLUSIONS OF EMPLOYEES UNDER THE TAFT-HARTLEY ACT, 4 INDUSTRIAL AND L.R.R. 556). The 1958 estimate of the Small Business Administration is that the National Board's jurisdictional standards cover less than 3% of the retail industry in the United States, less than 1% of services and public utilities, and less than 50% of the manufacturers.

Included in the "no-man's land" are 126 local transit companies which serve 129 cities with a total population of over 50 million people[17] and the entire hotel industry, over which the National Board, with Congressional approval, consistently has declined jurisdiction.[18] In the State of New York, for instance, there are some 7,800 hotels and inns employing over 120,000 workers.[19]

The National Board has also refused to assert jurisdiction over taxicab companies.[20] In New York City, alone, there are hundreds

[15] See note 12, *supra* at 11, 77 S. Ct. at 607, 1 L. Ed. 2d at 610.

[16] U. S. DEPARTMENT OF COMMERCE AND HEALTH, EDUCATION AND WELFARE, Part I, 1st Quarter, 4-6, (1953) Table 1A. For statistics as to the individual states and territories, see Table 1B, pp. 8-52.

[17] Matter of Charleston Transit Co., 118 N. L. R. B. 1164 (1957).

[18] Matter of St. Louis Hotel Ass'n., 92 N. L. R. B. 1388 (1951).

[19] Industrial Bulletin, N. Y. S. Department of Labor, Feb., 1951.

[20] 19 N. L. R. B. ANN. REP. 5 (1954).

of taxicab companies employing over 30,000 drivers. The entertainment and sport industry, operating thousands of nightclubs, vaudeville shows, theatres,[21] baseball parks and clubs,[22] hockey rinks,[23] boxing clubs, circus exhibitions and race tracks,[24] employing tens of thousands of workers, is another industry over which the National Board declines to assert jurisdiction because of the essentially local nature of the activities. In some of these cases the National Board in declining jurisdiction accepted the rationale of the Supreme Court in the *Federal Baseball Club* case where Mr. Justice Holmes stated that the interstate transportation of baseball players was merely incidental to, and not an essential element of, the sporting events concerned and did not serve to alter the intra-state character of those events so as to bring the baseball clubs within the purview of the Sherman Anti-Trust Act.[25] In a general review of the National Board's policy to decline jurisdiction in the entertainment field, the United States District Court for the Northern District of Illinois refused to enjoin picketing by American Guild of Variety Artists which was seeking to enforce its demands for contribution by nightclub operators to a welfare fund for the artists.[26] In this particular case the picketing

[21] The National Board asserted jurisdiction in Balaban & Katz v. Toledo Projection Ass'n., 87 N. L. R. B. 1071, 25 L. R. R. M. 1197 (1949), on the ground that Employer operated a chain of 120 theatres in three states; however, the Board declined to assert jurisdiction in Keam Co., Inc. v. Philadelphia Moving Picture Operators Union, Local 307-A, 90 N. L. R. B. 652, 26 L. R. R. M. 1255 (1950), on the ground that Employer operated only one theatre.

[22] Federal Baseball Club of Baltimore, Inc. v. National League, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1921); Tools v. New York Yankees, 346 U. S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1952), where again Supreme Court stated that baseball does not come within the scope of the federal anti-trust laws.

[23] Olympia Stadium Corp. v. International Union of Operating Engineers, 85 N. L. R. B. 389, 24 L. R. R. M. 1410 (1949). In this case the Board stated that "operations of indoor sport arenas, although not wholly unrelated to inter-state commerce, are so essentially local in character that assertion of jurisdiction by the N. L. R. B. would not effectuate the policies of the National Act."

[24] Matter of Los Angeles Turf Club, Inc., 90 N. L. R. B. 20 (1950), where the National Board held that while the operations of the Turf Club were not unrelated to inter-state commerce, such operations were so essentially local in character that assertion of jurisdiction would not effectuate the policy of the Act.

[25] See also: (a) Shall v. Henry, 211 F. 2d 226 (7th Cir. 1954), in which it was held that professional boxing, like baseball, does not come within the scope of the federal anti-trust laws; (b) Keith Vaudeville Exchange, 12 F. 2d 341 (2d Cir. 1926), where the court held that "Persons in vaudeville business, like the operators of baseball clubs, are not engaged in interstate commerce . . . the equipment transported across state lines was purely incidental to the local performances." (c) Neugen v. Associated Chautauqua Co., 70 F. 2d 605 (10th Cir. 1934), where the court held that a member of a travelling circus troupe was not employed in intra-state commerce and was not therefore covered by Kansas' Workmen's Compensation Act.

