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Labor Law

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McCahan Sugar Ref. Co.[34]: "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

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LABOR LAW

Labor Law—Jurisdictional Conflict between State Courts and NLRB. The United States Supreme Court recently reversed,[1] without opinion, the Washington Supreme Court's decision in *State ex rel. Yellow Cab Serv., Inc. v. Superior Court.*[2] The case involved a labor dispute wherein the issue was whether the state court was precluded from asserting jurisdiction by reason of the terms of the National Labor Relations Act.[3] The Washington Supreme Court held that the state court had jurisdiction in the case.

The relator, Yellow Cab Service, Inc., is a corporation which provides dispatching and administrative services to one hundred-eighteen individual corporations, each of which had purchased one taxicab from the relator under a conditional sales contract. The relator exercised some degree of control and discipline over the operation of these cabs. For the purposes of decision, the court considered the entire system as one entity. The cabs operated in Seattle and the local area only. A portion of the service provided by the system consisted of picking up and delivering persons from points within the city to railroad, airport and dock terminals in the local area, and transporting, under exclusive contract rights held with these terminals, travelers arriving at such teminals to points within the city. Some of these passengers were, of course, either arriving at these interstate carrier terminals from points outside the state, or embarking from the terminals for destinations outside the state.

The operators of the cabs were members of the local teamsters union. Upon the expiration of the contract which the union had with the relator, the union proposed a new contract, which the relator accepted. However, a substantial number of the operators rejected the proposed union contract. The union thereupon picketed the relator's premises

defendant are still present and quite as much at work when a jury discerns that a corporate insurer of the plaintiff is to recoup a claim that it has paid." See also note 20 *supra*.

[34] 248 U.S. 139, 149 (1918).

[1] State *ex rel.* Yellow Cab Serv. Inc. v. Superior Court, 80 S. Ct. 400 (1960).
[2] 53 Wn.2d 644, 333 P.2d 924 (1959).
[3] 49 STAT. 449-457 (1953), 29 U.S.C. §§ 151-188.

and, as a result, the relator's dispatching crew refused to work. The relator, disclaiming any interest in the union's dispute with the recalcitrant operators, instituted proceedings in the superior court seeking an injunction of the picketing. By the terms of the National Labor Relations Act, the National Labor Relations Board has jurisdiction over unfair labor practice disputes where such disputes will "affect interstate commerce."[4] The superior court found that the relator's business affected interstate commerce and that it therefore did not have jurisdiction over the case because of the United States Supreme Court's holding in *Guss v. Utah Labor Relations Bd.*[5] The relator then applied to the state supreme court under a writ of mandamus to compel the superior court to try the case. The supreme court directed the superior court to take jurisdiction, holding that the transportation of passengers to and from the interestate carrier terminals was not an activity which required a classification of the relator's business as one affecting interstate commerce; that, therefore, the *Guss* decision did not apply, and hence the state court did have jurisdiction in the case.

The United States Supreme Court, in a per curiam decision,[6] reversed the holding of the Washington court. The Court gave no opinion for its reversal but cited *San Diego Bldg. Trades Union, Local 2020, v. Garmon,*[7] which concerned the state's jurisdiction to award legal or equitable relief to an employer whose business was being peacefully picketed by a union in an effort to compel the employer to sign a contract containing union security provisions. The employees involved were not members of the union and had indicated that they did not desire to join, or be represented by the union. The union had

[4] 49 STAT. 453 (1935), 29 U.S.C. § 160(a).

[5] 353 U.S. 1 (1957). The Supreme Court held that where the NLRB had jurisdiction over a labor dispute, state courts and labor boards were without jurisdiction in the case, unless there had been an express cession of jurisdiction to the state courts or boards by the NLRB. Even though the NLRB had declined to assert its jurisdiction, the state tribunals were nevertheless precluded from exercising jurisdiction. Thus, where there had not been such an express cession of jurisdiction, a jurisdictional "no man's land" was created for cases where the NLRB had jurisdiction, yet, because of a failure to satisfy its jurisdictional yardsticks, it refused to exercise its jurisdiction. This "no man's land" has been eliminated by section 701 of the Labor-Management Reporting and Disclosure Act of 1959, which states that "Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." Therefore, under this section, the state courts and labor agencies have jurisdiction in those cases in which the Board declines to exercise jurisdiction. The state courts and agencies also probably will be deemed to have jurisdiction in cases in which the NLRB has jurisdiction but where it is apparent that the Board would not exercise its jurisdiction because of failure to meet the jurisdictional yardstick requirements.

