Manipulating Forum Jurisdiction and Generating a Law of Employee Free Speech

Ivan C. Rutledge

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Civil Procedure Commons, and the First Amendment Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol32/iss2/2

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Manipulating Forum Jurisdiction and Generating a Law of Employee Free Speech

By Ivan C. Rutledge*

I. INTRODUCTION

The National Labor Relations Act\(^1\) contains protection of employee solicitation, handbilling, and choice of representatives that the first and fourteenth amendments do not vouchsafe to other members of society. This essay is written to review the development of this thesis and to argue that the United States Supreme Court has fashioned a regime of forum jurisdiction surrounding employees' rights to speak and print that is both unique and exquisitely complex. Two patterns of allocating jurisdiction, both subsumed under the fuzzy expression "federal pre-emption," engender the complexity. This article will first review the Court's

---

* Walter F. George Distinguished Professor Of Law, Walter F. George School of Law, Mercer University; Carson-Newman College (B.A., 1934); Duke University (M.A., 1940); Duke University (L.L.B., 1946); Columbia University (L.L.M., 1952).


2. The Court has on the one hand voted for forum jurisdiction in the courts concurrent with that of the National Labor Relations Board, subject of course to the supremacy of federal law in state as well as federal courts. On the other, the Court has from time to time staked out, with varying formulas, a zone of exclusive primary jurisdiction in the Board, such that not even the Court itself should pronounce on federal law until the Board has first spoken. In the exclusive zone, for example, a federal district court rules for the defendant under 12(b)(1), even if pressed for a ruling under 12(b)(6) by an argument that under the National Labor Relations Act the plaintiff has failed to state a claim upon which relief can be granted.
precedents before the Taft-Hartley Act in 1947, then discuss what followed in the 1950's, then, penultimately, review the Court's holding in Linn v. United Plant Guard Workers Local 114, the campaign defamation case of 1966, and, finally, discuss the employer's property line.

One approach can be understood as elaborated from Gibbons v. Ogden in Cooley v. Board of Wardens. It consists of recognizing the jurisdiction of state tribunals to try whether a state regulation of commerce conflicts with federal law and postulates that the states possess some concurrent jurisdiction to regulate commerce among the states, when local conformity yields a polity superior to national uniformity. Before the National Labor Relations Act was amended in 1947 to add unfair labor practice prohibitions addressed to labor organizations, the Court in Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board, without even questioning the jurisdiction of a state agency, affirmed the judgment of the state supreme court which upheld the agency's order against mass picketing.

The Local argued that the order was repugnant to the Act (not that the state tribunals were without jurisdiction), but the Court concluded that since the state system was, in this instance, devoted to preventing breaches of the peace in connection with labor disputes, it could be reconciled with the Act, and that as focused in this case, the two regimes could consistently stand together. The opinion of the Court did not allude to Cooley, which upheld state pilotage rules for the port of Philadelphia, but adverted to the long-standing insistence of the Court that an "intention of Congress to exclude States from exerting their police power must be clearly manifested." This approach approximates that of Justice Daniel,
who, concurring in Cooley, characterized the pilotage rules as not "essentially and regularly within that power of commercial regulation vested by the Constitution in Congress."\(^{10}\)

II. PRECEDENTS BEFORE 1948

The Gibbons branch of the formula is displayed in *Hill v. Florida,*\(^{11}\) which reaches the assembly or choice-of-representatives component of employee interests protected by the Act, but not those of soliciting or handbilling. The case came to the Court from the Florida Courts, and no question was raised of their jurisdiction. The question was on a Florida statute which provided that no person could serve as a union official unless he had been a citizen for ten years, was of good moral character, and had no felony conviction. To enforce these disabilities, anyone seeking to serve as a business representative had to obtain a license. The Court held the statute in conflict with the Act and inoperative under the Supremacy Clause, because of expressions in the Act (section 7\(^{14}\) and especially section 9\(^{14}\)) providing for employee freedom of choice. "Thus, the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom."\(^{14}\) "Congress attached no conditions whatsoever"\(^{15}\) to employees' choice of representatives.

So much, for the time being, for the vigor of the Act under the Supremacy Clause. It, as its own terms require, is administered equally by federal and state judges. *Hill* nails down an immunity under the Act from state regulation, in favor of a nationally uniform rule of freedom of choice as a part of congressional regulation of commerce among the states. Five years earlier, under the due process clause of the fourteenth amendment, the Court in *Thornhill v. Alabama,*\(^{16}\) had postulated a freedom of any person, not just employees, to discuss the facts of a labor dispute. This constitutional immunity does not extend to mass picketing,\(^{17}\) nor does the statutory freedom of association extend to mutiny, as

---

11. 325 U.S. 538 (1945). That is, a state court with jurisdiction, but error under the supremacy clause in misapplying the Act of Congress regulating commerce. See note 2 *supra*.
14. 325 U.S. at 542.
15. *Id.* at 541.
held in *Southern Steamship Co. v. NLRB.*[^18]