[26] James Pappas, d/b/a Vine Gardens v. A. G. V. A., 125 F. Supp. 343 (N. D. Ill. 1954).

was against an employer, who operated a large nightclub in Chicago and whose yearly volume of business fully met the jurisdictional requisites promulgated by the National Board. The court, however, reviewed various Supreme Court decisions involving sports and the National Board's decision in the entertainment industry concluded that Congress had acquiesced in this policy by its failure to include in the 1947 amendments to the original Wagner Act a provision compelling the Board to assert jurisdiction in the entertainment industry which it had always declined.

A brief mention of some of the court decisions dealing with the reach of the federal commerce power will serve to further highlight the extent of the unregulated area.

In *N.L.R.B.* v. *Fainblatt,*[27] the Supreme Court stated that:

". . . The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce . . . we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimus.*"

In *Polish National Alliance* v. *N.L.R.B.,*[28] the Supreme Court stated that in enacting the National Labor Relations Act Congress intended to protect interstate commerce from any adverse effect of labor disputes, and that it undertook to regulate all conduct which might tend to obstruct the free flow of commerce. The court further stated:

"Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which, if left unchecked, may well become far-reaching in its harm to commerce."

When these two principles are combined, as they have been in several cases, there is little, or nothing, which cannot be reached under the commerce clause. For instance, in *N.L.R.B.* v. *Denver Building and Construction Trades Council,*[29] the Supreme Court noted that annual out-of-state purchases of $55,000 for local construction "was not negligible." In the particular construction involved in this case, the sub-contractor had used only $225 of the out-of-state materials, up to the time its services were discontinued.

[27] N. L. R. B. v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014 (1939).

[28] Polish National Alliance v. N. L. R. B., 322 U. S. 643, 71 S. Ct. 950, 95 L. Ed. 1293 (1951).

[29] N. L. R. B. v. Denver Building and Construction Trades Council, *supra,* note 3.

In *N.L.R.B.* v. *Stoller*,[30] the court held that federal jurisdiction extended to a single laundry and dry-cleaning establishment located on an atomic energy reservation, which had no out-of-state sales or services, and whose annual purchases amounted to $24,000 of which only $12,000 came from outside the state.

In *N.L.R.B.* v. *El Paso-Ysleta Bus Line Inc.*,[31] the company owned thirteen buses which transported passengers between two towns in Texas, a distance of twelve miles. Federal jurisdiction was upheld because some of the passengers were employed by companies engaged in interstate commerce.

In *Fall* v. *N.L.RB*,[32] the jurisdiction of the National Board was upheld over a poultry feed company whose product was sold to a local breeder who shipped eggs, valued at $60,000 in interstate commerce.

In *Salt River Valley Water Users' Association*,[33] federal jurisdiction was upheld because the Association, which neither bought nor sold outside the state, furnished water to irrigate farms whose crops eventually were shipped outside the state.

Generally, the Supreme Court has held that the Taft-Hartley Act has pre-empted the field of labor relations in all matters affecting interstate commerce and that in such matters, the jurisdiction of the National Board is exclusive.[34] And, as we have seen, the National Board has power, in its discretion, to refuse or decline jurisdiction over labor disputes which do not sufficiently affect interstate commerce.[35] Furthermore, in 1950 and 1954 the National Board announced

[30] 207 Fed. 2d 305 (9th Cir. 1953).

[31] 190 Fed. 2d 261 (5th Cir. 1951).

[32] 202 Fed. 2d 499 (9th Cir. 1953).

[33] Salt River Valley Water Users's Ass'n. v. N. L. R. B., 206 Fed. 2d 325 (9th Cir. 1953).

[34] Weber v. Anheuser-Busch, note 10, *supra;* Garner v. Teamsters, note 9, *supra;* Building Trades Council v. Kinard Construction Co., 346 U. S. 933, 74 S. Ct. 373, 98 L. Ed. 423 (1954); Bus Employees v. Wisconsin E. R. B., 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364 (1951); U. A. W. v. O'Brien, 339 U. S. 454, 71 S. Ct. 362, 95 L. Ed. 372 (1949); Plankinton Packing Co. v. Wisconsin E. R. B., 338 U. S. 953, 71 S. Ct. 363, 95 L. Ed. 373 (1951); Electric Ry. Employees v. Wisconsin E. R. B., 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364 (1951); Bethlehem Steel Co. v. N. Y. S. L. R. B., note 5, *supra*; La Crosse Telephone Co. v. Wisconsin E. R. B., *supra,* note 8.