[6] State *ex. rel.* Yellow Cab Serv. Inc. v. Superior Court, 80 S. Ct. 400 (1960).

[7] 359 U.S. 236 (1959).

not been certified as the bargaining representative nor had it been recognized as such by the employer. It was found in the trial court that the primary purpose of the picketing was not to educate or inform the employees of the advantages of unionization, but only to force the employer to sign the contract containing the union security clause. The employer had applied to the NLRB for representation proceedings in order to settle the question of the union's right to bargain as the representative of the employees. The Board refused to assert its jurisdiction saying that "The amount of business done by [the employer] in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions."[8] The case went through the state courts and up to the United States Supreme Court, which held that even though the NLRB would not assert jurisdiction because of the employer's inability to satisfy the jurisdiction yardstick, the state courts were without power to grant injunctive relief.[9] On remand the state court held that even though it was precluded from awarding injunctive relief, it could still award damages to the employer.[10] A second appeal was taken to the Supreme Court, which held that the state court was not only precluded from awarding injunctive relief, but also from awarding legal relief as well.[11] It had already been recognized in the state court litigation that the employer's business was one which affected interstate commerce.[12]

In order for there to be a preemption of state court jurisdiction in a particular labor case, it must appear that the activity involved or the employer's business affects interstate commerce, and also that such activity constitutes either a protected activity or an unfair labor practice under the NLRA. Even though the employer's business is one which affects interstate commerce, the state courts and labor agencies will have jurisdiction in the dispute if the NLRB has decided that the activity is neither protected nor an unfair labor practice under the NLRA. If the activity is clearly one which does not fall within these categories, the state courts will have jurisdiction even without a NLRB determination to that effect. Since it had already been established that the employer's business affected interstate commerce, the Supreme

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[8] Garmon v. San Diego Bldg. Trades Union, Local 2020, 45 Cal.2d 657, 291 P.2d 1, 5 (1955).
[9] 353 U.S. 26 (1957).
[10] Garmon v. San Diego Bldg. Trades Union, Local 2020, 49 Cal.2d 595, 320 P.2d 473 (1958).
[11] 359 U.S. 236 (1959)
[12] Garmon v. San Diego Bldg. Trades Union, Local 2020, 45 Cal.2d 657, 291 P.2d 1 (1955)

Court in the *Garmon* case was primarily concerned with the nature of the union's activity in respect to preemption. The Court held that where such an activity clearly appears or may fairly be assumed to constitute a protected activity or an unfair labor practice, the state courts are without jurisdiction, even though the NLRB has declined to definitely decide the character of the activity or otherwise to assert its jurisdiction in the dispute. The *Garmon* case thus stands for the proposition that where the employer's business affects interstate commerce, state courts are without jurisdiction in a labor dispute involving such employer if the activity involved is clearly protected or an unfair labor practice or may fairly be assumed to fall within these categories.

In view of the Supreme Court's citation of *Garmon* in its reversal of the instant case, it was apparently of the opinion that the activity of the union clearly, or at least fairly appeared to constitute an unfair labor practice. In the *Garmon* case, a union which was not the bargaining representative of the employees was picketing the employer in an effort to coerce the employer to enter a contract under which the employees would be compelled to join the union. Such activity was at least such as could fairly be assumed to constitute an unfair labor practice. In the instant case, the union was picketing the relator's premises because of a dispute with the recalcitrant operators. Apparently the Supreme Court decided that it could at least be fairly assumed that such picketing was for the purpose of inducing the relator to persuade the reluctant operators to accept the proposed contract. The Court apparently was of the opinion that such activity could at least be fairly assumed to constitute an unfair labor practice and that the NLRB therefore had exclusive jurisdiction.

