STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CIVIL DIVISION

LODGE 76 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND DISTRICT NO. 10 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,		
Petitioners,		No. 410-071
-vs-		
WISCONSIN EMPLOYMENT RELATIONS COMMISSION,		Decision No. 11083-C
Respondent.		

This action is a review of an order of the Wisconsin Employment relations Board affirming the order of an Examiner of the Commission pertaining to a labor dispute between Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and Kearney & Trecker Corporation. The order appealed from requires the Union to immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments at the complainant's Milwaukee area plants.

As a result of a complaint filed with the Wisconsin Employment Relations Board on June 15, 1972, an Examiner of the Commission conducted a hearing and determined that the Union was in violation of Section 111.06 (2) (b) and 111.06 (3), Wis. Stats., prohibiting a union from engaging in a concerted effort to interfere with the employer's production by other means than by leaving the premises in an orderly manner for the purposes of going on strike. On April 23, 1973, the order was affirmed by the Commission, and on May 7, 1973, the Union petitioned for a review. The Commission counter petitioned for enforcement of its order on May 15, 1973, and the court allowed the employer to intervene on May 24th.

The parties agree that the sole issue presented is whether or not federal law preempted the power of the State of Wisconsin to prohibit interference with production by a concerted refusal to work overtime. The matter of overtime appears to be a major issue that will face unions and employers at the negotiating table in the immediate years ahead. The merits of the respective sides of that conflict are not now before the court. The more narrow issue confronting this case is whether the federal law prevents the Wisconsin Employment Relations Board from exercising its authority under the laws of the State of Wisconsin regarding this area.

The role of the court is defined by Section 227.20 (1), Wis. Stats., which provides that the court confines itself to the record and may affirm, reverse, or modify the decision (order) of the administrative agency. One of the grounds for review is that the decision was "in excess of statutory authority or jurisdiction of the agency or affected by other error of law."

In the case at bar the employer filed a complaint with the Wisconsin Employment Relations Board charging the Union with having engaged in a specific unfair labor practice within the meaning of Section 111.06 (2) (b), (h) and (3). The findings of fact contained in Paragraph 13 are undisputed that the Union engaged in a concerted effort to encourage its members to refuse to work overtime. The order requiring them to cease and desist from this activity is challenged on the ground it exceeds the authority of the Commission under the doctrine of preemption.

The doctrine of preemption is well established in labor law where the United States Supreme Court denied to the states the power to regulate labor disputes in those areas which Congress chose to exercise its authority by the enactment of the National Labor Relations Act and creating an agency to carry out its mandate. To effect the ends of the Act, to promote uniformity of regulation throughout the nation, and establish an expert body to interpret the Act and adopt implementing regulations, Congress declared, and the United States Supreme Court ruled, that the Board had exclusive jurisdiction in the area encompassed by the Act. The entire field of labor, however, is one in which there is overlapping or dual jurisdiction possessed by the federal and state government. The Wisconsin Employment Peace Act is a viable and active instrument in resolving labor disputes which lie outside the perimeters of federal legislation.

On June 27, 1972, the employer's application for a complaint filed with the National Labor Relations Board was dismissed by the Regional Director on the grounds that the conduct of the Union does not appear to be in violation of the Act. The letter dismissing the application stated, "Dismissal by this agency does not necessarily preclude the charging party from pursuing the rights under the statutes other than the National Labor Relations Act, or matters not covered by the Act." Dismissal of an application for a complaint by the National Labor Relations Board does not constitute a determination that the subject matter is not preempted. When the Company filed its complaint with the Wisconsin Employment Relations Board, the Union moved to dismiss the complaint on the grounds of federal preemption, but the Examiner denied the motion. On appeal the Commission affirmed that ruling. The same issue is now the exclusive matter in this appeal to the court.

Both parties agree that the ultimate forum for deciding the issue of the right of an employer to require an employe to work overtime is collective bargaining. Collective bargaining has proved to be the enduring agency that allows for maximum potential development of both labor and industry. The enactment of the National Labor Relations Act and the Wisconsin Employment Peace Act were designed to make the collective bargaining affair proceed with a minimum of economic loss to management, labor, and the public.

Is the conduct of the Union the kind of activity that Congress intended should be untouched by either federal or state control as being an intrinsic part of the collective bargaining process? Nothing in the National Employment Relations Act expressly permits or expressly prohibits the Union from persuading its members to refuse overtime employment. The parties have been engaged in negotiations, and the issue of overtime as related to the conflict between employer and Union regarding the employer's effort to change the labor contract from a 37 1/2-hour week to a 40-hour week.