For certain limited exceptions, see Taft-Hartley Act § 14(b) 301, 303, *infra,* note 66; and U. A. W. v. Wisconsin E. R. B., 336 U. S. 245, 74 S. Ct. 177, 98 L. Ed. 203 (1951); Algoma Plywood Co. v. Wisconsin E. R. B., 336 U. S. 301, 74 S. Ct. 164, 98 L. Ed. 238 (1951); United Construction Workers v. Laburnum, 347 U. S. 653, 75 S. Ct. 489, 99 L. Ed. 10 (1954); Ass'n. of Westinghouse Employees v. Westinghouse, 348 U. S. 437, 75 S. Ct. 489, 99 L. Ed. 410 (1954).

[35] N. L. R. B. v. Denver Building Trades Council, *supra,* note 3; Haleston Drug Stores v. N. L. R. B., 187 F. 2d 418 (9th Cir. 1951); Progressive Mine Workers v. N. L. R. B., 189 F. 2d (7th Cir. 1951).

certain jurisdictional standards which further restricted the area in which it would assert jurisdiction.[36] Thus, in non-retail industries, for example, the National Board will not assert jurisdiction unless the enterprise (a) has annual, direct out-of-state purchases of $500,000 or (b) indirect purchases of $1,000,000 or (c) annual, out-of-state shipments of $50,000 or indirect out-of-state shipments of $100,000. In the case of retail enterprises, the requirements are double the above amounts.

The extent of the "no-man's land" is further indicated by the experience of the New York State Labor Relations Board since the *Guss* decision. The State Board, in view of the decision of the Supreme Court, has been compelled to dismiss cases involving franchised automobile dealers, local newspapers, automobile glass distributors, and vending machine companies, even though these companies admittedly failed to meet the National Board's jurisdictional standards.

The New York Board's jurisdiction is presently challenged in a large number of cases involving local taxicab companies, some retail stores, a few restaurants, and two hospitals and nursing homes, over none of which would the National Board assert jurisdiction.

III. COMPLEXITIES AND INEQUITIES OF THE "NO-MAN'S LAND"

THE foregoing analysis of the extent and nature of the "no-man's land" demonstrates that the extent of this unregulated area is indeed vast. The evils and dangers inherent in the existence of such an unregulated area need no lengthy exposition. The parties to labor disputes in this unregulated area are left without a forum for the peaceful resolution of their disputes. They are necessarily relegated to the use of economic warfare, contrary to both national and state policy. Moreover, the states, which bear the consequences of economic disruption due to strikes and the consequent reduction in production and sales, and which must exercise the obligation of policing such disputes, are left without power to protect the public interest in maintaining industrial peace.

Although the National Board theoretically could exercise jurisdiction over most labor disputes, I do not believe that such a course is either feasible or practical. Is it not wiser to permit the National Board to devote its time to labor disputes which have a substantial impact on interstate commerce, and allow the states to handle the

[36] Note 3, *supra*. Note 4, *supra*.

predominantly local cases, in which they have first hand knowledge of local conditions and can render speedier and more efficient service?

This conclusion, indeed, in inherent in the National Board's long-standing practice of declining jurisdiction over predominantly local matters. A number of Congressional committees have expressed the same views.[37] Thus, the Joint Committee on Labor-Management Relations, stated:

"The Committee believes that small local business, retail and service establishments, should not be subject to the Act." (Report of the Committee, 80th Cong., 2d Sess. p. 14, 1950.)

It is questionable, moreover, whether labor disputes at individual restaurants, cleaning and dyeing establishments, taxicab companies, retail food stores, meat markets and drug stores (except where they are part of a multi-state chain), and other small local enterprises are of sufficient importance, nationally, to warrant or justify the intervention of federal power.

Federal pre-emption of the entire field, moreover, eliminates one of the basic advantages of our federal system of government, namely, the existence of the several states as separate laboratories for the development and testing of new techniques and procedures, often subsequently adopted by the federal government.[38]

At present, therefore, the situation is this: The National Labor Relations Board has exclusive jurisdiction over labor disputes affecting inter-state commerce; state boards and courts are without jurisdiction to act in any of those matters even where the National Board declines to assert jurisdiction on the ground that the matters involved are predominantly local in nature and do not warrant the exercise of

[37] It should be noted that National Board's discretionary curtailment of its jurisdiction and its promulgation and publication of jurisdictional standards in 1950 and 1954, followed some Congressional criticism of the Board's assertion of jurisdiction over predominantly local matters. *12th Interm. Report,* House Committee on Expenditures in the Executive Departments, H. R. REP. No. 2050, 80th Cong., 2d Sess. 4-5 (1950); Report of the Joint Committee on Labor-Management Relations, S. REP. No. 986, Part 3, 80th Cong., 2d Sess. 13-15 (1950); Report of Senate Committee on Labor and Public Welfare, S. REP. No. 99, 81st Cong., 1st Sess. 43 (1951). See also, for Congressional approval of the National Board's declination of jurisdiction over local matters: Hearings before the Senate Committee on Labor and Public Welfare on S. REP. No. 249, 81st Cong., 1st Sess. 177 (1951); Hearings before the Senate Committee on Expenditures in the Executive Departments on S. RES. No. 248, 81st Cong., 2nd Sess. 35 (1951); Hearings before the House Committee on Expenditures in the Executive Departments on H. R. RES. No. 512 and No. 516, 81st Cong., 2d Sess. 109 (1951); Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess. 45 (1950).

