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Sears, Roebuck & Co. v. San Diego County District Council of Carpenters: The Demise of Federal Preemption of Labor Disputes

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SEARS, ROEBUCK & CO. V. SAN DIEGO COUNTY
DISTRICT COUNCIL OF CARPENTERS:
THE DEMISE OF FEDERAL
PREEMPTION OF LABOR
DISPUTES

The National Labor Relations Board, with certain exceptions, has exclusive jurisdiction over labor disputes involving union activity which the provisions of the National Labor Relations Act may either protect or prohibit. In Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, the United States Supreme Court excepted from this doctrine of federal preemption labor disputes involving peaceful trespassory union activity. This Comment examines the Sears decision and its impact and concludes that although the decision purports to create only an exception to the doctrine of federal preemption, the Sears exception undermines the very purpose and efficacy of the doctrine itself.

INTRODUCTION

In San Diego Building Trades Council v. Garmon, the United States Supreme Court held that the National Labor Relations Board (NLRB) has exclusive jurisdiction over labor union activity arguably protected by section 7 of the Labor Management Relations Act or arguably prohibited by section 8 of the Act. In order


The Clayton Act constitutes Congress' first major attempt to regulate labor relations in the noncarrier field. Ch. 323, §§ 6, 20, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 17, 29 U.S.C. § 52 (1976)). Section 6 of the Clayton Act provided that federal antitrust law should not be construed to prohibit the existence of labor organizations. Section 20 of the Act barred federal courts from issuing injunctions in labor disputes. However, the United States Supreme Court lessened the impact of
to avoid state conflict with comprehensive national labor policies, Garmon established a broad doctrine of federal preemption of labor disputes. However, the Court has created numerous exceptions to Garmon since the doctrine's most complete expression in 1959.4

In 1978, the Supreme Court created perhaps the greatest exception to Garmon: Sears, Roebuck & Co. v. San Diego County District Council of Carpenters.5 In Sears, the Court found Garmon inapplicable to labor disputes involving union picketing which violated state trespass law. The broad principles enunciated in Sears may wholly undermine the concept of federal preemption of labor disputes.

This Comment considers the impact of the Sears decision. First, the Garmon doctrine and the doctrine's exceptions prior to Sears are outlined, followed by a discussion of the federal preemption issues raised by trespassory union activity. Finally, the Sears decision and its ramifications are analyzed.


Congress, in response to the Supreme Court's emasculation of the Clayton Act, enacted the Norris-La Guardia Act. Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)). The primary purpose of the Norris-La Guardia Act was to ensure that federal courts were prohibited from enjoining coercive union activity that did not involve fraud or violence.

The current National Labor Relations Act is the primary body of federal law controlling labor-management relations in private industry. The Act is the result of a three-stage legislative process. In 1935 Congress enacted the National Labor Relations (Wagner) Act (NLRA) which had two primary purposes: 1) to establish certain employee rights and 2) to impose affirmative obligations on employers to bargain collectively. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).


The Garmon Doctrine

The National Labor Relations Act (NLRA), as amended by the Labor-Management Relations Act (LMRA) and the Labor-Management Reporting and Disclosure Act (LMRDA), implicitly creates three types of union activity potentially subject to federal preemption. First, sections 76 and 8(a)(1)7 of the NLRA create protected activity. Second, section 8(b) creates prohibited activity.8 The third type of activity is that which sections 7 and 8(a)(1) do not protect and which section 8(b) does not prohibit.9 A series of Supreme Court decisions during the 1940s and 1950s laid the initial foundation for federal preemption of labor disputes. The general rule evolved that the NLRB had exclusive jurisdiction over labor disputes involving union activity which the NLRA clearly protected or prohibited.10 *Garmon* focused on arguably protected or arguably prohibited activities.

6. Section 7 provides that: "[e]mployees 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 . . . ." NLRA § 7, 29 U.S.C. § 157 (1976).

7. Section 8(a)(1) provides that "it shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of the title . . . ." Id. § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

8. In general, § 8(b) of the NLRA prohibits a union from 1) interfering with employees' § 7 rights, 2) engaging in secondary boycotts and strikes, and 3) engaging in recognitional picketing. *Id.* § 8(b), 29 U.S.C. § 158(b) (1976).


