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Sears, Roebuck & Co. v. San Diego County District Council of Carpenters: Garmon Reconsidered and the Reaffirmation of Property Rights

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SEARS, ROEBUCK & CO. V. SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS: GARMON RECONSIDERED AND THE REAFFIRMATION OF PROPERTY RIGHTS

I. INTRODUCTION

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters[1] resolves the problem of a jurisdictional hiatus facing an employer when a union's peaceful picketing on his property is within the ambit of the National Labor Relations Act[2] (NLRA or the Act). Prior to the *Sears* decision, the right of the states to enjoin labor union picketing on an employer's private property, when the union's picketing was arguably protected and arguably prohibited, was uncertain. As a rule, conduct which is arguably protected under the Act[3] or arguably prohibited under the Act,[4] with few exceptions, cannot be the subject of litigation in state courts.[5] However, on the sensitive issue of picketing on private property, state court decisions were in disarray with some courts ruling state trespass laws could be used against union members on private property[6] and other courts ruling that state jurisdiction was preempted by the NLRA.[7] Both the Warren Court and the Burger Court had left the issue open by consistently refusing to grant certiorari.[8]

The jurisdictional dilemma which faces an employer in such situations stems from the fact that the National Labor Relations Board (NLRB or

1. 98 S. Ct. 1745 (1978).

2. 29 U.S.C. §§ 141-197 (1970 & Supp. V 1975).

3. 29 U.S.C. § 157.

4. 29 U.S.C. § 158.

5. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

6. Taggart v. Weinacker's Inc., 283 Ala. 171, 214 So. 2d 913 (1968), *cert. granted,* 396 U.S. 813 (1969), *cert. dismissed,* 397 U.S. 223 (1970); May Dept. Stores Co. v. Teamsters Union Local No. 743, 64 Ill. 2d 153, 355 N.E.2d 7, 384 N.Y.S.2d 733 (1976); People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied,* 368 U.S. 927 (1961); People v. Bush, 39 N.Y.2d 529, 349 N.E.2d 832 (1976); Moreland Corp. v. Retail Store Employees Union Local No. 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962).

7. Musicians Union Local No. 6 v. Superior Crt., 69 Cal. 2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968); Shirley v. Retail Store Employees Union, 22 Kan. 373, 565 P.2d 585 (1977); Broadmoor Plaza v. Amalgamated Meat Cutters, 21 Ohio Misc. 245, 257 N.E.2d 420 (1969); Freeman v. Retail Clerks Union Local No. 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961).

8. The issue was originally raised in Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20, 24 (1957). Since then the Warren Court denied certiorari on this issue at least twice. Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied,* 380 U.S. 906 (1965); People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied,* 368 U.S. 927 (1961). The Burger Court had one opportunity to rule on the issue but due to changed circumstances a grant of certiorari was dismissed as improvidently granted. Taggart v. Weinacker's Inc., 283 Ala. 171, 214 So. 2d 913 (1968), *cert. granted* 396 U.S. 813 (1969), *cert. dismissed* 397 U.S. 223 (1970).

the Board) is precluded from ruling on the legality of peaceful picketing of an employer's property by a non-employee union until weeks after it has begun.[9] Before *Sears*, an employer who had a valid claim against union pickets on his property had no forum in which he could pursue litigation.[10] The decision in *Sears* finally resolves the dilemma in favor of giving state courts jurisdiction to determine whether the picketing is permissible.

The fact situation of the *Sears* case presented a classic example of the jurisdictional problem facing an employer when a non-employee union picketed his property. This no man's land was the result of a strong federal preemption doctrine promulgated in the decision of *San Diego Building Trades Council v. Garmon.*[11] However, an analysis of the *Sears* decision reveals that it is consistent with a trend of reevaluation of the *Garmon* doctrine and a shift toward a less strict preemption rule. As shall be pointed out, the Court's reevaluation of the importance of property rights is a significant factor diminishing the harshness of the preemption doctrine. In the wake of the *Sears* holding, several questions remain to be answered regarding the extent to which the Court is willing to allow state courts to become involved in national labor relations policy.

II. Labor Law Preemption Prior to Sears

Since the passage of the Act, it has been held generally that the federal government preempts the states in regulating labor-management disputes.[12] The foundation for federal preemption of the states is the suprem-

9. Peaceful picketing is not prohibited by 29 U.S.C. § 158(b)(7)(C) if the union filed a petition for a representation election within "a reasonable period of time not to exceed thirty days from the commencement of such picketing." The Board has held that the "reasonable period of time" clause is not violated after 25 days of picketing. Culinary Workers Local 62 (Tropics Enterprises, Inc.), [1968] 69 L.R.R.M. 1175, 1176.

10. Before the *Sears* decision the employer had two unattractive alternatives to this jurisdictional hiatus. First, he could have resorted to "self help" and physically expelled the pickets from his property. However this alternative was dangerous because it could incite a riot or subject the employer to civil liability if more force than necessary was used.