[38] See: Feldblum, *Report on Federal-State Jurisdictional Problems in the Field of Labor Relations* made to Brooklyn Bar Association (1956).

federal power; and the sole method by which a state board could act in any such case is through a cession agreement with the National Board as provided in section 10(a) of the National Labor Relations Act.

Soon after the Supreme Court decisions of March 25, 1957,[39] the Association of State Labor Relations Agencies adopted a resolution calling for immediate and appropriate remedial action by the Congress.[40]

Since October, 1957, numerous legislators and government officials have commented on the existence of this vast "no-man's land" and have offered proposals for its elimination.[41] All realize the importance of peacefully resolving labor disputes by eliminating the "no-man's land." It is clear that under the present situation the small local union and the small business enterprise which falls within the "no-man's land" need a proper forum for the resolution of their labor disputes. As has been demonstrated in the foregoing analysis of the *Extent and Nature of the No-Man's Land,* the National Board's potential jurisdiction is so vast that it is theoretically, all-inclusive. The line of demarcation between inter-state and intra-state commerce in labor relations is difficult to find.

While it is clear that Congressional resolution of the problem of federal-state jurisdiction in labor-management disputes is absolutely essential, one must recognize the inescapable fact that the problem is so complex that some time may elapse before agreement can be reached on a generally acceptable plan. In the meantime, it is suggested that both labor and management cooperate with state agencies in trying to achieve a peaceful resolution of their problems in keeping with national and state policy.

IV. AVAILABLE PROCEDURES TO NARROW LIMITS OF THE "NO-MAN'S LAND"

SECTION 10(a) of the National Labor Relations Act expressly authorizes the National Board to enter into cession agreements with

[39] See *supra,* note 6, Guss v. Utah L. R. B.; San Diego Bldg. Trades Council v. Garmon, *supra,* note 6; Amalgamated Meat Cutters v. Fairlawn, *supra,* note 6.

[40] This Association is composed of the following Boards: New York, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Michigan, Wisconsin, Oregon, Puerto Rico and Hawaii.

[41] The President of the United States in his annual message to the Congress; The Secretary of Labor and various Congressional leaders; The Governor of New York, Mr. Averell Harriman; The New York State Industrial Commissioner, Mr. Isador Lubin, Senator Irving M. Ives and the Chairmen of the various State Boards.

state agencies, subject to certain limitations. Although the original National Labor Relations Act, better known as the Wagner Act, contained no express authorization therefor, the National Board did enter into cession agreements with state agencies.[42] The National and New York State Boards entered into such an agreement, and worked together in complete harmony and cooperation from 1937 to 1947.

The opinion of the United States Supreme Court in the *Bethlehem* case,[43] decided in April, 1947, raised some doubt as to the National Board's power to enter into cession agreements.[44] When the Taft-Hartley amendments were adopted in June 1947, Congress added the proviso in section 10(a) to eliminate any doubt as to the authority of the National Board to enter into cession agreements with state agencies.[45]

Section 10(a) of National Labor Relations Act, as amended in 1947, now provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided, that the Board is empowered by agreement with any agency of any state or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the state or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*" (Italics supplied.)

In its brief *amicus curiae* in the *Guss* case,[46] the National Board, discussing section 10(a) said on page 28:

"The problem as to state power in this field, therefore, remained as it was before. Congress did not answer, at least in express terms, the question reserved in *Bethlehem* as to the power of states in cases where the Board declines 'for budgetary or other reasons' to assert

[42] 3 N. L. R. B. ANN. REP. 3 (1938).

[43] Bethlehem Steel Co. v. N. Y. S. L. R. B., note 5, *supra*.

[44] See separate opinion of Mr. Justice Frankfurter 330 U. S. at 777, 71 S. Ct. at 371, 95 L. Ed. at 382.

[45] S. REP. No. 105, 80th Cong., 1st Sess. 26, 38 (1950); S. REP. No. 99, 81st Cong., 1st Sess. 43 (1951); 93 CONG. REC. 6386 (1947).

[46] See *supra*, note 6, Guss v. Utah L. R. B.

jurisdiction. It did, however, deal with the second question raised in the *Bethlehem* case, namely the problem of cession agreements."