Section 111.06 of the Wisconsin Employment Peace Act contains numerous provisions constituting unfair labor practices by the employer and the employe which may be enforced by submission of a complaint to the Commission. Federal law has preempted certain activities contained in Sections 7 and 8 of the National Labor Relations Act, but no case has been cited which declares that Subsection 2, (2) (h) of the Wisconsin Statutes relied upon by the Commission has become inoperative by reason of preemption.

The Union cites National Labor Relations Board v. Insurance Agents International Union, AFL-CIO, 361 U. S. 477 (1959) as authority for designating certain union activity as being outside the legally proscribed conduct even during negotiations. In that case the employes arrived late, neglected reports, left early, failed to cooperate in promotional schemes, but continued to sit at the bargaining table in a good faith effort to arrive at a contract.

The Supreme Court, in reversing the National Labor Relations Board, declared that the tactics used by the union do not support the finding that it failed to bargain in good faith. Section 8-B-3 of the Act does not prohibit the use of economic pressure. "Congress," said the court, "did not intend and has not authorized the Board to determine what economic sanctions might be permitted the negotiating parties in an ideal or a balanced state of collective bargaining."

To conclude from this language that the State is barred by the doctrine of preemption is a giant step. The decision does not hold that state law does not apply, and to infer from the language employed by the court that it did would be tenuous. Before a provision of the Wisconsin Peace Act is declared a nullity, a more definitive basis must be relied upon. The tendency on the part of the Federal Government to participate more aggressively in the field of labor disputes may ultimately provide the stepping stones to extend federal authority either by legislation or court decision, but until then state activity is not denied by preemption on the basis of the Insurance Agents case.

In San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1958), the question of preemption again arose with respect to Sections 7 and 8.

> "We have necessarily been concerned with the potential conflict of two law enforcing authorities with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes, but the unifying consideration of our decisions has been in regard to the fact that Congress has entrusted administration of the labor policy for the nation to a centralized administrative agency armed with its own procedures and equipped with its specialized knowledge and cumulative experience."

The Union argues that Garmon is authority fot the contention that where activity is clearly or arguably protected or prohibited by the Federal Act, state jurisdiction must yield. The key correlary to this principle enunciated by Justice Frankfurther is that where activity is neither prohibited or protected and, further, where the National Labor Relations Board fails to act, does not mean an automatic grant of authority and power to the states.

The guideline "where activity is clearly or arguably protected or prohibited" is used in other cases. The court's conclusion is that this activity is not arguably subject to the provisions of Section 7 or 8 of the Federal Act.

It is conceded by all parties that the record discloses that the Regional Director of the National Act dismissed the complaint of the Company on the ground that the complaint failed to set forth a violation of the Act. The failure on the part of the Federal Agency to take affirmative action does not confer power upon the state to act. The last bar to state jurisdiction is stated in the Frankfurter correlary. No standard, criteria, or clear principle has been set forth to invoke the Frankfurter correlary to this case. No persuasive reason has been announced to cause the court to conclude that the state law should be swept away on the basis of the cautionary dictum set forth in the Garmon case.

It is clear from the court's rulings that Sections 7 and 8 do not dominate the area of activity by a union engaged in the kind of activity at bar to sweep away state law. The Briggs & Stratton case, where the union engaged in concerted activity by holding frequent and irregularly scheduled meetings during working hours to the inconvenience of the production of the company, the authority of the Wisconsin Employment Relations Board to intervene with the application of state law was approved by the court. This case has never been overruled. International Union UAW-AFL, Local 232 v. WERB, 336 U. S. 245.

In order for the doctrine of preemption to take effect either the words of the National Labor Relations Act, the courts' decisions, or the declarations of the Board should manifest authority over the area concerned. No authority has been cited which satisfied the court that such an intention has ever been made in the area that was ruled upon by the Wisconsin Employment Relations Board in the instant case.

The petition to review, to overrule the Wisconsin Employment Relations Board, is denied. Its order is affirmed.

Counsel for the respondent is to prepare an order in conformity with this decision. A hearing will be held in Room 504 of the Courthouse before Branch 6 of the Circuit Court for Milwaukee County for consideration of further orders pertaining to this case, providing 72 hours' notice is given by the moving party.

Dated, Milwaukee, Wisconsin, August 24, 1973.

ROBERT W. LANDRY /s/
Circuit Judge.