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Labor Law—Preemption—Lodge 76, *International Association of Machinists v. Wisconsin Employment Relations Commission (Kearney)*¹—During negotiations for a renewed collective bargaining agreement,² petitioner, Lodge 76, International Association of Machinists and Aerospace Workers (the Union) and respondent, Kearney and Trecker Corporation (the Company), reached a bargaining impasse concerning the workday and workweek provisions to be included in the new agreement.³ When the Company unilaterally announced plans to implement its proposal for changes in the workday and workweek provisions with corresponding changes in the hours constituting overtime work, the Union adopted a resolution, effective immediately, binding its members to refuse to work any overtime.⁴ The Company did not implement its proposed changes before the new agreement became effective, but the Union continued the overtime ban with virtually total employee compliance.⁵

The Company did not discipline employees who complied with the Union resolution, but instead, while negotiations continued, filed a charge with the National Labor Relations Board (NLRB or the Board) that the Union's overtime ban violated section 8(b)(3)⁶ of the National Labor Relations Act (NLRA).⁷ The Regional Director found no violation of the NLRA and dismissed the charge on the ground that the union conduct was not cognizable by the Board.⁸

The Company also filed a complaint before the respondent Wisconsin Employment Relations Commission (the Commission) charging that the refusal to work overtime constituted an unfair labor practice under state law.⁹ Rejecting the Union's challenge to its jurisdiction, the Commission concluded that it was not preempted from regulating the Union's conduct. The Commission applied "the primary jurisdic-

¹ 427 U.S. 132 (1976).

² The previous agreement terminated pursuant to its terms on June 19, 1971. A new agreement became effective on July 23, 1972. *Id.* at 134.

³ For the prior 17 years, the basic workday had been 7½ hours, and the workweek, 37½ hours. The Company demanded that the workday be changed to eight hours, and the workweek to 40 hours, and that the terms on which overtime rates of pay were payable be changed accordingly. The Union opposed such changes. *Id.*

⁴ Overtime was defined under the old contract as work in excess of 7½ hours in a day or 37½ hours in a week. *Id.* The parties disagreed as to whether overtime at the Company was voluntary or mandatory. See note 102 *infra*.

⁵ 427 U.S. at 134-35.

⁶ Section 8(b)(3), 29 U.S.C. § 158(b)(3) (1970), makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees . . ."

⁷ 29 U.S.C. §§ 151 *et seq.* (1970), as amended by Pub. L. No. 93-360, 88 Stat. 395 (1974).

⁸ 427 U.S. at 135.

⁹ See note 12 *infra*.

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tion of the NLRB" preemption approach¹⁰ and concluded that the overtime ban was neither "arguably protected" nor "arguably prohibited"¹¹ by the NLRA. Therefore, according to the Commission, preemption was not required. On the merits, the Commission determined that the concerted refusal to work overtime constituted an unfair labor practice under Wisconsin law,¹² and ordered the Union to "cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments . . ."¹³ The Wisconsin Circuit Court affirmed and entered judgment enforcing the Commission's order. This decision, in turn, was affirmed by the Wisconsin Supreme Court.¹⁴

The Union sought certiorari from the United States Supreme Court, claiming that federal policy preempted the Commission's exercise of its regulatory authority in this case. The Supreme Court granted certiorari, reversed the state court determination and HELD: State regulation of the Union's peaceful concerted refusal to work overtime is impermissible because such regulation would frustrate the

¹⁰ This approach preempts state regulation of conduct arguably subject to federal labor law; see text at note 50 *infra*.

¹¹ Economic pressure tactics in labor disputes are classified as either "protected," "prohibited," or federally unregulated. Union conduct is "protected" if it falls under the protections of § 7 of the NLRA, 29 U.S.C. § 157 (1970), which provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . .

Union or employer conduct is prohibited if defined as an unfair labor practice under § 8 of the NLRA, 29 U.S.C. § 158 (1970). Section 8(a)(1), for example, declares that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . ." The Act, however, does not preclude the employer from engaging in certain limited economic countermeasures even where employee activity is protected under § 7. For example, an employer may replace striking employees, *NLRB v. Mackay Radio Tel. Co.*, 304 U.S. 333, 345 (1938). Similarly, in some circumstances an employer may resort to lockouts as a form of bargaining pressure on unions. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

On the other hand, where employee conduct is not protected, employers may resort to discipline, discharge and other strong countermeasures without violating section 8. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 492-94 (1961). See generally, Schatzki, *Some Observations and Suggestions Concerning a Misnomer - "Protected" Concerted Activities*, 47 TEX. L. REV. 378, 379-92 (1969).

¹² The Commission found that the overtime ban constituted proscribed activity under WIS. STAT. ANN. § 111.06(2) (1974) (West) which provides in pertinent part: It shall be an unfair labor practice for an employee individually or in concert with others:

....

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

¹³ 427 U.S. at 136. The Commission's decision is unreported.

¹⁴ 67 Wis. 2d 13, 26, 226 N.W.2d 203, 209, 88 L.R.R.M. 3340, 3345 (1975). The opinion of the Circuit Court for Milwaukee County is unreported.

intent of Congress to leave such activity, neither protected nor prohibited under federal law, controlled only by the free play of contending economic forces.¹⁵ In so holding, the Court expressly overruled the so-called *Briggs-Stratton* case, *Automobile Workers Local 232 v. Wisconsin Employment Relations Board*,¹⁶ which permitted state regulation of partial strike activity,¹⁷ as "no longer of general application."¹⁸

Justice Brennan, writing for the majority,¹⁹ analyzed the Commission's regulation of the Union's refusal to work overtime in light of earlier cases²⁰ in which the Court preempted state regulation of certain economic tactics which were neither protected nor prohibited by the NLRA.²¹ Those cases, the Court stated, established that the states do not have jurisdiction to proscribe the use of a particular economic weapon where it is inferable that Congress intended to leave the weapon available as part of the federal balance between the "uncontrolled power of management and labor to further their respective

¹⁵ 427 U.S. at 155.

¹⁶ 336 U.S. 245 (1949). In *Briggs-Stratton*, while collective bargaining was in progress, employees called twenty-six unannounced and irregularly scheduled meetings during working hours in order to exert bargaining pressure on the employer. *Id.* at 249. The Court upheld an order by the Wisconsin Employment Relations Board, which was construed and upheld by the State Supreme Court, forbidding a concerted effort to interfere with production by those methods. *Id.* at 250, 265. The United States Supreme Court examined the Union conduct and found it neither protected nor prohibited under the NLRA, and concluded that there was "no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate" such activity. *Id.* at 269. It determined that such conduct was "governable by the states or it was entirely ungoverned." *Id.* at 254.

¹⁷ The term "partial strike activity" refers to various kinds of union pressure tactics short of a full strike. It includes slowdowns, see *Raleigh Water Heater Mfg. Co.*, 136 N.L.R.B. 76, 79, 80, 49 L.R.R.M. 1708, 1709 (1962), on the job harassment tactics, see *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 480-81 (1960), refusals to work overtime and other conduct of a similar nature.

The NLRB has held such tactics unprotected because the unions utilizing them exert economic pressure on the employer without taking the risks of replacement and loss of pay inherent in a full strike: "Employees who choose to withhold their services because of a dispute over scheduled hours may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working." *First National Bank*, 171 N.L.R.B. 1145, 1151, 69 L.R.R.M. 1103, 1104 (1968), *enforced*, 413 F.2d 921, 926, 71 L.R.R.M. 3019, 3022 (8th Cir. 1969).

A related reason for holding a refusal to work overtime unprotected is that it constitutes an attempt by employees to work on terms of their own choosing. See *John S. Swift Co.*, 124 N.L.R.B. 394, 397, 44 L.R.R.M. 1388, 1390 (1959), *modified and enforced*, 277 F.2d 641, 646-47, 46 L.R.R.M. 2090, 2094 (7th Cir. 1960), *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1595, 35 L.R.R.M. 1265, 1266 (1954).

¹⁸ 427 U.S. at 151. The instant case did not overrule *Briggs* on its facts since in *Briggs*, overtones of violence were involved. *Id.* at 151 n. 13.

¹⁹ Justices Marshall, White, Powell, Blackman and Chief Justice Burger joined in the opinion but Justice Powell, in his concurrence in which the Chief Justice joined, conditioned his agreement on the understanding that the Court's approach would not preempt "neutral" state law. See text at note 148 *infra*. Justice Stevens wrote a dissenting opinion in which Justices Stewart and Rehnquist joined.

²⁰ *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964); *Garner v. Teamsters Local 776*, 346 U.S. 485, 499-500 (1953).

