LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT, SECTION 14 (c) AND NATIONAL LABOR POLICY REQUIRE AFFIRMATIVE DECLINATION BY NLRB BEFORE STATE MAY ASSUME JURISDICTION. *Stryjewski v. Local 830, Brewery Distributor Drivers* (Pa. 1967).

Plaintiff, owner-operator of a small beer distributorship in Philadelphia, was picketed by the Beer Drivers' Union for the purposes of advertising the non-union nature of the business and organizing the employees. Since plaintiff's source of supply was a union shop, the drivers supplying him would not cross the picket lines; and, as a consequence, profits began to decline. In addition, due to a collective bargaining agreement between the union and the supplier, plaintiff was prevented from procuring beer at the supplier's place of business. Plaintiff requested a preliminary injunction from the Court of Common Pleas in Philadelphia in order to restrain the union from picketing until the merits of the case could be heard. State relief was sought because the number of the plaintiff's employees and his yearly gross sales did not meet the National Labor Relations Board's[1] minimum jurisdictional standards for a retail enterprise.[2] The court, however, refused to entertain the suit, reasoning that the jurisdiction of the Board was exclusive over disputes that are *arguably* within the minimum standards. On appeal to the Supreme Court of Pennsylvania, *held*, affirmed: A state court should not assume jurisdiction over a labor dispute until the National Labor Relations Board has affirmatively declined jurisdiction. *Stryjewski v. Local 830, Brewery Distributor Drivers*, 426 Pa. 512, 233 A.2d 264 (1967).

The field of labor relations has, in the past, been one of federal preemption.[3] Yet, the disparity between a judicially idealistic doctrine

---

[1] National Labor Relations Board, created under the National Labor Relations Act, 49 Stat. 449 (1935), *as amended* Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 151-187 (1964), is authorized to assume jurisdiction in all disputes which "affect" interstate commerce. For the definition of "affecting commerce" see 29 U.S.C. § 152(6)(7) (1964).

[2] Under the discretionary authority granted by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) § 701(a) (presently codified in Labor-Management Relations Act at 29 U.S.C. § 164(c)(1)(2) (1964)), the Board announced that it will assert jurisdiction over all retail business having a yearly gross volume of at least $500,000. *See* NLRB Release No. R-576, October 2, 1958, 42 LRRM 96 (1958).

[3] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1, 11 (1957); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 476 (1955); Garner v. Teamsters, Local, 776, 346 U.S. 485, 490-91

of a uniform labor policy and the lack of administrative funds[4] for such a policy created the proverbial "no man's land" in labor relations. The genesis of this problem can be traced to *Guss v. Utah Labor Relations Board*[5] where the Supreme Court ruled that states were without authority to assume jurisdiction over disputes within the NLRB's statutory jurisdiction. After *Guss*, however, the Board, because of administrative overload, continued to exercise its discretion in refusing to hear all cases within its exclusive jurisdiction.[6] The combination of these two factors produced the jurisdictional gap—labor's "no man's land."[7] Congress, in passing Section 701 of the Labor Management Reporting and Disclosure Act, which amended the Labor Management Relations Act of 1947, attempted to end this quandary.[8] The amendment, now incorporated as section 14(c)(1)(2) of the LMRA, gives the states residual jurisdiction:

> (c)(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 jurisdiction.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.[9]

Although the amendment was designed to eliminate the jurisdictional

---

(1953). See McCoid, *Notes on a "G-String"; A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205, 206 n.6 (1959) for helpful articles in this area.

4 Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 735 (1961).

5 353 U.S. 1 (1957).

6 *E.g.*, Liddon White Truck Co., 76 N.L.R.B. 1181 (1948).

7 *See generally* Cohen, *Congress Clears the Labor No Man's Land*, 56 NW. U.L. REV. 333 (1961); COX, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); Hanley, *Federal-State Jurisdiction in Labor's No Man's Land: 1960*, 48 GEO. L.J. 708 (1960); McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959).

8 One writer states that:

> [s]ince a majority of the states do not have a 'modern' labor relations code which grants, among other things, the right of self organization and collective bargaining, this solution of the no man's land problem must be counted as a net loss to workers and to the trade union movement.

Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195, 235 (1960).