Second, the employer could have requested the pickets to move which would have been an unfair labor practice under 29 U.S.C. § 8. 98 S. Ct. 1760, 1763. However, a union could ignore the request and not file such a charge and the Board would have no way of hearing the dispute. *See* Come, *Federal Preemption of Labor - Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435, 1437-38, 1443 (1970); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972).

11. 359 U.S. 236 (1957).

12. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 *rehearing denied* 404 U.S. 874 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1957); Garner v. Teamsters Local Union No. 776, 346 U.S. 485 (1953); Hill v. Florida, 325 U.S. 538 (1945).

acy clause[13] and the federal power to regulate commerce.[14] The Supreme Court has ruled that the Act established the NLRB to adjudicate labor grievances to the exclusion of state labor law remedies.[15]

Underlying the establishment of this strong federally oriented Act was the desire for a uniform national labor policy to promote the full flow of interstate commerce.[16] One particularly troublesome problem prior to the passage of the Act was state court abuse of granting injunctions in *ex parte* proceedings against labor unions.[17] Hence, the Supreme Court in the period following the passage of the NLRA in 1935 until the *Garmon* decision attempted to fashion an acceptable preemption doctrine that would free labor from the restraints of a multitude of diverse state statutes, rulings, and procedures and, yet, not totally preempt the states in the field of labor relations.[18] At the same time, the Court attempted to shape a judicial standard which would be easy to understand and to apply.[19]

This effort culminated in the *Garmon* decision which categorized labor activity in one of three ways: (1) protected or prohibited, (2) neither protected nor prohibited, or (3) arguably protected or arguably prohibited.[20] In the first category, state courts are clearly preempted from regulating labor activity.[21] If labor activity falls in the second category, the Court ruled that this narrow area of activities was withdrawn from state regulation.[22] In an effort to develop uniformity in labor law, the Court ruled that in conflicts within the third category, which this comment exclusively addresses, state and federal courts must defer to the exclusive and primary jurisdiction of the NLRB.[23] The states were given the power to regulate

13. U.S. CONST. art. VI, § 2.

14. U.S. CONST. art. I, § 8, cl. 3.

15. International Union U.A.W. v. O'Brien, 339 U.S. 454 (1950).

16. 29 U.S.C. § 141.

17. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 200-01 (1930); R. GORMAN, BASIC TEXT ON LABOR LAW 1-2 (1976).

18. "The national Labor Management Relations Act, . . . leaves much to the states . . . . We must spell out from conflicting indications of congressional will the area in which state action is still permissible." Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 488 (1953); *See also* Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 469-72 (1972). For a concise history of the development of the pre-*Garmon* labor preemption policy, *see* Cox *supra* note 10, at 1340-48.

19. Amalgamated Ass'n. of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 290-91 *rehearing denied* 404 U.S. 874 (1971).

20. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-46 (1959).

21. *Id.* at 244.

22. *Id.* at 246; *See generally* Note, *Labor Law - Preemption - Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n (Kearney)*, 18 B.C. INDUS. & COM. L. REV. 494 (1977).

23. 359 U.S. at 244-45.

only those activities which were set out as exceptions to the *Garmon* doctrine - activities that can be described as matters of "peripheral concern" of the NLRA or conduct which touches interests "deeply rooted in local feeling and responsibility" [hereinafter referred to as the local interest exception].[24]

Cases that the Supreme Court has deemed to fall within the scope of the above exceptions involve violent conduct[25] and matters which the Act does not directly address.[26] The decisions allowing state regulation of matters within the local interest exception or the peripheral concern exception are aimed at preventing violence or at providing plaintiffs legal redress for conduct not within the central focus of the Act. The *Garmon* test has been particularly troublesome in the past because it has produced inequitable results by foreclosing all forums to a plaintiff whose cause of action is valid but does not fall within the local interest or peripheral concern exceptions of the *Garmon* rule.[27] This was the situation in the *Sears* case. Until recently, the inequitites produced by the *Garmon* rule were viewed by the Court to be a necessary evil in achieving a national uniform labor policy.[28]

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24. *Id.* at 243-44.

25. Conduct within the local interest exception usually involves some form of violence or outrageous conduct. *See e.g.*, Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977)(intentional infliction of emotional distress as a result of union officials engaging in outrageous conduct, intimidation and threats); International Union U.A.W. v. Russell, 356 U.S. 634 (1958)(employee denied access to employer's plant by a striking union engaging in mass picketing and threats of violence); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957)(striking employees engaged in loud and offensive name calling, singing and shouting directed at non-striking workers); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954)(Virginia suit for damages allowed where employer caused to abandon project due to union agents' threats of violence).