Alternative to the Supremacy Clause approach is the recognition, by statutory or judicial designation, of a federal agency as seized of exclusive original, or primary, jurisdiction to litigate disputes arising under federal law, specifically, a statutory regulation of commerce like the Act. An example is *Bethlehem Steel Co. v. New York State Labor Relations Board.*[^10] A New York statute, in that case, gave its agency powers similar to those granted by section 9 of the Act to the Board in Washington (hereinafter “the Board” unless otherwise qualified). The Board has to resolve questions of choice of representatives, including the determination of what employees are eligible to vote in a Board-directed election. A major status-resolving function of the Board in making that determination is delineating the bounds of the election district or, as the Act puts it, ascertaining the “unit appropriate for the purposes of collective bargaining”[^9] with the employer. The state agency had asserted jurisdiction over the same employees and their respective employers as were subject to the Board’s jurisdiction under section 9. The Court held that, even if the Board would not act, the state agency had no jurisdiction because of the mere existence of the Act and the powers it confers upon the Board.

Although the opinion noted that the New York and United States policies were at some points in conflict, it is essential to stress that the issue was not whether the state agency would have erred in marking out the election district; it might have arrived at the same solution as the Board. Its flaw was in having meddled in federal business belonging exclusively to the Board, whether or not that body was attending to it. This case has large significance in that it is the beginning of a theory that greatly expands during the 1950’s and ousts courts and state agencies of jurisdiction. The theory advances another gradient of the supremacy of federal law, not by abjuring the uniformity-conformity tension in the courts but by side-tracking it and marshalling the litigation to the Board in the first instance.

The disappearance in *Bethlehem Steel* of any jurisdiction other than the Board’s seems to be grounded upon the supremacy principle relating

---


to freedom of choice of representatives, although it had not abrogated the jurisdiction of the Florida court in the *Hill* case. If the principle is freedom of choice, could it also extend to the campaigning that makes that choice intelligent, and deprive courts and other agencies of jurisdiction with respect to employees' oral and printed communications, including peaceable picketing? The case itself seems to mean that the Board's operations under section 9 strip from other agencies and the courts any similar function. That means the Board's ascertainment of whether employees wish to bargain collectively, and it matters not whether the court or other agency would simply duplicate or produce a result at odds with what the Board would do. Note also that this result comes about only under the Board's jurisdiction to resolve questions concerning representation without reference to unfair labor practices or to protected employee activities. The Act obliges the court or other agency to decline jurisdiction rather than to accord supremacy to applicable federal law. The principle is not immediately the supremacy of federal law but the primacy of the federal agency in sequence of litigation.

The Court, from *Cooley* on, had successfully claimed for state as well as federal courts jurisdiction to resolve the Commerce Clause question in favor of uniformity or conformity as a branch of Supremacy Clause doctrine. What the Court had not been notably successful at, though, was enunciating dependable criteria for applying the distinction. So it is not to be wondered at that Justice Douglas, writing for the Court in *Allen-Bradley*, faded off into an allusion to the “police power” of the states. The facts of that case pin it down, though, that a state court or agency has jurisdiction to hold that mass picketing is not protected by the Act. Other precedents signify nothing against a state court’s jurisdiction to decide whether employee choice of representatives or exercise of speech or press is protected by the Act. So far, there is only one qualification—the Court's judgment that, in endowing the Board with resolving representation disputes, Congress did not thereby intend a state agency to continue to have jurisdiction over the same employees in the exercise of “full freedom” under section 9 to choose collective representatives. This qualification entails the resolution of two issues in concluding: (1) under the Supremacy Clause (as in *Hill*), nothing in state law that is inconsistent with the “full freedom” is valid, and (2) the *very jurisdiction* of a state agency (in *Bethlehem Steel*) to direct elections is inconsistent with the “full freedom” Congress directed its agency, the Board, to foster, no matter that in fact a state agency’s order might be exactly congruent with what the Board would have ordered.

The Court’s precedents as of 1947 thus provide two avenues for protection of the employee interest under the Act in freedom of assembly (or choice of employee representatives). One is under the Supremacy Clause as it operates upon the Commerce Clause distinction between conformity
with the states and national uniformity. The other is by way of imputing to Congress the design of a federal administrative-agency jurisdiction that is exclusive of the courts' jurisdiction as well as that of other agencies. Allen-Bradley, the mass picketing case, taken with Hotel & Restaurant Employees v. Wisconsin Employment Relations Board, another mass picketing case, and with the mutiny case, Southern Steamship Co., could inspire the speculation that the Court's concern for the protection afforded by the Act may take one form when the activities of employees are similar to those traditionally understood as shared with other members of society under the Constitution, and another form when the means employed in those activities transcend those characteristic of constitutionally protected speech, assembly, and press.

The jurisdictional contrast between Hill, the supremacy clause freedom of association case, and Bethlehem Steel, the case of exclusive jurisdiction of the Board, nevertheless left an unstable boundary between cases that had to go to the Board first and those which might undergo the Supremacy Clause test in court or in a state agency. In any event, if the distinction between the Board's jurisdiction over unfair labor practices and its operations under section 9, as suggested above, is real, Bethlehem Steel would hardly have been an augury for the eventual overruling of Hill. Bethlehem Steel, on these terms, would not forecast a holding that the state court had no jurisdiction without reaching the issue of law (that is, whether the state law is compatible with the Act), unless the state agency is duplicating the Board's administration.