10. Decisions reflecting the development of the doctrine of federal preemption, in chronological order, are *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942) (threats of violence not governed by the NLRA and thus could not be enjoined); *Hill v. Florida ex rel Watson*, 325 U.S. 538 (1945) (striking down state law because it interfered with § 7 rights); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947) (potential conflict between state and federal labor policy sufficient reason to preclude state action); *U.A.W. Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949), overruled, *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 155 (1976) (union activity classified as being within the jurisdiction of either the NLRB or the state courts); *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953) (state courts could not enjoin peaceful picketing subject to the jurisdiction of the NLRB to prevent unfair labor practices, even if state courts were to apply a substantive rule of state law identical to federal law).
In *Garmon*, the Supreme Court held that the state and federal courts must defer to the exclusive jurisdiction of the NLRB if an adjudication involves labor activity arguably subject to sections 7 and 8 of the NLRA. The Court concluded that Congress intended to establish a uniform national labor policy. The Court recognized that in order to achieve this goal Congress had entrusted the administration of the NLRA to the NLRB, a centralized administrative agency armed with its own procedure and equipped with specialized knowledge and cumulated experience. Furthermore, the Court recognized that if labor disputes were litigated in multiple tribunals, each with its own diverse procedure, incompatible or conflicting adjudications would result, thereby disrupting Congress' goal of uniform federal labor policy.

The *Garmon* court indicated that state courts might have jurisdiction over disputes involving union activity which the NLRA neither protected nor prohibited. However, the Court's decision precludes state courts from making the initial determination where the union's activity is arguably subject to the NLRA. The NLRB has primary jurisdiction to characterize the union's activity. Only if the NLRB makes a clear determination that the NLRA does not protect or prohibit the activity can a state exercise its jurisdiction.

11. San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 244-45. Professor Howard Lesnick states that the approach taken under *Garmon* is as follows:

(1) If conduct is protected under section 7 or prohibited under section 8, there is preemption because federal law regulates the conduct and concurrent state regulation is not permitted;

(2) if the conduct is neither protected nor prohibited, there is no preemption because the conduct is not federally regulated, but

(3) if the conduct is "arguably" protected or prohibited, there is preemption because only the NLRB (subject to appellate review) can adjudicate questions under the Act, and thus determine whether the conduct in fact falls within proposition 1 or proposition 2.


16. Id. See also NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); Hanna Mining Co. v. District 2, Marine Eng'r's Beneficial Ass'n, 382 U.S. 181 (1965).

17. The term primary jurisdiction refers to "the various considerations articulated in *Garmon* and its progeny that militate in favor of preempting state court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal board." Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 189 n.20 (1978). But see 3 K. Davis, *Administrative Law Treatise* § 19.01 (1958) (Primary jurisdiction governs only the question whether the courts or the agency will initially decide an issue, not whether the courts or the agency will make the final decision).
risdiction to adjudicate the dispute. Thus, the Garmon Court established a broad doctrine of federal preemption of labor disputes.

Exceptions to the Garmon Doctrine

The courts, Congress, and the NLRB have continually created exceptions to the Garmon doctrine. There are three major judicial exceptions. The Supreme Court created the first two in the Garmon decision itself.

First, the Court exempted from the doctrine of federal preemption disputes involving matters of “peripheral concern” to the NLRA. The Court reasoned that exercise of state jurisdiction over matters of peripheral concern poses only a minimal threat to national labor policy. Matters considered to be of peripheral concern have generally related to purely internal union affairs, such as a union member’s suit to recover damages and for reinstatement to union membership when the member was allegedly expelled in violation of the union’s bylaws.

19. There is one minor judicial exception that should be noted. In Hanna Mining Co. v. District 2, Marine Eng’rs Beneficial Ass’n, 382 U.S. 181 (1965), the Supreme Court indicated that if only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the NLRB, Gar- mon should not be read to require preemption of state jurisdiction. Id. at 192-93.

The Supreme Court over the past two decades has consistently narrowed the peripheral concern exception to Garmon. In Amalgamated Ass’n of Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), the Supreme Court all but overruled Gonzales. The Court stated that the determination of the issue in Lockridge re-quired construction of the relevant union security clauses, but in Gonzales it re-quired merely an interpretation of the union’s constitution and bylaws. The result of the Lockridge decision is the increased preemption of cases involving internal union affairs. For a valuable discussion of the significance of the Lockridge deci-
Second, the Garmon Court created an exception for labor disputes involving state interests with "deeply rooted local feeling and responsibility." The Court will not infer that Congress has deprived states of the power to act with respect to such matters absent an express congressional intention to the contrary. The Court has long recognized a state's compelling interest in labor disputes involving violence, threats of violence, and mass picketing. State courts through their police powers may grant injunctions to restrain such conduct even though the conduct would constitute an unfair labor practice under the NLRA. In addition to violence, threats of violence, and mass picketing, the Court has more recently recognized a state's deeply rooted interest in labor disputes involving malicious defamation and intentional infliction of mental distress. In Vaca v. Sipes, the Supreme Court created a third judicial exception to Garmon for labor disputes in which state adjudication would promote rather than interfere with federal labor policy. In Vaca, the Court upheld a state's jurisdiction over a union member's suit in which the member sought damages and injunctive relief under state law for breach of a union's duty of fair representation. The Court concluded that the union's activity constituted an unfair labor practice under the NLRA. Nevertheless, the Court held that the NLRA did not preempt state jurisdiction since application of the state law would promote rather than interfere with Congress' goal of a uniform national labor policy.
In addition to the above-mentioned judicial exceptions, Congress has created four statutory exceptions to the doctrine of federal preemption of labor disputes. First, section 303 of the LMRA creates a cause of action for property owners injured by union activity constituting an unfair labor practice under section 8(b)(4) of the NLRA. The injured property owner may sue either in federal district court or in state court. The NLRB's jurisdiction and both state and federal court jurisdiction are concurrent under this section.