26. Conduct of peripheral concern to the Act is subject to regulation by the states. *See e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967)(breach of union duty of fair representation suit was not preempted as it involved issues not usually within NLRB's unfair labor practice jurisdiction); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966)(malicious intent in circulation of false and defamatory statements during organizational campaign)(also classified as local interest exception); Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 382 U.S. 181 (1965)(supervisory picketing enjoinable after Board ruling that supervisors were not included by the Act's definition of employees); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958)(state court jurisdiction over a purely internal union matter not affecting employment *per se* allowed). *Cf.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)(dictum)(companion suits for breach of the duty of fair representation are not subject to preemption by the NLRB).

27. This situation has been particularly burdensome on employers. Cox, *supra* note 10, at 1362-63.

28. *Cf.* Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). Court ruled that *stare decisis* and congressional intent were the important factors in maintaining the *Garmon* doctrine even though the plaintiff, having a valid claim, was denied relief by the doctrine's application. *Id.* at 302.

The inequity of a jurisdictional hiatus existing up until the *Sears* ruling was similar to the inequity of a "no man's land" that existed in the 1950's when the Supreme Court ruled in *Guss v. Utah Labor Relations Board*[29] that the states were preempted from exercising jurisdiction over cases which the Board had jurisdiction but which it had declined to exercise. In this situation, both unions and management were left without a forum for litigation where small businesses were unable to meet the Board's jurisdictional standards. Unlike the judicial resolution of the jurisdictional problem confronting the employer in a *Sears* situation, Congress resolved the issue facing labor and management in a *Guss* situation by enacting section 14(c) of the NLRA[30] in 1959.

It is important to note that the Court's labor law preemption policy is not considered in a legal vacuum. At one point prior to the *Sears* decision, the preemption issue in cases involving peaceful picketing was engulfed in the much larger issue of first and fourteenth amendment rights of labor pickets and fifth and fourteenth amendment property rights of employers.[31] Although the Court no longer continues to subordinate property rights in its analysis of peaceful picketing by labor unions,[32] private property rights remain a potent factor in determining the direction of labor law preemption.[33]

29. *See* Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).

30. 29 U.S.C. § 164(c)(2). Congressional disapproval, of the predicament many litigants were in, prompted approval of the section. S. REP. No. 187, 86th Cong., 1st Sess., 17, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2341-43; A. COX & D. BOK, CASES ON LABOR LAW 1218-19 (7th ed. 1970).

31. In Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) the Court did not address the issue of whether or not the state court was preempted by the Board when a state court issued an injunction restraining picketing and trespassing on an employer's property by a non-employee union. The Court, instead, analyzed the problem in terms of the pickets' first amendment rights to be on the employer's property and the employer's fifth amendment rights in having the state use its trespass laws to prevent picketing on his private property.

32. In recent decisions the Court has brought the issue of preemption of state courts, a matter not considered by the *Logan Valley* Court, back into play by ruling any right a union might have to picket on the private property of another is divorced from any first amendment issue and is totally dependent on the NLRA for its existence. *See* Hudgens v. NLRB, 424 U.S. 507, 520-22 (1976) (employees' rights under 29 U.S.C. § 157 are to be decided solely under the criteria of the NLRA without regard to first amendment rights); Lloyd Corp. v. Tanner, 407 U.S. 551, 562-67 (1972) (property rights are unwarrantedly infringed upon by requiring them to yield to the exercise of first amendment rights where alternative avenues of communication exist); Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972) (private property must assume to some significant degree attributes of public property before the owner is subject to first and fourteenth amendment rights).

33. *See* text, *infra* at notes 81-88.

III. The Sears Dilemma

The factual situation of the *Sears* case presented a classic example of the dilemma facing an employer when a non-employee union picketed his property. On October 24, 1973, two business representatives of the San Diego County District Council of Carpenters visited the Sears store in Chula Vista, California and determined that certain carpentry work was being done by men who had not been dispatched by the union hiring hall.[34] The union agents met with the Sears manager that day and requested that Sears either contract the work through a building trades contractor or sign a union master labor agreement. The Sears manager did not respond to either request.

On October 26, the union established picket lines on Sears' property.[35] The picketers, carrying signs indicating that they were AFL-CIO pickets sanctioned by the "Carpenters' Trade Union," patrolled on or near the private walkway next to the building or in the parking lot immediately beside the building. The record disclosed no acts of violence, threats of violence or obstruction of traffic—activity which would allow the state to act under the local interest exception to the *Garmon* rule.

The security manager of the store demanded that the union remove the pickets from Sears' property, and the union refused stating that the pickets would not move unless forced to by legal action.[36] The status of the pickets was uncertain at the time they were requested to leave. The picketing was arguably protected by section 7[37] if the action was to secure compliance by Sears with area standards.[38] Likewise, the picketing was arguably prohibited under section 8(b)(4)(D)[39] if the objective was to force Sears into assigning its carpentry work away from its employees to union members or it could have been prohibited under section 8(b)(7)(C)[40] if its objective

34. The non-union carpenters were building platforms and other wooden structures for the store. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 17 Cal. 3d 893, 553 P.2d 603, 605, 132 Cal. Rptr. 443 (1976).