9 29 U.S.C. § 164(c)(1)(2) (1964).

gap by giving the states jurisdiction over labor disputes[10] declined[11] by the Board, it has inadvertently created a "hesitation land" in some states because courts will not utilize the amendment to act initially in determining jurisdiction. This hesitation stems from pre-LMRDA decisions by the Supreme Court in the area of federal preemption. The most important of these is *San Diego Building Trades Council v. Garmon*[12] in which the Court held that the states cannot assume jurisdiction over conduct *arguably* protected under section 7 or prohibited under section 8 of the amended National Labor Relations Act.[13] Though Congress has made evident its intention for the states to assume jurisdiction where the Board so declines, one of the questions yet to be answered by either Congress or the Supreme Court is: Must the Board make the initial determination whether an enterprise will satisfy its jurisdictional yardstick, or may the states under section 14(c)(2) make the determination before assuming jurisdiction?[14]

Under section 14(c), the Board has promulgated monetary guidelines due to its inability to handle all the cases over which it has legal jurisdiction.[15] The standard for retailers is determined by gross volume of yearly sales.[16]

In the *Stryjewski* case, the plaintiff was a retailer with a yearly sales volume of $230,000, whereas the minimum retail volume established by the Board is $500,000. Nevertheless, the court chose to remain within the shadow of the *Garmon* requirement,[17] *i.e.*, that the dispute

---

10 "Labor Dispute" as defined in the National Labor Relations Act, ch. 372, § 2(9), 49 Stat. 449 (1935) (presently codified in 29 U.S.C. § 152(9)):

> [I]ncludes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating . . . or seeking to arrange terms or conditions of employment . . . .

11 The Board, in 1958, used press releases to establish its jurisdictional yardsticks, and Congress ratified this action by requiring the Board not to decline jurisdiction over any case over which it would have assumed jurisdiction on August 1, 1959. Thus far, however, the Board has failed to utilize the Administration Procedure Act, as provided for in section 14(c)(1), to decline jurisdiction.

12 359 U.S. 236 (1959).

13 *Id.* at 246. See § 7 and § 8 of the *amended* National Labor Relations Act (presently codified in 29 U.S.C. § 157-58 (1964)) for the federally protected and prohibited unfair labor practices.

14 Another question that arises after the states have in some manner assumed jurisdiction is: May the states apply any law to decide the labor dispute? This question is not explored. *Compare* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1098 (1960) *with* Papps, *Section 701 and the State Courts: What Law to Be Applied?*, 48 GEO. L.J. 316, 317 (1959).

15 *See* Siemons Mailing Serv., 122 N.L.R.B. 80, 81 (1958), *amended*, 124 N.L.R.B. 594 (1959).

16 Carolina Supplies & Cement Co., 122 N.L.R.B. 88 (1958).

17 426 Pa. 512, —, 233 A.2d 264, 267 (1967). *Accord*, Lay v. Electrical Workers,

not be arguably within section 8 before the state court assumes jurisdiction. After applying the *Garmon* "arguably" test, the court assumed *arguendo* that even if the plaintiff had been able to prove in the lower court that, due to his $230,000 gross volume, the Board would in all probability decline jurisdiction, the question still remained as to whether the state court could assume jurisdiction before the NLRB had *in fact* refused to hear the dispute.

Because of this somewhat cryptic nexus between the "arguably" test and *in fact* declination by the Board, the inference to be drawn from *Stryjewski* is that arguability has been liberally extended to include "slight probability," and therefore—as a practical matter—states cannot assume jurisdiction without an actual NLRB declination.

This liberal interpretation, however, appears tenuous. Mr. Justice Bell, in his dissenting opinion, highlights the illogic of the majority by stating: "In these highly controversial and emotional days, the [arguably test] . . . is one of the most unrealistic and unjustifiable ever invented. Is there any topic, subject, question or issue upon which there is no argument today? The aforesaid 'arguably' test should be quickly changed by Congress or by the Supreme Court."[18]

The only instances in which the "arguably" test appears palatable occur when there is a close question as to meeting the Board's standards or when the facts reveal that the minimum business volume necessary for Board determination has been exceeded. Illustrative of this latter instance is the Supreme Court of Pennsylvania's decision in *Lay v. Electrical Workers, Local 174*[19] decided subsequent to *Stryjewski*. There the court was concerned with a non-retail firm—the Board's minimum standard for which is $50,000, measured by an inflow-outflow volume.[20] Since the plaintiff's business volume was

