C. 3

Hum.
Shelf.

For Release
at
12 Noon
February 11, 1954

California. University. Institute of Industrial Relations (Berkeley)

"New Directions in Labor Relations and Mediation"

by

Carl R. Schedler, Associate Director

of the

Federal Mediation and Conciliation Service

before the

Arbitration and Labor Relations Conference

at the

Hotel Sir Francis Drake

San Francisco, California

Thursday, February 11, 1954

Conference Presented by:

Institute of Industrial Relations
American Arbitration Association
School of Business Administration

In Cooperation With:

Distributors Association of Northern Calif.
National Academy of Arbitrators
The Conference of Junior Bar Members
San Francisco Labor Council
California Metal Trades Association
San Francisco CIO Council

Through Facilities of:

University Extension
University of California
Berkeley, California

NEW DIRECTIONS IN LABOR RELATIONS AND MEDIATION

I. Introduction

A. Need for Recognition

It is interesting to note that in the Title almost any word could be used in place of "directions" due to the uncertainties of the present control the states may exercise in labor law and labor relations including mediation. Equally as uncertain is the specific action that Congress has proposed to take in this direction.

This state labor relations problem is extremely difficult because of the misconstruction of judicial opinion. In initially considering the problem, an analysis is necessary of Federal and State laws and court decisions. Before I forget it I would like to express my gratitude for being allotted only 35 minutes, this precludes going into the details of cases and laws -- you may be interested to know that I am not prepared to do that anyway. At any rate, perhaps a summary of such cases and laws may prove helpful.

I feel that at the present time there is more of a need for identification of the problems and a recognition of the

uncertainties rather than specific proposals to try to alleviate them. As a Government official, I doubt the wisdom of my proposing specific changes -- except when I make such proposals to the appropriate Congressional Committee.

B. Outline of Information To Be Covered

There are several several aspects of the problem which I would like to discuss with you. I shall touch upon the trends indicating a shift of control in labor matters from the states to the Federal Government. I shall also attempt to evaluate the impact of the recent Garner case and the areas where there may still be room for state action.

II. History of States Labor Powers

A. Crime - Common Law - Restraint of Trade - Free Speech

The power of the states to regulate and control labor matters, particularly strikes and picketing, for the most part has remained with the states until just a few years ago. At the very beginning of this control by the states, union activities were curtailed

on the theory that a crime had been committed. The concerted action by labor for picketing or strike purposes was treated as a conspiracy of a criminal nature. Needless to say its use against labor was generally effective.

When the labor movement gained support and power, state control of labor activities such as strikes and picketing, by way of criminal penalties became unpopular and considered unjust. It was at this time that the common law or private rights theory became in vogue. Union liability for concerted activities was considered a tort and so the criminal responsibility was changed to civil. Although as you know, common-law responsibility was not new, its applicability at that time to concerted activities of labor became widespread. Union liability was usually by way of money damages. In spite of the fact that allegations of unlawful purpose and illegal means in the conduct of the strike or picketing had to be proven, such proof was not overly difficult. Furthermore, based on the same

tort or common law theory the use of the injunction became more effective as a means of control.

After enactment of both the Sherman and Clayton Anti-trust Acts, it was possible to curtail union activities as being in restraint of trade. The Clayton Act which was later than the Sherman Act had a provision excluding labor organizations from anti-trust; however, by legal construction or misconstruction, it was still possible to obtain damages and injunctions for restraint of trade reasons. It is obvious by these anti-trust acts that the Federal Government was commencing its exercise of control over labor matters. This is particularly emphasized by the enactment of the Norris-LaGuardia Anti-injunction Act, which among other things granted new powers to the Federal courts. The control of the states over labor activities was made certain by the Supreme Court in the Hutcheson Case. By over-simplifying the result, it can be said that many actions by labor are exempt from anti-trust prosecution by Federal courts, with a few minor exceptions. The control of strikes remained with

the states; however, picketing for awhile went back to Federal control. The Supreme Court gave the Federal Government control by preventing state courts the right to enjoin peaceful picketing which had the protection of free speech under the Federal Constitution. The control over picketing was lost to the states in a short time as evidenced by Building Service Union vs. Gazzan, decided in May 1950. The Supreme Court of the United States upheld an injunction restraining the Union from peaceful picketing where the object of the picketing was to compel the owner of a hotel to require his employees to join the union. The court went on to state that such picketing was unlawful as violative of the public policy of the state that employers shall not coerce employees in their choice of bargaining agent. Injunction for such an object, the court said, is not invalid as abridging the right of free speech.

