comparative ease with which management obtains approval of its proposals should afford a practical means to "continue in effect" this relationship while still complying with the court's interpretation of the statute.

GEORGE T. LENEHAN

Labor Law—Federal Pre-Emption Doctrine—Criminal Trespass.—*People v. Goduto.*[1]—The defendants, non-employee union organizers, entered upon a parking lot, leased by Sears, Roebuck and Company adjacent to one of their Chicago stores, for the purpose of distributing union leaflets and questionnaires to the store's employees. The operating superintendent asked them to leave several times, but each time they refused. The superintendent then called the police, who arrested the defendants and charged them with a violation of Illinois' criminal trespass statute.[2] After being convicted in the Chicago Municipal Court, they appealed on the ground, *inter alia,* that Illinois had no jurisdiction because of federal preemption of labor disputes. The Illinois Supreme Court affirmed. HELD: "[T]he maintenance of domestic peace and the absence of any preventive relief for the protection of the employer's property rights is of sufficient importance to give [the state] . . . jurisdiction to enforce the criminal trespass statute . . . ."[3] And although it is arguable that the defendants' conduct was protected by Section 7 of the National Labor Relations Act,[4] and notwithstanding the fact that a state has no jurisdiction to determine the validity of this defense, nevertheless, because of the defendants' failure to invoke the jurisdiction of the National Labor Relations Board, the state could assume jurisdiction of the crime charged.[5]

The expansion of the federal government into areas once the private domain of the states has been a continuing cause of jurisdictional conflict. A frequent battleground is labor-management relations. Following the enactment of the Wagner Act in 1935,[6] a series of cases in the United

(1959): "While it (proxy voting) is a useful device to get things done, it is also a device which favors management in its operation, more than the corporation shareholder."

1 21 Ill. 2d 605, 174 N.E.2d 385 (1961), cert. denied, 30 U.S.L. Week 3179 (U.S. Dec. 5, 1961).

2 Whoever . . . is unlawfully upon the enclosed or unenclosed land of another and is notified to depart therefrom by the owner, or occupant, or by his agent or servant, and neglects or refuses so to do, . . . shall be guilty of a misdemeanor. . . .

Ill. Rev. Stat. ch. 38, § 565 (1957).

3 174 N.E.2d at 388.

4 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

5 Contra, Freeman v. Local 1207, Retail Clerks, 363 P.2d 803 (Wash. 1961); State v. Williams, 37 CCH Lab. Cas. ¶ 65,708 (Md. Crim. Ct., Baltimore City, 1959).

The defendants also contended that, under Marsh v. Alabama, 326 U.S. 501 (1946), their right to disseminate information was protected by the first and fourteenth amendments to the United States Constitution. The court distinguished the *Marsh* case by limiting it to its facts and held that the defendants' conduct was not constitutionally protected. On this point there is contrary authority. See People v. Mazo, 38 CCH Lab. Cas. ¶ 68,835 (Ill. Cir. Ct. 1959); State v. Williams, supra.

6 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 *et seq.* (1958).

States Supreme Court severely restricted the power of the states to regulate labor disputes covered by the terms of the act.[7] These cases culminated in the decision in *San Diego Building Trades Council v. Garmon*[8] which reserved to the NLRB primary jurisdiction in any case in which the activity to be regulated is arguably protected by section 7 or prohibited by section 8. Exception to this rule is made in two kinds of cases: those involving matters only tangentially affecting the national labor policy[9] and those involving "conduct marked by violence and imminent threats to the public order."[10]

The court in the instant case assumes that the activity of the defendants is arguably protected by section 7. Nevertheless, the court asserted two grounds for jurisdiction. The first is that, because a trespasser's refusal to leave upon the owner's request gives the owner the right of self-help, such a refusal creates a threat of imminent violence. The second is that the willful failure of the defendants to assert their claim of right before the NLRB leaves the dispute open to state jurisdiction.

Perhaps if the exchange between the parties had gone beyond words and exploded into violence, the state would have been justified in asserting jurisdiction. But no blows were struck and the court was forced to rely on the inference of impending violence that arises whenever one man refuses to leave the property of another. Without a doubt this threat would be sufficient to warrant imposition by the state of criminal penalties in trespass cases not complicated by federal pre-emption or constitutional questions. But once the federal government has imposed its system of uniform regulation upon a proper subject, it is most unlikely that it will be lifted by so weak an inference of violence.

There has not yet been any United States Supreme Court ruling on this question. All the cases involving violence which have thus far come before the Court have manifested it on a grand scale.[11] The threat to the public peace and safety was clear; there was little danger that the states were using their concern for good order as a pretext for illicit regulation. But if the states are allowed to assume jurisdiction on the basis of a constructive threat of violence, then criminal trespass and breach of the peace

---

7 See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Teamsters Union v. New York, N.H. & H. R.R., 350 U.S. 155 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 485 (1955); Garner v. Local 776, Teamsters Union, 346 U.S. 485 (1953); Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951); UAW v. O'Brien, 339 U.S. 454 (1950); Hill v. Florida, 325 U.S. 538 (1945).

8 Supra note 7.

9 International Assn. of Machinists v. Gonzales, 356 U.S. 617 (1958).

10 *Garmon* case, supra note 7, at 247.

11 See UAW v. Russell, 356 U.S. 634 (1958) (massed pickets preventing ingress and egress from a plant by threats and force of numbers); Youngdahl v. Rainfair, 355 U.S. 131 (1957) (massed picketing, name calling, threats, and seeding of the parking lot with roofing tacks); UAW v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956) (massed pickets preventing ingress and egress from plant, coercion of employees and threats of physical injury); United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954) (threats of violence and presence of a large crowd, some drunk and some armed).

statutes will become a potent threat to the uniformity of regulation which Congress has found desirable.

