

RECENT DEVELOPMENTS

PEACEFUL PICKETING BY MINORITY UNION PROTECTED BY THE NLRA

NLRB v. Drivers, Chauffeurs, etc., Local Union No. 639

362 U.S. 274 (1960)

In 1955, Curtis Bros., Inc., a retail furniture store in Washington, D. C., employed 29 drivers, helpers, warehousemen and furniture finishers whose exclusive representative was Teamsters Local 639. Upon petition of the employer, the National Labor Relations Board [hereafter, NLRB], conducted an election among these employees which resulted in a vote of 28 to 1 against union representation. Following this election, the ousted Local maintained 2 orderly pickets at the customers' entrance to the store carrying placards urging the employees to join the union. Curtis Bros. filed a complaint with the NLRB charging that the picketing was an unfair labor practice under § 8(b)(1)(A) of the Labor Management Relations Act.¹ The basis of the charge was that the activity was "recognitional" picketing designed to induce the employer to recognize a minority union as the employees' exclusive bargaining agent and that this in effect would "restrain or coerce" a majority of the employees in the exercise of their rights under § 7 of the National Labor Relations Act [hereafter, NLRA], as amended.² By a six to three decision,³ the Supreme Court, in reversing the NLRB held that peaceful picketing by a minority union to compel recognition as the employees' exclusive bargaining agent did not constitute an unfair labor practice as defined by § 8(b)(1)(A).⁴ More specifically, the Court held

¹ § 8(b)(1)(A) of the NLRB as amended provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce—(A) employees in the exercise of the rights guaranteed in section 7. . . ." 61 Stat. 141, 29 U.S.C. § 158(b)(1)(A).

² § 7, as amended by the Taft-Hartley Act provides: "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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 49 Stat. 452, as amended, 61 Stat. 140, 29 U.S.C. § 157.

³ Justices Stewart, Frankfurter and Whittaker would have remanded to the Board without reaching the issue in that new § 8(b)(7) of the NLRA as amended by the 1959 Landrum-Griffin Act would have prohibited the activity since a company election had been held within the past 12 months. *Infra* note 7.

⁴ The Court relied to a great extent on the legislative history of the Taft-Hartley Act and in particular on Senator Taft's following comment on § 8(b)(1)(A): "I can see nothing in the pending measure which, as suggested by the Senator from Oregon (Morse), would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anyone striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing

that the activity did not amount to restraint or coercion of employees in the exercise of their rights under § 7.

Prior to their ruling in *Curtis* [popular name of the noted case] the Board had been consistent in holding that § 8(b)(1)(A) was not applicable to peaceful recognitional picketing unless there had been a direct interference with employees' rights under § 7.⁵ In the interim between the original *Curtis* ruling and the Supreme Court's reversal, the Board followed *Curtis* in all cases of peaceful recognitional picketing by minority unions.⁶ The Supreme Court's decision proscribes the Board's past interpretation, however, and should have a "braking" effect on the future administration of § 8. The unions are thereby assured that the economic power of the picket line will be subject to less interference from the NLRB. This power can be abused, however, should a minority union use it to compel an employer to inflict upon the majority of his employees an "unwanted" union to act as their exclusive bargaining agent. It was this possibility that led Congress to amend § 8 of the NLRA by a provision in the new Landrum-Griffin Act which prohibits picketing where, (1) an employer has legally recognized another union, (2) an NLRB election has been held among the employees within the past 12 months, or (3) a petition for a company election is not filed within 30 days from the time the picketing began.⁷ This section, however, does not seem to completely close the gap created by the judiciary's reduced scope of § 8(b)(1)(A).

In reversing *Curtis*, the Court gave further effect to its decision by holding that peaceful picketing not expressly prohibited by §§ 8(b)(1)(A)

persuasion, all it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." 93 Cong. Rec. 4436 (May 2, 1947).

⁵ See *e.g.*: District 50, United Mine Workers of America, 106 N.L.R.B. 903 (1953); Painters Dist. Council No. 6, 97 N.L.R.B. 654 (1951); Medford Bldg. and Const. Trades Council, 96 N.L.R.B. 165 (1951); United Const. Workers, 94 N.L.R.B. 1731 (1951); Pinkerton's National Detective Agency, 90 N.L.R.B. 205 (1950); Clara Val Packing Co., 87 N.L.R.B. 703 (1949); Local 74, United Brotherhood of Carpenters, 80 N.L.R.B. 533 (1948); Perry Norvell Co., 80 N.L.R.B. 225 (1948); National Maritime Union of America, 78 N.L.R.B. 971 (1947).

