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Labor Law—Labor Disputes—Federal Pre-emption of Jurisdiction

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The evidence tended to show that the fall, rather than the beating, was responsible for the broken ribs, the immediate cause of death. The Vermont court recognized the causal connection to be established, as the delirium which was responsible for the fall was caused by the acts of the defendant, analysing it as a "cause of a cause" problem.[16] The conviction was reversed on the sole ground that some of the blows were justified in self-defense and some were not, and it could not be proved which caused the delirium. The Vermont court held that unless expert medical testimony was introduced tending to show that the unjustified blows caused the delirium, the jury was not warranted in so finding and convicting the accused.[17]

In *Little,* the court points out that the deceased fell because of his semiconscious condition,[18] but while it is a step in the analysis, the result is left to turn on other factors. It is submitted that without the concurrence of this delirium in producing the falls, the conviction cannot be supported. If Johnson had been conscious, and had fallen on a slippery floor, a murder conviction could not properly be sustained.

In conclusion, it appears that the cut-off point of criminal responsibility could have been extended to include the occurrence of the fatal injuries due to the continuing semiconscious condition of the victim. However, this circumstance does not lend validity to the action of the court in the present case. A causal connection supported only by the mental condition of the victim, stretching over a time period of five days, seems questionable enough to warrant the full consideration of the jury. It seems obvious from the reported decision that the jury received no adequate instruction or emphasis upon the sole factor that could form a basis for their verdict. The defendant seems entitled to a new trial with proper jury instructions.

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LABOR LAW

Labor Disputes—Federal Pre-emption of Jurisdiction. The doctrine of federal pre-emption of jurisdiction over labor disputes was given a significant application by the Washington Supreme Court in

[16] The "cause of a cause" reasoning refers to the intervention of dependent causes, as opposed to independent causes, leaving the chain of causation unbroken.

[17] Concerning the necessity of expert medical testimony as to cause of death to support a homicide conviction, see Annot., 31 A.L.R.2d 693, 703 (1953). See also State v. Bozovich, 145 Wash. 227, 259 Pac. 395 (1927). No Washington case has required expert medical testimony in support of a conviction, but the lack of authority is probably due to the practice of providing it where there is any doubt as to medical cause.

[18] State v. Little, 57 Wn.2d 516, 522, 358 P.2d 120, 123 (1961).

1961. In *Freeman v. Retail Clerks Union, Local No. 1207,*[1] the court held that since the "controversy is within the 'arguably subject' rule of *San Diego Bldg. Trades Council v. Garmon* . . ."[2] the state courts lacked jurisdiction to grant an injunction against peaceful picketing.

Plaintiffs were the owners of the Bellevue Square shopping center in Bellevue, Washington. The center, which is well integrated with the city's principal business district, consists of from 70 to 80 stores and shops which plaintiff had leased to nearly as many tenants. J. C. Penney & Co. held one of these leases and operated a large retail department store in the shopping center.

The defendant Retail Clerks Union had labor contracts in effect with the other Penney stores in the greater Seattle area at the time, and were seeking to induce the employees of the Bellevue store to join their ranks. When other prior organizing efforts had failed to organize these employees[3] the union set up a picket line on the sidewalk in front of the Penney store. The pickets, never exceeding three in number, were at all times peaceful in their manner and they restricted their activities to the immediate vicinity of Penney's. All picketing was done on property owned by the plaintiff and not included in Penney's lease. Signs carried by the pickets requested the public not to "patronize the non-union employees of this store" and thereby to help persuade these employees to join the union.

Before commencing an action in superior court of King County, the plaintiff sought to persuade the pickets to leave the premises, but met with no success. The lessee, Penney Co., made no effort to remove the pickets.[4] The plaintiff then began an action to enjoin the union from picketing on property owned by the plaintiff, as the lessor, on the ground that the picketing constituted a trespass. The superior court, after finding that it had jurisdiction to hear and determine the controversy, denied the injunction on the ground that the defendant's right of free speech outweighed the private property interest of the plaintiff in the circumstances.[5] The supreme court affirmed the denial of the injunction, but for the reason that the state courts were without jurisdiction in the matter. The court relied principally on the *Garmon* decision[6]