---

Local 174, 427 Pa. 387, 235 A.2d 402 (1967); Cox's Food Center, Inc. v. Retail Clerks, Local 1653, 420 P.2d 645 (Idaho 1966) (required lower court to petition for advisory opinion before making any decision on the merits); Council of Carpenters v. District Court, 155 Colo. 54, 392 P.2d 601 (1964) (distinguished in Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 27, 409 P.2d 926, 929, 48 Cal. Rptr. 702, 705 (1966) as a case obviously falling within Board's standards); Russell v. Electrical Workers Local 569, 43 Cal. Rptr. 725 (1966), *rev'd*, 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966); Barksdale & Le Blanc v. Local 130, Elec. Workers, 143 So. 2d 770 (La. Ct. App. 1962).

18 426 Pa. 512, —, 233 A.2d 264, 269 n.4 (1967).

19 427 Pa. 387, 235 A.2d 402 (1967).

20 Although difficult to apply because the commerce data required by this standard is complex, the inflow-outflow is a more accurate indication of impact on interstate

$73,000 and the dispute could possibly be disruptive of interstate commerce upon its facts, the case was "arguably" if not obviously within the Board's jurisdiction.

However, under the *Stryjewski* facts, the same court gave the "arguably" test a strained interpretation because of the conclusion that an attempt by the states to apply the Board's standards, as well as the numerous variables utilized in administrative determinations, would lead to a chaotic situation. Reverting to the spirit of *Garmon*,[21] the court envisaged this chaos as inimical to the national labor policy.

Contrary to the *Stryjewski* rationale, commentators have criticized[22] any attempt to apply the *Garmon* test to a determination whether the NLRB would assert jurisdiction in a particular case on the basis of its published jurisdictional yardsticks. The proper application of the *Garmon* doctrine, it is contended, should be limited to a determination whether the conduct complained of is protected or prohibited under the amended Act; furthermore, it is believed that the question whether the Board would assume jurisdiction over such conduct cannot be decided on the basis of the *Garmon* decision.

This contention, however, overlooks the methodology used by the Board in considering jurisdiction. Indeed, the determination of a procedural problem has in many cases involved a decision of substantive law.[23] The Board has considered the nature of the action in conjunction with the application of the jurisdictional standards. For instance, in a case involving a secondary boycott of a retail enterprise, the primary employer who seeks relief will have added to his gross volume the volume of the boycotted firm. This relatively simple example may be expanded to encompass the following situation: The Board in a union's petition for election refuses to hear the dispute because of the inadequate dollar volume. The union, unable to obtain relief, begins a secondary boycott of firms supplying the employer. The Board will now decide the original unfair labor prac-

commerce than the gross volume yardstick. This is due to the fact that the inflow-outflow yardstick measures the volume crossing state lines.

21 The *Garmon* Court stated, "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts 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." 359 U.S. at 245.

22 Hanley, *supra* note 7, at 713; 80 HARV. L. REV. 1600, 1603 (1966).

23 Senator Morse remarked during debate on section 14(c)(1): "The same employer and indeed the same labor dispute can be both inside and outside of the Board's standards, depending on the nature of the proceeding." 105 CONG. REC. 17878 (1959).

tice based upon the additional dollar volume of the boycotted firms.[24] However, the Board will not exercise its jurisdiction to hold an election on the basis of the union's petition, since that issue involves only the primary employer, whose gross volume of business continues to fall short of the jurisdictional yardstick.

Other factors frequently taken into account by the Board are the lowering of the employer's volume because of strikes,[25] and the lack of volume figures for the entire year.[26] In the former instance, the Board will not take the lower volume; rather, it will look to preceding years' records. In the latter case, the enterprise's yearly earnings will be projected according to available information. The Board, in addition to these factors, has considered whether the enterprise is related to the national defense,[27] or whether it consists of many integrated companies.[28] To compound the problem, the possibility always exists that the Board may expand its jurisdiction at any time.[29] The questions now arise whether the states could apply the complex variables presently utilized by the Board, and whether Congress intended them to do so.