²¹ See text at notes 52-96 *infra*.

interests'.²² In accordance with its approach to the instant case, the Court formulated the "crucial inquiry regarding preemption" as "whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'"²³ Applying this inquiry to the *Kearney* facts the Court determined that, even if the refusal to work overtime was assumed to be neither protected nor prohibited by the NLRA, state law was preempted from restraining such activity because any such restraint would frustrate Congress' intent to leave union refusals to work overtime available as part of the labor balance struck by federal law.²⁴ The Court further reasoned that permitting such state regulation would allow the state to influence the substantive outcome of negotiations, contrary to federal policy which seeks to allow parties to bargain freely.²⁵

Having set forth its view of federal labor policy, the Court overruled the *Briggs* decision as inconsistent with that policy to the extent that it held that states could regulate peaceful partial strike activity.²⁶ Moreover, in view of its disposition of the case on the ground that Congress intended to allow unions to engage in concerted refusals to work overtime, the Court found the "primary jurisdiction of the NLRB" approach to preemption,²⁷ which preempts state regulation of conduct arguably subject to federal regulation, to be "largely inapplicable to the circumstances of this case."²⁸

The significance of the *Kearney* decision lies in the Court's express adoption of a "permitted activities" preemption inquiry based on the premise that Congress generally intended to leave federally unprohibited, peaceful self-help available as an integral part of the collective bargaining process. Earlier cases²⁹ had preempted state regulation of particular economic pressure tactics. However, preemption arguably was only invoked where the Court could infer preemptive congressional intent from evidence that Congress in fact had considered such activity and affirmatively decided to allow a union to engage in it.³⁰ *Briggs-Stratton*³¹ was consistent with this narrow view of congressionally unregulated labor combat to the extent that *Briggs* stood for the proposition that certain forms of federally unregulated self-help,

²² 427 U.S. at 146, *quoting* Local 20, Teamsters Union v. Morton, 377 U.S. 252, 259 (1964).

²³ 427 U.S. at 147-48, *quoting* Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969).

²⁴ 427 U.S. at 149-50.

²⁵ *Id.* at 149.

²⁶ *Id.* at 151.

²⁷ See text at notes 40-50 *infra*.

²⁸ 427 U.S. at 155.

²⁹ See note 20 *supra*.

³⁰ See 427 U.S. at 157 (Stevens, J., dissenting); Local 20, Teamsters Union v. Morton, 377 U.S. 252, 258-59. See also Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972). See text at notes 77-96 *infra*.

³¹ 236 U.S. 245, 254 (1949).

such as partial strike activity, were left by Congress to state regulation. In overruling *Briggs* and rejecting the arguably restrictive implications of the earlier "permitted activities" preemption cases, the Court in *Kearney* has invoked a potentially broad preemption approach which seeks to prevent a "frustration of the Act's processes" caused by state interference with the federal labor balance, and which does not depend on a finding of particularized congressional intent to allow a given activity. The potentially broad application of this approach also appears to leave the future role of the "primary jurisdiction" preemption inquiry somewhat uncertain.

After a brief introduction to the issue of preemption in labor law, this casenote initially will examine the state of labor law preemption prior to *Kearney*. In examining the pre-*Kearney* preemption cases, the note will first focus on the "primary jurisdiction of the NLRB" preemption approach, and then will analyze the "permitted activities" preemption cases. Having considered these two lines of preemption inquiry, the note will turn to *Kearney* and will analyze its significance for the "permitted activities" preemption inquiry as well as its broader implications for the future of labor law preemption.

I. LABOR LAW PREEMPTION PRIOR TO *KEARNEY*

The question of the role of state law in regulating labor relations³² has arisen frequently since the enactment of the National Labor Relations Act (NLRA).³³ While a number of the Act's provisions deal with the role of state law,³⁴ there are no clear statutory standards for determining whether the NLRA preempts state law in a given set of circumstances. The Supreme Court, however, has formulated its own criteria, based on its understanding of congressional purpose in enacting the NLRA, for the preemption of state law. Thus, the Court early established that the states are preempted from regulating conduct which is protected by section 7 of the Act.³⁵ The

³² The question of the role of state labor law arises where a given business has a sufficient link to interstate commerce to satisfy the jurisdictional standards of the NLRB. NLRB Press Release No. R. 576, Oct. 2, 1958, cited in Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1338 n.5 (1972).

³³ 29 U.S.C. §§ 151 *et seq.* (1970), as amended by Pub. L. No. 93-360, 88 Stat. 395 (1974).

³⁴ See, e.g., § 10(a), 29 U.S.C. § 160(a) (1970) (by agreement with a state agency, the Board may cede jurisdiction to such agency); § 8(d), 29 U.S.C. § 158(d) (1970) (state mediatory or conciliatory agencies must be notified before a party may terminate or modify an existing collective bargaining agreement); § 14(b), 29 U.S.C. § 164(b) (1970) (the Act not to be construed as authorizing agreements requiring union membership as a condition of employment where such agreements are prohibited by state law); § 14(c)(2), 29 U.S.C. § 164(c)(2) (1970) (the Act does not bar states from asserting jurisdiction over labor disputes over which the Board declines to assert jurisdiction because of insufficient effect on interstate commerce).

³⁵ *Automobile Workers v. O'Brien*, 339 U.S. 454, 459 (1950); *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 542, 543 (1945). Section 7, 29 U.S.C. § 157 (1970) is set forth in pertinent part in note 11 *supra*.

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Court also established that the preemption of state regulation of peaceful economic activity which is prohibited under section 8³⁶ was necessary to avoid potential conflict of substantive law, procedures and remedies.³⁷ In addition to delineating these guiding principles, the Court was concerned with the practical problems involved in their application. Since state courts are self-policing with respect to their jurisdiction to hear cases arising out of labor disputes, the Court recognized the need for a rule which would facilitate such jurisdictional determinations.³⁸ At the same time, the Court was concerned that the states, pursuant to the exercise of jurisdiction, might make determinations with regard to federal labor policy which would conflict with that policy as implemented by the NLRB.³⁹ The confluence of these general principles and practical concerns gave rise to the "primary jurisdiction of the NLRB" approach to preemption.

A. *The "Primary Jurisdiction of the NLRB" Approach to Preemption*

The Supreme Court first formulated the "primary jurisdiction of the NLRB" preemption approach in *San Diego Building Trades Council v. Garmon*.⁴⁰ In *Garmon*, a union which had not been selected as bargaining representative of the employees sought an agreement with a company under which the company would retain in its employ only those employees who were union members or who applied for union membership within thirty days.⁴¹ When the company refused to agree to these terms, the union peacefully picketed the employer's place of business and also attempted to persuade customers of the company to cease doing business with it until the employer agreed to the union's terms.⁴² The employer sought relief in state court on the ground that the union was attempting to compel the company to discriminate against non-union employees. At the same time the company began a representation proceeding before the NLRB, which declined jurisdiction.⁴³ The state court, however, asserted jurisdiction, finding that the union's picketing and other activities constituted an unfair labor practice under state law,⁴⁴ and awarding damages for the

³⁶ 29 U.S.C. § 158 (1970). Portions of section 8 are set forth at notes 64 and 70 *infra*.

³⁷ *Garner v. Teamsters Local 776*, 346 U.S. 485, 488-89, 491 (1953).

³⁸ See *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 290 (1971).

³⁹ *Id.* at 289.

⁴⁰ 359 U.S. 236 (1959).

⁴¹ *Id.* at 237.

⁴² *Id.*

⁴³ "The regional Director declined jurisdiction, presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.* at 238.

⁴⁴ *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 609, 320 P.2d 473, 481, 41 L.R.R.M. 2496, 2503 (1958).

company's losses.⁴⁵

The Supreme Court reversed and held that the state court was preempted from awarding damages both because the union conduct was "arguably prohibited" under the NLRA,⁴⁶ and because the state regulation of such federally regulated conduct would interfere with the implementation of federal policy. The Court reasoned that to allow states to remedy injuries caused by conduct which is clearly protected or clearly prohibited under federal law would create potential conflict of substantive law, remedy and procedure between state and federal regulation.⁴⁷ Moreover, the Court noted that there were cases in which it was not clear whether the conduct which the states sought to regulate was protected by section 7, prohibited by section 8, or not regulated by either of those sections.⁴⁸ The Court reasoned that in such cases, the administration of the NLRA required that the determination of whether conduct was federally protected or prohibited "be left in the first instance to the National Labor Relations Board."⁴⁹ Thus, the Court formulated the "primary jurisdiction" rule for preempting state law: "When an activity is arguably subject to §7 or §8 of the [NLRA], the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."⁵⁰

⁴⁵ *Id.* at 614, 320 P.2d at 485, 41 L.R.R.M. at 2506. For the earlier procedural history of the case see *Garmon*, 359 U.S. at 238-39.

⁴⁶ 359 U.S. at 246.

⁴⁷ *Id.* at 244.

⁴⁸ *Id.* at 244-45.