[1] 158 Wash. Dec. 433, 363 P.2d 803 (1961).
[2] *Id.* at 437, 363 P.2d at 805.
[3] The store employed approximately 30 full-time, permanent employees. After attempting for several months to organize the employees, only five had joined the union at the time the picketing began. Brief for Respondents, pp. 13-15.
[4] *Id.* at pp. 13-14.
[5] Freeman v. Retail Clerks Union, Local 1207, 38 CCH LAB. CAS. ¶ 68,674 (1959).
[6] 359 U.S. 236 (1959).

for its holding that state jurisdiction had been pre-empted. The scope of this Note is confined to the issue of pre-emption of jurisdiction, and does not extend to the question of free speech.

The *Garmon* case, decided in 1959, established the "arguably subject" rule as follows: "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ."[7] Section seven describes those activities of employees which are protected from employer interference; section eight describes those activities of both employers and unions which are prohibited as unfair labor practices. The supreme court was of the opinion that the picketing conducted by the Retail Clerks Union was arguably subject to section seven and to section eight, subsections (b) (1), (4) and (7).[8]

The case law background establishing the precedents for resolving pre-emption problems has involved actions in which the plaintiff has been picketed by the defendant union. The factual pattern in *Freeman* is unique in that the picketing was directed against a non-litigant party; the two parties to the action were related only through their respective business relationships with the picketed lessee, J. C. Penney & Co. The decision's significance lies in its illustration of a type of situation over which the state will no longer entertain jurisdiction. It substantially enlarges that area of labor law closed to state jurisdiction by the federal pre-emption doctrine.

The superior court was of the opinion that "much has been left to the states even in the direct field of relations between a primary employer and his employees"[9] and that therefore even more was left to the states in the factual situation at bar, where the litigants did not stand in the relationship of "primary employer and his employees." Alluding to the widely accepted policy favoring national uniformity of the labor laws, the court reasoned that this uniformity would be achieved whether the law was applied by state or federal courts, and that "certainly it cannot now be said that Congress intended to leave the individual citizens of the fifty sovereign states exposed in a no-man's land

[7] *Id.* at 245.

[8] Section seven guarantees the right to engage in concerted activities toward the ends of self-organization and collective bargaining. The cited subsections of section eight prohibit the following unfair labor practices by labor organizations: (b) (1)—restraining or coercing employees in their rights as guaranteed by section seven; (b) (4)—engaging in or inducing secondary strikes and boycotts in certain situations; (b) (7)—picketing in certain instances by an uncertified union.

[9] 38 CCH LAB. CAS. ¶ 68,674, 68,676 (1959).

awaiting the decision of ... [an] administrative tribunal to decide whether or not it will assume jurisdiction."[10]

To be sure, the effect of federal pre-emption of jurisdiction from the states was to create the so-called "no-man's land" where, because the National Labor Relations Board declined to exercise its jurisdiction, no relief was available.[11] The only choice open to the Court was to create, by its decisions, the "no-man's land," or to allow state court action to influence the shaping of the labor law in the United States. The former alternative was chosen in 1957 in *Guss v. Utah LRB*,[12] the Court stating its awareness of the problem.

Two years later, in the *Garmon* case,[13] the United States Supreme Court applied this principle in denying jurisdiction to the California courts to award either legal or equitable relief against peaceful picketing. The court again recognized in *Garmon*, that its decision would have a marked significance on the issue of pre-emption.[14]

In view of the *Guss* and *Garmon* decisions the trial court had little to support its claim to jurisdiction. Even when it is considered that the no-man's land problem had been eliminated in the period between the *Garmon* and *Freeman* cases,[15] the trial court's holding seems improper. No appeal for a Board determination had been made by the parties, and therefore no express rejection of jurisdiction had been made. There was no doubt that the jurisdictional standard fashioned by the Board had been met; J. C. Penney & Co. easily exceeded the $500,000 gross annual volume established in 1958 as the minimum for retail stores.[16]

Garmon announces the rule that no state action can be commenced when an activity is arguably subject to either section seven or section

[10] *Id.* at 68,677.

[11] Many articles have appeared describing the "no-man's land" problem. For two of the more thorough analyses, see McCoid, *Notes on a G-String*, 44 MINN. L. REV. 205 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, *Id.* at 257, 261.