Again at page 38 of the same brief, it was said:

"The cession of jurisdiction by the Board in these circumstances, the concurring opinion added, should be viewed not as an 'encroachment upon national authority' but rather as an 'effective means of accomplishing a common end'. The cession proviso, we believe, was designed to supply that authority to the Board, so that where the Board as a matter of deliberate judgment concludes that due regard for local interests make it desirable to enlist the aid of state agencies, it can accomplish that purpose by agreement, subject to the qualification that the applicable state law is not inconsistent with federal law."

Section 10(a) does not require that a state statute contain all the provisions and procedures of the National Act. Nor does it require that all the provisions of the state act must be consistent with all the corresponding provisions of the National Act. The language is carefully phrased, in the singular, to authorize the transfer of cases, "unless *the provision* of the state or Territorial statute applicable . . . is inconsistent with *the corresponding provision* of this Act."

"It is a long-established canon of construction that all language used in a statute must be given meaning, purpose and effect. To interpret section 10(a) as requiring consistency in all provisions is to ignore, as meaningless, the carefully chosen language quoted above. If the purpose of Congress was to compel the states to adopt complete Taft-Hartley Acts, identical in all details, it is difficult to conceive of more oblique and indirect language to express that intent or achieve that result."[47]

Unfortunately, this proviso, which was enacted to enable state action, has operated to hinder collaboration between the National and State Boards. This has resulted, in large part, from the National Board's past interpretation of the statutory requirement of consistency. But, whereas prior to the *Guss* v. *Utah Labor Relations Board*[48] case there was no immediate necessity for cession agreements, there is now a present and compelling necessity for a re-evaluation of past concepts as to the meaning of section 10(a) of the National Act. Prior to the *Guss* case state boards were proceeding on the theory that they lawfully could assert jurisdiction in matters declined by the National

[47] Memorandum prepared by New York State Labor Relations Board and filed with National Board on May 16, 1958, for cession agreement in taxicab cases.

[48] See *supra*, note 6, Guss v. Utah L. R. B.

Board. But the Supreme Court, in the *Guss* case, has unequivocally stated that the states cannot act in matters affecting interstate commerce even where the National Board declines jurisdiction. This preclusion of all state power stems from the Supreme Court's holding that section 10(a) provides the sole means by which jurisdiction may be transferred to, or exercised by, the states.

The New York State Labor Relations Board has contended for many years that section 10(a) permits cession agreements over a very large number of cases where the applicable provisions of the National and State Acts are consistent.[49] A recent article in the Labor Law Journal,[50] discussing the requirement of consistency between the National and the State Acts, said, at page 269-70:

"The possibility of examining all facets of state law and requiring consistency in all matters seems definitely gone. Rather than require that the policy contours of the state act be explored before cession is possible, the language of the Act narrows the scope of relevant considerations to the applicable provisions of the state law and to the construction of those provisions."

"Before ceding jurisdiction, the Board was directed to examine the state law to determine (1) if a state agency was operating under state statute, (2) what types of cases might be ceded and (3) if those cases were ceded, whether the substantive law disposing of those cases would be consistent . . . with the federal law. In short, if state law were applied, would the result be the same on any given set of facts as if the federal law had been applied? If so, cession was possible."

Similarly, a recent note in the Harvard Law Review[51] commenting on section 10(a) states:

"It seems that the only requirement of that section is that 'the provision' of the statute applicable to the ceded case be consistent with 'the corresponding provision' of the federal act. Therefore, if cases involving a particular unfair labor practice are otherwise eligible for cession, only the specific provision governing that practice should have to conform. This view seems proper since the state agency would, in the circumstances of the particular case, be applying law consistent with the federal labor policy."

The author of the note expresses the opinion that the National Board should reconsider its policy with respect to cession agreements in view of the *Guss* decision which holds that state agencies can ob-

[49] Brief of *amicus curiae* in the *Guss* case, filed by the N. Y. S. L. R. B., 24-29.

[50] Blumrosen, *The Misinterpretation of Section 10(a)*, 9 LABOR LAW JOURNAL 265 (1958).

[51] 71 HARV. L. REV. 542 (1958).

tain jurisdiction over a matter affecting interstate commerce only through a cession agreement as provided in section 10(a) of the Act. The author further comments on the argument advanced by some that Congress, through section 10(a), sought to pressure the states into adopting "little Taft-Hartley Acts" in order to insure the application of a uniform labor policy. He reviews the history of section 10(a) and finds nothing to support this theory.