Second, under section 14(c) of the NLRA, Congress created residual state jurisdiction. Section 14(c)(2) provides that "[n]othing in this Act shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes which the Board declines . . .

jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and their effect upon the administration of national labor policies of permitting the state courts to proceed. Id. at 180.

34. Section 303 of the LMRA provides as follows:
   (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of [the National Labor Relations Act, as amended].
   (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.


35. Section 14(c) of the NLRA provides as follows:
   (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
   (2) Nothing in this Act, shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

NLR § 14(c), 29 U.S.C. § 164(c) (1976). Congress enacted § 14(c) in response to the dilemma created when the NLRB had jurisdiction to affect a labor dispute but declined to exercise it and the states lacked jurisdiction to do so. See Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).
to assert jurisdiction” over. The NLRB may decline to assert jurisdiction if it determines that the effect of the labor dispute on interstate commerce is not sufficiently substantial to warrant exercise of its jurisdiction.\(^3\)

Third, section 14(b) of the NLRA grants states the power to enact laws prohibiting union security agreements.\(^3\) In Retail Clerks Local 1625 v. Schermerhorn,\(^3\) the Supreme Court held that the state courts have the power to declare negotiated union shop agreements void and to enjoin their enforcement. The Court, in attempting to reconcile its decision in Garmon with its decision in Schermerhorn, stated that when a union security clause is negotiated in violation of the state’s law, the state court has jurisdiction over any dispute arising under the clause.\(^3\) Furthermore, states have the right to apply traditional forms of process to effectuate their own labor policies.\(^4\)

The fourth statutory exception arises under section 301 of the LMRA.\(^4\) Section 301 permits parties to a collective bargaining agreement to sue in either state or federal court for enforcement of the agreement. In Boys Markets, Inc. v. Retail Clerks Local 770,\(^4\) Boys Markets sought to enjoin a strike which violated the terms of a collective bargaining agreement. The Supreme Court found that, under the terms of the collective bargaining agreement, the grievance was subject to arbitration. Section 8 of the NLRA arguably prohibited the union’s activity in Boys Markets. Therefore, direct application of Garmon would have resulted in federal preemption. Nevertheless, the Court upheld the state’s power to enjoin the strike.\(^4\) The Court reasoned that the central

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4. Section 14(b) states as follows: “Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which execution or application is prohibited by State or Territorial law.” NLRA § 14(b), 29 U.S.C. § 164(b) (1976).
37. Section 14(b) states as follows: “Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which execution or application is prohibited by State or Territorial law.” NLRA § 14(b), 29 U.S.C. § 164(b) (1976).
39. Id. at 103.
40. Id. at 102.
41. Section 301 of the LMRA provides as follows:
   (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
43. Id. See also Kramer, Injunctive Relief Under Section 301 of the Labor Management Relations Act, in LABOR-MANAGEMENT RELATIONS 237 (1978).
purpose of the NLRA is not sacrificed by the limited use of equitable state remedies to further the important congressional policy of peaceful resolution of labor disputes.44

Commentators predicted that the Supreme Court would eventually have to decide whether to create an exception for labor disputes involving arguably protected or prohibited union activity that violated state trespass law.45 The trespass-preemption issue is complicated by constitutional considerations and by issues concerning the rights of private property owners. These considerations delayed a Supreme Court ruling on this issue.

Trespassory Union Activity—The Next Exception

The regulation of trespassory union activity creates a conflict between traditional notions of the rights of private property owners and a union's need for effective communication.46 Private property owners do not have an absolute right to exclude nonemployees and their unions from their property. In NLRB v. Babcock & Wilcox Co.,47 the Supreme Court held that an employer may ban nonemployees from distributing union literature if the nonemployees have reasonable alternate channels of communication. The Court indicated, however, that this right must yield if the nonemployees' reasonable attempts to communicate with otherwise inaccessible employees through the usual channels are ineffective.48 Hence, under Babcock an employer has only a qualified right to exclude a union from his property.