35. The Sears store stood on a large rectangular parking lot bordered by a concrete wall on one end and by public streets on the other three sides. 553 P.2d at 605.

36. At the request to move, the union had the opportunity to bring the issue of their right to picket before the Board but it did not do so. Sears had no safe way to bring the issue before the Board. *See* notes 9 and 10 *supra.*

37. 29 U.S.C. § 157.

38. International Longshoremen's Assoc., Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 200-01 (1970).

39. 29 U.S.C. § 158(b)(4)(D) which provides in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . to threaten . . . any person . . . where an object . . . is forcing . . . any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another . . . class . . . ."

40. 29 U.S.C. § 158(b)(7)(C) which provides in relevant part: "It shall be an unfair labor

was to engage in recognitional picketing. Under *Garmon*, this categorization of the activity would have ended the analysis.

On the third day of picketing, Sears, in an *ex parte* proceeding,[41] obtained a preliminary injunction against the picketing from the Superior Court of California. The court held that the picketing was neither protected by state law nor by the first and fourteenth amendments.[42] The union promptly removed the pickets to the public sidewalks surrounding the store and finally discontinued the picketing on November 12 concluding that it was too far removed from the store to be effective.[43]

The California Court of Appeals affirmed the decision[44] on the grounds that the picketing was within the local interest exception to the *Garmon* rule. The California Supreme Court reversed,[45] holding that the trespass element was only one factor that the board would consider in determining whether the union conduct was arguably permisible under section 7. It also determined that under section 8(b)(7)(C) the union was arguably engaged in recognitional picketing which the Board might find to be prohibited conduct. As the Supreme Court had already ruled that protection of private property was not within the local interest exception,[46] it ruled that the superior court was preempted by the NLRA as the conduct was arguably protected and arguably prohibited.

Sears sought certiorari from the United States Supreme Court[47] and the Court reversed the decision of the California Supreme Court; Mr. Justice Stevens, speaking for six members of the Court, opined that the states were not preempted from using trespass laws to enjoin pickets in the *Sears*-type situation. An analysis of the decision reveals two major grounds on which it was based: (1) that the controversy presented to the state court was different from that which could have been presented to the Board thereby

practice for a labor organization or its agents . . . to picket . . . any employer where an object . . . is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . where such picketing has been conducted without a petition under § 159(c) . . . [to be] filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ."

41. According to Justice Blackmun, the union was not accorded a hearing until November 16, over two weeks after they were enjoined from picketing, to show cause why a preliminary injunction should not be entered. 98 S. Ct. 1765.

42. 98 S. Ct. 1750, n.3.

43. The nearest street bordering the store was 220 feet away. 52 Cal. App. 3d 690, 125 Cal. Rptr. 245, 247 (1975).

44. 52 Cal. App. 3d 690, 125 Cal. Rptr. 245.

45. 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443.

46. Musicians Union, Local No. 6 v. Superior Ct., 69 Cal. 2d 690, 447 P.2d 313, 73 Cal. Rptr. 201 (1968).

47. *Cert. granted,* 430 U.S. 905.

making it proper for the state court to hear it, and (2) that the primary jurisdiction rationale of *Garmon*, requiring a state court to stay its hand pending Board adjudication, is an insufficient reason for preemption when the union could have presented the issue to the Board but did not do so and Sears had no acceptable means of doing so.

Focusing on the arguably prohibited conduct of the union,[48] the Court ruled that there were two considerations which favored state court jurisdiction. First, the Court held that there was a significant state interest in protecting Sears from the challenged conduct comparing the conduct to cases within the local interest exception.[49] Second, the Court held that since the issue presented before the state court was different from the issue which would have been presented before the Board[50] there was no risk of interference with the unfair labor practice jurisdiction of the NLRB. Considering Sears' inability to invoke the Board's jurisdiction, the Court held that in section 7 cases involving trespassory union conduct it was probable that the conduct was not protected.[51] Therefore, the risk of an erroneous state court decision with regard to the protected nature of the activity is outweighed by the inequitable result of denying an employer his "day in court."

A. *Federal Oriented Preemption Doctrine Reconsidered*

The holding of *Sears*, albeit contrary to a strong federally oriented preemption doctrine, is not surprising in light of the criticism of the *Garmon* rule. Members of the Court and legal scholars have criticized it for almost a decade.[52] The first signs of serious dissatisfaction with the *Garmon* rule are found in two cases which the Court heard in 1969.

In the first case, *International Longshoremen's Ass'n v. Ariadne Shipping Co.*,[53] three Justices concurred that a Florida court was preempted by the Board's jurisdiction, but they rejected the view that the reversal should be based on the "arguably protected" and "arguably prohibited" test of

48. *See* notes 39 and 40, *supra*.

49. *See* note 25, *supra*.