III. THE BOARD'S SERVITUDES FOR SPEECH AND PRESS

As of 1947, the Act had been construed to confer upon employees, in addition to interests protected constitutionally from state or federal interference, a servitude of employers' premises to campaigning for support of collective bargaining. These activities contain elements of speech, press and assembly, but the Court validated Board judgments denying immunity to violence and sit-down strikes, and Board judgments creating presumptions that employer interferences with congregation, solicitation, or handbilling, other than on working time or at work stations, are unfair labor practices subject to employer justification in terms of employer interests in management or property. Yet, as was subsequently explained in Eastex, Inc. v. NLRB, when the employees are already rightfully on the employer's premises, the employer's "reliance on its property rights is

22. The leading case is still Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
The Court further observed that if there was any meaningful intrusion upon the proprietary interests of the employer, it does not vary with the content of the message in the paper.

The Eastex case emphasizes a cardinal distinction between free speech and related interests under section 7 of the Act and their constitutional analogies. The only purpose conditioning the constitutional freedoms of speech and press (and the freedom of association auxiliary thereto) is enlightenment of the listener or reader. By contrast, there are two purposes denominated in section 7: collective bargaining (and, since 1947, opposition thereto) and other mutual aid or protection. The Court in Eastex refused to lop off the latter or to subordinate it as merely a component of the collective bargaining goal. The Court also again sanctioned the Board’s view that, in default of employer evidence of justification based on managerial interests, the employer’s interference with employee distributions is presumed to be an unfair labor practice. The Court has also purported to sanction the Board’s extension of its factory rules about workplace to hospitals, but exercised a much wider scope of discretion in reading the evidence on judicial review than it had mandated for the courts of appeals.

IV. FROM TAFT-HARTLEY THROUGH THE 1960’s

The 1950’s saw the Court impose two important curbs on the Board’s discretion. One of them was an innovative disagreement with the Board on the beneficiaries of the servitude for employee speech-press-assembly on employers’ premises. In apparent disregard of the definitions in section 2 of the Act, and notwithstanding the statutory purpose of collective bargaining or of mutual aid and protection, the Court took its turn in erecting a presumption: It is not an unfair labor practice for the employer to exclude individuals, other than its employees, from its premises absent evidence of exiguous circumstances, so limiting the alternatives for organizing its employees as to create by such exclusion an “imbalance” in

24. Id. at 572-73. Eastex involved the distribution of a newspaper within immune times and places, but the paper contained appeals for goals which were beyond the power of the employer to concede, such as keeping the Texas statute prohibiting union shops from becoming a part of the state constitution.


27. These instructions are set forth in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

28. “When used in this subchapter . . . (3) The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise.” 29 U.S.C. § 152 (3) (1976).
the campaign for the hearts and minds of its employees.99

The Court's conclusion, imposing a disability upon employees other than those of a particular employer, strained the statutory structure and may have pushed the Board towards application of the Constitution rather than the more narrowly purposed immunities of the Act. The Court at first went along, but later concluded that the analogy of the employer to the state itself had been promoted too far, and ultimately directed the Board to look to the Act, and never mind the resemblance of the shopping plaza of the 1970's to the company town of the 1940's.50 That the Board resorted to the Constitution instead of the Act may have been in part attributable to the Court's presumption against "non-employees" of the employer whose premises these campaigners sought to use.3 But the signal development of the 1950's made it all but inevitable that if the employees could not rely upon immunities under the first and fourteenth amendments, they would be required to rely upon the Board in the first instance for a favorable wind under the Act.

The exclusive primary jurisdictional approach of the 1940's in denying the New York board jurisdiction to direct an election because of section 9 of the Act bore fruit in a somewhat expanded and truly innovative form. Garner v. Teamsters Local 776 treated the cease-and-desist order jurisdiction of the Board in the same way as its jurisdiction to resolve the appropriate election district and determine whether to direct an election therein (resolve a representation question). The issue was whether Pennsylvania through its judicial process could enjoin what was concededly the subject of the Board's jurisdiction to issue an order. In particular, the Pennsylvania courts had enjoined picketing to coerce an employer to require its employees to support collective bargaining in the absence of a "labor dispute" as between the employer and its employees.83

As in the Bethlehem Steel case of directing an election, it could not be trusted to chance, according to the Court, that the state tribunal would

31. The Board's application of Logan Valley to an employer parking lot which was adjacent to the employer's store but open to the public was reversed in Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).
33. This absence seems to mean "stranger picketing," arguably protected and arguably an unfair labor practice under section 8(b)(2) of the Act, which condemns union activity in terms of its purpose: in this instance seeking to discriminate against employees to encourage their support of a labor organization.
come out the same way as the Board. Hence the state courts had been deprived of jurisdiction, and it was essential that the first stage of litigation be in a single commerce-regulating chamber, the Board, for the sake of national uniformity.