At one time, the conflict between private property rights and section 7 rights was thought to involve first amendment free speech considerations,49 further complicating the trespass-pre-


47. 351 U.S. 105 (1956).

48. Id. at 112.

49. First amendment free speech issues complicate the trespass-preemption issue because the Supreme Court at one time characterized picketing as a "speech-plus" activity. See Thornhill v. Alabama, 310 U.S. 88 (1940). The Court dramatically changed its position in Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284
emption issue. Food Employees Local 590 v. Logan Valley Plaza, Inc.\textsuperscript{50} represents the Supreme Court's first major attempt to resolve the conflict. In Logan Valley, the state court enjoined a union's peaceful picketing at a privately owned shopping center. The Pennsylvania Supreme Court affirmed on the ground that the picketing constituted a trespass under state law.\textsuperscript{51} The United States Supreme Court reversed.

The Supreme Court characterized the union's picketing as an exercise of its first amendment free speech rights. The Court held that the owners of the shopping center could not prevent the union from exercising its first amendment rights even though the exercise of those rights would violate state trespass law.\textsuperscript{52} The Court was able to find the requisite state action by stating that the owners had dedicated the center's walkways, streets, and parking lots to public use.\textsuperscript{53} Four years later the Supreme Court implicitly retreated from this position in Central Hardware Co. v. NLRB.\textsuperscript{54}

In Central Hardware, the NLRB, relying on Logan Valley, enjoined a union from soliciting on Central Hardware's private property.\textsuperscript{55} The Court of Appeals for the Eighth Circuit affirmed.\textsuperscript{56} The Supreme Court rejected the union's argument that it had a constitutional right to solicit Central Hardware's employees on the store's private property.\textsuperscript{57} The Court found Logan Valley inapplicable. The Court tenuously distinguished Logan Valley from Central Hardware on the ground that Logan Valley rested on principles of constitutional law rather than on principles of labor law.\textsuperscript{58} The Court remanded Central Hardware for consideration under its decision in Babcock.\textsuperscript{59}

In Hudgens v. NLRB,\textsuperscript{60} the Supreme Court effectively overruled Logan Valley. In Hudgens, the warehouse employees struck and

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(1957). States are generally free to regulate picketing for any purpose or in any reasonable fashion other than a blanket policy banning all picketing. \textit{But see NLRB v. Fruit & Vegetable Packers Local 760}, 377 U.S. 58 (1964) (thought to bring vitality back to \textit{Thornhill}).
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picketed the employer's retail store, which was located in a privately owned shopping center. The union filed unfair labor practice charges when the shopping center owners threatened to have union members arrested for trespassing. The Supreme Court held that despite the shopping center's public nature, it was not a governmental agency. Therefore, the owners were not subject to the proscriptions of the first amendment. The union did not have a constitutional right to picket.61

The Court recognized that the basic objective of the NLRA is the accommodation of section 7 rights with the rights of private property owners with as little destruction of one as is consistent with the maintenance of the other.62 The Supreme Court, however, went on to state that the locus of that accommodation may fall at differing points along the spectrum depending upon the nature and strength of the respective section 7 rights and private property rights asserted in any given context.63

The Supreme Court, in effect, established that under certain circumstances nonemployee union representatives have a right protected under section 7 to enter the employer's premises and to commit a trespass in violation of state law. The difficulty is discerning when a trespass is protected. If the trespass is not protected by the NLRA, then, a fortiori, the employer has a right to exclude the union. It is at this juncture that the trespass-preemption issue arises.

Theoretically, an employer has three means of enforcing his right to exclude a union from his private property. First, an employer can use self-help.64 Relying on basic principles of tort law, the employer can use reasonable force to remove the union from his premises.65 However, this is not an effective method of enforcing an employer's right to exclude a union from his property because the employer would be exposed to unfair labor charges or to liability for damages suffered by the union as a result of an eviction with unreasonable force.66

61. Id. at 521.
62. Id.
63. Id.
66. Id.
Second, an employer can enforce his right to exclude a union from his property by filing unfair labor charges in hopes of securing relief from the NLRB.67 The effectiveness of this alternative depends upon the nature of the union's conduct. The employer must be able to prove that the union's conduct constitutes an unfair labor practice. If, after the charges are filed, the NLRB's regional attorney determines that there is reasonable cause to believe that the charges are valid, a temporary restraining order enjoining the activity may be sought from the federal district court.68 If the NLRB finally determines that the union's conduct constitutes an unfair labor practice, the Board is empowered to issue a cease and desist order enjoining the union.69

Third, an employer can sue in state court for an injunction against the union's alleged trespassory activity.70 If the union's conduct is arguably protected or prohibited by the NLRA, the issue of whether the state court jurisdiction is preempted under Garmon is raised. Prior to Sears, the probability of success of suing in state court depended upon how the particular state court had ruled on the issue.