⁴⁹ *Id.*

⁵⁰ *Id.* at 245. While the "primary jurisdiction of the NLRB" approach provided a preemption rule "capable of relatively easy application," *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 290 (1970), it has not been applied in every case in which state jurisdiction has been at issue. The Court in some circumstances has allowed state regulation while refraining from an inquiry into the arguably protected or prohibited nature of the conduct regulated. For example, the court, reasoning that the states have a compelling local interest in restraining violent activity, has declined to preempt states from policing violent conduct arising out of labor disputes even where the conduct was federally prohibited. *Garmon*, 359 U.S. 236, 247. *International Union of Automobile Workers v. Russell*, 356 U.S. 634, 646 (1958); *Younjdahl v. Rainfair Inc.*, 355 U.S. 131, 139 (1957); *United Constr. Workers v. Labrunum Constr. Corp.*, 347 U.S. 656, 669 (1954). Similarly, the Court has not preempted state regulation of arguably protected or prohibited conduct where it has found the conduct to be of only "peripheral concern" to the policy underlying the NLRA. See *Vaca v. Sipes*, 386 U.S. 171, 180-81 (1967) (state court jurisdiction over suits alleging breaches of the union duty of fair representation is not preempted because, *inter alia*, such suits involve issues not usually within the Board's unfair labor practice jurisdiction); *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53, 61 (1966) (a state remedy for malicious libel arising out of a labor dispute would not impinge upon the policy of the NLRA); *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 192-93 (1965) (even if supervisory union picketing constituted an arguable unfair labor practice, supervisors are outside the central focus of the Act's concern and state law was not preempted); *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619-23 (1958) (a state court was not preempted from ordering a union to reinstate and award damages to a wrongfully expelled member even though the union conduct might involve an

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Subsequent to *Garmon*, the Court developed another important rationale for the preemption of state law. In *Kearney* and one earlier case,⁵¹ the Court determined that union tactics clearly unprohibited by section 8 were in fact intended by Congress to be free of *all* governmental regulation; accordingly, the Court held that allowing state law to regulate such tactics would be inconsistent with federal policy. The Court in those cases found it unnecessary to inquire whether the conduct involved was "arguably protected" by section 7, since even if the conduct were in fact unprotected, the state would have no jurisdiction to proscribe it because Congress intended that it remain free of all governmental prohibition. The next section of this note will focus on those cases in which preemption was based on the Court's inference of congressional intent to leave some forms of self-help governmentally unregulated so as to be controlled only by the free play of the economic power of unions and management.

B. The "Permitted Activities" Line of Preemption Inquiry Prior to *Kearney*

One of the Court's earliest attempts to interpret the impact of the Taft-Hartley amendments⁵² on the role of state labor regulation was the so-called *Briggs-Stratton* case, *Automobile Workers Local 232 v. Wisconsin Employment Relations Board*.⁵³ In *Briggs-Stratton* the Court held that a state labor board had jurisdiction to enjoin a union from calling intermittent, unannounced meetings during working hours as a means of exerting bargaining pressure on the employer.⁵⁴ The Court reasoned that this "coercive" activity remained subject to state control in the absence of a clear manifestation of congressional intent to exclude states from exercising their police power.⁵⁵ Furthermore, the Court assumed that such a manifestation of preemptive congressional intent would be present only where the federal Act protected or prohibited the conduct which the state sought to regulate.⁵⁶ Since the Court in *Briggs* found that the union tactics were neither protected nor prohibited under the NLRA,⁵⁷ it concluded that there was "no basis for denying to Wisconsin the power" to regulate such conduct.⁵⁸

unfair labor practice, since such internal union affairs were of only peripheral concern to the policy of the NLRA).

⁵¹ *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258-60 (1964).

⁵² Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, ch. 120, 61 Stat. 136 (1947), (codified as 29 U.S.C. §§ 141-44, 151-58, 159-68, 171-82, 185-87, 191-97).

⁵³ 336 U.S. 245 (1949).

⁵⁴ *Id.* at 265.

⁵⁵ *Id.* at 253.

⁵⁶ *Id.* at 252-53.

⁵⁷ *Id.* at 252-54.

⁵⁸ *Id.* at 256. The dissenting opinions in *Briggs* did not dispute the premise that the sole issue involved was whether the union's calling of unannounced meetings during working hours constituted federally protected activity, but dissented only from the

In subsequent cases, however, the Court departed from the *Briggs* assumption and inferred that federal policy required the preemption of state regulation of certain activities which were *not* subject to section 7 or section 8 of the Act. *Garner v. Teamsters Local 776*⁵⁹ provided the first indication that federal labor policy might preempt state regulation of conduct neither protected nor prohibited under the NLRA. In *Garner*, a local union picketed a trucking concern in support of a demand for recognition and a closed shop.⁶⁰ The company did not file a charge with the NLRB, but sued in state court for an injunction against the union's alleged attempt to coerce the company to discriminate against nonunion employees.⁶¹ A lower state court granted the injunction,⁶² but the Supreme Court held the state court preempted because its injunction created a danger of conflict with federal labor policy.⁶³ The Court reasoned that the union's picketing would constitute an unfair labor practice under NLRA section 8(b)(2)⁶⁴ if the employer's allegations were true, and that Congress intended the NLRA procedures for proscribing such conduct to be exclusive.⁶⁵ Moreover, the Court suggested that even if the Board found that the union's picketing did not constitute an unfair labor practice and dismissed the complaint, that dismissal effectively would sanction the picketing so as to preclude state regulation:

The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of

Court's conclusion that the union's tactic was federally unprotected. *Id.* at 268 (Douglas, J., dissenting); *id.* at 270 (Murphy, J., dissenting).

⁵⁹ 346 U.S. 485 (1953).

⁶⁰ *Id.* at 487. Four of the company's 24 employees were members of the union. *Id.* at 486. The company's business fell off drastically when drivers for other carriers refused to cross the picket lines. *Id.* at 487.

⁶¹ *Id.* at 487.

⁶² 62 Dauphin County Rep. 339, 361, 30 L.R.R.M. 2379, 2391, (C. P. 1951). The Pennsylvania Supreme Court subsequently reversed. 373 Pa. 19, 30, 94 A.2d 893, 899, 31 L.R.R.M. 2392, 2396 (1953). This later decision was affirmed by the Supreme Court. 346 U.S. at 501.

⁶³ 346 U.S. at 490-91, 501.

⁶⁴ Section 8(b)(2), 29 U.S.C. § 158(b)(2) (1970), provides that it is an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a)(3)" Subsection 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"

⁶⁵ 346 U.S. at 488-89.

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federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.⁶⁶

Thus, *Garner* articulated the concept that there is an area of labor combat intended to be free of governmental regulation.⁶⁷ While the Court in *Garner* inferred only that certain forms of picketing were permitted, its implications arguably extended to other forms of economic combat. The section 8 "procedure for restraint of specified types of picketing" referred to in *Garner* was not in fact prescribed for the regulation of certain types of picketing⁶⁸ *per se*; rather, its purpose was the proscription of *any* form of union economic combat when engaged in for unlawful ends.⁶⁹ Thus, section 8(b) prohibits in general language union conduct which constrains employees in the exercise of their rights⁷⁰ or which causes certain forms of employer discrimination.⁷¹ It likewise prohibits unions from engaging in, or inducing or encouraging employees to engage in certain types of secondary boycott activity and other specified forms of coercive conduct.⁷² While section 8(b) evinced congressional concern with the illegal purpose or results of prohibited union self-help, it did not evince concern with the particular form which prohibited self-help took. It was inferable, therefore, that section 8(b) could be applied to proscribe any form of union economic conduct, including partial strike activity, provided that the effect or purpose of such conduct is illegal.⁷³ Thus, by analogy to the Court's language in *Garner*, "[t]he

⁶⁶ *Id.* at 499-500.

⁶⁷ *Id.* at 500.

⁶⁸ However, § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970), which Congress added in 1959, proscribes certain kinds of recognitional picketing.

⁶⁹ See *Briggs-Stratton*, 336 U.S. at 253.

⁷⁰ Section 8(b)(1), 29 U.S.C. § 158(b)(1) (1970), makes it an unfair labor practice for a union or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining . . ."

⁷¹ 29 U.S.C. § 158(b)(2) (1970). Section 8(b)(2) is quoted, in pertinent part, in note 64 *supra*.

⁷² Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1970).

⁷³ It should be noted that the Board has in fact found partial strike activity prohibited when engaged in for unlawful goals. *NLRB v. Amalgamated Lithographers*, 309 F.2d 31, 42, 51 L.R.R.M. 2093, 2101 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). In *Lithographers*, the Ninth Circuit held that a union strike and overtime ban constituted unfair labor practices under §§ 8(b)(3) and 8(b)(4)(A), 29 U.S.C. §§ 158(b)(3), b(4)(A) (1970), since one of the objects of such activity was the inclusion in the collective bargaining agreement of a "hot cargo" clause and other clauses violating § 8(e), 29 U.S.C. § 158(e) (1970). 309 F.2d at 42-43, 52 L.R.R.M. at 2101. (The court distinguished *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), see note 111 *infra*, since there were no unlawful contract clauses involved in that case. 309 F.2d at 42 n.18, 51 L.R.R.M. at 2101 n.18).