B. National Labor Relations Act

The above very generally covered the change of control up to the Taft-Hartley. Before moving on to those specific instances of

loss of control, a brief mention should be made to this problem under the Wagner Act.

Generally speaking, the Wagner Act and the court decisions construing it permitted the states to regulate. Perhaps the reason was that the Wagner Act dealt specifically with the unfair labor practices of management and with representation matters. Consequently, the area of control of labor unions with respect to strikes, picketing and boycotts was not in issue as we shall see it was under Taft-Hartley where unfair labor practices of unions are also set forth. As a matter of fact, some states had labor laws similar in many respects to the Wagner Act. Frequently, there were agreements between Federal and State labor boards with respect to what cases would be handled by each. I point this out because the evidence of this cooperation indicates that Federal and state labor boards can work out their problems of jurisdiction.

C. Taft-Hartley

Under Taft-Hartley, the National Labor Relations Board was given new authority, namely: the right to control the unfair labor practices

of unions. Up until Taft-Hartley, the state courts had exercised quite extensive control over strikes and picketing whether in intra or inter-state commerce. The power given to NLRB created a natural conflict with state powers to regulate such activities.

Many of the court decisions dealing directly with this control question indicates a suspension of the powers of the states. The states in an effort to retain their powers argued that they had power to enforce common law personal rights even though Taft-Hartley is applicable to the same facts. The states further argued that under Taft-Hartley the Federal Government is only concerned with enforcement of public rights which are to be enforced by NLRB. Therefore, private injuries with which NLRB is not concerned is left to the state courts to stop action by a labor organization which is declared to be unlawful and which is causing irreparable damage, this being a private injury for which there is no adequate remedy at law. Stating it another way, Taft-Hartley does not provide for assistance to protect private rights, consequently the states can act to protect those rights,

at least until the NLRB acts to enforce the public rights. For example, assuming there is a secondary boycott by a union, if the employer wanted to prevent a private injury, he would have to look to the courts for aid since he would have no recourse before NLRB. He would not be attempting to process an unfair labor practice through the courts, but would only want temporary relief until the NLRB acted. There would be no flouting of the Board's processes because the union could still be held responsible by the NLRB for its unfair labor practice. Another convincing point urged by those arguing for control by the states is that there is nothing express or by implication that could mean that such an unfair labor practice must be allowed to continue until the NLRB acts. An injunction to prevent irreparable injury would provide aid when needed because the administrative processes of the Board are so slow. It is indicated from Supreme Court decisions that labor-management activities have been treated separately such as: representation, employee guaranteed rights under Section 7, employee forbidden activities, employer unfair

practices, and those activities of employees which are neither forbidden nor permitted under the Act.

In the Bethlehem Steel Company Case, decided by the Supreme Court in 1947, foremen employees of the Company could not obtain certification from the NLRB under Taft-Hartley policies. The foremen filed a petition with the New York Labor Relations Board which set up a bargaining unit of foremen. The New York Court of Appeals upheld a lower court, but was reversed by the Supreme Court of the United States. The court held that where the NLRB refused to act because it was not appropriate under Taft-Hartley, the New York Board would be unable to certify. The court further states that there is to be no competition between Federal and State Boards for such would frustrate the intent of Congress for a national labor policy.