The state courts split on the trespass-preemption issue in the absence of guidance from the Supreme Court.71 In Meat Cutters v. Fairlawn Meats, Inc.,72 the Supreme Court left open the trespass-preemption issue. The Court had a second opportunity to decide the issue when it granted a writ of certiorari in Taggart v. Weinrackers, Inc.73 However, the Court eventually dismissed Taggart, stating that the record had become obscured and only remnants of the original dispute remained.74 The Supreme Court finally faced the trespass-preemption issue in Sears, Roebuck &

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67. NLRA § 10(a), 29 U.S.C § 160(a) (1976).
69. Id. § 10(c), 29 U.S.C. § 160(c) (1976).
71. State court decisions holding that state court jurisdiction over arguably protected trespassory union activity was not federally preempted include Musicians Union Local 6 v. Superior Court, 69 Cal. 2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968); Reece Shirley & Ron's, Inc. v. Retail Store Employees, 22 Kan. 373, 555 P.2d 585 (1977); Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961). For state court decisions holding that state court jurisdiction is not preempted, see May Dep't Stores Co. v. Teamsters Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1975); People v. Bush, 39 N.Y.2d 559, 349 N.E.2d 832, 384 N.Y.S.2d 733 (1976); Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 766 (1964).
Co. v. San Diego County District Council of Carpenters. 75

THE SEARS EXCEPTION TO GARMON

The Facts of Sears 76

In Sears, the respondent, San Diego County District Council of Carpenters (Union), and the Building Trades Council of San Diego County had entered into a master labor agreement concerning the use and dispatch of carpenters. The petitioner, Sears, Roebuck & Co. (Sears), was having carpentry work performed at its store in Chula Vista, California, by workers who had not been dispatched by the Union hiring hall. Two Union business representatives determined that the work was within the ambit of the master labor agreement and that the men Sears had hired came within the classification of journeymen carpenters.

The Union demanded either that Sears contract the work through a Building Trades contractor who would have used union-dispatched carpenters or that Sears agree to sign a short form agreement to abide by the terms of the master labor agreement. Sears neither accepted nor rejected the Union’s requests, despite the Union’s repeated inquiries over the next two days.

Sears’ unresponsiveness caused the Union to establish picket lines on Sears’ private property. The pickets patrolled either the walkways next to the store or the adjacent parking lot. The picketing was at all times peaceful, involving no threat of violence or obstruction of traffic. The Union refused Sears’ requests to remove the pickets. The Union’s business representative stated that the Union would remove the pickets only if ordered to do so by the courts.

Sears filed suit in the Superior Court of California to have the pickets enjoined. The court granted Sears’ motion for a temporary restraining order, enjoining the Union from picketing on Sears’ private property. The Union promptly ceased picketing and began patrolling the public sidewalks nearest the store. Soon thereafter the Union discontinued the picketing because it was

76. The nature of the labor dispute involved in the Sears fact situation clearly warranted federal preemption under Garmon. Id. at 215 (Brennan, J., dissenting). The facts are significant because there are no unusual facts or circumstances involved. As Justice Brennan stated, Sears is a “classic one for preemption.” Id. at 224.
too far removed from the store to be effective.

The superior court granted Sears' motion for a preliminary injunction, restraining the Union from causing, instigating, furthering, participating in, or carrying on picketing on plaintiff's property. The California Court of Appeal affirmed. The court of appeal rested its decision on two grounds. First, the court concluded that Central Hardware was controlling. The court stated that the first and fourteenth amendments to the United States Constitution did not protect the Union's picketing. Second, the court determined that state law did not prohibit the injunction.

The court of appeal rejected the Union's contention that the dispute involved labor activity arguably protected by section 8 of the NLRA and that therefore the state court lacked jurisdiction under Garmon. The court concluded that illegal trespassory picketing fell within the "deeply rooted" exception to Garmon, despite the picketing's arguably protected nature. The Union appealed to the California Supreme Court.

The California Supreme Court reversed, holding that Garmon directly controlled the case. The court concluded that the union's activity was both arguably protected under section 7 of the LMRA and arguably prohibited by section 8 of the LMRA.