Similarly, in *Local P-575, Amalgamated Meat Cutters*, 188 N.L.R.B. 5, 6, 76 L.R.R.M. 1273, 1274-75 (1971), the Board held that the employees of a neutral employer violated § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970), which prohibits strikes for a secondary object, by engaging in a refusal to work overtime in an attempt to coerce the neutral employer to stop processing the products of a primary employer.

detailed prescription of a procedure for restraint of specified types of [partial strike activity] would seem to imply that other [partial strike activity] is to be free of other methods and sources of restraint."⁷⁴ Although the *Garner* rationale thus seemed to imply the permissibility of partial strike activity undertaken for lawful purposes, there was an indication that the *Garner* holding was intended to be more limited in scope; *Garner* reaffirmed *Briggs*, distinguishing it on the grounds that it involved "injurious conduct which the National Labor Relations Board is without express power to prevent."⁷⁵ Nevertheless, the Court in *Garner* modified the *Briggs* assumption that an inference of congressional intent to preempt state law could be drawn only where the conduct in question was either protected or prohibited by the NLRA.⁷⁶ Instead, *Garner* clearly suggested that the Court might find conduct unregulable by the states precisely because the Board lacked the power to prohibit such conduct.

*Local 20, Teamsters Union v. Morton*⁷⁷ was the only case prior to *Kearney* in which the Court squarely held state regulation of union self-help preempted on the grounds that Congress intended to leave the conduct in question free of all governmental interference.⁷⁸ In *Morton*, a striking union appealed directly to the management of one of the company's customers to cease its business relationship with the company for the duration of the strike.⁷⁹ Seeking damages for the al-

⁷⁴ 346 U.S. at 499.

⁷⁵ *Id.* at 488. The Court drew this distinction in the context of the finding that the NLRB had jurisdiction to hear and remedy the kind of complaint involved in *Garner*. *Id.*

⁷⁶ See text at note 56 *supra*.

⁷⁷ 377 U.S. 252 (1964).

⁷⁸ In *Hanna Mining v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181 (1965) the Court rejected a supervisory union's argument for preemption based on a permitted activities rationale. There the union engaged in recognition picketing and secondary activity. The *Garmon* preemption rationale was found inapplicable because the union's recognition picketing was not arguably prohibited conduct under § 8(b)(7), 29 U.S.C. § 158(b)(7), since the Act's definition of "employees" excluded supervisors. 382 U.S. at 188-89. See § 2(3) of the NLRA, 29 U.S.C. § 152(3) (1970).

Relying on its interpretation of § 2(3) as well as § 14(a), 29 U.S.C. § 164(a) (1970), the union nevertheless argued that state regulation was preempted because Congress intended to leave such activities of the supervisors free of all regulation. 382 U.S. at 188. The Court, however, examined the legislative history of these sections and found no expression of intent to exclude state limitations on supervisory union organizing. *Id.* at 189-90.

⁷⁹ 377 U.S. at 255. The union also encouraged employees of other neutral employers to compel those employers to cease doing business with the company while the strike continued. *Id.* at 253. The federal district court awarded damages under section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187 (1970), for coercion of the neutral employers through the medium of their employees. *Morton v. Local 20, Teamsters*, 200 F. Supp. 653, 661, 659, 49 L.R.R.M. 2381, 2387, 2385 (N.D. Ohio 1961). Section 303(a), 29 U.S.C. § 187(a) (1970), makes it unlawful for a labor organization to engage in activities which section 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), defines as unfair labor practices. Section 303(b), 29 U.S.C. § 187(b) (1970), gives parties injured in their business or property by violations of § 303(a) the right to sue for damages in federal district court or any other court with jurisdiction over the parties.

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leged union violations of federal and state laws of secondary boycott,⁸⁰ the company sued in federal district court. The court held that while the direct persuasion of neutral employers did not contravene section 303 of the LMRA,⁸¹ it did violate the Ohio common law of secondary boycotts.⁸² The district court accordingly awarded damages under state law for the direct persuasion of the neutral employer.⁸³ The Supreme Court reversed and held that an award of damages under state law would frustrate the intent of Congress to allow employees directly to persuade secondary employers to boycott a primary employer.⁸⁴ Indicating that federal policy preempted state law from prohibiting such direct persuasion even if it were assumed to be federally unprotected,⁸⁵ the Court in *Morton* did not reach the "primary jurisdiction of the NLRB" inquiry as to whether the secondary persuasion constituted arguably protected conduct.⁸⁶

The Court in *Morton* based its conclusion that Congress intended to preempt state regulation of direct secondary persuasion on its determination that Congress, in enacting section 303 "dealt with particularity" with secondary boycott activity, yet omitted any prohibition on the conduct in question.⁸⁷ The Court reasoned that in forbidding certain forms of secondary activity federal labor policy struck a balance between prohibited and permitted secondary boycotts, and that additional state restraints on secondary boycotts would disrupt this balance.⁸⁸ Accordingly, the Court concluded that Congress had closed the field to the application of state law to proscribe federally unprohibited secondary boycotts.⁸⁹ In concluding that Congress intended to "permit" direct secondary persuasion, the *Morton* opinion appeared to imply that it was relying on the legislative history of the

⁸⁰ *Morton v. Local 20, Teamsters*, 200 F. Supp. 653, 656, 49 L.R.R.M. 2381, 2382-83 (N.D. Ohio 1961).

⁸¹ 29 U.S.C. § 187 (1970); see note 79 *supra*.

⁸² 200 F. Supp. at 656, 659, 661, 49 L.R.R.M. at 2382-83, 2387 and cases cited therein. See 377 U.S. at 255.

⁸³ 200 F. Supp. at 661, 49 L.R.R.M. at 2387. See 377 U.S. at 255.

⁸⁴ 377 U.S. at 259-60.

⁸⁵ *Id.* at 258-60.

⁸⁶ See *id.* at 258.

⁸⁷ The Court stated:

Section 303(b) of the Labor Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in § 303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and § 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.' In selecting which forms of economic pressure should be prohibited by § 303, Congress struck the 'balance . . . between the uncontrolled power of management and labor to further their respective interests . . .'

Id. at 258-59, quoting *United Bhd. of Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 100 (1958) (footnotes and citation omitted).

⁸⁸ 377 U.S. at 258-59.

⁸⁹ *Id.* at 260.

Taft-Hartley amendments.⁹⁰ However, an examination of this legislative history indicates that Congress in considering section 303 was not in fact concerned with the direct persuasion of secondary employers.⁹¹ It appears, therefore, that there was no evidence in the legislative history or in the statute that Congress affirmatively intended to permit the direct persuasion of secondary employers.⁹²

Since neither the statutory wording nor the legislative history of section 303 support a finding of specific congressional intent to allow direct action against secondary employers, it appears that the real basis for the *Morton* Court's inference of the permissibility of secondary persuasion was a general conception of federal labor policy developed in earlier cases. To support its view that state regulation of

⁹⁰ The Court noted, for example, that "[t]he type of conduct to be made the subject of a private damage action was considered by Congress . . ." 377 U.S. at 258. Similarly, the Court indicated its unwillingness to apply the Ohio law of secondary boycott "to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303 . . ." *Id.* at 259-60 (emphasis added).

However, the Court did not cite the legislative history in support of its holding that a court is not free to apply state law in awarding compensatory damages for union secondary activities. This omission is all the more significant in light of *Morton*'s subsequent specific citation of the legislative history of § 303 to support its conclusion that the federal court could not award *punitive* damages under state law for the direct persuasion of neutral employers. *Id.* at 260, 260 n.16.

⁹¹ None of the proposed House or Senate bills included a prohibition or any other mention of direct secondary persuasion. See, e.g., H.R. 3020, 80th Cong., 1st Sess. (1947) as reported in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 [hereinafter cited as *Legislative History*] 42 (1948) (definition of "illegal boycott"); H.R. 3020, 80th Cong., 1st Sess. (1947), (as passed House), reported in LEGISLATIVE HISTORY *supra* at 168-69 (definition of "illegal boycott"); H.R. 3020 (as passed Senate), reported in LEGISLATIVE HISTORY *supra* at 240 (draft of § 8(b)(4)). Furthermore, the committee reports in discussing the ramifications of the amendment's secondary boycott provisions did not refer to the status of direct secondary persuasion. See, e.g., HOUSE CONF. REP. NO. 510, ON H.R. 3020, reported in LEGISLATIVE HISTORY *supra* at 547.