_Bethlehem Steel_ had involved more than adjudication. The case involved administration of a comprehensive system of executive and delegated legislative as well as adjudicative powers in the resolution of whether there was a bargaining representative. The previous leading case had also involved the _imperium in imperio_ of the Commerce Commission, which had newly been invested with delegated power to legislate railroad tariffs. The Court, against the apparently clear direction of the new statute to the contrary, held that the Commission's adjudicative jurisdiction (reparations awards) superseded that of the courts.\(^3\) Cases of exclusive primary jurisdiction under the Interstate Commerce Act and those most closely related thereto have involved national uniformity in the sense of a single nationally uniform rate structure and avoidance of the risk (similar to that identified in _Garner_) of subversion of the federal rule defining the rate (or imposing _maxima_ and _minima_) by individual adjudications at odds with it. The extraordinary outcome in _Garner_ not only extends the uniformity concept to injunctions as well as judgments for damages, but does so in a case in which there were no sublegislative rules to be subverted by adjudicative misjudgments of the facts.\(^4\)

The next and most recent sweeping stride towards national uniformity by means of exclusive primary jurisdiction of a single federal agency, the Board, was taken in _San Diego Building Trades Council v. Garmon_.\(^5\) A state court had awarded damages for a violation of state labor-relations law. The Court took the occasion not merely to expand _Garner_ regardless of the state sanction but, completely recasting the rationale for denying jurisdiction to the state court, extended the Board's initial jurisdiction in general, with the corresponding defeasance of court and other agency jurisdiction, regardless of whether state law might be characterized as expressing labor-relations policy. That is, both the facts that California law was congruent with the Act, and that it did not invest the courts with an injunctive remedy, turned out to be immaterial. Instead, the Court laid it down that the court or agency must decline jurisdiction if the case merely presents either of two kinds of issues: whether the activity (speech, or otherwise) is protected by the Act (presumably section 7) or whether the

---

Act (presumably sections 8 and 10) prohibits it. In either case, it is for the Board to decide such an issue, but as in Bethlehem Steel, it does not matter if the Board never gets around to deciding.

This does not mean that all other courts and agencies are forever divested of jurisdiction. First, the Board can err or abuse its discretion, and in that event, its primary jurisdiction has been exhausted and judicial review in the federal courts accrues. Further, assume that the Board lawfully concludes that although the activity is not prohibited, neither is it protected. That amounts to a Supremacy Clause resolution against uniformity, leaving open the jurisdiction in courts or other agencies to carry out policy in conformity with state law.

Justice Harlan, joined by Justices Clark, Whittaker, and Stewart, concurred in Garmon on the ground that the activities of the union for which the state had awarded damages "may fairly be considered protected...[hence] state action is precluded until" the Board has determined that such activities are unprotected. The subject in Garmon was picketing for an arguably unfair practice end, as in Garner, as well as arguably protected activities. But note that the four concurring justices viewed the picketing as prima facie protected, albeit it would not qualify as free speech in its "obvious and accepted scope."

The general rule of defeasance of jurisdiction concurrent with that of the Board is subject to an exception in favor of such concurrent jurisdiction which is phrased as follows:

It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order... We have also allowed the States to enjoin such conduct... State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.

It will have been noted that the magisterial "we have allowed" is not addressed to the supremacy clause. There could still be a federal question under the Act for a court or another agency to resolve. An example (which is, however, outside the speech-press area) is Machinists Lodge 76

40. 359 U.S. at 249 (Harlan, J., concurring).
v. Wisconsin Commission, which overruled Briggs-Stratton.

The curious history of the problem in this case makes it useful to go back to Hill and trace a sequence therefrom. The Court in that case by necessary implication rejected an argument advanced in the dissent, as it happens, by Justice Frankfurter, who wrote for the Court in Garmon. His argument in the Hill dissent was that section 7 of the Act does not define immunities as against the states but only as against employers. Chief Justice Stone, concurring, expressly rejected the argument, asserting that section 7 "confers the right of choice generally on employees and not merely as against the employer." Then, in Garmon, the Court's opinion established as an exception, in addition to the compelling state interest in domestic peace, the following: "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." And the Court also had said: "What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board."

What the Court was next to do with the "compelling precedent" all but transcends comprehension. A footnote to the opinion of the Court in Garmon casually forecast the overruling of Briggs-Stratton (the case of intermittent and unannounced work stoppages held unprotected from state regulation), in these terms: "[T]he approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." So what does the Court do, in overruling Briggs-Stratton seventeen years later? Does it hold that the issue of whether concerted refusal to work overtime to get the collective agreement renewed is protected (from the employer or from the state) should first be presented to the Board? No. This precedent was so un-controlling that the Court took hold of the Act and ruled that the conduct in question was not only not prohibited by the Act but was not regulable by the Board or the states.