Another case that clearly points out the lack of state jurisdiction is the 1949 Supreme Court decision in Automobile Workers vs. O'Brien. The court held invalid the strike vote provision of the Michigan Labor Mediation Law. This strike vote, the court held,

was in conflict with the Federal Act. The reasoning of the court was that concurrent state regulation of peaceful strikes for higher wages guaranteed by Section 7 was forbidden. In 1951 the court applied the same reasoning to a Wisconsin case where a Wisconsin Law required compulsory arbitration. With respect to employer unfair activities, state control was denied where the State of Wisconsin acted in a discharge case affecting an employee in interstate commerce even though the state law was similar to Taft-Hartley.

Those union activities forbidden by Taft-Hartley under Section 8(B) have furnished a source for conflicting judicial opinions. Some decisions place control with the states and others with the Federal Government. This conflict was for the most part resolved in the December 14th, 1953 decision in Garner vs. Teamsters, which we will refer to in more detail momentarily. Also, those activities not guaranteed or forbidden will be considered under the discussion of the Garner Case.

Another situation not specifically covered by Taft-Hartley and made certain by court decisions is the question of enforcing

collective bargaining agreements. Under Section 301 of Taft-Hartley which permits Federal Courts to entertain suits for violation of contracts in an industry in interstate commerce, the Federal Courts have jurisdiction but there is a conflict of laws problem in that it is not clear whether Federal or state law must be applied.

D. Garner Case

Briefly, the facts are as follows: The Teamsters picketed Garner who was in the trucking business, and who had no objection to the employees joining the union. The lower court found that the purpose in picketing was to coerce Garner into compelling or influencing its employees to join the union, which conduct was held to violate the Pennsylvania Labor Relations Act. The Pennsylvania Supreme Court felt that this fell within the jurisdiction of the NLRB to prevent an unfair labor practice. The United States Supreme Court held that a state court may not restrain picketing which is within the area assigned by the Taft-Hartley to

the NLRB to regulate even though the action may violate a state labor law. The court further said that the picketing affected interstate commerce and the only relief open to the employer was an unfair labor practice proceeding before the NLRB.

The Garner decision as you can see, greatly limits the authority of state courts to act. Prior to this case, as was pointed out, there were conflicting decisions of state authority to regulate the activity forbidden by Section 8(b) of the Taft-Hartley Act. There is no longer that conflict. The Garner decision also destroys the argument of the states that they may act when the Federal law has been violated pending NLRB action. This answers the problem of the right of states to provide common law remedies or to protect private rights.

It is not absolutely certain if the broad implications of the Garner decision will prevent the states from acting where the activities regulated are neither guaranteed by Section 7 or forbidden by Section 8(B) of Taft-Hartley, such as slowdowns.

E. Summary of States Present Powers

First, let us summarize those instances in which the states may not regulate where business is engaged in interstate commerce. They are as follows:

1. Activities which are forbidden by Section 8(B) such as strikes for closed shop, organizational strikes, secondary boycotts, and jurisdictional strikes. Also, precluded is state control based upon private rights or for state assistance pending NLRB action.
2. Activities protected or guaranteed by Section 7, such as strikes for higher wages.
3. Representation proceedings which include those things incidential to the conduct of an election.
4. Activities considered to be employer unfair labor practice under Section 8(A).

It is more important for our purposes to list those instances

where the states may act and to list those instances where there is a possibility that the state may act -- at least until tested further by the courts. They are as follows:

1. In representation cases the NLRB in its exclusive jurisdiction may act or may decline to do so where there is no effect on interstate commerce. Until tested by the courts, the states may be free to act in this limited area.

2. Those activities neither guaranteed nor forbidden by Taft-Hartley may possibly be another area where the states may regulate. The broad implications of the Garner case may cover such activities -- slowdown.

3. Very similar to the above is the right of a state to act to regulate a breach of a collective bargaining contract or its terms.

As I expressed a few minutes ago, it is not clear whether a Federal court under Section 301 should

apply Federal or state law.

4. The states can also act in instances of violence to protect persons and property from injury. Court decisions are clear in this respect.

5. Under Section 14-B of Taft-Hartley, it is certain that the states can restrict the negotiations of the union security provisions of a contract.