[12] 353 U.S. 1, 10-11 (1957).

[13] *Guss* was decided March 25, 1957. The decision in *Garmon* was handed down April 20, 1959, nearly eight months prior to the superior court's decision in *Freeman*, December 8, 1959.

[14] See Mr. Justice Harlan's concurring opinion in which he predicts that the case will become a pre-emption landmark. 359 U.S. 236, 249-50 (1959).

[15] Section 701(c)(2) of the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Amendment), which abrogated the no-man's land problem, took effect November 13, 1959. This section is an amendment to the 1947 Labor-Management Relations Act (Taft-Hartley Act), section 14(c)(2), 61 Stat. 101 (1947), 29 U.S.C. § 164(c)(2).

[16] NLRB, 23D ANN. REP. 8 (1958). This jurisdictional standard determines whether the Board will accept jurisdiction of the case; at the present time, where the employer's gross dollar volume falls below the minimum, the Board will not accept jurisdiction, thus allowing state courts to take jurisdiction under section 701(c)(2) of the LMRDA.

eight of the Labor Management Relations Act until there has been a *clear determination* by the NLRB that its jurisdiction is not exclusive. Where the jurisdictional standards are not satisfied, the 1959 Labor-Management Reporting and Disclosure Act eliminates the requirement for such a clear determination by the Board[17] and the states may take jurisdiction just as if that determination had been expressly announced by the Board.

The only uncertainty in the rule is the construction to be put to the term "arguably subject." The Washington court has adopted what seems to be a reasonable interpretation. This interpretation might be stated to be that whenever the question of the applicability of either section seven or section eight of the LMRA can reasonably be raised or debated, the activity is arguably subject to the Act. Such a construction is in line with the Supreme Court's ideas expressed in *Garmon* as to the function of the NLRB: "... It is essential to the administration of the Act that these determinations be left in the first instance to the ... [NLRB]."[18] The broad construction applied by the Washington court will leave the initial determination with the Board, thus preserving, through the federal process, the national uniformity sought by Congress.

Shopping centers present a situation in which a lessor, non-party to the labor controversy, can become a litigant against the picketing union on behalf of his tenant, a party to the labor controversy. In this situation the court is presented with the problem of balancing the shopping center's property rights against the right of the union to picket the tenants. Should the property right prevail, a practical problem would undoubtedly arise; immunity from picketing would become a marketable commodity. The Supreme Court in 1957 in *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*[19] expressly left this problem open: "Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here."[20]

Counsel for the plaintiff-shopping center, referring to this portion of the *Fairlawn* decision, argued that "in principle it would seem as though the state courts should retain jurisdiction to enjoin trespasses to land by picketing fully as much as jurisdiction to enjoin trespasses to the person."[21] However, trespasses to persons almost by definition

[17] *Ibid.*
[18] 359 U.S. 236, 244-45 (1960).
[19] 353 U.S. 20 (1957).
[20] *Id.* at 24.
[21] Brief for Appellants, pp. 45-46.

include either violence or a threat of violence, and may be enjoined on that basis. On the other hand, trespasses to land are much more apt to be free of violence or any threat of violence, as in the *Freeman* case.

The plaintiff was supported, however, by the four-judge minority in *Freeman,* which concluded from the majority's holding that:

> "... the logic of the pre-emption of jurisdiction, as applied by the majority, is that trespass means nothing. Given peaceful picketing and a concern engaged in interstate commerce, then the state courts are divested of jurisdiction over any controversy which might arise."[22]

The *Garmon* decision set forth the principle which settles this point. After stating its "arguably subject" doctrine, the Court declares:

> "[It has not] mattered whether the States have acted through *laws of broad general application* rather than towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."[23] (Emphasis added.)

An action of common-law trespass is a "law of broad general application," and its application here would, of course, have governed industrial relations, though perhaps indirectly. The Washington court appears to have properly applied this portion of the *Garmon* doctrine to the *Freeman* case. The shopping center-trespass situation has, by its appearance in a few cases,[24] caused some specialized concern to be expressed in law review articles.[25] In view of the general applicability of pre-emption principles set down in *Garmon,* and the actual application of those principles by the Washington court in *Freeman,* there is little basis for expecting the court to accord any special treatment to this factual situation.