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77. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975). (This decision has been deleted from the official reporter. Consequently, citations to the California Court of Appeal decision in this case will be solely to the California Reporter.)

78. Id., 125 Cal. Rptr. at 254.

79. Id. at 252. California law had adopted the position that under certain circumstances, the use of trespass laws in labor controversies would have no relevance to the function of the NLRB. Therefore, the state's power to enjoin trespasses would not interfere with NLRB jurisdiction over the merits of the labor controversy. Musicians Local 6 v. Superior Court, 69 Cal. 2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968) (citing Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 63 (1966)).


81. Id.


83. The California Supreme Court concluded that the Union had two purposes in picketing Sears. First the Union sought to secure work for the Union's members. Second, the Union wanted to publicize Sears' undercutting of wages below prevailing area standards for the employment of carpenters. Id. at 899, 553 P.2d at 609, 132 Cal. Rptr. at 448. In Musicians Local 6 v. Superior Court, 69 Cal. 2d 695, 447 P.2d 313, 73 Cal. Rptr. 201 (1968), the court had recognized that a labor union seeking to broaden the employment opportunities of its members pursues an objective arguably protected by § 7 as an activity for the employees' mutual aid or protection. Picketing for an employees' mutual aid or protection is a classic form of concerted activity within the meaning of § 7. In Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 200-01 (1970), the United States Supreme Court held that primary area standards picketing was protected under § 7.

84. The California Supreme Court concluded that the Union's activity may
The state court, therefore, lacked jurisdiction over the controversy. Sears successfully petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court reversed.

The Sears Decision

The Supreme Court's decision in Sears rests on two significant premises. First, the Court accepted the California Court of Appeal's determination that the location of the Union's picketing violated state trespass law. This premise is significant because if the NLRA did not arguably protect or prohibit the Union's picketing, then the superior court had jurisdiction and state grounds to properly enjoin the Union. Second, the Court concluded that the picketing was both arguably prohibited and arguably protected by the Act. This premise is significant because, having once reached this conclusion, strict application of Garmon would have resulted in federal preemption of the dispute.

In resolving the Garmon issue, the Sears Court analyzed the arguably prohibited branch of the Garmon doctrine and the arguably protected branch of the doctrine separately. The Court stated that the arguably prohibited branch of Garmon was designed to avoid a risk of state interference with the NLRB's un-
fair labor practice jurisdiction when the same controversy is presented to a state court. The Court held that the critical inquiry is whether the controversy presented is identical to or different from the controversy which could have been, but was not, presented to the NLRB.

With respect to the arguably protected branch of Garmon, the Court held that the mere fact that the Union's trespass was arguably protected is insufficient reason to deprive the state courts of jurisdiction. The Court advanced two reasons for this holding. First, the Court reasoned that Garmon's primary jurisdiction rationale "does not provide a sufficient justification for preempting jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." Second, the Court reasoned that "permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected".

**A Critical Analysis of Sears**

**The Arguably Protected Aspect of Sears**

The Sears Court's major concern was to bridge the gap created by the interaction of Garmon, Babcock, and Hudgens, wherein an employer could not effectively challenge trespassory union activity. If an employer sought relief from a state court, the state court would have to determine whether the trespass was protected. However, strict application of Garmon would result in federal preemption of the lawsuit. The difficulty was that the employer could take only the trespass issue to the NLRB if the employer interfered with the union's activity, thereby forcing the union to file unfair labor practice charges. However, if the union chose not to file charges, the employer property owner was without a remedy. The employer was in a "no-man's land."

*Sears* effectively establishes a remedy by excepting state juris-

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88. Id. at 197.
89. Id.
90. Id. at 200.
91. Id. at 202-03.
92. Id. at 205.
94. See text accompanying notes 67-69 supra.
diction over union activity violative of state trespass law from NLRB preemption. In order to achieve this result, the Sears Court was forced to find Garmon inapplicable. The Court held that when an employer is without a remedy and is unable to present the protection issue to the NLRB, Garmon's primary jurisdiction rationale does not warrant preemption.95

However, even assuming, arguendo, that the Court was correct in finding that Garmon's primary jurisdiction rationale does not provide sufficient justification for preempting state jurisdiction, Garmon's second rationale was to avoid the danger of state court interference with federally protected conduct.96 In order to circumvent this aspect of Garmon, the Sears Court was forced to conclude that state court evaluation of the merits of an argument that certain trespassory union activity is protected does not create an unacceptable risk of state interference with federal labor policy.97

The Court based its conclusions on three considerations. First, the Court found trespassory union activity rarely to be protected.98 Second, unions have a reasonable means of bringing the protection issue to the NLRB.99 Third, the concern for the employer's "no-man's land" dilemma outweighed any risk of an erroneous state court adjudication.100 A critical evaluation of these three considerations indicates insufficient support for the Court's holding.