It is obvious from the summarization that the area is limited where there is certainty of state action.

F. Mediation and Arbitration

The history of the change in the states mediation and arbitration functions can perhaps be generally referred to in two stages, namely: pre-Taft-Hartley and post-Taft-Hartley.

Pre-Taft-Hartley, including just prior to World War II, the United States Conciliation Service, predecessor to the Federal Mediation and Conciliation Service, was for the most part operating

out of the Department of Labor in Washington with a limited staff. This, of course, afforded more freedom to those states having a mediation service. At first, staffs were set up in strategic parts of the country and as World War II progressed and as the defense effort expanded, the United States Conciliation Service established regional offices. With the growth of mediation, an overlapping of jurisdiction became more noticeable between the Federal Service and existing state services. The problem was somewhat lessened by the freedom of choice afforded labor or management as to whether they desired the Federal or state service. Also, because of a limited staff, the United States Conciliation Service handled more major disputes, thereby leaving the less substantial disputes to the states.

After the enactment of Taft-Hartley, greater emphasis was placed on mediation and voluntary aribtration with increased responsibility placedwith the Federal Mediation and Conciliation Service. This helps to explain the greater Federal activity.

III. Granting of Control to the States

A. Advantages and Disadvantages

As mentioned earlier, it is important to be aware of the loss of state powers and uncertainty of the remaining power of the states in labor relations matters. In view of that, Congressional action may be anticipated. First, however, mention should be made of a few of the major advantages and disadvantages there would be to a Congressional grant of power to the states.

Some of the advantages advanced are as follows:

1. Since each states has the duty to maintain industrial peace within its borders, the authority to handle such disputes should be returned to the states.
2. The assumption of their full responsibility would provide economies and promote efficiency by eliminating wasteful duplication.
3. The processing of unfair labor practices, for example before state boards might be handled more expeditiously

than before the General Counsel and NLRB.

4. The states could handle the disputes more judiciously. In other words, the dispute could be determined at an actual hearing rather than having to decide an issue based upon a cold written record, without the personalities present. Similarly, a state board would be more familiar with local court decisions and local problems. Issues would be less apt to be over-emphasized.

5. The experience of the various states in labor matters would be available to other states as well as to the Government -- sort of the proving ground idea.

Some of the disadvantages of granting more control to the states often mentioned would be:

1. Once a sound labor policy is established, its benefits should be extended to everyone.

2. Many employers and unions would be inconvenienced by

the possibility of being subject to not a uniformly consistent labor policy but to a variety of different labor laws and policies existing between states. This would create additional expense and burdens as well as create uncertainties which we are trying to avoid.

3. Certain businesses are too vital to our nation as a whole, making it impractical to permit state control.

4. Competition between states would be promoted in labor relations. Labor laws, in other words, would be used by some states to attract industries from states with less attractive laws.

5. Since there is a labor law in existence, any major change in power to regulate, such as to the states, would create more conflict between labor and management.

B. Federal-State Mediation and Arbitration

Many of the advantages and disadvantages in granting control to the states are also applicable to mediation and voluntary arbitration.

I do not have any advance information as to what may or may not happen to mediation and arbitration with respect to the overall Federal-state control problem. I can, however, express my opinion. I feel that where ever it is practical, as much control as possible should be returned to the states and to the localities, regardless of what department, agency, or bureau it may be. I say that with as much sincerity of purpose in regard to mediation and arbitration, even though this very minute I may be talking myself out of a job. It may be possible to work out a solution whereby responsibility which primarily is that of the states is returned to them.

Director Whitley P. McCoy in a recent speech before the Town Hall in Los Angeles said;

"I think the Administration and the taxpayers feel that the Commerce Clause of the Constitution has been stretched too far with respect to such agencies as the National Labor Relations Board and the Federal Mediation and Conciliation Service, and that we should

tighten our jurisdictional lines to throw responsibility back where it primarily belongs in the great majority of cases -- namely, to the states and to the localities."