Now, in addition to the exceptions for violence and controlling prece-
dent, Garmon is subject to a new exception: When an activity free of fraud or violence is led for a bargaining purpose by a representative having the status conferred by section 9 of the Act, courts and state agencies have jurisdiction concurrent with that of the Board to accord immunity from regulation consistent with the nationally uniform policy of freedom to exert pressure in contract negotiations.49 And the concerted violation of work rules as a bargaining tactic is likewise immune, although probably unprotected from employer discrimination.50

To go back to the end of the 1950’s and Garmon, the Court has equated activities not merely prohibited and not merely protected but either arguably so as suspending all jurisdiction to award damages as well as injunction or any other sanctions, except that of the Board. The major exception is for domestic peace. The Congress straightway created another exception for cases in which the General Counsel or the Board did not reach the merits.51

Accordingly, if the activity is arguably under the special solicitation-handbilling concert of action immunity of section 7 of the Act and the Board (or General Counsel) does not decline to reach the merits, the Board’s jurisdiction is exclusive. It may be speculated, then, that this part of the section 7 immunities comes within neither the domestic peace, peripheral interest, nor compelling precedent exceptions. “Arguably protected” will suffice to defer the judicial reckoning under the Supremacy Clause until review of the Board’s order on the merits.

49. See, e.g., New York Tel. Co. v. New York State Dep’t of Labor, 440 U.S. 519 (1979). When the pressure of state policy takes the form of a seven-week waiting period before a claimant can get unemployment benefits, if the claimant is out of work because of a strike, but thereafter burdens the struck employer with higher premiums because of the increased benefit load, the Act is not offended, although the strike is a bargaining strike. The Court could not agree on an opinion partly because, it appears, only three of the majority justices would distinguish Machinists Lodge 76 as a case of state regulation or prohibition of private conduct, whereas the other three found sufficient evidence from 1935 history of enactment of the Wagner and Social Security Acts of a license to the states. The jurisdiction of the federal district court, however, was not discussed in either the dissenting or the three majority opinions. All appear to read the issue as arising under the Supremacy Clause rather than as a matter of forum jurisdiction. See Hudgens v. NLRB, 424 U.S. 507, 522 (1976), a case of what is protected from employer interference or discrimination containing a flirtation with the possibility that the statutory protection of bargaining propaganda differs from that of organizing propaganda. The Board, on remand, exhibited its expertise, albeit tersely and without explanatory findings, by the innovative conclusion that bargaining programs involve appeals not to patronize, whereas organizational campaigns do not. (The best that can be said for this startling announcement is that on the facts of that particular case the picketing was for a bargaining objective and sought to persuade ultimate consumers not to trade.) 230 N.L.R.B. 414, 416, 95 L.R.R.M. 1351, 1353 (1977).


These estimates, however, turned out to be wrong in the campaign-defamation case of Linn v. United Plant Guard Workers Local 114. The Court rejected the Garmon formula as applicable to the argument that defamation perpetrated during an organizing campaign by a union and its officers is protected, or prohibited as an unfair labor practice in violation of the Act under section 8(b). A state court does have jurisdiction to apply state remedies in a civil action by the injured person. The plaintiff was the assistant general manager of the employer, and the handbills accused him and others of lying to the employees and other discreditable conduct.

The opinion of the Court observed by way of a quotation from its opinion in Garner that although the Act leaves much to the states, Congress has refrained from telling how much. The opinion appealed to an overriding state interest which was merely a peripheral concern of the Act. It also stressed that its conclusion was experimental and subject to reconsideration, and in that connection stated that the issue was not constitutional but had to do "solely with the degree to which state remedies have been preempted by the Act." Now it is clear not only from the Court's opinion but from the two dissents, that a state remedy of damages for libel does exist.

The opinion reviews the Board's decisions and concludes that although the Board tolerates intemperate, abusive, and inaccurate statements of the union in organizing campaigns, it does not interpret the Act as protecting either the union or the employer in inflicting intentional injury upon the other by circulating known falsehoods of a defamatory or insulting content.

In light of these considerations it appears that the exercise of state jurisdiction here would be a 'merely peripheral concern of the Labor Management Relations Act,' provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances.

The two quotations within this excerpt were not accompanied by references to their source, but it is readily recognized as Garmon, which ad-
dressed the peripheral interest exception by example of a state remedy awarding damages and reinstatement in the union of a member expelled from the union in breach of the union constitution and by-laws. 67 Garmon’s overriding state interest exception was for state remedies of damages “for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order.” 68 But the Linn opinion does not argue that defamation has the “conduct marked by” characteristic, other than to observe that libel suits have long been recognized as preventing violence.