⁹² The Court, however, might have established an intent to allow direct secondary persuasion on the basis of the wording and legislative history of § 8(b)(4)(B) and § 303(a) as amended in 1959. Labor Management Reporting and Disclosure Act (Landrum-Griffin Amendments), Pub. L. No. 86-257, §§ 704(a), 704(e), 73 Stat. 519, 542-43, 545 (1959). Section 704(a) of the amendments added new language to § 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), making it unlawful to coerce "any person engaged in commerce" not simply "the employees of any employer," for the purpose of bringing about a secondary boycott. Moreover, the legislative history of the 1959 amendments indicated that Congress intended to allow secondary persuasion. A proposed Senate bill, S. 1384, would have prohibited an attempt by a union to "exert or attempt to exert any economic or other coercion against, or offer any inducement to, any person engaged in commerce . . ." to boycott another individual or company. S. 1384 as referred, 86th Cong., 1st Sess. (1947), reported in LEGISLATIVE HISTORY, *supra* note 91, at 327 (emphasis added). Congress' failure to enact this prohibition suggests that it instead decided to permit the offering of "inducements" to neutral employers, and therefore, impliedly was also willing to allow the mere persuasion of neutral employers.

The Court, however, found the 1959 amendments "not germane" to the issues presented. 377 U.S. at 254 n.1. The Court in *Morton* may have been reluctant to rely on the legislative history of the 1959 amendments because the secondary persuasion involved in *Morton* occurred in 1956.

direct secondary persuasion would disrupt the federal labor balance, the *Morton* opinion relied heavily on *United Brotherhood of Carpenters Local 1976 v. NLRB*.⁹³ In *Carpenters Local*, the Court defined the scope of the Board's authority under section 8(b)(4)(A).⁹⁴ In concluding that the Board's authority under that section did not extend to the prohibition of secondary persuasion, the Court noted that the Act prohibits secondary boycotts only in narrowly defined circumstances. It further noted that the Act does not preclude employers from voluntarily engaging in boycotts, nor does it prohibit a union from persuading neutral employers to engage in boycotts "so long as it refrains from the specifically prohibited means of coercion through inducement of employees."⁹⁵ Therefore, the Court concluded that the Act did not include an express wholesale prohibition of secondary persuasion. The Court further reasoned that federal labor policy required a strict construction of the section's interdiction of specific types of secondary activity because the Taft-Hartley amendments were, "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on . . . the appropriate balance to be struck between the uncontrolled power of management and labor to

⁹³ 357 U.S. 93 (1958). In *Carpenters Local*, a union and an employer had a "hot cargo" agreement which provided that "workmen shall not be required to handle non-union material." *Id.* at 95. The union refused to install doors manufactured by a purportedly nonunion company (Paine). *Id.* The employer filed a charge with the Board which found that the union had violated § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) in encouraging employees to refuse to handle Paine's doors in order to compel the employer to cease its business relations with Paine. *Local 1976, United Bhd. of Carpenters*, 113 N.L.R.B. 1210, 1213, 36 L.R.R.M. 1478, 1479 (1955), *enf'd*, 241 F.2d 147, 39 L.R.R.M. 2428 (9th Cir. 1957). The Court affirmed the Board's finding that the union's action had constituted compulsion of the secondary employer in violation of section 8(b)(4)(A). 357 U.S. at 111. Furthermore, the Court concluded that "inducement of employees that are prohibited under § 8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision." *Id.* at 106. The Court recognized that section 8(b)(4)(A) did not comprise a wholesale prohibition of all secondary boycotts and thus did not proscribe secondary boycotts where the neutral employer consents to the boycott. *Id.* at 98-99. See text *infra* at notes 99-100. However, the Court reasoned that the union could not immunize itself from charges of § 8(b)(4)(A) violations by contending that the employer in accepting the hot cargo clause in the contract, had voluntarily agreed that his workers should not handle the goods. 357 U.S. at 105. Instead, the Court concluded that the freedom of choice for the employer contemplated by § 8(b)(4)(A) was not merely the abstract freedom at the time of contract negotiations, but included the right to make intelligent decisions under the impact of a concrete situation. *Id.* at 105-06.

⁹⁴ 357 U.S. at 98-100. Section 8(b)(4)(A), as enacted in 1947, prohibited unions from engaging in or encouraging the employees of any employer to engage "in a strike or a concerted refusal in the course of their employment to use, manufacture, . . . any goods, . . . or commodities, or to perform any services" where an object thereof is—"forcing or requiring . . . any employer . . . or other person to cease using, selling, . . . or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ." Labor Management Relations Act, 61 Stat. 136, 141 (1947). This prohibition is now incorporated in § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970). Labor Management Reporting and Disclosure Act, Pub. L. No. 86-257, § 704(a), 73 Stat. 519, 542 (1959).

⁹⁵ 357 U.S. at 98-99

further their respective interests."⁹⁶ The *Carpenters Local* Court, then, did not rely on evidence in the legislative history of the Taft-Hartley amendments to permit the conduct in question; it instead reasoned from a broad conception of federal labor policy which in effect assumes the allowability of economic self-help in the absence of a clear statutory mandate for its prohibition. Thus, despite the narrow concern of the *Morton* decision with the allowability of secondary activity not prohibited under section 303, the reasoning of that decision and its reliance on *Carpenters Local* in fact implied a broad basis for the preemption of state regulation of federally unprohibited self-help.

II. ANALYSIS OF *KEARNEY*

A. *Kearney* and the "Primary Jurisdiction of the NLRB" Approach to Preemption

The Court in *Kearney* might have found that the Union's refusal to work overtime was "arguably protected" conduct with the result that deference to the "primary jurisdiction" of the NLRB required preemption of state regulation. Although the Court recognized the potential application of the primary jurisdiction approach,⁹⁷ it termed that analysis "largely inapplicable to the circumstances of this case"⁹⁸ and chose instead to base its decision on the "permitted activities" inquiry without resolving the "arguably protected" issue. This section of the casenote will reflect briefly on the substantive questions which a "primary jurisdiction" analysis of *Kearney* would have involved and on the implications of the Court's choice of the "permitted activities" rather than the "primary jurisdiction" approach.

In previous cases, the Board has determined that union refusals to work overtime constitute protected conduct under the NLRA when the overtime is voluntary.⁹⁹ The Board appears to distinguish between voluntary and involuntary overtime because it views a concerted refusal to work involuntary overtime as an unprotected attempt by employees to "establish and impose upon the employer their own chosen conditions of employment."¹⁰⁰ On the other hand, the Board apparently views *brief* refusals to work voluntary overtime as protected conduct because the union refusal in that case would not constitute an attempt to impose conditions of employment since "the employer had already agreed to permit employees to decide for themselves whether they wished to work [overtime]"¹⁰¹

⁹⁶ *Id.* at 99-100.

⁹⁷ See 427 U.S. at 152 n. 14.

⁹⁸ *Id.* at 155.

⁹⁹ *Dow Chem. Co.*, 152 N.L.R.B. 1150, 1152, 59 L.R.R.M. 1279, 1281 (1965).

¹⁰⁰ *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1809-10, 1811, 35 L.R.R.M. 1305, 1306-07 (1954); *Valley City Furniture Co.*, 110 N.L.R.B. 1589, 1593-95, 35 L.R.R.M. 1265, 1265-66 (1954).

¹⁰¹ *Dow Chem. Co.*, 152 N.L.R.B. 1150, 1152, 59 L.R.R.M. 1279, 1281 (1965).

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In *Kearney*, the Union and the Company disagreed as to whether overtime at the Company was voluntary or mandatory.¹⁰² Yet, even if the overtime had been voluntary, the Union's refusal to work overtime still would have been only arguably protected, and not clearly protected in fact, in view of two factors. First, the overtime ban in *Kearney* was of long duration.¹⁰³ Second, there is Board precedent for finding refusals to work overtime unprotected where it is established that a business was geared to overtime work,¹⁰⁴ and it was at least arguable that *Kearney-Trecker's* operation was geared to the overtime work of its employees.¹⁰⁵ In view of these factors and in view of the voluntariness of the overtime work in *Kearney*, it is not clear whether the Board, had it been presented with the issue, would have found that Lodge 76's overtime ban constituted protected or unprotected conduct.

The Court recognized that it might have reviewed the Board decisions concerning refusals to work overtime in conjunction with the state court's application of the "arguably protected" test,¹⁰⁶ but stated

¹⁰² 427 U.S. at 152 n. 14. Compare Brief for Union at 5 with Brief for Company at 2-3.

¹⁰³ The refusal to work overtime began on March 7, 1972 and continued until July 23, 1972, when the new agreement became effective. 427 U.S. at 134-35.

¹⁰⁴ *Decision, Inc.*, 166 N.L.R.B. 464, 479, 65 L.R.R.M. 1660 (1967).

¹⁰⁵ See Brief for Company at 2, 15.