A somewhat similar feeling was expressed in a different manner by Guy Farmer, Chairman of the National Labor Relations Board, on January 22, 1954, at New Orleans. Mr. Farmer stated that, "... the Board should not seek to push its jurisdiction into every local labor dispute however insignificant in terms of national importance. I have said that we should follow a rule of administrative self-restraint and voluntarily limit our jurisdiction to disputes which have a real and substantial impact on interstate commerce."

As in any return of control or power to the states, there are problems to overcome which are necessarily created by such a major change in position. The Federal Mediation Service would be no exception, even though last year it handled over 15,000 cases, of which about half were disputes involving strikes or threat of strikes.

Before making reference to some of the practical problems with which the Federal Mediation Service would be faced, I would like to comment on state mediation boards. Some of the boards I know of are staffed by able mediators. The mediators with our Service who were formerly with state agencies have been quite effective. Groups such as the Labor-Management Citizens Committee of Stamford and Greenwich, Connecticut, provide forums where management, labor and citizens discuss common problems. With such local groups and with those competent state mediation services, a transfer of control might be more easily accomplished.

On the other hand, other practical difficulties would have to be considered. For example, very few states provide active mediation services. As you can see, in those situations there would be no service provided unless it is furnished by the Federal Government. It should also be brought to mind that the defense effort is national in scope and would have to be treated accordingly. Another major consideration would be the placing of responsibility for mediation

on those industries of an interstate nature. In other words, if a company operated in three states, which one of the three states would be responsible for mediation? In addition to these mentioned difficulties, there are of course many others, all of which have to be satisfactorily worked out.

IV. Uncertainty of Congressional Action

A. Official Statements

If anyone expressed an opinion as to what Congress will do concerning the granting of power in labor relations to the states, it would at the most be a guess -- I haven't even heard rumors that would give any hints. Bills have been introduced in Congress which were perhaps stimulated by the loss of power by the states, particularly after the Garner decision. The Goldwater Bill, for instance, provides full power of the states to regulate strikes and picketing, even in interstate commerce. Also, another Bill seeks to place extensive limitations on the jurisdiction of the National Labor Relations Board. Likewise, proposals have been numerous to change

or repeal Section 14(B) of Taft-Hartley which permits states to restrict the negotiation of union security contracts.

There has been conjecture as to what the President meant in his message to Congress when he stated, that -

"The Act should make clear that the several states and territories, when confronted with emergencies endangering the health or safety of their citizens, are not, through any conflict with the Federal Law, actual or implied, deprived of the right to deal with such emergencies."

The questions immediately raised is the definition of "Emergencies" and who defines it and what are the remedies. It seems to me that in spite of the very few powers remaining to the states that this was one of them. The Smith Bill, S-2650, merely provides the language to express the President's Emergency statement; therefore, there is no added clarification.

The President went on to state in his message that,

"The need for clarification of jurisdiction between the Federal and State and Territorial Governments in the labor-management field

has lately been emphasized by the broad implications of the most recent decision of the Supreme Court dealing with this subject. The department and agency heads concerned are, at my request, presently examining the various areas in which conflicts of jurisdiction occur. When such examination is completed, I shall make my recommendations to the Congress for corrective legislation."

The President may have meant that further recommendations are forthcoming concerning conflicts regarding emergencies only. Another interpretation would be that further recommendations would be made regarding the overall conflict of jurisdiction between the Federal Government and states. This may be the more logical interpretation inasmuch as the President has recognized the preclusion of the states to act by his reference to the most recent Supreme Court decision on the subject, which it seems can only be the Garner case.

V. Conclusion

A. Importance of Recognition of Uncertainty

It is important that there be a recognition of the limited powers of the states where interstate commerce is concerned. From such an awareness a satisfactory solution may be found.

Continued discussions such as you are having here today should eventually lead to a mutually satisfactory understanding of these many problems. In the meantime we in the Federal Mediation and Conciliation Service will continue to make available competent mediators to labor and management. By so doing when disputes occur, we are better able to assist in the earliest possible settlement with the least inconvenience to the general public. As public servants we are constantly aware of this reponsibility.