In short, the Court moves back towards Hill rather than Bethlehem Steel in allowing concurrent jurisdiction, referring to the degree of pre-emption of state remedies by the Act rather than the exclusion of a state forum by the primary jurisdiction of the Board. In Hill, the state licensing system was held invalid, but also inconsistent with the Act were the substantive rules of qualification to represent employees, a complete wipe-out under the Supremacy Clause. Now, moving from association to speech, the Court designs (albeit from nothing expressed in the Act) a series of federal limitations, primarily upon substantive rules of liability, contemplating both compensatory and punitive damages. Indeed, the court’s competence to award damages is relied on as a reason for concurrent jurisdiction. In addition, the supplementary sanctions likely to be sought from the Board would not work at cross purposes with the state sanctions. 69

Why not? Simply, the state rules of liability (substantive rules of decision) would be congruent with the policies of the Act. 70 They are primarily three. First, the defendant must have published defamatory statements knowing that they were false or with reckless disregard of whether true or false. Second, the plaintiff must prove the severity of the harm, but such proof may track state rules about different forms of harm. Finally, punitive damages are allowable only when compensable harm is proved. 71 The third condition also fits the Court’s reference to state sanctions. 72

58. 359 U.S. at 247. Compare Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977), upholding a somewhat less than traditional remedy under state law for inflicting mental distress by means of “outrageous conduct.”
60. See Letter Carriers, Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974). Because Executive Order No. 11491 contains by implication the federal rule in Linn, its doctrine is here expressly supplemented by a rule on the scope of appellate review. That is the duty of the Court itself to make an independent examination of the record, as in constitutional cases, to make sure that the speech is not protected under federal law.
62. The United States, as amicus, had urged a further federal limitation that the defam-
Unlike *Hill*, representing either a federal or a state law determination, *Linn* is a new departure, blending (without statutory formula) federal with state rules to be litigated concurrently with whatever sanctions may be forthcoming from the Board. It further appears that, as in the bargaining (non-speech) cases, the Board may accord unprotected status to speech that is tortious under the federal-state rules applicable to labor-dispute defamation actions in the courts. It may also be seen that there is an argument under the intermittent-strike bargaining case, that defamation immune from liability in tort is likewise immune from condemnation as an unfair labor practice, although it may constitute grounds for setting aside an election.

The high-water line of marshalling issues under the Act to the Board, in *Garmon*, had thus been lowered not only by the 1959 amendment conferring jurisdiction upon courts and agencies over labor disputes when the Board declines to reach the merits, but also by expansion of exceptions foreshadowed in *Garmon* in its references to “compelling precedent applied to essentially undisputed facts” (the immunity of union bargaining tactics from both state and federal regulation), and the exceptions based on the traditional law of torts and the peripheral interest of the Act. The defamation vehicle for this expansion deals, of course, with immunity for the content of speech granted by the Act. The concluding topic will examine picketing, which has from time to time been characterized as a mode of communication.

**VI. The Employer’s Property Line**

The Court has arrived at a revision of *Garmon* in a case of trespassory picketing that is otherwise peaceable. In *Sears, Roebuck & Co. v. Carpenters (Sears I)*, this kind of case became the vehicle for a reexamination of *Garmon*, rather than, as in *Linn*, a mere invocation of the traditional law of torts and matters of interest peripheral to the Act. That is, *Sears I* reexamines the *Garmon* formulation as it might be applied to “conduct traditionally subject to state regulation.” The conduct in this case was intrusion by the pickets on Sears' land, and the traditional state regulation is injunction against such conduct as a continuing trespass.

---

63. A recent case on a state prohibition of peaceful picketing generated controversy about whether the issue arose under the due process or equal protection clause, but the opinion of the Court used the equal protection clause and concluded against the statute because it discriminated among pickets on the basis of the contents of their expression. *Carey v. Brown*, 100 S. Ct. 2286 (1980).

64. 383 U.S. at 65 n.7.
Trespass to land is, of course, like defamation, about as close as any tort may be to the core of traditional tort law, although its characteristics do not link up as closely as those of defamation to the compelling interest in preserving the public peace against violence. In any event, trespass to land fits the new "conduct traditionally subject to state regulation" quite comfortably.

Whether this tort, like defamation, is to survive under new federal rules somehow extracted from the Act in the Garmon or Linn style could not be readily assumed from this introduction. It turns out that the Act does not radiate federal rules of decision when the state property line entangles the federal labor dispute. But before reviewing the critical reason for according to a court the jurisdiction to enjoin picketing on the premises of an employer, the reader's attention to the opinion of the Court should have been grabbed by an evident retreat from Garmon's marshalling process.

The first technique is to examine Garmon's "arguably protected" separately from its "arguably prohibited," a technique past due after the Court's overruling of Briggs-Stratton. Let us look first at the "arguably prohibited" branch. Recall that the 1950's revealed the Court's suspicion that tribunals other than the Board would subvert federal uniformity as required by Congress and that it was no good for concurrent jurisdiction that the state rule was congruent with the federal rule. The vermin in the woodwork was that the other tribunal might call the facts wrong on the evidence.

Here, in terms of Garner, assume that the Act forbids use of the employer's premises for solicitation that takes the form of picketing, and that California law of trespass agrees. The problem of Garner is that the court (or agency other than the Board) would mislocate the property line in relation to the location of the pickets as a matter of fact. That is, the Board would get the location of the pickets right, whereas the result in other tribunals was uncertain. The susceptibility of other tribunals to non-conformity (i.e., local policies in assessing the evidence) was not over-balanced by their expertise in locating the property line. The Garmon formula reinforced this position giving primacy to the Board's forum by emphasizing that it made no difference whether state law concerned labor relations and enforcement by injunction. The principal question was the applicability of the Act and hence, the "arguably protected-prohibited" test was not divided into two separate standards.