¹⁰⁶ The analysis made by the Wisconsin Supreme Court was less than satisfactory when read in light of the relevant Board precedent. That court recognized that the Board has found refusals to work optional or voluntary overtime to be protected, see note 99 *supra*, while it has found refusals to work mandatory and scheduled overtime to be unprotected; see note 100 *supra*. See 67 Wis.2d at 23, 226 N.W.2d at 206, 88 L.R.R.M. at 3344. Nevertheless, the court found the overtime ban in the instant case unprotected without determining whether overtime at the Company was in fact voluntary or mandatory. *Id.*

The court relied wholly on *Prince Lithograph Co.*, 205 N.L.R.B. 110, 115, 83 L.R.R.M. 1654, 1654-55 (1973), which it interpreted as holding "that a concerted refusal to work [voluntary] overtime is not protected." 67 Wis. 2d at 23, 226 N.W.2d at 208, 88 L.R.R.M. at 3344. This was a misreading of *Prince*. *Prince* in fact held that an employer did not violate § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970) (see note 64 *supra*) by replacing an employee who had participated in a protected refusal to work overtime. 205 N.L.R.B. at 115, 83 L.R.R.M. at 1655. The determination that the union conduct was protected was not essential to the holding, since the replacement of strikers would not have violated § 8(a)(3) whether the overtime ban was protected or unprotected. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) for the principle that an employer may replace striking employees even if their strike constitutes protected conduct.

Moreover, even if it had been essential for the Board in *Prince* to determine whether the union overtime ban constituted protected conduct, the facts of *Prince* did not warrant an inquiry into whether concerted refusals to work overtime are generally protected, since the Board found the conduct in *Prince* protected on the basis of a detailed clause in the union contract which permitted such refusals. 205 N.L.R.B. at 115, 110, 83 L.R.R.M. at 1654. Finally, the case which *Prince* cited in support of the dictum that overtime bans constitute "unprotected activity for which an employee may be discharged," *id.* at 115, *First Nat'l Bank of Omaha*, 171 N.L.R.B. 1145, 1149, 1150, 69 L.R.R.M. 1103, 1105 (1968), does not appear to support that proposition. In *Omaha* the Board reasoned that past cases had found union refusals to work overtime unprotected

that "[i]n light of our disposition of the case we have no occasion to address the issue."¹⁰⁷ The Court's decision not to address this issue casts doubt on the extent to which the Court still considers deference to the primary jurisdiction of the NLRB a compelling basis for preemption where the conduct in question, as in *Kearney*, is not *actually* protected, but only *arguably* subject to Board regulation. In recent years, critics on and off the Court have urged that the "arguably protected" test tends in some cases to work injustices on management.¹⁰⁸ Specifically, where state law is preempted because conduct is "arguably protected," management has no way of obtaining a Board determination of whether the conduct is protected in fact. Thus, management is left without any remedy despite the possibility that the union conduct is unprotected; such a result appears unnecessary and perhaps unfair if judged in light of "primary jurisdiction's" major purpose, which is the avoidance of state interference with conduct which is (actually) protected or prohibited under federal law.

The disposition of *Kearney* on "primary jurisdiction" grounds would have been susceptible to the above criticism. Preemption of state law on the ground that the Union's overtime ban constituted arguably protected conduct, if the ban was in fact unprotected, would have deprived *Kearney-Trecker* of a remedy on no basis other than deference to the NLRB. In light of the widespread reservations¹⁰⁹ as to whether such deference constitutes a value of sufficient importance to justify a total deprivation of management remedies, it is submitted that in *Kearney* the Court has achieved the result it would have achieved on the basis of the "arguably" test, but has done so by employing a rationale with a more substantial basis in federal labor policy. Thus, *Kearney* signals a judicial reluctance to invoke the "arguably protected" preemption inquiry, and therefore may presage an ultimate finding that the "primary jurisdiction" approach to preemption is no longer of general application.

B. The "Permitted Activities" Line of Preemption Inquiry in *Kearney*

The Court in *Kearney*, choosing not to address the "arguably protected" issue, instead focused on the extent to which federal labor

where the employer had warned his employees that they would be disciplined for refusing to work overtime, but distinguished *Dow Chemical Co.*, 152 N.L.R.B. 1150, 1152, 59 L.R.R.M. 1279, 1281 (1965), as based on a determination that the overtime in question was voluntary. 171 N.L.R.B. at 1150 n.6 (This portion was omitted in L.R.R.M.).

¹⁰⁷ 427 U.S. at 152 n. 14.

¹⁰⁸ See *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 314-15 (1971) (White, J., dissenting); *Longshoremen's Ass'n Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (1970) (White, J., concurring); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1359-63 (1972); see generally Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 473-78 (1972). Where, however, the Board declines jurisdiction on the grounds that a dispute does not have a sufficiently substantial effect on interstate commerce, § 14(c)(2), 29 U.S.C. § 164(c)(2) (1970), allows the states to exercise jurisdiction.

¹⁰⁹ See note 108 *supra* and sources cited therein.

policy requires that federally unprohibited self-help be left available to parties to labor disputes. The Court concluded that states may not prohibit peaceful partial strike activity which is federally unprohibited because such activity is an integral part of the collective bargaining process.¹¹⁰ Thus, in *Kearney*, the Court expressly relied on the reasoning on which it impliedly based the *Morton* opinion. While *Morton* might have been read as relying on affirmative evidence that Congress intended to permit secondary persuasion,¹¹¹ an analysis of that case has indicated that the Court based its inference of the allowability of secondary persuasion primarily on its general conception of the labor balance struck by Congress when it enacted the NLRA.¹¹² It is this same conception of the federal labor balance, and the integral role of economic self-help, on which the Court in *Kearney* based the overruling of *Briggs* and the holding that Wisconsin was preempted from prohibiting a union refusal to work overtime.

While the *Kearney* majority took the view that *Morton* required the preemption of state regulation in the instant case,¹¹³ the dissent distinguished *Morton* on the ground that in *Kearney* there was "no legislative expression" of an "intent to leave partial strike activity wholly unregulated."¹¹⁴ The dissent would have found *Morton* controlling had Congress "focused on the problems presented by partial strike activity, and enacted special legislation dealing with this subject matter," yet had decided not to prohibit union refusals to work overtime.¹¹⁵ However, the *Kearney* dissent appears to have taken *Morton* at face value and viewed its holding in a somewhat mechanical framework. Justice Stevens assumed that *Morton* relied on clearcut expressions of legislative intent, when, in fact, the Court there inferred congressional intent from a coherent overall conception of federal labor policy.¹¹⁶ Furthermore, although the dissent indicated that it preferred to limit preemption to cases of such "express legislative intent," it appeared to be willing to find the necessary expressions of intent from speculative evidence. Thus, Justice Stevens suggested that there would have been sufficient evidence of legislative intent to permit the union conduct if Congress had "enacted special legislation dealing with [partial strike activity], but left the form of the activity disclosed by this record unregulated . . ."¹¹⁷ The failure to regulate all activities which fall under the rubric "partial strike activity" would not seem in and of itself to manifest an express intent to permit that

¹¹⁰ 427 U.S. at 148-51.

¹¹¹ One commentator assumed that the *Morton* Court relied on the 1959 amendments to the NLRA for its inference of Congress' intent to permit peaceful persuasion. Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972). Such an assumption appears to be without basis in the *Morton* opinion. See note 92 *supra*.

¹¹² See text *supra* at notes 90-96.

¹¹³ 427 U.S. at 145-49.

¹¹⁴ *Id.* at 157 (Stevens, J., dissenting).

¹¹⁵ *Id.*

¹¹⁶ See note 91 *supra* and accompanying text.

¹¹⁷ 427 U.S. at 157 (Stevens, J., dissenting).

conduct not mentioned in the legislation. Justice Stevens' requirement of "legislative expression," then, would not add to the inference of preemptive congressional intent which was drawn by the majority from an overall conception of federal labor policy.