⁶ See *e.g.*: Sierra Furniture Co., 123 N.L.R.B. 1198 (1959); Machinery Overhaul Co. Inc., 121 N.L.R.B. 1176 (1958); Alling & Cory Co., 121 N.L.R.B. 315 (1959); Biltmore Furniture Mfg. Corp., 120 N.L.R.B. 1728 (1958); Andrew Brown Co., 120 N.L.R.B. 1425 (1958); H. A. Rider & Sons, 120 N.L.R.B. 1577 (1958); Harou, Inc. & En Tour, 120 N.L.R.B. 659 (1958); Fisk & Mason, 120 N.L.R.B. 135 (1958); Ruffalo's Trucking Service, Inc., 119 N.L.R.B. 1268 (1958); Shepherd Machinery Co., 119 N.L.R.B. 320 (1957).

⁷ Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 544, 29 U.S.C. § 158(b)(7).

⁸ § 13 provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U.S.C. § 163, 29 U.S.C.A. § 163. Picketing has been equated with striking for the purpose of § 13. See *e.g.*: *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

or 8(b)(7) is in fact *protected* by § 13.⁸ The opinion provides as follows: "Therefore, since the Board's order in this case against peaceful picketing would obviously 'impede' the right to strike, it can only be sustained if such power is specifically provided for in the Taft-Hartley Act, that is in § 8(b)(1)(A)." It is of particular importance that the Court recognized the activity in this case as being "protected" rather than merely unprohibited. Protected activity remains within the exclusive scope of federal power whereas unprohibited activity might not. Therefore, since federal jurisdiction over peaceful picketing is plenary to the federal power derived from the "commerce clause,"⁹ the protection afforded by § 13 will prevail against conflicting state action wherever the NLRB acquires jurisdiction over activity affecting interstate commerce.¹⁰

Consequently, just how far the *Curtis* decision will protect peaceful picketing depends on the extent to which the pre-emption doctrine operates to preclude state jurisdiction. Unfortunately, the pre-emption doctrine as applied to peaceful picketing is not so clearly established as it may seem. Its history has been a long series of case-by-case delineation resulting in some rather surprising limitations.¹¹ A striking example is the so-called "no man's land" resulting from the pre-emption of state action where the Board had refused to exert jurisdiction¹² because of its "dollar volume" requirements.¹³

⁹ U.S. Const. art. I § 8; see e.g. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁰ U.S. Const. art. VI § 2 provides: "This Constitution and the Laws of the United States which shall be made in pursuance thereof: and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

¹¹ In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court establishes the following precepts: (1) State action is pre-empted whenever the activity is clearly or arguably either prohibited or protected by the Act. (2) The preceding question must be initially determined by the NLRB. (3) The pre-emption doctrine applies to state damage remedies as well as injunctive relief.

¹² A recent Ohio case serves as an example, *Faxon Hills Construction Co. v. United Brotherhood of Carpenters & Joiners of America*, 109 Ohio App. 21, 10 Ohio Op. 2d 151 (1957). The employer, after the NLRB denied jurisdiction for failure to meet the dollar volume requirements, obtained an injunction from the common pleas court. The picketing union appealed on the grounds that the employer had introduced into evidence the refusal of jurisdiction by the NLRB and therefore by his own admissions had established the fact that he was engaged in interstate commerce. The appellate court agreed and dismissed the action on the grounds that state action was pre-empted. The Ohio Supreme Court agreed on the pre-emption issue but reversed on the grounds that the employer's admission did not by itself establish the fact that interstate commerce was involved, 168 Ohio St. 497, 156 N.E.2d 32 (1958). On remand the injunction was upheld, 109 Ohio App. 33, 10 Ohio Op. 2d 158 (1958).

¹³ On October 2, 1958, the Board announced its new jurisdictional standards which modified somewhat its original proposal. Examples of the new standards are: Nonretail: \$50,000 outflow or inflow, direct or indirect; Retail concerns: \$500,000 gross volume of business; Public utilities: \$250,000 gross volume, or meet standard 1 (nonretail); Newspapers and communications systems: Radio, television, telegraph, and telephone:

Fortunately, this problem has been corrected by a provision in § 701 of the Landrum-Griffin Act which amends § 14(c) of the NLRA to allow states to take jurisdiction whenever the Board expressly declines.¹⁴

At the present time, the combined effects of the 1959 *Garmon* decision¹⁵ and the Landrum-Griffin Act appear to have modified the pre-emption doctrine so as to present three distinct categories in which states may take action to restrain peaceful picketing which would otherwise be protected by federal law as in *Curtis*: (1) where interstate commerce is not affected, (2) where the Board has expressly ceded jurisdiction under § 10(a),¹⁶ or (3) where the Board can take action but declines to do so because of its own self-imposed jurisdictional requirements.¹⁷