The Washington court had directed its opinion exclusively to the question of whether the relator's business was one affecting interstate commerce and had not concerned itself with the question of the character of the union's picketing. Since the *Garmon* case was concerned primarily with the nature of the activity involved rather than the affect commerce question, the Supreme Court's citation of that case in its reversal of the instant case would seem to indicate that it assumed the relator's business affected interstate commerce.

The Washington court had relied heavily on *United States v. Yellow Cab Co.*[13] in support of its holding that the relator's business was not

[13] 332 U.S. 218 (1947)
[14] 26 STAT. 209 (1890), 50 STAT. 693 (1937), 15 U.S.C. §§ 1-7.
[15] 53 Wn.2d 644, 649, 333 P.2d 924, 928 (1959).

one affecting commerce. That case involved the question of the application of the Sherman Anti-Trust Act[14] to a conspiracy to monopolize taxi service in the city of Chicago, part of which consisted of transportation of pasengers to and from interstate carrier terminals. The Supreme Court held that *such transportation* was not a *part* of interstate commerce and, therefore, that the Sherman Act did not apply to such a conspiracy. The Washington court, in the instant case, expressly stated in a footnote to its opinion[15] that the fact that the *Yellow Cab* case involved the application of the Sherman Act rather than the NLRA in no way detracted from its applicability to the facts of the instant case. This was erroneous. In *Apex Hosiery Co. v Leader,*[16] the Supreme Court indicated that the Sherman Act does not apply to *all* restraints affecting interstate commerce, but only to those restraints which tend to restrict free competition in goods and services *moving in interstate commerce,* to the possible detriment of purchasers and consumers. Thus, it would seem that the "affect commerce" concept involved in the application of the Sherman Act is much more restricted than the "affect commerce" test applied in the application of the NLRA. In order for the Sherman Act to apply, the activity in question must be found to produce a *particular* kind of effect on interstate commerce, *i.e.,* a restraint on competition in interstate commerce. Under the NLRA, all that need be shown is an obstruction to the free flow of interstate commerce.[17] Thus, it would seem that the Supreme Court in the *Yellow Cab* case refused to apply the Sherman Act to the conspiracy to monopolize the local cab service since the restraint on competition in the transportation of passengers to and from the local carrier terminals would not affect interstate commerce in such a way as to restrain competition in the sale or furnishing of goods and serv-

[16] 310 U.S. 469 (1940)

[17] The *Apex* case involved a sitdown strike by the employees of a manufacturer which resulted in the prevention of the shipment of goods to buyers in other states. The goods had been produced to fill the orders of such buyers. The Court held that the Sherman Act did not apply since the activity would not result in a restraint in the competition, or tend to control the price, of such goods in interstate commerce. However, it is quite obvious that the strike did in fact affect interstate commerce since it prevented the shipment of goods in interstate commerce. If an action had been brought under the NLRA on such a set of facts, that act would have applied since the dispute obstructed the free flow of commerce. The Court said at p. 486: "But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportion." and at p. 489: "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce." The concept of affecting interstate commerce as a test of scope of application would thus seem to be broader under the NLRA than under the Sherman Act.

ices in interstate commerce. Although the character of the restraint on competition in cab service was of the sort prohibited by the Sherman Act, it did not involve an activity which was an *integral part* of interstate commerce, nor did it produce the kind of *effect* on interstate commerce which that act was designed to prevent. The holding in the *Yellow Cab Case* is therefore not authority for the position which was taken by the Washington court in the instant case that the transportation of passengers to and from terminals by the relator in the course of its business was not sufficient to classify the relator's business as one affecting interstate commerce. Although such service is not a *part* of interstate commerce, it may very well *affect* interstate commerce, and it need not be found that an employer's business is *in* or a part of interstate commerce in order for the NLRA to apply, but only that the business affects interstate commerce. This conclusion is supported by language in the *Yellow Cab* case to the effect that the Court's finding should not be construed as establishing a rule that local cab service to and from railroad stations is completely beyond the reach of federal power or even beyond the application of the Sherman Act. The Court expressly stated that all that its holding imported was that cab transportation between railroad stations and the city as a part of the normal course of cab operations is not an *integral part* of interstate commerce, and that a restraint on that service was not sufficient to invoke the application of the Sherman Act.[18]