Since the inclusion of section 14(c) in the Labor Management

---

[24] McAllister Transfer Inc., 110 N.L.R.B. 1769 (1954); Reilly Cartage Co., 110 N.L.R.B. 1742 (1954).

[25] Hygienic Sanitation Co., 118 N.L.R.B. 1030 (1957).

[26] City Line Open Hearth, Inc., 141 N.L.R.B. 799 (1963).

[27] In Ready Mixed Concrete and Materials, Inc., 122 N.L.R.B. 318, 320 (1958), the Board stated that to effectuate the Act it must assert jurisdiction over operations that "exert a substantial impact on national defense irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards."

[28] T. H. Rogers Lumber Co., 117 N.L.R.B. 1732 (1957). For an example of the complexities of a jurisdictional determination in this area, see Pacific Hosts, Inc.—Padre Trails Motel Corp., 156 N.L.R.B. 1467 (1966) where the Board combined not only the volume of the management consultant firm (Pacific Host, Inc.) and the managed motel (Padre), but also lumped together all other motels which Pacific Host, Inc. had similarly managed.

[29] *See* Cox, *supra* note 7, at 262. The Board is free at any time to expend its discretionary power in either a "class or category of employers," but cannot under section 14(c) reduce its jurisdiction from the level established in August 1, 1959. The existing doctrine of federal preemption over labor relations was reinforced as a result of this added restraining clause. The Senators favoring the maintenance of a strong federal labor policy chose August 1 because as of that date labor and management enjoyed their greatest amount of federal protection.

For an example of the Board using its discretion in choosing a "class" of employer over whom it will assert jurisdiction, see Flatbush General Hospital, 126 N.L.R.B. 144 (1960). Congress, in allowing the Board in its discretion to choose or restrict an entire class of employees, nullified the Supreme Court decision in Hotel Employees Local 255 v. Leedom, 358 U.S. 99 (1958). Note, Evangline Downs, Inc. v. Pari-Mutual Clerks, Local 328, 191 So. 2d 358 (La. Ct. App. 1966) where the state court refused to assert jurisdiction even though the Board has never heard a dispute involving the racing industry.

Relations Act, several views have been proposed which attempt to theorize what Congress intended. First, there is the view espoused in *Stryjewski* that Congress did not write section 14(c) with the idea of removing small businesses from the purview of the national labor policy,[30] and to this extent *Garmon* remains a valid expression of that policy.[31] Another theory regards the policy of administrative advisory opinions[32] as evidence that section 14(c) does not give state courts carte blanche to disregard the Board.[33]

However, in opposing these interpretations, those who advocate that states may assume jurisdiction without a specific declination, theorize that a simple reading of section 14(c) manifests a congressional intent to permit a general Board declination of jurisdiction in lieu of a case by case approach. The tenor of the discussion in Congress, it is contended,[34] does not indicate that the Board's declination was to be a condition precedent to seeking state relief.

---

[30] Senator John Kennedy remarked during the Conference Committee report:

> In that connection, I assure the Senator from Colorado that I shall watch very carefully what actions are taken by these various States, because if any effort is made to use this provision as an opportunity to limit rights which all of us believe all American working people and employers in these States have, then it will be very easy under this provision for the National Labor Relations Board by administrative decision to assume much fuller jurisdiction. 105 CONG. REC. 17902 (1959).

For a capsule summary of the debates, see Blumrosen, *The New Federalism In Labor Law*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 693, 722 (R. Slovenko ed. 1961). *But see* McCoid, *supra* note 3, at 249-56.

[31] McCoid, *supra* note 3, at 240 believes that the Board, in light of *Garmon*, should decide all questionable cases of jurisdiction. He apparently does not think *Garmon* requires an initial Board determination in all questions involving jurisdiction.

[32] Under the procedure established in 29 C.F.R. §§ 101.39, 101.40, 24 Fed. Reg. 9115 (1959), an advisory opinion may be requested by any party to a labor dispute or by any state court or agency for a dispute before it. The petition for the opinion must allege the nature of the business and information regarding its finances and commerce.