50. In the state controversy Sears only challenged the location of the picketing whereas the issue before the Board would have been whether the picketing had a recognitional or work reassignment objective. 98 S. Ct. 1758.

51. This *dictum* is consistent with the Court's trend of protection of property rights. *See* text at notes 84-88, *infra*.

52. *See* Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassing Union Activity*, 83 HARV. L. REV. 552 (1970); Come, *supra* note 10; Cox, *supra* note 10.

53. 397 U.S. 195 (1970)(the Court ruled that Florida state courts were preempted by the NLRB where the union was picketing to protest substandard wages paid to American workmen by foreign shipowners).

Garmon.[54] The concurring opinion, which rested reversal on the fact that the union activity was actually protected by the NLRA, held that the *Garmon* rule "should be reconsidered" because an employer faced with arguably protected picketing had no adequate means of determining whether the activity was actually protected.[55]

In the second case, *Taggart v. Weinacker's Inc.*,[56] Chief Justice Burger, concurring in the dismissal of a grant of certiorari, seriously questioned the validity of the *Garmon* doctrine. The facts in *Taggart* are analogous to the facts in *Sears*.[57] The Chief Justice intimated that the state's trespass law should be available to enjoin pickets on private property, and expressed disbelief in the theory that federal preemption on this point was based on congressional intent.[58]

The most severe indictment of the *Garmon* decision is found in the dissenting opinion of Justice White in *Amalgamated Ass'n of Street, Electric Employees of America v. Lockridge*.[59] This decision clearly exposed the element of unfairness in a strong federally oriented preemption doctrine which may adversly affect not only employers but employees as well. The case involved the suspension of Wilson Lockridge, a union member who had been delinquent in paying his dues.[60] Lockridge, suing in an Idaho state court, maintained that the union had violated an implied promise in law by suspending him before it had the right to do so.

The Supreme Court, in a split decision, reversed the Idaho Supreme Court's affirmance of the trial court's award for compensatory damages resulting from Lockridge's loss of employment. Applying the *Garmon* rule, the Court held that Idaho state courts were preempted because the union's conduct was arguably protected and arguably prohibited; the majority opinion deemed it necessary for the Board to interpret the union constitu-

54. Justice White, joined by Chief Justice Burger and Justice Stewart, authored the concurring opinion. *Id.* at 201.

55. *Id.* at 201-02.

56. 397 U.S. 223 (1970).

57. Although there is some indication that the picketing obstructed customers who were entering and leaving Weinacker's Inc., the picketing was otherwise similar in that it occurred on the owner's private sidewalk adjacent to his store. Taggart v. Weinacker's Inc., 283 Ala. 171, 214 So. 2d 913 (1968).

58. 397 U.S. 228 (Burger, C.J., concurring).

59. 403 U.S. 274 (1971).

60. Lockridge, the respondent employee and member of petitioner's union, was fired by his employer at the union's request. The union's constitution provided that a member who did not pay his dues for two months suspended himself by allowing his arrearage to continue into the first day of the third month. The union, however, suspended Lockridge in *less than* two months after he had failed to pay his dues.

tion to determine whether the union was guilty of an unfair labor practice.[61] The Board, however, was unwilling to make this determination.[62]

Justice White's dissenting opinion, with which the Chief Justice concurred, severely criticized the outcome of the case and the *Garmon* rule. It noted that "[t]he phenomenon of the no man's land . . . cast substantial doubt . . . on the very foundations of *Garmon* itself."[63] The dissenters pointed to the hiatus created by *Guss v. Utah Labor Relations Board*[64] and emphasized the prompt congressional amendment of the NLRA to alleviate the problem.[65] The Congressional action indicated to the dissenters that Congress intended to allow states a much larger role in federal labor policy than that allowed by the majority opinion.[66]

Recent decisions preceding *Sears* deemphasized strict use of the *Garmon* rule. In *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n,*[67] the Court ruled that a second line of preemption analysis was appropriate in determining whether a union's activity was amenable to regulation by the states. Although the problem would have been more easily resolved by ruling that the state's authority was preempted under *Garmon's* arguably protected, arguably prohibited test, the Court, after noting that alternative,[68] chose to use another line of preemption analysis in overturning the state court ruling.[69]

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61. 403 U.S. at 292-93.

62. Another union member, Elmer Day, similarly suspended and discharged from employment, had filed a formal charge against the union with the Regional Director of the Board, but he refused to issue a complaint. *Id.* at 280, n.3. Since the Board ruling was not with unclouded legal significance as required by *Garmon* (359 U.S. 246), Lockridge ultimately was left in the same position. Day was left without a legal forum to adjudicate his claim.

63. 403 U.S. 315 (White, J., dissenting).

64. 353 U.S. 1 (1957).