65. It should be noted that such conduct might be protected under section 7 or be prohibited as an unfair labor practice under section 8.

66. Machinists Lodge 76 invoked NLRB v. Insurance Agents, another bargaining tactics case containing a clear obiter dictum that a non-speech tactic could be unprotected yet not prohibited as an unfair labor practice.
In considering the "prohibited" branch, the Sears I opinion goes back to Garner and distinguishes it as a state labor-relations law case and refers to the essential proposition that in federal labor disputes the states have no competence. The opinion concedes that even when state law is not addressed to labor relations it is displaced by the exclusive primary jurisdiction of the Board. The examples given, however, are characterized as state law invoked against "precisely the same conduct."67 The opinion goes on to show that state laws of "general applicability" have preserved concurrent jurisdiction when they seek to vindicate "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."68

The opinion of the Court in Sears I wiped out the Garmon rationale, as follows:

The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in Garner) or different from (as in Farmer) that which could have been, but was not, presented to the Labor Board.69

In short, the Court asserts (contrary to Garmon) that there is a potential distinction between state law not specifically addressed to labor relations and state law that is. The quoted passage seems to say that they converge only if the general law (of the state) asks the same questions of the facts as a state labor-relations law would have asked.

The conclusion is telegraphed by the analysis. Jurisdiction aliunde the Board survives if the forum is administering state law to facts that are not wholly within the Act. This was implicit in Garner but overruled in Garmon. Specifically, if speech is arguably prohibited by the Act, its lawfulness must be referred to the Board, unless the speech in question is arguably prohibited by state law other than labor-relations law.

The Sears I split of Garmon seems to yield, as to facts revealing both an arguable prohibition of the Act (i.e., a tenable argument that an unfair labor practice has been committed) and an arguable violation of state law, jurisdiction concurrent with the Board if state law generates a different controversy. Such a state law must make material a set of facts different

67. 436 U.S. at 193.
69. 436 U.S. at 197.
from those the Board would consider as material under the Act. In case of
difference, the Farmer combination of "peripheral concern" of the Act (or
"no realistic threat of interference with the federal scheme") with a
state's "overriding interest" becomes applicable.

There were, in Sears I, some contentions that the picketing was an
unfair practice, depending on whether its purpose was to gain recognition
or to obtain assignment of carpentry work to Union members. It would
not be an unfair practice if the purpose was to obtain compliance with
area standards of working conditions such as pay or hours. The opinion
points out at the outset that the case is not one of picketing "definitely"
protected or prohibited by federal law. But the issue before the court
presents a different controversy, one completely unrelated to ascertaining
the purpose of the picketing and concerned only with whether the loca-
tion of the picketing was lawful under state law. That answers half the
question of concurrent jurisdiction in favor of the jurisdiction of the
court.

Let us look now at the "arguably-protected" branch. What the opinion
characterizes as "federal supremacy" considerations become "implicated
to a greater extent" than when labor-related activity is prohibited. The
opinion (accurately, it seems) demonstrates a controversy overlap that in-
deed occurs by reason of the Supremacy Clause. The court's first issue
would be whether the picketing was "actually protected by federal law"
(the Act), because only if it were not would state law come into play.

The Farmer formula seems to have answered the question of how to
deal with the overlap. At least if the remedy under state law is damages
not within the remedial armory of the Board, trust the fact-finding
processes of the courts, and safeguard the supremacy of the Act by court-
made rules of decision and remedy. This means that federal law will be
vindicated by the appellate process as applicable to courts in general
rather than exclusively by way of judicial review of the Board.

Another way, prior to Farmer, of coping with the overlap was resolved
in NLRB v. Nash-Finch Co., another picketing case. Let the Board sue
in federal court to enjoin litigation in state court. That case presents a
purpose of the picketing that was, in an unusual sense, "arguably" pro-
tected. Its arguably protected status was unusual because the Board's
trial examiner had recommended a finding of unfair labor practices on
the part of the employer. Although the Board had not acted on the trial
examiner's report, if the report had been adopted, it is highly likely that
the picketing was protected because there is not much picketing that is
more "protected" than picketing to remonstrate with an employer about
his violations of the Act. Thus, in Sears I, the other half of the dismem-

70. 404 U.S. 138 (1971).
berment of Garmon could have been avoided had the Board chosen to take action in federal court to "enjoin a state court order which regulates peaceful picketing governed by the federal agency."\footnote{Id. at 139-140.}

Yet, in Sears I, the Court declines the invitation of Farmer. Nash-Finch was no help because the Sears I facts lacked the intervention of the Board under its license to resort to federal court to enjoin orders of state courts. Instead, Sears I constructs a procedural restriction, rather than speaking to the state and federal courts by the free-speech authority that Linn found in the Act. Thus it seems to have complicated doctrine by another subdivision in addition to the distinction between arguably prohibited and arguably protected by the Act. The other subdivision is between speech in its "obvious and accepted scope" and speech communicated by picketing.