The advisory opinions were instituted to expedite the jurisdictional determination. They are given great weight by the courts, but are not binding on them. In Hirsch v. McCulloch, 303 F.2d 208 (D.C. Cir. 1962), the court held since the Board did not decline jurisdiction over the category of employers now seeking relief, the advisory opinions were not equivalent to "rules of decision," therefore, they are not a binding declination.

For Pennsylvania's view of a formal declination, see Pennsylvania Labor Relations Bd. v. Butz, 411 Pa. 360, 192 A.2d 707 (1963), where the court reasoned that the declination must arise from some formality, and a letter from the Director declining jurisdiction was sufficient formality. The court points out in a footnote, however, an advisory opinion from the National Board would have superceded the regional Director's letter had it been requested.

[33] *See* Goldberg & Meiklejohn, *Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History*, 54 NW. U.L. REV. 747, 753 (1960).

[34] *See* Cohen, *supra* note 7, at 348. *See also* Cox, *supra* note 7, at 262; Reilly, *Federal-State Jurisdiction*, 48 GEO. L.J. 304, 311 (1959). Hanley, *supra* note 7, at 713-14, however, also suggests it would be advisable in close cases for the litigants to seek an advisory opinion. *But see* 105 CONG. REC. 17877-79 (1959) (remarks of Sen. Morse).

A few state courts[35] have accepted this challenge and have applied the Board's standards. The foremost case, *Russell v. Electrical Workers Local 569*,[36] decided in California, answered the *Garmon* decision without making reference to it. The *Russell* court, in refusing to accept that the tenor of *Garmon* applies to a jurisdictional determination, concluded that it did "not undertake to interpret statutory language . . . . Rather, [it sought] only to *apply* standards which the board has laid down . . . ."[37] for administrative and judicial guidance.

Other state opinions in rapport with *Russell* adopted jurisdiction on one of the following grounds: state policy,[38] pre-LMRDA state decision,[39] commentator analysis,[40] or implications of a recent Supreme Court decision.[41] In *Russell* itself, the court relied on *Radio Broadcast Technicians Local 1264 v. Broadcast Service*[42] where the Supreme Court, in reversing a state judgement, held that "a proper determination [must be made] of whether the case is actually one of those which the Board will decline to hear."[43] This wording was interpreted to mean that since the Supreme Court did not explicitly exclude the states from making the "proper determination," they must be competent in this regard.

However, an analysis of the entire Supreme Court decision does not give rise to the implication found instrumental in *Russell*. The *Russell* court would probably have been justified in implying such a conclusion if the phrase read "a proper determination of whether the case is actually one which the Board *would* decline to hear." Yet without the use of the conditional *would*,[44] *Russell's* argument ap-

35 Vegas Franchises, Ltd. v. Culinary Workers, Local 226, 427 P.2d 959 (Nev. 1967); Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966); Continental Slip Form Builders v. Construction & Gen. Labor, Local 1290, 193 Kan. 459, 393 P.2d 1004 (1964); Local 227, Amalgamated Meat Cutters v. Fleishaker, 384 S.W.2d 68 (Ky. 1964); Smith v. Noel, 24 Ohio Op. 2d 159, 188 N.E.2d 195 (Ct. Common Pleas 1963).

36 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966).

37 *Id.* at 28, 409 P.2d at 930, 48 Cal. Rptr. at 706.

38 Vegas Franchises, Ltd. v. Culinary Workers, Local 226, 427 P.2d 959, 960 (Nev. 1967) (union picketed employer contrary to employees' clear intent not to organize).

39 Continental Slip Form Builders v. Construction & Gen. Labor, Local 1290, 193 Kan. 459, 462, 393 P.2d 1004, 1006 (1964) (relied on Binder v. Construction & Gen. Labor Local 685, 181 Kan. 799, 317 P.2d 371 (1957) which is tenuous in light of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)).

40 Local 227, Amalgamated Meat Cutters v. Fleishaker, 384 S.W.2d 68, 71 (Ky. 1964) (relies chiefly on McCoid, *supra* note 3, and Cohen, *supra* note 7, at 342 n.42).

41 Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 26, 409 P.2d 926, 929, 48 Cal. Rptr. 702, 705 (1966).

42 380 U.S. 255 (1965).

43 *Id.* at 256.