The history of section 10(a) definitely supports the opinion that its primary function was to insure the validity of cession agreements in view of the doubts expressed by some members of the court in the *Bethlehem Steel* case. There would seem to be no compelling reason, for instance, why the National Board should not cede jurisdiction to a state board in most representation cases. Section 9 of the National Act and section 705 of the New York State Act are substantially similar. A question may be raised as to the value of a determination of representation where there is no legally enforceable duty to bargain with a certified representative. However, experience has shown that most determinations of controversies concerning representation lead to a settlement of the potential dispute. Hence, even if no cession agreement could cover an ensuing unfair labor practice, its value in most representation proceedings would be beyond dispute. No claim is made that the "no-man's land" could be eliminated completely by cession agreements. But, there is no question that such procedure would materially reduce the number of cases which now are completely unregulated.

It has been argued that the filing requirements under section 9 (f)(g)(h) of the National Act may be an obstacle to cession agreements.[52] Assuming this to be true, and there is some question about it,[53] this objection can readily be met by limiting the cession agreement to cases in which the petitioning union is in compliance with the aforesaid requirements.[54]

Since any cession agreement is within the discretion of the National Board, that Board can control the circumstances under which a state agency may act. This should overcome the fear expressed by some members of Congress that the National Labor Relations Act may be completely disregarded by the states. Rather than raising

[52] Requirement for the filing of non-Communist affidavits and financial reports.

[53] See, N. L. R. B. v. District 50, 41 L. R. R. M. 2449 (1952).

[54] Similar limiting provisions can be inserted in cession agreements as to any other variations between the two acts which the National Board deems important.

obstacles and fears, if it is agreed that the existence of a "no-man's land" is legally, morally and practically abhorrent, every effort should be made to limit the unregulated area. Even if it is not possible, by cession agreements, to eliminate the entire unregulated area, it is certainly desirable to eliminate as much thereof as possible. It is better to provide some relief than none at all.[55]

In the past, the National Board has given effect to elections conducted by the American Arbitration Association and local officials. If the National Board is willing to recognize the results of elections so conducted in cases in which the National Board itself would have acted, there is all the more reason to permit a state labor relations board to act in representation proceedings which would otherwise fall within the "no-man's land."[56]

V. Proposed Legislative Remedies

While neither the New York State Labor Relations Board nor the Association of State Labor Relations Agencies have proposed any specific legislation, the time has obviously arrived when Congress should amend the Taft-Hartley Act in two respects in order to eliminate the "no-man's land."[57] There are two simple ways which suggest themselves to achieve the aforesaid desired result: First, the states should be given power to act in cases, or classes of cases, over which the National Board declines, or would decline jurisdiction. Second, section 10(a) should be amended to eliminate the inflexible requirement of consistency contained therein, so as to make it easier for the National Board to cede additional jurisdiction to appropriate state agencies administering substantially consistent statutes.

The first proposal will permit the states to act, without formal cession, in all cases which do not come within the National Board's jurisdictional standards. The second proposal will permit the National Board, *in its discretion,* to cede additional jurisdiction to state or territorial agencies.

It has been said that confusion would result if the states are permitted to regulate labor disputes over which the National Board

[55] See note 50, *supra* at 275.

[56] Brief of the N. Y. S. L. R. B. filed with N. L. R. B. on May 16, 1958, for cession agreement in taxicab cases.

[57] The writer realizes full well that for the past ten years many attempts have been made to amend the Taft-Hartley Act, and many proposals to do this are now pending before Congress. However, the purpose of this article is to discuss the "no-man's land," in labor relations and what should be done about it.

refuses jurisdiction. The argument is based on the premise that the National Board's jurisdictional standards are not sufficiently definite to enable determination in advance whether a particular labor dispute falls within or without the formula. This argument, it is submitted, is wholly without merit.

The National Board's jurisdictional standards, fixed in terms of dollar volume of income, inflow or outflow of enterprises in various industries, are specific and detailed; certainly so in comparison with the abstract terms "affecting commerce" or "engaged in the production of goods for commerce" which are the customary guideposts provided in federal legislation. In the vast majority of cases, application of the standards presents no problem. It is only in a relatively few borderline cases that any question or uncertainty might arise. Such a penumbral area is inevitable under our federal system, and the existence of some doubtful borderline cases manifestly should not upset an otherwise lawful allocation of jurisdiction between the federal and state governments.

The argument is also erroneous in its assumption that the purported confusion it envisages would be the result of permitting state regulation where the National Board refuses jurisdiction. A boundary line between the federal and state domains is a concomitant of our federal form of government. Doubtful borderline cases arise whether the line is fixed by the commerce clause itself, by Congressional legislation, or by a federal agency's jurisdictional standards. Such confusion as may occur results from the fact that there is a line; not from its location or the identity of its source.

Moreover, preclusion of state regulation, and the resultant "no-man's land," actually compounds the purported "confusion." It creates an anomalous situation where one group is subject to federal labor law, a second group (intra-state) is subject to state labor law, and a third intermediate group is subject to no law whatsoever. Certainly, a single boundary line has less potential of confusion than dual boundaries on either side of a no-man's land.