The court's second argument is that the failure of the parties to invoke the jurisdiction of the NLRB may result in a special power in the states to assume jurisdiction. This seems to spring from a feeling that, at least in this type of case, someone must adjudicate the matter. However, the cases are unanimous in holding that whenever (barring only the exceptions noted above) the controversy falls within the terms of sections 7 or 8, only the NLRB can have primary jurisdiction,[12] and that this jurisdiction can be ceded to the states only in accordance with certain narrow statutory provisions.[13] There is nothing either in the statute or in the cases to indicate that inaction by the parties can create new exceptions to the primacy of the Board's jurisdiction.

A careful reading of the law, particularly the *Garmon* case,[14] suggests that the instant case was wrongly decided. Nevertheless, the Illinois court has brought into focus a grave deficiency in the existing law. Almost certainly an employer in Sears' position has no basis for complaint to the NLRB.[15] Most probably the union, because of the decision in *NLRB v. Babcock-Wilcox Co.*,[16] would not go to the Board. Without application by one of the parties, the Board cannot act. And, without a determination by the Board that the activity is neither protected nor prohibited, the state is excluded by the *Garmon* decision.[17] This would leave the employer in the unhappy position of either permitting the union to use its property for an unwanted organizational campaign, or hiring guards to keep the union out. If the union conduct is not protected by section 7, the employer should not be forced to tolerate the union's presence. But from the point of view of a store, such as Sears, whose principal appeal is to the lower middle income group, it is clearly undesirable to post anti-union guards.

One solution to this dilemma, which would give the employer the relief it needs and still preserve the primacy of the NLRB, is to grant the employer access to the Board for the purpose of determining whether or not the union's activity is protected. In the event that the conduct was found to

[12] Supra note 8.

[13] Prior to the 1959 amendments to the act, unless the Board had ceded jurisdiction under § 10(a), 63 Stat. 107 (1949), 29 U.S.C. § 160 (1958), no state court or agency could assume jurisdiction, even where the Board had declined it for monetary reasons. Guss v. Utah Labor Board, supra note 7. Section 701(a) of the 1959 amendments changed this to the extent that now the states can take jurisdiction if the Board declines it. 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(2) (Supp. II, 1958).

[14] Supra note 8.

[15] Absent a finding that the leaflets distributed by the defendants contained "threat[s] of reprisal or force or promise of benefit", section 8(c) would prevent a finding that the defendants committed an unfair labor practice. Thus, the employer would get no federal relief and would still be barred from the state courts by the possibility that the union's conduct was protected under § 7.

[16] 351 U.S. 105 (1956), in which it was held that non-employee union organizers did not have a right to distribute union literature on the employer's property unless there were no reasonable alternative channels of communication with the employees. The union would be hard pressed to prove this in the instant case where the vast bulk of the employees live in the city of Chicago.

[17] Supra note 7.

be outside the terms of the act, *i.e.*, neither protected nor prohibited, the state court would have jurisdiction to hear the employer's plea for state relief.

JOSEPH D. BERMINGHAM, JR.

Labor Law—LMRDA Civil Enforcement Section—Local Union Officer Has No Cause of Action in Tort Against District Union Officials in Their Individual Capacities.—*Tomko v. Hilbert*.[1]—Tomko, appellant, commenced an action under Title I ("bill of rights") of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[2] against Hilbert and Kreheley, appellees, for damages and an injunction, alleging that appellees assaulted, libeled, and, by means of threats, force and disorderly conduct, interfered with his rights as a local union member and president by disrupting the conduct of regular business meetings and regular business. Appellees are both officials of the district union of which Tomko's local is a part, but the complaint merely charged the appellees in their individual capacities and did not allege that any labor organization, or any officer or agent thereof acting in his official capacity, had violated the appellant's rights under the "bill of rights." The United States District Court for the Western District of Pennsylvania[3] dismissed the action on the ground that the appellant had failed to exhaust his internal union remedies. On appeal the Court of Appeals for the Third Circuit affirmed. HELD: A local union member and officer has no cause of action for damages and/or an injunction against (district) union officials in their individual capacities absent diversity jurisdiction. The majority of the Court of Appeals reached the conclusion that the LMRDA deals exclusively with the union-member relationship after considering the language of the LMRDA, its purpose, the evils it was intended to cure, and its legislative history. Judge Hastie concurred on the ground that, although the record was not very clear, the conclusion of the district court was warranted. Judge Hastie suggested that if the district court were wrong the appellant should merely be given leave to plead over.

There was no National Labor Relations Board (NLRB) jurisdiction of this case because there were no facts alleged which would put it within the ambit of the Labor-Management Relations Act of 1947 (LMRA), sections 8(b)(1), 8(b)(2), or 8(b)(5).[4] The LMRA is operative in the area of employer-employee-union relationships and concerns the action of these groups as they affect wages, hours and conditions of employment.

Title I of the LMRDA, more popularly known as the Landrum-Griffin Act, grants to every member of a labor organization the fundamental rights to nominate candidates for election, to vote in organization elections, to attend and participate in meetings, subject to reasonable rules and regulations;[5] to speak and assemble freely with other members and to express

1 288 F.2d 625 (3d Cir. 1961).
2 73 Stat. 522 (1959), 29 U.S.C.A. § 411 (Supp. 1960).
3 46 L.R.R.M. 2853 (W.D. Pa. 1960).
4 65 Stat. 601 (1951), 29 U.S.C. § 158 (1958).
5 73 Stat. 522 (1959), 29 U.S.C.A. § 411(a)(1) (Supp. 1960).