There are a number of exceptions to the pre-emption of jurisdiction. While a full discussion of them is outside the purpose of this Note, each will be mentioned briefly to outline the full scope of the operation of pre-emption and to show that none of them applied to the *Freeman* facts.

Exceptions of the more obvious nature are those cases in which (1)

[22] 158 Wash. Dec. 433, 440, 363 P.2d 803, 807 (1961).

[23] 359 U.S. 236, 244 (1959).

[24] State v. Williams, 37 CCH LAB. CAS. 65,708 (Baltimore Crim. Ct. 1959), 44 LRRM 2357; People v. Mazo, 44 LRRM 2881 (1959). Nahas v. Local 905, 144 Cal. App. 2d 808, 301 P.2d 932, 302 P.2d 829 (1956), referred to by the Washington court was not in point. The lessor-landowner in the case was not a party to either the disputed labor activity or the litigation.

[25] Law review articles cited by the Washington court are: Book Note, 73 HARV. L. REV. 1216 (1960); Comment, 1960 DUKE L.J. 310; Comment, 10 STAN. L. REV. 694 (1958).

no interstate commerce is involved;[26] (2) the Board's volume-of-business standards prerequisite to the acceptance of jurisdiction are not met; and (3) the NLRA expressly reserves jurisdiction to the states.[27] Clearly, none of these apply in the *Freeman* case.

Other exceptions, less objective in nature, are set out in the *Garmon* case. The first is termed activity which is "merely a peripheral concern" of the LMRA.[28] *Freeman* did not involve this peripheral activity; picketing for organizational purposes is a primary concern of the Act.

The second exception pointed out in *Garmon* is that "... where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we cannot infer that Congress had deprived the States of the power to act."[29] These deeply rooted interests include the prevention of conduct which is violent, or riotous,[30] or which presents imminent danger of riot or violence.[31] Jurisdiction over this type of conduct has been reserved to the states because "... the compelling state interest ... in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."[32] Conduct of a violent or imminently violent nature quite clearly cannot be found in the *Freeman* facts.

Arguably, the plaintiff was privileged at common law to use force to expel the pickets as trespassers, and a breach of the peace would be threatened should the pickets forcefully resist expulsion. This possibility was urged by the plaintiff.[33] Short of instituting legal or administrative proceedings reasonable force was the plaintiff's sole remaining remedy. In view of the peaceful manner of the picketing, the extent of the force which the plaintiff would be privileged to use could not be reasonably considered violence-provoking[34]. *Youngdahl v. Rainfair,*

[26] A thorough discussion of the interstate commerce aspect is given in 35 WASH. L. REV. 196 (1960).

[27] This last exception is rarely encountered, and exists only in the area of union-security agreements, which are beyond the scope of this Note.

[28] 359 U.S. 236, 243. An example of peripheral activity was presented in Association of Machinists v. Gonzales, 356 U.S. 617 (1958). Internal union affairs were held to be subject to state jurisdiction and the jurisdiction of the NLRB non-exclusive.

[29] 359 U.S. 236, 244.

[30] UAW v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[31] Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).

[32] 359 U.S. 236, 247 (1959).

[33] Brief for Appellants, pp. 45-47.

[34] The use of force to remove trespassers is limited by common law to that which is reasonably necessary in the circumstances. It is limited by statute in Washington to essentially the same extent. RCW 9.11.040.

Inc.[35] established that where picketing includes violence or threats of violence, only that violent portion of the picketing may be enjoined by the states and the peaceful aspects must be left to federal agency jurisdiction unless further peaceful picketing has been rendered impossible. The conclusion here must be that the defendant union's picketing was not within the violence exception to the pre-emption doctrine.