65. 403 U.S. 316; *See* notes 29 and 30 and accompanying text, *supra.*

66. Justice White cited 29 U.S.C. § 164(b) which allows states to choose between open and closed shop laws as an example of congressional intent to leave state law intact in the national labor relations field. 403 U.S. at 317-18. He continued by writing that ". . . for activity that is arguably protected . . . the *Garmon* rule blindly preempts other tribunals." *Id.* at 326. In drawing a parallel to Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), he concluded his dissenting opinion by comparing the predicament of an employer who is faced with union picketing and no available forum for relief with ". . . the wage earner who finds that claims of another have cut his take-home pay in half." 403 U.S. at 330-31.

67. 427 U.S. 132 (1976). The Court decided that where a union's concerted refusal to work overtime as a source of bargaining power in negotiating a new contract with its employer was determined by the Board to be neither protected nor prohibited by the NLRA then the Wisconsin Labor Relations Commission was preempted from ruling that the union's conduct was in violation of state law.

68. *Id.* at 138-40.

69. "*Kearney* . . . presage[s] an ultimate finding that the 'primary jurisdiction' approach to preemption [developed by *Garmon*] is no longer of general application." Note, *Labor Law*

In another case,[70] the Court displayed its willingness to allow states more leeway in exercising its jurisdiction over matters traditionally within the Board's jurisdiction. The Court ruled that the *Garmon* preemption doctrine would not be applied inflexibly to deny the plaintiff a state court forum even though his allegations ". . . form the basis for unfair labor practice charges before the Board."[71] The Court was unwilling to dismiss the case by using a hard line federal oriented preemption approach similar to the application of the *Garmon* rule in the *Lockridge* case.[72]

The *Sears* decision is consistent with a trend, spanning almost a decade, of unwillingness to use a strong federally oriented preemption analysis. Considered against the backdrop of past criticisms of the *Garmon* rule, the *Sears* decision is consistent with the present Supreme Court's rejection of the spirit of the *Garmon* doctrine.

As a result of this shift in judicial attitudes, the *Garmon* rule itself is undergoing change. For instance, the peaceful picketing of Sears did not fall within either of the two exceptions to *Garmon* as they have been interpreted in the past. While the Court categorized the picketing of Sears to be a matter of local interest,[73] previous decisions placing an activity solely under the local interest exception have involved some form of violence. These cases have ranged from outrageous conduct, intimidation and threats to a strong potential for violence.[74] However, in *Sears* the Court notes that the picketing was peaceful and that there was prompt compliance with the order to move from the property.[75]

- *Preemption - Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n (Kearney)*, 18 B.C. INDUS. & COM. L. REV. 494, 510 (1977).

70. Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977), *vacating and remanding*, Hill v. United Bhd. of Carpenters, 49 Cal. App.3d 614, 122 Cal. Rptr. 722 (1975)(plaintiff alleged, *inter alia*, intentional infliction of mental distress by the union president).

71. *Id.* at 302.

72. In contrast the California Court of Appeals in reversing the verdict for the plaintiff in Farmer v. United Bhd. of Carpenters used a strict federal oriented preemption analysis. The court ruled that the "crux" of the case arguably constituted unfair labor practices, and that regardless of the acts that supported the charge of intentional infliction of mental distress ". . . the federal government has preempted this field and the state courts have no jurisdiction, that jurisdiction to right the alleged wrong is vested in the N.L.R.B." Hill v. United Bhd. of Carpenters, 49 Cal. App. 3d 614, 620, 122 Cal. Rptr. 722, 725 (1975), *vacated and remanded sub nom.* Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977).

73. The Court discussed peaceful trespass in the context of local interest exception cases and reasoned that in *Sears* as in those cases (*see* note 22, *supra*) the controversy presented to the state court was different from that which would have been presented before the Board. 98 S. Ct. 1756-58. Therefore in local interest exception cases, e.g. Farmer v. United Bhd. of Carpenters, the Court felt that there was no undue risk of interference with the NLRB's unfair labor practice jurisdiction. *Id.* at 1758.

74. *See* note 25, *supra*.

75. 98 S. Ct. 1750. The Court also noted that there is another major distinction between

B. *Preemption of the Protection of Property Rights Revisited*

One explanation for the expansion of the local interest exception to the *Garmon* rule to accommodate state protection of private property lies in the Court's reevaluation, in this decade, of the significance of property rights.[76] Since 1970, the Court has strictly curtailed union use of private property in contrast to its previous protection of such use.

The NLRA itself made inroads into an employer's proprietary rights.[77] The Court laid the groundwork for allowing employees to use an employer's property over his objection as early as 1945.[78] *NLRB v. Babcock & Wilcox Co.*[79] is the leading case in which the Supreme Court set forth the test for balancing an employer's proprietary rights against a union's organizational rights. The Court in an 8-0 decision held:[80]

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights.
>
> [W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, [of personal contacts, letters, and telephone calls], the right to exclude them from property has been required to yield to the extent needed to permit communication of information on the right to organize.