44 But see Merrifield, *Federal-State Jurisdiction in Labor Relations Law*, 29 GEO.

pears tenuous. By focusing only on this statement, the court overlooked the Supreme Court's later statement in *Broadcast Service:*

> The record made below is more than adequate to show that all these factors [criteria used by board] are present . . . and that this is not a case which the Board has announced it would decline to hear.[45]

This conclusion more properly indicates a Supreme Court intent to have state courts yield to the NLRB when the record presents factors that are customarily passed on by the Board.

Absent a Supreme Court ruling on the proper forum to make the initial determination of jurisdiction, analyses must be made of (1) the possible ramifications of state courts' determining the proper forum; (2) the problem in the states of allocating the burden of proof as to whether the Board would or would not decline jurisdiction; and (3) although peripheral to the main problem of jurisdiction, as a practical matter, the ability of state trial judges to apply the complex jurisdictional standards consistent with [46] the Board's pronouncements.[47]

The ramifications that may arise from some states' intially assuming jurisdiction are difficult to establish. It has been urged that small businesses receive preferential treatment over labor unions in certain states, yet this is primarily due to a lack of comprehensive labor legislation rather than any law overtly protecting the businessman.[48]

Though it is clear that state jurisdiction will not precipitate a mass exodus to states having a preferable business climate, the additional factors of state jurisdiction and state-afforded remedies could have a substantial effect on the small businessman's attitude toward his choice of location.[49]

WASH. L. REV. 318, 327 (1960) where Representative Griffin, discussing his analysis of the amendment, granted the states jurisdiction over the cases the Board has declined or would decline.

[45] 380 U.S. at 257.

[46] *See* Papps, *supra* note 33, at 319.

[47] Cohen, *supra* note 7, at 348 argues the wording and tenor of section 14(c) negates any congressional apprehension of this problem.

[48] Delony, *State Power To Regulate Labor-Management Relations*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 666, 688 (R. Slovenko ed. 1961); Rayack, *LMRDA And The Prospects For Union Growth*, in SYMPOSIUM ON LABOR RELATIONS LAW, 109, 110 (R. Slovenko ed. 1961). *See generally* Merrifield, *State Labor Relations Legislation*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 734 (R. Slovenko ed. 1961).

[49] *But see* Cohen, *supra* note 7, at 336 n.15. He states:

> The argument, although emotionally attractive to pro-union Congressmen,

Assuming that small businessmen in most instances need to be free from extensive economic struggles with unions,[50] state jurisdiction and expeditious relief could give rise to business location shopping. This, however, would not only impede commerce, but would also reject the well established doctrine of a uniform labor policy.

The second analysis of state proceedings focuses upon the allocation of the burden of proof. The task of showing that the Board would decline jurisdiction almost invariably falls on the businessman since he is the one seeking relief.[51] Precedent has shown this to be a major obstacle to petitioners; and in some cases dealing with this problem, the businessman has been unable to sustain this burden of proof.[52] However, in the Florida case of *Operating Engineers Local 675 v. Meekins, Inc.*,[53] the ultimate burden of proof lay with the union, as appellant, to show that the plaintiff-contractor, by sufficiently engaging in interstate commerce, had come within the ambit of the Board's jurisdiction. The union failed in this attempt due to its inability to prove that the in-state suppliers of the plaintiff had purchased their goods out-of-state. Though the union, through stipulation, was able to establish the Board's minimum inflow-outflow yardstick for nonretail enterprises,[54] the court ruled this insufficient by itself to "affect" interstate commerce. Yet in cases which follow the prevalent rule, and in which there is a close question as to NLRB standards, the result of requiring businessmen to prove that the Board would decline jurisdiction[55] is a furtherance of the uniform

---

(see, e.g., 105 Cong. Rec. 18143 (1959) (remarks of Congressman Dent)), would seem to have been a fallacious one; for any manufacturing business large enough to consider moving from north to south because of favorable state labor laws would surely be large enough to come within the NLRB's non-retail jurisdictional standards and thus still to remain under the L.M.R.A.

50 *See* Chief Justice Bell's dissent in Stryjewski v. Brewery Distrib. Drivers, Local 830, 426 Pa. 512, 519, 233 A.2d 264, 269 (1967).