The former focuses on content protected by the Board and the courts concurrently, under a set of rules drawn from the Act if it is commerce and labor relations connected. In the second instance, picketing, nothing in Sears I alters the Garmon exception for the primacy of state law (for the Board as well as the courts) when the conduct mentioned as picketing actually involves or even arguably involves "conduct marked by violence and imminent threats to the public order." The issue is whether, when the state tort is arguably trespass *quare clausum fregit* and not trespass *vi et armis*, and it is also arguably what the Act protects, has the court lost jurisdiction? The innovation is that it may have and that Farmer does not apply because, although the court may be obliged first to decide whether, under the Act, the picketing is protected, there are no new federal rules addressed to the court as such.

Instead, the Court in Sears I addresses the employer seeking an injunction under state law in state court.\footnote{This is the route of action presumably because of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976).} In the last footnote of the opinion, the Court chooses to alert the reader to a fact critical to its holding—the demand by Sears that the pickets withdraw to the streets.\footnote{436 U.S. at 207 n.44.} The holding, then, is that when picketing is trespassory but otherwise peaceable, and is being conducted by a labor organization against an employer subject to the active jurisdiction of the Board, the Board's jurisdiction is exclusive unless prior to resort to a court or, perhaps, to another agency, the employer shall have demanded that the trespass be discontinued. That is, conversely, the Board's jurisdiction is concurrent only when such a demand has been made. This rule, like the rules about malice and compensable harm in Linn, is federal, supposedly somehow drawn from the Act.

This federal rule of a "demand," when picketing is arguably protected
though trespassory, amounts to the Court’s disagreement with the Board’s rule that any person may make a charge. The Court asserts that Sears had no right to invoke the Board’s jurisdiction and implies that the Carpenters did. Except for a situation involving an expedited election under section 8(b)(7), it seems clear that both propositions cannot be right. There is a sense in which it must be insisted that only the General Counsel can invoke the jurisdiction of the Board under section 10. Nevertheless, it turns out that under the precise facts of this case, in which no charges had been filed, but the federal demand to terminate the state trespass had given the union ample opportunity to file charges, the assertion of jurisdiction by the California court created no “significant risk of prohibition of protected conduct.”

VII. Recapitulation and Conclusion

The general rule is that the Act forbids jurisdiction concurrent with that of the Board when there is a substantial risk that the controversies will overlap, but this does not apply to claims within the traditional law of torts even if there is such overlap. When the claim is based on speech or speech-related conduct there are two distinct and unrelated “rulettes.” If the claim is for defamation, jurisdiction is concurrent with that of the Board, but the rules of decision, in a case in which the facts come under the Act, are federal. If the claim is arguably protected trespassory picketing, jurisdiction concurrent with that of the Board is qualified by a federal condition that neither party files charges and the employer, before going to court, demands that the pickets move back to the street.

The cardinal principle of the foregoing discussion of the increment to freedom of speech and press afforded employees under the Act, in addition to their constitutional rights, is that the language of the Act in section 7 is not confined to action in concert as such but includes communication. The Court underscores this principle by its Garmon exception in favor of a concurrent forum when the subject is not speech but violence.

However, when there are speech-press considerations, the post-Garmon developments spell out a distinction earlier marked out in the constitutional arena between picketing-speech and other speech. These developments in the speech-press area belie, although they render diminishing lip-service to the Garmon, “arguably” formula. It turns out that non-picketing communication goes one way and trespassory picketing another. This distinction, however, was in no way telegraphed by the Court’s constitutional precedents, and this essay accordingly submits that the Court

74. 29 C.F.R. § 102.9 (1979).
75. 436 U.S. at 207.
has here arrogated to itself the semilegal, or even non-legal, technique that it had earlier reserved to itself in due process cases—\(^76\)—that is, a Delphic oracularity in construing the Constitution, now extended to the Act.

In the incremental area of the Act's protection of employee solicitation and handbilling, and now placarding or solicitation on the picket line, the Court has set its jaw against the "arguably prohibited" \(\text{Garmon}\) formula. Absent picketing, and when the issue is the content of the communication, \(\text{Garmon}\) is altogether overruled. Instead, the Act as supreme law is to be enforced (under the malice and other rules) by whatever tribunal in which it is properly invoked. But the scene shifts, if the mode of communication is picketing, to a federally-dictated protocol under the Act: tell the pickets to move back before you seek to enjoin the picketing.

The theme of these complex, and after-the-fact-invented rules for solicitation and handbilling is a retreat from the broad exclusivity of the Board as a forum. Rather, the Court here seems to favor applications of the supremacy clause under the two rules, one largely substantive and the other procedural, neither hinted at in the Act or its legislative history but both imputed to it.

---

\(^76\) Davidson v. New Orleans, 96 U.S. 97, 104 (1877): The "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." See also \textit{International Ass'n of Machinists v. Gonzales}, 356 U.S. 617, 619 (1958), where the Court went all the way to the Pythia at Delphi. For an entertaining and learned discussion of the classical allusion see C. Morris, \textit{The Developing Labor Law}, 783, 784 n.12 (1971).