Addressing the first consideration, the Court summarily stated that "while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the act teaches that... a trespass is far more likely to be unprotected."101 The Sears Court's conclusion is both objectionable and erroneous.

The Court's decision is objectionable in that the Court disregards the purpose and effect of the Garmon doctrine—the preemption of state jurisdiction over disputes involving activity in

96. See text accompanying notes 11-14 supra.
98. Id.
99. Id. at 207.
100. Id. at 206.
101. Id. at 205.
"which the question whether it is protected is fairly debatable" (that is, arguably protected activity). The Sears Court's decision is erroneous in that the Court, without citing authority, assumes that a trespass is more likely to be unprotected. The Court fails to recognize that the only trespassory union activity that clearly will be unprotected involves mass picketing, violence, or obstruction. \(^\text{102}\) Under these circumstances, the Garmon doctrine does not deny an employer the opportunity to obtain injunctive relief and damages from the state courts. \(^\text{103}\) Furthermore, if the union is engaged in trespassory picketing with an objective prohibited by section 8(b), the employer may file an unfair labor practice charge. The NLRB is empowered in such instances to issue cease and desist orders. \(^\text{104}\)

In addressing the second consideration, the Court stated that unions have an adequate opportunity to present the protection issue to the NLRB for determination. \(^\text{105}\) The NLRB, as amicus curiae, took the position before the Sears Court that it would consider an employer's mere act of informing the union that it was not permitted on the employer's property a sufficient interference with section 7 rights to warrant the issuance of a section 8(a)(1) complaint. \(^\text{106}\) The NLRB's position theoretically narrows the gap because it makes it easier for the union to file unfair labor practice charges.

The Court erroneously assumes that when a union has a strong argument that its trespassory activity is in fact protected, the union will, in fact, file unfair labor practice charges. In effect, the Court has placed the burden of raising the protection issue on the union. The union must now protect itself from erroneous state adjudications. By placing the burden on the union to raise the protection issue before the NLRB, the Sears Court has created serious procedural and policy problems.

The union's filing of unfair labor charges against the employer

\(^{102}\) See text accompanying notes 23-30 supra.

\(^{103}\) Id.

\(^{104}\) Section 10(c) of the NLRA provides that:
If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . .

NLR\(\text{A}\) § 10(c), 29 U.S.C. § 160(c) (1976).


with the NLRB creates two significant procedural problems. First, if the charges are filed prior to the employer's filing of an action in state court, will the state court's jurisdiction be preempted? Second, if the union files charges subsequent to the employer's filing of an action in state court, will state court proceedings be stayed? Furthermore, what will be the effect of subsequently filed unfair labor practice charges on temporary, preliminary, or final state court orders? The majority opinion leaves these problems unresolved. Absent guidance from the Supreme Court, lower federal courts and state courts will inevitably reach different resolutions of these procedural problems. Procedural differences will produce substantive differences, thereby interfering with uniform national labor policies.

Placing the burden of taking the protection issue to the NLRB on the union by forcing it to file unfair labor practice charges creates serious policy problems as well. The Court simply assumes that because a union could file unfair labor practice charges against an employer, the union will file such charges. This assumption ignores any economic or strategic considerations that play a part in a union's decision to file charges. A union may have insufficient funds to become embroiled in litigation. The union will then be forced to discontinue what may otherwise be protected activity.

With respect to the third consideration, the Court stated:

Whatever risk of an erroneous state court adjudication does exist is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by § 7.

The Sears Court erroneously assumes that the damage incurred by the employer as a result of the unremedied peaceful picketing exceeds the damage that the union will suffer if its protected activity is enjoined.

Traditionally, mere infringement of general property rights has been insufficient damage to warrant complete denial of union ac-

107. Justice Blackmun in his concurring opinion stated that as a logical corollary of the majority's decision, state jurisdiction will be preempted in both situations. Id. at 209. (Blackmun, J., concurring).
108. See id. at 233 (Brennan, J., dissenting).
cess to the employer's private property.\textsuperscript{111} Employers may not absolutely ban employee solicitation.\textsuperscript{112} Furthermore, an employer must afford nonemployees access to his property under certain circumstances.\textsuperscript{113} Thus, the Court has recognized that effective communication is necessary for the protection, preservation, and exercise of section 7 rights.