For further support, the Washington court relied on two other cases. One was the case of *Mateo v. Auto Rental Co.*,[19] in which it was held that the Fair Labor Standards Act[20] did not apply to a labor dispute involving the operation of an "airporter" limousine service between a local airport and the nearby city, since the employees engaged in the rendition of such service were not engaged *in* interstate commerce. However, that case is not authority for a holding that a curtailment of local cab service to and from interstate carrier terminals would not *affect* interstate commerce. The jurisdictional scope of the Fair Labor Standards Act is narrower than that of the NLRA. As pointed out in the *Mateo* case, the former act is applicable only to an activity or employment which is *in* interstate commerce or a part thereof, not where the activity involved merely *affects* interstate commerce. However, the NLRA is applicable where the activity affects interstate commerce,

[18] 332 U.S. 218, 232, 233 (1947).
[19] 240 F.2d 831 (9th Cir. 1957)
[20] 52 STAT. 1060 (1938), 29 U.S.C. §§ 201-219.

although such activity is only local in nature and is not a part of commerce.[21]

Checker Cab Co.[22] was also cited by the Washington court as authority for its position. That decision was one in which the NLRB refused to assert jurisdiction over a dispute involving a local cab company which furnished transportation from bus and rail terminals to points within the city as part of its business. The Board did not hold that it did not have jurisdiction, but only that it would not exercise its jurisdiction. The Board said that such taxicab companies might come within the broad scope of the Board's power to assert jurisdiction, but that exercise of its jurisdiction over a company so predominantly local in its operations would not "effectuate the policies of the Act."[23] Merely because the Board declines to *exercise* jurisdiction because of failure to satisfy the Board's jurisdictional yardstick does not necessarily mean that jurisdiction does not *exist*.[24]

An impairment in the availability of local cab transportation to and from the interstate carrier terminals might easily be found to affect interstate commerce. This would seem to be especially true where, as in the instant case, the taxicab company involved has exclusive rights to serve the terminal trade and to provide transportation to points in the local area. In *New York State Labor Relations Bd. v. Wags Transp. System, Inc.*[25] it was held that where a local taxicab company, as part of its normal local service, furnished transportation to passengers arriving at interstate carrier terminals to points within New York City, under a franchise with the carriers involved to provide such service, its business was one which affected interstate commerce under the NLRA.[26] Here too, just as in the *Wags* case, the relator, under cer-

[21] NLRB v. New York State Labor Relations Bd., 106 F. Supp. 749, 754 (S.D.N.Y. 1952): "In enacting [the NLRA], Congress extended the regulatory power of the federal government over unfair labor practices as far as it could constitutionally be extended.... This federal power extends to employers whose activities when separately considered appear intrastate in character, provided that such activities bear a close and substantial relation to interstate commerce."

[22] 110 N.L.R.B. 683 (1954).

[23] *Id.* at 684.

[24] NLRB v. Dixie Terminal Co., 210 F.2d 538, 540 (6th Cir. 1954).

[25] 130 N.Y.S.2d 731 (1954).

[26] The New York Court stated at p. 740: "Taxicabs, particularly those which have a franchise to serve railroad and bus terminals, are an adjunct of interstate travel. Their temporary unavailability would constitute a burden upon interstate rail and bus travel." A few years previous to the *Wags* case, the New York Court held in New York State Labor Relations Bd. v. Charman Service Corp., 107 N.Y.S.2d 41 (1951) that local cab transportation of passengers to and from interstate carrier terminals was not an activity affecting interstate commerce so as to confer exclusive jurisdiction in the NLRB of a labor dispute involving a cab company which furnished such transportation as part of its operations. The Charman Company was a much smaller company than the taxicab company involved in the *Wags* case which was of substantial size.

tain rights to service the terminal trade, transported passengers to points within the city. An impairment of cab service to and from the terminals could well affect interstate commerce in that access to and from the terminals would be hampered for persons arriving from out of state points and embarking on interstate journeys. The impairment of this local service might well have an ultimate effect on the interstate movement of such persons because of delays and inconvenience in obtaining local access to and from the terminals.