The decision before the Congress, therefore, does not present a choice between confusion and certainty; the choice is between state regulation or anarchy in a substantial segment of labor relations.

Several attempts have been made by members of Congress to clarify this question of federal-state jurisdiction. In February, 1953, Senator Irving M. Ives of New York introduced a bill[58] to amend

[58] S. BILL No. 1264, 83rd Cong., 1st Sess. (1956).

the Taft-Hartley Act by (1) expressly providing that the states may act in cases over which the National Board declines jurisdiction, and (2) eliminating the statutory language in section 10(a) which has been interpreted to require consistency between the National Act and State Acts before the National Board can cede jurisdiction to state agencies. The provisions of this bill were approved by the National Board and by numerous commentators.[59]

No action was taken by the Senate at the first session of the 83rd Congress on Senator Ives' bill, or other bills relating to federal-state jurisdictional problems.[60] At the 1954 session of Congress the Senate Labor Committee reported out an omnibus bill amending the Taft-Hartley Act and incorporated the first part of Senator Ives' bill which would permit states to act in cases over which the National Board declined jurisdiction.[61] However, after several days of debate the whole bill was sent back to the labor committee[62] and no subsequent action has been taken since then.

During the present session of Congress several bills have been introduced which deal with the various aspects of the federal-state jurisdictional issue.[63] The major intent of the bills introduced by Senators Ives and Watkins is to permit states to act in labor disputes over which the National Labor Relations Board declines jurisdiction. The bill introduced by Senator Smith, while containing a similar provision, also attempts to amend the Taft-Hartley Act in other respects.

[59] Statement of Paul M. Herzog, Chairman of N. L. R. B. before Senate Labor Committee, April 28, 1953; Speech by Guy Farmer, Chairman of N. L. R. B. before Industrial Relations Committee of the *Edison Electric Institute*, Jan. 21, 1954; Cox & Seidman: *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 216 (1950); Emily C. Brown: *Needed—A New Start in National Labor Relations Law*, LABOR LAW JOURNAL 73 (1953).

[60] H. R. BILLS Nos. 3055, 3163, 3661, 4274; S. BILLS, No. 1161—all in 83rd Cong., 1st Session (1956).

[61] S. BILL No. 2650, 81st Cong., 1st Sess. (1954).

[62] 34 L. R. R. 23.

[63] Among some of the bills introduced at this session of Congress, 85th Cong., 2d Session (1958) are:

Senator Smith, S. BILL No. 3099, which amends Taft-Hartley Act generally, but adds a provision to § 14 which permits states to assume jurisdiction over labor disputes over which the National Board has declined to assert jurisdiction.

Senator Ives, S. BILL No. 1772, amends § 6 so as to permit the National Board to decline jurisdiction over cases, but lets states act when the Board declines. It also strikes out consistency language in § 10(a) and permits National Board to cede jurisdiction to state agencies in representation and unfair labor practice cases.

Senator Goldwater, S. BILL 372, permits states to regulate strikes, picketing, boycotts or lockouts, provided the same are not unfair labor practices under the National Act.

Senator Watkins, S. BILL No. 1723, permits states to act in cases over which the National Board declines jurisdiction.

It has been suggested, at various Committee hearings, that Congress amend the Taft-Hartley Act so as to define what is meant by the phrase *affecting commerce* and to "explicitly define" the jurisdiction of the National Board, leaving all other cases to the states.[64] While this proposal has certain advantages it would again incorporate statutory inflexibility.[65] It is difficult to define the jurisdiction of the National Board in any better way than it has already done through the promulgation of its jurisdictional standards of 1950 and 1954.

The proposal which Congress should consider and pass as soon as possible is one which will completely eliminate the "no-man's land." Such an amendment should vest in the National Board the discretionary power to fix jurisdictional standards, permit state action in cases which do not meet those standards, and authorize the N.L.R.B. to cede additional jurisdiction to state boards. This proposal preserves the paramount nature of the federal power. At the same time, it avoids the potentials of conflict and the possibility of shopping for a favorable forum inherent in concurrent or dual jurisdiction. It will permit the National Board to devote its time, energies and funds to matters which are more truly of national concern, and at the same time permit a return to the harmonious cooperation between National and State Boards which will result in a more efficient, expeditious and economical disposition of cases by both national and state agencies. All this, to the benefit of management, labor and the public.

VI. CONCLUSION

THE jurisdiction conferred upon the National Labor Relations Board by the National Labor Relations Act extends to all labor disputes which affect interstate commerce.[66] However, we have seen that the National Board may lawfully decline to assert jurisdiction in certain cases and has limited the assertion of its jurisdiction to "enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce."[67] It has also been shown that the National Board's power to withhold jurisdiction has been upheld by the federal courts.[68] And, the Su-

[64] See, Minority Report on S. REP. No. 2650, at 15.