In addition to relying on *Morton*, the *Kearney* Court also found support in the view of federal policy which the Court set forth in *NLRB v. Insurance Agents' International Union*.¹¹⁸ In *Insurance Agents*, white collar union employees engaged in peaceful on-the-job harassment activities for the purpose of exerting pressure on an employer during collective bargaining.¹¹⁹ The employer filed a complaint with the NLRB which found that the harassing conduct constituted a *per se* violation of the union's duty to bargain in good faith under section 8(b)(3).¹²⁰ The Court reversed the Board and held that the NLRB did not have authority to apply a *per se* rule because there was no inconsistency between good faith collective bargaining as envisioned by the NLRA and a union's use of economic pressure tactics during the course of good-faith negotiations.¹²¹ In reaching this conclusion, the Court analyzed the legislative history of section 8(b)(3) which, in the Court's view, indicated that Congress narrowly conceived the duty to bargain in good faith. Specifically, the Court concluded that section 8(b)(3) was concerned only with the attitudes of the parties at the bargaining table and accordingly could not be invoked to prohibit union harassment or other activities external to the negotiations.¹²² Furthermore, the Court reasoned that allowing the Board to apply its *per se* rule would have serious implications for federal labor policy because it would allow the Board wide latitude—in the guise of finding refusals to bargain in good faith—to "regulate what economic weapons a party might summon to its aid."¹²³ This latitude, the Court reasoned, would allow the Board, contrary to the policy of the NLRA, to influence the substantive outcome of bargaining.¹²⁴ The Court expressed its understanding of this policy by indicating that in prohibiting certain self-help tactics, Congress intended that the Board could not brand other tactics unlawful.¹²⁵ The rationale advanced in sup-

¹¹⁸ 361 U.S. 477 (1960). *Kearney* described the analysis of *Insurance Agents* as coming "full bloom in the preemption area in [*Morton*]." 427 U.S. at 145.

¹¹⁹ The harassing activities included refusing to perform customary duties while engaging in "sit-in mornings" on the job; refusing to participate in a company campaign to solicit new business; reporting late at district offices on days on which agents were scheduled to attend them; absenting themselves from special business conferences arranged by the company; distributing leaflets to policy holders and soliciting signatures of policyholders on petitions directed to the company; and presenting such petitions to the company at its home office while engaging there in mass demonstrations. 361 U.S. at 480-81.

¹²⁰ *Insurance Agents' Int'l. Union*, 119 N.L.R.B. 768, 770-71, 41 L.R.R.M. 1176, 1177 (1957).

¹²¹ 361 U.S. at 490-91.

¹²² *Id.* at 487-88.

¹²³ *Id.* at 490.

¹²⁴ *Id.*

¹²⁵ *Id.* at 498.

port of this determination was that Congress had created a "statutory pattern," prohibiting certain economic weapons while leaving others available to parties to labor disputes.¹²⁶ Thus, *Insurance Agents* represented the view implicit in *Morton* that the federal labor balance of prohibition and permissibility included *all* peaceful economic weapons, and not only those with which Congress expressly concerned itself in the NLRA. By relying on *Insurance Agents*, the *Kearney* Court affirmed and made express the premises of *Morton*.

Still, the *Kearney* dissent suggested,¹²⁷ the Court's reliance on *Insurance Agents* appeared somewhat problematic. *Insurance Agents* addressed the question of the authority of the Board to find that union partial strike activity constituted *per se* a refusal to bargain under section 8(b)(3). It did not address the issue of the role of state law. Moreover, while *Insurance Agents* presented a situation in which the Board had exceeded its statutory authority,¹²⁸ there was no question but that the Wisconsin Commission in *Kearney* acted *within* its authority under state law when it enjoined the union refusal to work overtime.¹²⁹ *Insurance Agents*, if viewed as a narrow case reaffirming the principle that a regulatory agency may not exceed its statutory authority, would not support the result which the Court reached in *Kearney*.

However, *Insurance Agents* has a wider significance because the Court's conclusion that the Board had exceeded its statutory authority was based not simply on the legislative history of section 8(b)(3), but was grounded in a general conception of federal labor policy. The Court's central concern in *Insurance Agents* was that the Board, in exceeding its statutory authority, would be restricting the availability of economic tactics which Congress intended to leave available to unions and management as part of the "statutory pattern" created by Congress.¹³⁰ Moreover, the Court's determination in *Insurance Agents* that the Board may not disrupt the statutory pattern which Congress created in the NLRA would be without effect if the Court at the same time allowed states to regulate the field in such a manner as would

¹²⁶ *Id.* at 500.

¹²⁷ 427 U.S. at 158 (Stevens, J., dissenting).

¹²⁸ Much of the language in *Insurance Agents* is in fact concerned with the statutory authority of the NLRB, e.g.:

We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked. We see no indication here that Congress has put it to the Board to define . . . what economic sanctions might be permitted in an 'ideal' . . . state of collective bargaining.

361 U.S. at 499-500.

¹²⁹ The relevant Wisconsin statute, WIS. STAT. ANN. § 111.06(2) (1974) (West), is quoted at note 12 *supra*.

¹³⁰ See 361 U.S. at 498-500.

disrupt that statutory pattern.¹³¹ The application of the *Insurance Agents* rationale to the preemption context seems particularly compelling in view of the role of the NLRB in administering the federal Act. Because section 8 somewhat generally proscribes conduct directed at certain ends, the Act leaves to the Board the determination whether certain conduct is prohibited under particular circumstances. Thus, the Board in effect gives substance to the intent of Congress to ban particular economic weapons and bears the primary responsibility for the effectuation of federal labor policy.¹³² If restraint of partial strike activity by the agency which effectuates and gives substance to federal policy would disrupt the statutory pattern established in the NLRA, state restraint of the same activity *a fortiori* would frustrate federal policy.

Moreover, the *Kearney* reasoning which analogizes from a decision that the Board may not prohibit certain conduct to support a holding that the states are preempted from regulating the same conduct has precedent in *Morton*. The *Morton* decision preempting state law from regulating direct persuasion of secondary employers was based fundamentally on the conception of federal labor policy set forth in *Carpenters Local*.¹³³ *Carpenters Local*, like *Insurance Agents*, was a case limiting the authority of the Board to find that particular union conduct constituted an unfair labor practice. In both *Carpenters Local* and *Insurance Agents*, the Court reasoned that a strict reading of the relevant section 8 prohibition was necessary if the Board were not to disrupt the labor balance struck by Congress.¹³⁴ Neither opinion relied on legislative history or other express indications of Congressional intent to permit the conduct in question but rather based its conclusion on the need to maintain the "federally struck labor balance". It appears, then, that the *Kearney* dissent's criticism of the Court's reliance on *Insurance Agents* overlooked the true relevance of that decision. *Insurance Agents*' relevance can only be understood in view of the common basic premise underlying *Insurance Agents*, *Morton*, *Carpenters Local* and *Kearney*: Congress' creation of a balance of permitted and prohibited self-help, a balance which includes all peaceful union tactics whether or not expressly referred to in the Act.

III. THE IMPACT OF KEARNEY

A. Direct State Curtailment of Self-Help

The basic rationale of the *Kearney-Morton* preemption approach is that federal labor legislation represents a comprehensive balance of prohibited and allowable conduct, and that state proscriptions on

¹³¹ See Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 669 (1961).

¹³² See *Insurance Agents*, 361 U.S. at 499.

¹³³ See text *supra* at notes 91-96.

¹³⁴ See text *supra* at notes 93-97.

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conduct neither prohibited nor protected under the NLRA serve to disrupt this balance. Since *Kearney* was not based on a finding of a specific Congressional intent to allow union refusals to work overtime, but rather on a more general conception of federal policy, it appears to imply the preemption of *all* direct state regulation of federally unprotected and unprohibited conduct, except where such conduct is of only peripheral concern to the policy of the NLRA.¹³⁵ Thus, *Kearney* will in all likelihood have its most direct impact on state regulation of activities which are federally "permitted." Such activities include, in addition to refusals to work overtime, other partial strike activity such as slowdowns¹³⁶ and on-the-job harassment.¹³⁷ Other "permitted" activities are the issuing in certain circumstances of statements by a union maligning an employer's product;¹³⁸ the peaceful persuasion of secondary employers;¹³⁹ and strikes to compel payment of a wage increase prohibited by federal law.¹⁴⁰

In addition to its direct implications for the relatively narrow area of "permitted activities," the *Kearney-Morton* approach raises the broader question of whether the "primary jurisdiction of the NLRB" test as developed in *Garmon*¹⁴¹ is necessary to the protection of federal labor policy against state interference. The primary jurisdiction approach is ultimately based on the premise that in determining the allowability of state regulation of union conduct, it is crucial to determine whether the conduct is federally protected or prohibited. *Kearney*, however, establishes in effect that states may not regulate federally unprohibited conduct which is of more than peripheral concern to the NLRA, since such regulation would disrupt the federally struck labor balance. Moreover, it appears that, once it is determined that the application of state law would disrupt the substantive labor balance established by Congress, it would be unnecessary to go further and determine whether the state action also restricts a union's exercise of a federal right. Thus, while the *Kearney* holding was limited to the area of conduct assumed neither protected nor prohibited, it logically requires the preemption of any federally unprohibited self-help other than conduct found to be peripheral to the concerns of the NLRA.

¹³⁵ Where conduct is of only "peripheral concern" to the NLRA, there is only a slight danger that its regulation by the states will disrupt the federal balance. This view is implicit in *Hannah Mining v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181 (1965), discussed in note 78 *supra*. See generally Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1364-66 (1972).