Amalgamated Food Employees Local 590 v. Logan Valley Plaza Inc.,[81]

Sears and the other cases within the local interest exception - none of the other cases within the exception involved protected conduct whereas a violation of a trespass law may be protected under section 7. *Id.* at 1761.

76. Though the Court was undoubtedly concerned with the harsh effect of the *Garmon* rule where it deprived an employer of his "day in Court," due to the pervasive reference to cases and principles relating to the property rights of employers in section V of the opinion this area merits exploration.

77. Sections 7 and 8(a)(1) have given employees and non-employees alike the right to use an employer's land against his wishes. *See* Cox, *supra* note 7, at 1360-61.

78. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)(a rule against solicitation on an employer's premises during the employee's own time was held invalid and a discharge from employment as a result of the rule's violation required reinstatement of the employee). *Cf.* NLRB v. S. & H. Grossingers, Inc., 372 F.2d 26 (2d Cir. 1967)(employer must let non-employee union organizers on his premises where he operated a resort hotel at which employees resided); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948)(where union organizers must have access to the employer's premises or be seriously handicapped in organizational activity).

79. 351 U.S. 105 (1956)(an employer was required to allow non-employee union organizers to come on his property and distribute union literature to his employees).

80. *Id.* at 112. The Court also ruled that the accommodation between the two rights must be obtained with as little destruction of one right as is consistent with the maintenance of the other. *Id.*

81. 391 U.S. 308 (1968).

marks the furthest extent the Court has allowed unions to organize workers on an employer's private property. The Court ruled that picketing fell under the first and fourteenth amendment right of freedom of speech and expression which could not be circumscribed. The Court analogized a shopping center to a municipal business district[82] and the opinion held that state trespass laws were not to be invoked to deprive union pickets of their first amendment rights. The Court as of 1968 definitely favored the right to peacefully picket on private property over the state's right to protect the private property of its citizens.[83]

In recent years, however, the Court has severely restricted *Logan Valley* and has shown an unwillingness to liberally interpret the *Babcock* decision allowing unions the right to use an employer's property. Following *Logan Valley,* the Supreme Court began to allow employers greater latitude in restricting the use of their private property to union activity. The Court in *Lloyd Corp. v. Tanner*[84] limited the *Logan Valley* decision by restricting the analogy of a shopping center to a municipal business district. The Court then moved to restrict a union's solicitation rights when they were exercised on an employer's property.[85] In doing so the Burger Court emphasized that long settled rights of private property protected by the fifth and fourteenth amendments militated against allowing a union to use an employer's property against his wishes. Briefly stated, union solicitation on private property appeared to be no longer constitutionally protected. *Hudgens v. NLRB*[87] laid to rest any remaining doubts about the viability

82. The opinion depended, in large part, on Marsh v. Alabama, 326 U.S. 501 (1946) for support. In *Marsh* the Court held that it was unconstitutional for Jehovah's Witnesses to be prevented from handbilling on the main business block of a company-owned town.

83. As one commentator noted shortly after the decision was handed down, "[a]lthough the first amendment is not directly relevant to controversies involving rights granted under section 7 of the NLRA, *Logan Valley* indicates that there has been a steady decline in the significance of 'naked title' since the decision in *Babcock & Wilcox.*" *See* Broomfield, *supra* note 52, at 554.

84. 407 U.S. 551, 569 (1972)(Vietnam draft and war protestors were ruled to have no right to handbill in a privately-owned shopping center where the handbilling was unrelated to the shopping center's operations). After *Logan Valley* the Court held that property does not ". . . lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* at 569.

85. In Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), the Supreme Court was presented with a case involving non-employee union organizers' rights to solicit membership for its union on an employer's parking lot. The Court rejected the argument that the first amendment protected union solicitation on the employer's parking lot. The Court ruled that the public property concept promulgated in *Marsh v. Alabama* was different from property such as *Central Hardware's* which was merely "open to the public." *Id.* at 547.

86. *Id.*

87. 424 U.S. 507 (1976)(pickets paraded in an enclosed mall in front of a satellite store of the petitioner's main store which was being struck by an employees' union).

of *Logan Valley* and held that the union had no first amendment right to picket a privately owned shopping center unless its picketing was protected by the NLRB.[88]

The *Sears* decision, in citing the *Babcock* criteria for allowing union organizational activity on private property and the *Hudgens* decision allowing protection of union organizational activity only under the NLRA, is consistent with the current Supreme Court trend in protecting private property rights. The holding gives the employer a forum in which he can protect his property interests. It also indicates that a majority of the present Court is reluctant to find union organizational activity on private property protected in the future.[89]

IV. IMPLICATIONS

In the wake of the *Sears* ruling, several important issues remain to be decided. Most important is whether state court jurisdiction will be preempted upon the mere filing of a section 8 charge with the Board. Justice Blackmun, in his concurring opinion, interpreted *Sears* to mean that state court jurisdiction is preempted when a union merely files a section 8 complaint with the Board against an employer.[90] Justice Powell disagreed with this interpretation of the majority opinion and stated that state court jurisdiction is not to be preempted upon the filing of a charge by the union.[91]

Both Justices' views will be important in the future because the question was not addressed in the majority opinion. In a footnote to the Court's opinion Justice Stevens wrote "the Board's jurisdiction could have been invoked . . . even after the litigation in the state court had commenced . . . ."[92] Justice Stevens cited two cases to buttress this rule. The first case, *NLRB v. Nash-Finch Co.*,[93] held that it was proper for the Board to have a federal court restrain the enforcement of a state court injunction which regulated conduct governed exclusively by the NLRB.[94] *Capital*

88. *Id.* at 519-21.