In contradistinction, the Court has in the past denied or at least circumscribed employee and union access to an employer's private property if the employer can demonstrate that denial of employee or union access is necessary for efficiency, safety, discipline, or legitimate business purposes.\textsuperscript{114} In these exceptional circumstances, the Court has recognized that the employer's right to be free from trespass outweighs a union's need for access to employees. The \textit{Sears} Court attempted to bring its decision within the ambit of these exceptional circumstances. However, in its analysis, the Court fails to identify why the risk of state court adjudication and the resulting detriment to the union is outweighed by the employer's right to be free from trespass.

Unions suffer both tangible and intangible damage when labor activity is enjoined. One major difficulty is that the efficacy of union activity greatly depends on how, where, and when the activity takes place.\textsuperscript{115} If an injunction against union activities forces the union to engage in the enjoined activities in another manner, in another place, or at a different time, the efficacy of the union's activity may be greatly reduced. This reduction in the efficacy of the union's activity is repugnant to Congress' goals in initially enacting federal labor law.\textsuperscript{116}

\textbf{The Arguably Prohibited Aspect of Sears}

The \textit{Sears} Court stated that the reasons federal preemption of state jurisdiction is normally appropriate when union activity is

\textsuperscript{112} Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
\textsuperscript{113} See text accompanying notes 46-63 \textit{supra}.
\textsuperscript{114} McDonnell Douglas Corp. v. NLRB, 472 F.2d 539 (8th Cir. 1973); Marshal Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1953); Stoddard Quirk Mfg. Co., 138 NLRB 615 (1962); Peyton Packing Co., 49 NLRB 828 (1943), \textit{enforced}, 142 F.2d 1009 (5th Cir.), \textit{cert. denied}, 323 U.S. 730 (1944).
\textsuperscript{115} The facts in Sears illustrate this point. After the superior court issued an injunction, Sears removed the pickets to the public sidewalks. The Union eventually removed the pickets because the picketing was too far removed from the store and thus ineffective. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).
\textsuperscript{116} See note 114 and accompanying text \textit{supra}. 940
arguably prohibited do not apply to trespassory union activity. The Court justifies this conclusion by further stating that only if the controversy presented to the state court is identical to that which could have been presented to the NLRB is there a risk of state court interference with NLRB jurisdiction.

The Sears Court erroneously assumes that if the controversy presented to the state court differs from the controversy which could be presented to the NLRB, one avoids the risk of state interference with NLRB jurisdiction. The Court mistakenly contends that the risk of state interference with NLRB jurisdiction is avoided because the state court in deciding the trespass issue does not have to make "relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred." The Court errs in assuming that the state court, in deciding the state trespass issue, need not make complex factual and legal determinations under federal labor laws. As previously noted, under Babcock and Hudgens, the employer may have only a qualified right to exclude the union from his private property. The state court in deciding the trespass issue must necessarily determine whether the union had reasonable alternative means of communication. This determination clearly involves complex factual and legal issues similar to those often decided by the NLRB. Where did the picketing take place on the employer's property? How effective was the communication? What was the union's purpose in trying to communicate with employees of the employers?

A state court must look to the NLRB decision and criteria in order to determine the protected nature of the trespassory picketing. A state court may have a predisposed attitude towards organized labor, or the court may lack expertise in labor law. These two factors may cause a state court to misconceive or mis-

118. Id. at 197.
119. Id. at 198.
120. See text accompanying notes 46-48 supra.
apply the NLRB decision or criteria.\textsuperscript{122} The state court in fact does run a risk of enjoining protected activity. This is the very result which Garmon sought to avoid.

CONCLUSION

The Supreme Court's decision in Sears is of considerable legal consequence for two reasons. First, the decision has a significant impact on the ability of employees to exercise their section 7 rights effectively. Second, the decision has a significant impact on the current validity of the Garmon doctrine.

The Sears decision has a significant impact on employees' abilities to exercise their section 7 rights effectively because the decision does not make a proper accommodation of those rights and the rights of private property owners as required under Babcock. Employees' rights to self-organize, to form, join, and assist labor organizations, and to engage in concerted activities depend on effective communication. Moreover, the union's ability to reach other employees and members of the public should not be unduly restricted. When protected union activity is improperly enjoined as a result of the application of state trespass law, the efficacy of union activity is impaired. This result is repugnant to the purpose of the NLRA in light of the minimal damage or impairment to employers' property rights.

Sears has a significant impact on the current validity of the Garmon doctrine. The Supreme Court created a new exception for trespassory union activity rather than finding that trespassory union conduct fell within one of the preexisting exceptions as did the California Court of Appeal. The Supreme Court's rationale in Sears completely disregards the very purpose and effect of the Garmon doctrine. Although the Sears Court did not overrule the Garmon doctrine, the exception created by the Court in Sears signals the doctrine's demise.

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