[65] See note 38, *supra.*

[66] Labor Management Relations Act (Taft-Hartley Act) § 2(6)(7), 61 Stat. 136, 29 U. S. C. § 141 (1947); N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1936); N. L. R. B. v. Fainblatt, note 27, *supra.*

[67] Hollow Tree Lumber Co., 91 N. L. R. B. 635, 636 (1950).

[68] N. L. R. B. v. Denver Bldg. Trades Council, *supra,* note 3; Haleston Drug

preme Court of the United States, in the *Guss*[69] case, has stated that state boards and courts are without jurisdiction to act even in those cases in which the National Board declines jurisdiction. The Court further pointed out that the only way a state agency can act in a matter which affects interstate commerce is through a cession agreement as provided in section 10(a) of the National Act.

The National Board's current discretionary jurisdictional formula is drawn up on a nation-wide basis which makes no distinction between states which have, and those which do not have, labor relations boards. Nor does this formula distinguish between states which have laws substantially consistent with federal law and those states which have basically inconsistent labor laws, or none at all.

Those who oppose any attempt to permit states to act in cases now in the "no-man's land" base their opposition on the necessity for uniformity of federal regulation of local labor disputes.[70]

While uniformity has definite advantages, the choice, so far as the "no-man's land" is concerned, is not between uniformity or diverse state regulation. Rather, it is a choice between state regulation or no regulation at all. Moreover, the Taft-Hartley Act itself frequently disregards the advantages of uniformity. It provides, in section 14(b), that state law shall be paramount with regard to union security provisions. The Supreme Court, in the *Laburnum*[71] case, upheld an action for damages in a state court for tortious primary picketing. Again, in the *Kohler*[72] case, the Supreme Court upheld the right of the state court to prohibit violence in mass-picketing, activities which are also prohibited by section 8(b)(1) of the National Act and therefore within the jurisdiction of the National Board. This, in effect, permits dual or concurrent jurisdiction which was the vice found in the *Bethlehem Steel*[73] case—the first case to spell out federal preemption of labor-management disputes.

In section 303 of the National Act, Congress provided that actions for damages for secondary boycott and jurisdictional disputes

Stores, Inc. v. N. L. R. B., 187 F. 2d 418 (9th Cir. 1951), *review denied* 342 U. S. 815, 72 S. Ct. 29, 96 L. Ed. 616 (1951); Progressive Mine Workers v. N. L. R. B., 189 F. 2d 1 (7th Cir. 1951), *cert. denied* 342 U. S. 868, 72 S. Ct. 108, 96 L. Ed. 652 (1951).

[69] See *supra* note 6, Guss v. Utah L. R. B.

[70] See testimony of David Benetar, on behalf of N. Y. S. Chamber of Commerce, before Senate Labor-Subcommittee on May 14, 1958.

[71] United Construction Workers v. Laburnum, *supra,* note 34.

[72] 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162 (1956).

[73] Bethlehem Steel Co. v. N. Y. S. L. R. B., note 5, *supra.*

may be brought in federal or state courts.[74] In one case the employer successfully sued the union for damages in a federal court on the ground that picketing constituted an unlawful secondary boycott. Yet, in the companion case, the same facts and involving the same parties, the National Labor Relations Board found that the picketing was primary and lawful. Numerous other instances could be cited where the theory of uniformity is more apparent than real.

Finally, many labor disputes affecting commerce are *predominantly* local in nature. In such cases, the employment relationship has a fixed location in a particular state. We need not be unduly concerned with the diversity of state law, for each local dispute will be subject only to the law of its own state. The field of labor relations traditionally has been a matter of local concern and within the power of the states legally and practically to regulate. Since the states and local communities must bear the economic consequences of labor disputes and shoulder the burden of policing industrial strife, it is essential that they be allowed to provide procedures for the peaceful resolution of these disputes before they result in economic hardship or flare into violence.

The problem of eliminating the "no-man's land" in labor-management disputes must be squarely met by Congress through legislation which will permit the states to cooperate with the federal government in achieving the common goal of labor and industrial peace.

[74] Deena Artware v. Brick & Clay Workers, 198 F. 2d 637 (6th Cir. 1952), *cert. denied* 344 U. S. 141, 73 S. Ct. 124, 97 L. Ed. 152 (1952); N. L. R. B. v. Deena Artware, 198 F. 2d 645 (6th Cir. 1952), *cert. denied* 344 U. S. 811, 73 S. Ct. 18, 97 L. Ed. 632 (1952).