89. This judicial philosophy held by a majority of the Court helps to account for the reason the Court was willing to place peaceful picketing within the local interest exception when no other cases within that exception involve protected conduct under the Act, and they involve some form of violence or intimidation. *See* notes 25 and 75, *supra.*

90. 98 S. Ct. 1764 (Blackmun, J., concurring). Justice Blackmun added that the union must ". . . process the charge expeditiously" and state courts may resume jurisdiction if the Board's General Counsel declines to issue a complaint or finds the picketing to be unprotected. *Id.*

91. 98 S. Ct. 1766 (Powell, J., concurring).

92. *Id.* at 1763, n.43.

93. 404 U.S. 138 (1971).

94. The State court injunction sought to regulate non-employee union picketing activity.

Services, Inc. v. NLRB,[95] is the second case on which Justice Stevens relied to imply that after a state court began adjudication of a union trespass it could be preempted by the Board. However, both cases involved preemption of a state court proceeding *after* the Board had determined a violation of the NLRA had occurred.

Whether the state is preempted before the controversy is heard by the NLRB, that is at a mere request by the union for a complaint to be issued, remains to be decided. Justice Blackmun's view, that mere filing of a charge preempts state jurisdiction, is based on a fear of state abuse in determining labor disputes.[96] Justice Blackmun would preempt the states' jurisdiction from the time of filing of a charge up until the time the Board declined to file a complaint.

In contrast, Justice Powell held that a state court is not preempted by the filing of a complaint because a jurisdictional hiatus would exist until the General Counsel decided whether to issue a complaint. Justice Powell notes that with the filing of a charge "nothing is likely to happen 'in a timely fashion.' "[97] The possibility of violence caused by an employer driven to use self-help to remove pickets from his property governs against preemption in Justice Powell's view.[98] This question remains to be resolved by the Court.

Justice Stevens' majority opinion also takes note of what may be termed a technical loophole in the NLRB's rulings which favors employers. The Court recognizes that the Board presently takes the position that an employer's resort to court action is not a violation of section 8(a)(1).[99] If a state's trespass law does not require the owner to ask the trespassor to leave

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The Court stated, in ruling that the injunction should have been issued by the federal court, "[i]t has long been held that the Board, though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes of the Act." *Id.* at 142.

95. 347 U.S. 501 (1954). In *Capital Services* a union was seeking to unionize the employer's workers and in doing so it engaged in secondary picketing of the employer's customers. The Court upheld a federal court's issuance of two injunctions. The first one restrained the employer from enforcing a state court injunction and the second restrained the union's conduct until the employer's section 8 charge was adjudicated by the Board.

96. *See* note 17, *supra* and accompanying text. Justice Blackmun also expressed concern over giving unions a prompt hearing which was apparently not accorded to the union in the *Sears* case. *See* note 41, *supra*.

97. 98 S. Ct. 1766.

98. Perhaps the "logical corollary" to the *Sears* case, given the trend of increased protection of property rights and affording litigants a forum, is that preemption should not occur until the Board issues a complaint.

99. NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); Clyde Taylor Co., 127 N.L.R.B. 103, 45 LRRM 1514 (1960); *Cf.* Cove Tankers Corp., No. 76-1633, 97 L.R.R.M. 3083 (1978)(law suits must be filed in complete good faith).

before filing suit the employer could seek relief in state court without giving the union an opportunity to seek Board protection for its picketing because the employer's action in state court is not an unfair labor practice. Although *dictum*[100] counsels against the constitutionality of this approach, the option remains to be tested.

V. CONCLUSION

The *Sears* decision has resolved the jurisdictional dilemma which had been recognized but ignored by both the Warren Court and the Burger Court for over two decades. As a result of the *Sears* ruling, an employer may appear before a state tribunal and obtain a temporary restraining order at the outset of labor picketing instead of having to wait several weeks before the Board can hear his charge. Whether the state court is preempted upon the mere filing of an unfair labor practice charge by a union is a question that remains to be answered. Given the trend of criticizing the strong federal preemption doctrine and the reevaluation of property rights which the Court has followed for the past decade it would not be surprising if a future ruling established that state court jurisdiction is not preempted upon the mere filing of an unfair labor practice charge.

Keith Barker

100. 98 S. Ct. 1763, n.44.