¹³⁶ See *Phelps Dodge Copper Prods., Corp.*, 101 N.L.R.B. 360, 368, 31 L.R.R.M. 1072, 1074-75 (1952); *Elk Lumber Co.*, 91 N.L.R.B. 333, 336-39, 26 L.R.R.M. 1493, 1494-95 (1950).

¹³⁷ See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 492-95 (1960).

¹³⁸ See *NLRB v. Local 1229, International Bhd. of Elec. Workers*, 346 U.S. 464, 477 (1953).

¹³⁹ See *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964).

¹⁴⁰ See, e.g., *American News Co.*, 55 N.L.R.B. 1302, 1312, 14 L.R.R.M. 64, 70 (1944).

¹⁴¹ 359 U.S. 236 (1959). See text at note 50 *supra*.

It might appear that, after *Kearney*, the determinative question for preemption is whether conduct which a state seeks to regulate is federally prohibited. However, *Garner* held that if conduct is federally prohibited, states may not regulate it, since such regulation would conflict with federal remedies and procedures.¹⁴² The *Garner* and *Kearney* rationales would likewise account for the preemption of direct state regulation of "arguably prohibited," as opposed to "actually prohibited" conduct in the following way. If the conduct found arguably prohibited were prohibited in fact, *Garner* would require preemption of state regulation. Moreover, if the conduct were in fact unprohibited, *Kearney* implies that direct state regulation would disrupt the federal labor balance and is thus preempted by federal policy. Accordingly, it seems that *Kearney* and *Garner*, viewed together, require the preemption of any state law which purports directly to regulate peaceful union conduct which is within the area of central concern to the NLRA. It appears, therefore, that the "primary jurisdiction of the NLRB" test, at least as applied to such direct state regulation, is of minimal conceptual importance to the avoidance of state interference with federal policy.

B. *State Curtailment of Self-Help Through the Application of Neutral State Laws*

The second inquiry into the extent of the preemption of state law mandated by *Kearney* focuses not on state laws which seek directly to regulate the peaceful conduct of parties to a labor dispute, but rather on the effect of neutral state laws.¹⁴³ The preemption of "neutral" law is an area in which the various formulas which the Court has developed have not provided clear answers. In the past, the Court has not applied the "primary jurisdiction of the NLRB" test in cases where it has found that the states have a compelling local concern such as in policing violence¹⁴⁴ or where it has determined that a case involved matters of merely "peripheral concern" to the NLRA.¹⁴⁵ The Court has invoked both of these exceptions to the *Garmon* test on occasion to allow the application of neutral state laws to cases growing out of labor disputes.¹⁴⁶ At the same time, however, the Court has not indicated that the *Garmon* inquiry would never operate to preempt any "neutral" state laws. The Court, for example, has had opportunities to make such an exception for the application of state trespass law, but so far has left that issue open.¹⁴⁷

¹⁴² 346 U.S. at 490-91.

¹⁴³ For one definition of "neutral" state laws, see text at note 149 *infra*.

¹⁴⁴ See note 50 *supra*.

¹⁴⁵ See note 50 *supra*.

¹⁴⁶ See, e.g., *Linn v. United Plant Guard Workers* 114, 383 U.S. 53, 61 (1966); *United Const. Workers v. Laburnum Const. Corp.*, 347 U.S. 656, 669 (1959).

¹⁴⁷ See *Taggart v. Weinacker's Inc.*, 397 U.S. 223, 226 (1971); *Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20, 24-25 (1957). See generally *Broomfield, Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity*, 83

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In *Kearney*, Justice Powell, joined by Chief Justice Burger, wrote a separate opinion¹⁴⁸ which appeared to condition his concurrence on his understanding that the majority's opinion did not preclude the enforcement of "neutral" state laws in the context of a labor dispute. Justice Powell defined "neutral" laws as those "not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength".¹⁴⁹ Justice Powell's approach appears to imply the nonpreemption of state trespass law in cases involving picketing.

Despite Powell's concurrence, the Court might well be hesitant to hold that federal labor policy generally allows state trespass actions arising out of picketing. Just as the outer limits of the application of the "peripheral concern" and "state interest" exceptions to the *Garmon* "arguably" rule are unclear, so are the outer limits of Justice Powell's "neutral laws" category. The concept that a law be "directed toward" altering bargaining positions should not imply that such a directedness necessarily be clear upon the face of the law. A law, neutral on its face, may in its application be directed toward an altering of bargaining positions;¹⁵⁰ a court may apply state trespass law to a picketing situation as a means of "institut[ing] ground rules governing the economic struggle between the union" and the employer.¹⁵¹ In such a case the effect on relative bargaining power would not be "incidental." It thus appears that the Court should not give the neutrality on its face of a law talismanic significance but should also look at the context of its application. Such an approach is consistent with the tone of the Court's opinion in *Kearney*. In determining whether state regulation frustrated the processes of the NLRA, the Court considered the motivation of the party invoking the regulation.¹⁵² In *Kearney* itself the application of the law was so clearly directed at the federal labor balance that the Company's motivation was probably not of controlling

HARV. L. REV. 552, 562-68 (1970). The state courts are divided on whether federal policy requires the preemption of state jurisdiction over trespass cases arising out of union picketing. For cases holding the state preempted, see *Sears, Roebuck & Co. v. San Diego County Dist. Council Carpenters*, 132 Cal. Rptr. 443, 453, 553 P.2d 603, 613, 93 L.R.R.M. 2161, 2167 (1976), *cert. granted*, 45 U.S.L.W. 3582 (1977); *Freeman v. Retail Clerks Local 1207*, 58 Wash. 2d 426, 434, 363 P.2d 803, 807, 48 L.R.R.M. 2835, 2837 (1961) (concurring opinion). *Contra*, *Moreland Corp. v. Retail Store Employers Local 444*, 16 Wis. 2d 499, 503, 114 N.W.2d 876, 878, 50 L.R.R.M. 2092, 2093 (1962); *People v. Goduto*, 21 Ill. 2d 605, 611-12, 174 N.E.2d 385, 388, 48 L.R.R.M. 2126, 2128, *cert. denied*, 368 U.S. 927 (1961).

¹⁴⁸ 427 U.S. at 155-56 (Powell, J., concurring).

¹⁴⁹ *Id.*

¹⁵⁰ "Decisional rules developed as particular applications of general tort principles are [according to Cox's proposed test] likewise preempted because particular application results from weighing the competing interests in a labor dispute . . ." Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972).

¹⁵¹ *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 132 Cal. Rptr. 443, 451, 553 P.2d 603, 611, 93 L.R.R.M. 2161, 2166 (1976), *cert. granted*, 45 U.S.L.W. 3582 (1977), *quoting* *Musicians Local 6 v. Superior Court*, 69 Cal.2d 695, 712, 73 Cal. Rptr. 201, 212, 447 P.2d 313, 324, 69 L.R.R.M. 2803, 2810 (1968).

¹⁵² 427 U.S. at 148-49.

importance. However, the mention of such a factor is consistent with the view that, in looking at the application of a "neutral" state law, the Court would not inflexibly assume that federal policy does not preempt the state action.

CONCLUSION

Kearney has left open the question whether the Court will subsequently overrule the "primary jurisdiction of the NLRB" approach to preemption. For the present, state courts probably will continue to apply the primary jurisdiction approach because the Supreme Court has given them no express directive to the contrary; because the approach usually yields "correct" results;¹⁵³ and because the courts are accustomed to applying that approach. Nevertheless, it is clear that the *Kearney* rationale has put in question the doctrinal vitality of the *Garmon* primary jurisdiction inquiry. More generally, the Court has resolved the doubt left by *Briggs* as to the scope of the federally struck labor balance, and has indicated in effect that the federal balance includes all peaceful self-help which is not clearly peripheral to the concerns of the NLRA. In overruling *Briggs* the Court has expressly applied to preemption the comprehensive view of the federal labor scheme which was implicit in past "permitted activities" preemption cases.

MITCHELL S. PRESSMAN

Labor Law—Boys Markets Injunction—Sympathy Strike—Accommodation of the Norris-LaGuardia Act—Buffalo Forge Co. v. United Steelworkers.¹

The United Steelworkers of America (the Union) and two of its locals were certified to represent office and clerical-technical employees in negotiating their first collective bargaining agreement with the Buffalo Forge Company. When negotiations broke down, these employees struck the company and established picket lines at three separate plant and office facilities in the Buffalo, New York area.² Two days later the production and maintenance employees, also represented by the United Steelworkers, refused to cross the office employees' picket lines at one of the company's plants.³ Shortly thereafter,

¹⁵³ See Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1359 (1972). By "correct" results are meant results consistent with the view that the states may not regulate labor so as to disrupt the federally struck labor balance.

¹ — U.S. ___, 96 S. Ct. 3141 (1976).

² *Id.* at 3143-44.

³ *Id.* at 3144. Throughout this note the terms refusal to cross a picket line, sympathy strike, and honoring a sister union's picket line will be used interchangeably. A