Two recent cases decided by the Washington court provide an interesting supplement to *Freeman* on the pre-emption issue. In *State ex rel. Yellow Cab v. Superior Court*[36] the Washington Supreme Court ordered the superior court to take jurisdiction in a suit to enjoin picketing, on the ground that interstate commerce was not sufficiently affected to pass jurisdiction to the NLRB. The United States Supreme Court reversed this order per curiam without a written opinion, citing the *Garmon* decision. It is apparent that this reversal played a substantial part in the *Freeman* decision and in fact foreshadowed it by indicating the attitude of the federal court regarding the priority of determination to be accorded the Board.[37]

Then in *Lucas Flour Co. v. Local 174, Teamsters Union*[38] the court recognized the "arguably subject" doctrine, but determined that the activity in question was not "arguably subject" to either section seven or eight of the NLRA. The union's activity consisted of a strike protesting the discharge of an employee, allegedly for cause, and the court's determination seems quite proper. Nothing in those sections can reasonably be said to protect or to prohibit the strike in question.

Rather, the strike was charged as being in breach of the collective bargaining agreement, the plaintiff seeking damages for breach of contract. Damages were awarded on the trial and affirmed by the court, over the objection of the defendant union that section 301 of the LMRA[39] pre-empted state jurisdiction over collective bargaining agreement disputes. The court rejected this contention on the grounds that section 301 provided a non-exclusive remedy in federal courts, and does not affect the jurisdiction of state courts. The propriety of that decision was confirmed by the United States Supreme Court when *Lucas* was heard on certiorari.[40] The Supreme Court agreed that under

[35] 355 U.S. 131 (1957).
[36] 53 Wn.2d 644, 333 P.2d 924 (1959), *rev'd.*, 361 U.S. 373 (1960).
[37] A thorough discussion of the *Yellow Cab* case is found in a Note, 35 WASH. L. REV. 196 (1960).
[38] 156 Wash. Dec. 935 (1960), *aff'd*, 82 S. Ct. 571 (1962).
[39] 61 Stat. 156 (1947), 29 U.S.C. § 185.
[40] Local 174, Teamsters Union v. Lucas Flour Co., 82 Sup.Ct. 571 (1962).

section 301 the state court had jurisdiction over the controversy and that the doctrine of federal pre-emption was not relevant. This same result had been reached just prior to *Lucas* in *Charles Dowd Box Co. v. Courtney*.[41] The state courts are limited by the *Lucas* and *Dowd* cases to the application of federal law to the controversy. Since the state law applied by the Washington court gave the same result which would have been reached under federal law, the Supreme Court affirmed.

The *Freeman* and *Lucas* cases provide a good delineation of what the Washington court considers to be permissible state action in labor cases, and illustrate the probable disposition of similar future labor cases in Washington. The two cases furnish a guide which should be helpful in determining whether given labor conduct is within the "arguably subject" rule. *Lucas* is also helpful as an illustration of a type of labor controversy over which the states may still assert jurisdiction, so long as they apply federal law.[42]

The effect of the *Freeman* case on Washington labor law should be a settling one. The scope of activities reserved for state jurisdiction has been significantly narrowed to those exceptions recognized by *Garmon*. The application of the pre-emption principle on the broad scope presented in the factual situation leaves few questions unanswered as to the disposition of this type of labor controversy. The Washington court has interpreted the "arguably subject" rule very broadly, thus resolving many uncertain or questionable results in past litigation.[43] It may be expected that more labor controversies will be left initially to determination by the NLRB than has been the case in the past.

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[41] 82 Sup. Ct. 519 (1962).

[42] There is no reason to expect a change in this availability to states for determination under section 301, since that section does not empower the administrative agency, but rather gives jurisdiction to the federal courts, with no mention of priority of jurisdiction at the federal level. The U.S. Supreme Court's decisions in *Lucas* and *Dowd* confirm this availability.

[43] An example is Selles v. Local 174, Teamsters Union, 50 Wn.2d 660, 314 P.2d 456 (1957), *cert. denied*, 356 U.S. 975 (1958), in which the Washington court allowed recovery of damages by a union member on the ground that a damages remedy was not available under federal jurisdiction and that therefore federal jurisdiction was not exclusive. However, the court also recognized that the defendant union's conduct was an unfair labor practice and within section eight of the LMRA. The court's recognition of the "arguably subject" rule in *Garmon* will now result in pre-emption in future cases with similar factual situations. A difference in remedy under state and federal jurisdiction will not be sufficient to overcome the "arguably subject" rule. The *Selles* case is discussed in Wollett, *State Power in Labor Relations*, 33 WASH. L. REV. 364, 375 (1958); Note, 33 WASH. L. REV. 160 (1958).