Although this may seem to answer the question as to when "protected" activity will be vulnerable to conflicting state action, there remains one additional consideration, *i.e.*, which law must the states apply—state or federal? As to category (1), it seems clear that state law will prevail since the activity itself is not subject to federal law. As to category (2), the statute makes it clear that state law will apply. In category (3), the statute is silent on the question and as yet there are no court decisions in point. The legislative history, however, seems to indicate that Congress clearly intended that state law apply. The final form of the Landrum-Griffin Bill which ultimately passed in both houses was a compromise reached by a joint conference of members of both the House and Senate.¹⁸ The Joint Conference was

\$100,000 gross volume. Newspapers: \$200,000 gross volume; National defense: substantial impact on national defense.

¹⁴ Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. § 164. New § 14(c)(2) provides: "Nothing in this Act shall be deemed to prevent or bar any agency or the court of any State or Territory . . . , from assuming and asserting jurisdiction over labor dispute over which the Board declines pursuant to paragraph (1) of this subsection, to assert jurisdiction."

¹⁵ *Supra* note 11.

¹⁶ § 10(a) of the NLRA as amended provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . 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 . . . even though such cases may involve labor disputes affecting commerce, unless the provisions of the State of 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."

¹⁷ However § 701 of the Landrum-Griffin Bill provides that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

¹⁸ The text of the Conference Report regarding § 701 reads as follows: "The Senate bill provision relating to this subject amends the National Labor Relations Act, as amended, so as to provide that nothing in that act could be construed to prevent any State or Territorial agency, other than a court, from exercising jurisdiction over all cases over which the Board has jurisdiction, but by rule or otherwise has declined to assert jurisdiction provided the State or Territorial agency applies and is governed

called when the House refused to accept the bill as passed by the Senate and one major point of disagreement was a provision in the Senate bill which specified that state courts apply federal law. The bill as adopted by the Joint Conference incorporated most of the provisions of the House bill and in the Senate debates before final passage, two key conferees, Senators Goldwater and Kennedy, made conclusive remarks in regard to the federal-state jurisdiction problem. Senator Goldwater commented as follows:

The House provision which was agreed to by the conferees specifically carries out the recommendation of the McClellan Committee by authorizing state labor boards and courts to assume jurisdiction and apply state law in cases over which the NLRB declines to assert jurisdiction.¹⁹

Senator Kennedy commented: “. . . it was agreed that state law could prevail, but only in those areas in which the NLRB does not now assume jurisdiction.”²⁰

Thus it seems clear that state law will apply in all 3 categories mentioned above and that the Court's decision in *Curtis* will now affect only those cases where the NLRB asserts positive jurisdiction.

In view of this extended scope of state jurisdiction over cases like *Curtis*, the future of peaceful picketing seems to be in a quandary. In states like Ohio which have no state labor board, picketing disputes are left entirely to the equity jurisdiction of the courts. Consequently, the major considerations affecting the decision will be the constitutional guarantees of free speech on the one hand and the hardship on the employer and community interest in preserving the peaceful and unobstructed use of public streets and sidewalks on the other.²¹ A balancing of these values will result in an injunction much more frequently than in an NLRB case where a

solely by Federal law as set forth in sections 8(a) and 8(b) and section 9 of the National Labor Relations Act.

The House amendment contains a provision which authorizes the Board, in its discretion, by rule of decision or by published rules adopted pursuant to the Administrative Procedures Act to decline to assert jurisdiction over any labor dispute involving any class or category of employers, where in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. The House amendment provides further that nothing in the National Labor Relations Act, as amended, shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands) from assuming and asserting jurisdiction over labor disputes over which the Board in its discretion, by rule of decision or by published rules adopted pursuant to the Administrative Procedures Act declines to assert jurisdiction.

The substitute agreed upon in conference contains the House amendment with two modifications. The first modification provides that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959” 105 Cong. Rec. 16539 (daily ed. Sept. 3, 1959).

¹⁹ 105 Cong. Rec. A-8509 (daily ed. Sept. 3, 1959).

²⁰ 105 Cong. Rec. 16254 (daily ed. Sept. 3, 1959).

²¹ See *e.g.* *Chuales v. Royalty*, 164 Ohio St. 214 (1955).

major consideration is preserving fair relative bargaining positions between labor and management. There is some justification for this disparity, however, in that the state's interest in preventing industrial strife and controlling the use of public streets and sidewalks is quite different from the interest of the federal government in regulating and preserving the free flow of commerce among the states.

Carl A. Rankin