The Washington court might also have found that the dispute in the instant case was subject to the exclusive jurisdiction of the NLRB because the employer derived a yearly gross income of over $500,000 from its operations. On October 2, 1958, the NLRB issued a press release[27] which provided a new jurisdictional yardstick for local taxicab companies. It provided that where such companies earn a gross income of $500,000 a year, or more, the Board would take jurisdiction over labor disputes involving such concerns. Apparently it is conclusively presumed by the Board that such a company's activities affect interstate commerce inasmuch as it will spend a substantial amount of its income in the purchase of cars, radio equipment, and other items which are sold in interstate commerce. Although the company itself may purchase these goods from local dealers, they are probably manufactured in other states, so that a curtailment of the company's taxicab operations would reduce the demand for such interstate goods. This is apparently an application of the indirect inflow yardstick under which the Board asserts jurisdiction in cases involving employers who purchase a certain minimum amount of goods which originate in other states, although the employer's purchase is made from local dealers.[28] The yardsticks merely serve as a standard by which the Board determines whether or not to assert jurisdiction in a given case. They do

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Also, the company in the *Wags* case provided transportation from the terminals under a franchise to serve such terminals, by transporting persons from the terminals to points within the city, whereas the Charman Company apparently had no such franchise under which it served such terminals. Furthermore, in the *Charman* case, the court relied on the case of United States v. Yellow Cab Co., 332 U.S. 218 (1948), as did the Washington court in the instant case. In the *Wags* case, however, the Court said, at p. 740, that a labor controversy might well have a greater impact on interstate transportation than a conspiracy to exclude competition.

[27] NLRB, Release No. 576, Oct. 2, 1958, f.n. 2.

[28] In the *Charman* case, *supra* note 26, the court stated that merely because an employer purchased goods from local suppliers which were manufactured in other states would not support a finding that the company's activities affected interstate commerce. However, in the federal case involving the same company, NLRB v. New York State Labor Relations Bd., 106 F. Supp. 749 (S.D.N.Y. 1952), it was found that such purchases were far below the minimum established by the NLRB as a standard of jurisdiction based on the purchase of goods originating outside the state.

not serve as a standard by which the Board determines whether it *has* jurisdiction. Where the Board declines to *exercise* its jurisdiction because of a failure to satisfy the yardstick, it is not necessarily saying that this jurisdiction does not exist. Satisfaction of these yardsticks not only indicates that the Board will exercise jurisdiction in a particular case but also that jurisdiction exists in the Board in such case, since it seems unlikely that the Board would exercise jurisdiction where jurisdiction did not exist. Where the Board's yardstick is *not* satisfied, the case formerly would fall into the "no man's land" created by the *Guss* case. However, the "no man's land" has been eliminated by section 701 of the Labor-Management Reporting & Disclosure Act of 1959. Under this provision the state courts have jurisdiction where the Board, although *having* jurisdiction, declines to *exercise* its jurisdiction because the business involved is insufficient to meet the Board's yardstick test for exercise of jurisdiction.[29] Since the relator's yearly gross revenue exceeded the $500,000 level, its business satisfied the Board's jurisdictional yardstick and therefore it would seem that the Board had jurisdiction of the case.

The Washington court seems to have required a finding that the relator's business was an *integral part* of interstate commerce, rather than merely a business affecting interstate commerce, in order for it to hold that the dispute was subject to NLRB jurisdiction. The relator's transportation of passengers to the interstate carrier terminals and of travelers from such terminals to points within the city under exclusive contract rights with the terminals to provide such transportation, and also the size of the relator's yearly gross income are the factors which indicate why the Washington court should have held that the relator's business affected interstate commerce and that the NLRB therefore had jurisdiction. The United States Supreme Court's reversal shows that the relator's business could at least be fairly well assumed to be one affecting interstate commerce and therefore that the Board had jurisdiction because of the type of union conduct involved in the controversy.

DENNY E. ANDERSON

LOCAL GOVERNMENT

Local Government—Municipal Corporations—Power of Eminent Domain—Condemnation of Lands for Resale to Private Industry. In *Hogue v. Port of Seattle*,[1] an attempted exercise of the power of

[29] See footnote 5 *supra*.

[1] 154 Wash. Dec. 319, 341 P.2d 171 (1959).