51 *Compare* Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 28-29, 409 P.2d 926, 930-31, 48 Cal. Rptr. 702, 706-07 (1966) *with* Hanley, *supra* note 7, at 714-15 (1960) *and* Reilley, *supra* note 34, at 311.

52 *See* Russell v. Electrical Workers Local 569, 64 Cal. 2d 22, 409 P.2d 926, 48 Cal. Rptr. 702 (1966); Smith v. Noel, 24 Ohio Op. 2d 159, 188 N.E.2d 195 (Ct. Common Pleas 1963). For examples of businessmen sustaining the burden of proof see Vegas Franchises, Ltd. v. Culinary Workers, Local 226, 427 P.2d 959 (Nev. 1967); Continental Slip Form Builders v. Construction & Gen. Labor, Local 1290, 193 Kan. 459, 393 P.2d 1004 (1964) (plaintiff able to show all but $7,000 worth of steel bought within Kansas).

53 175 So.2d 59 (Fla. Ct. App. 1965).

54 *See* text accompanying note 20 *supra*. *See also* Siemons Mailing Serv., 122 N.L.R.B. 80 (1958), *amended* 124 N.L.R.B. 594 (1959).

55 The Pennsylvania Supreme Court has apparently allocated the burden of proof differently in similar cases which were heard no more than two months apart.

In Stryjewski v. Local 830, Brewery Distrib. Drivers, 426 Pa. 512, 233 A.2d 264, 267

labor policy, and a disregard for the state and local concern of protecting the small businessman.[56]

Thirdly, as a policy matter, the diversity of opinion that may well follow from trial judges' inexperience in applying the complex standards of the Board must be balanced against the utility of an expeditious state remedy. Mr. Justice Tobriner, speaking for the Supreme Court of California in *Russell*, concluded:

> Neither the fact that state courts might experience difficulty in applying the board standards in certain cases nor the danger that those courts might reach diverse interpretations of those standards compels a ruling requiring a fruitless expedition to the board. The proper correctives to the stated problems lie in more clearly articulated board standards and in the availability of Supreme Court review of the state determinations.[57]

Apparently, the *Russell* court has found that the utility of state jurisdiction outweighs the difficulties presented. However, the court does not acknowledge the fact that the appeal may not be fruitless if it prevents these problems from arising. In addition, the court unknowingly undermines its conclusion that expeditious state relief is a necessity by suggesting increased availability to the Supreme Court for review as an answer.

Congress, it would appear, intended state courts to assert jurisdiction so that relief could be obtained in those labor disputes that clearly do not meet the NLRB's yardsticks. However, the Pennsylvania Supreme Court, under facts which clearly did not meet these yardsticks, decided not to assert jurisdiction, whereas the California Supreme Court, under facts arguably within them, entertained the dispute, only to deny relief.

In view of this conflict between the states, the decision will rest with the Supreme Court to determine whether the national labor policy necessitates the Board to make a jurisdictional determination in the first instance. Should the Court decide that initial determina-

---

(1967), the court stated that the petitioners had the burden of showing that the NLRB would not assume jurisdiction, whereas in Lay v. Electrical Workers, Local 174, 427 Pa. 387, 235 A.2d 402, 403 (1967), the court quoted the following perplexing statement from City Line Open Hearth, Inc. v. Hotel Employees, Local 568, 413 Pa. 420, 427, 197 A.2d 614, 618 (1964): "Furthermore, the jurisdiction of the N.L.R.B. must be readily ascertainable from the averments of fact contained in the complaint itself, or must be affirmatively proved by the party alleging such jurisdiction."

[56] Cox, *Federalism In The Law of Labor Relations*, 67 HARV. L. REV. 1297, 1305 (1954).

[57] 64 Cal. 2d 22, 25-26, 409 P.2d 926, 928, 48 Cal. Rptr. 702, 704 (1966).

tion by the states is not inimical to the national policy, hopefully, a degree of uniformity will be maintained by a requirement as to the burden of proof. If the Court, however, decides that an *in fact* declination by the Board must follow when the dispute is arguably within its jurisdiction, the "arguably" test should be given a restricted meaning to enable the purpose of 14(c)—expeditious state relief—to be implemented.

DAVID L. MCKENNA