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"Conflict" Between Federal and State Law--Arkansas Full Crew Statute Preempted

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over the country—the new racial situation. Failure of the cities to provide for the necessities of this particular social condition will result in increased social, economic, and racial tensions which will endanger the continued peace, safety, prosperity, and general welfare of the community. Cities which have enacted fair employment practices ordinances have partially justified such regulation on this realistic appraisal of the relationship between race relations and community welfare.[14]

The guiding thought behind this comment has been a conviction that the problems of race relations are going to be with us for some time. If the municipalities fail to act in this area, the pressures will not cease but cause greater disruption in the community and shift their focus to other government centers, with the result that state and federal regulation will increase. Our American ideal is to handle social problems on a level of government as close to the people as possible. In the field of race relations, local legislation and enforcement are especially desirable, because particular conditions vary from area to area. In *Commonwealth v. Dub's Fried Oyster Place,* the court of appeals has decided that municipalities have the legal authority to deal with their own civil rights concerns. This decision thus gives the municipalities another chance to prove that local government can still meet problems of society in our present day.

Fred G. Karem

"CONFLICT" BETWEEN FEDERAL AND STATE LAW—ARKANSAS FULL CREW STATUTE PREEMPTED—Public Law 88-108[1] provided for a special arbitration board to make final resolution of issues in a dispute between certain railroads and unions deadlocked in collective bargaining procedures under the Railway Labor Act. A national railroad strike threatened. The board was limited to the issues and parties described in notices previously filed pursuant to the Railway Labor Act and was to follow its rules of procedure. The arbitration award finally promulgated under Public Law 88-108 contained rulings on numerous issues, including crew consist. The award declared that a "minimum" number of crewmen would be required on certain types of trains.

[14] Minneapolis, Minn., Ordinance to Prohibit Discriminatory Practices in Employment, Jan. 31, 1947; Cleveland, Ohio, Ordinance 15, 1579-48, Jan. 30, 1950.

[1] 28 August 1963, 77 Stat. 132.

Plaintiffs brought suit against the state of Arkansas, which had a full crew law setting the minimum one or two crewmen higher than the arbitration award. Unions representing railroad employees intervened on behalf of defendants. Plaintiffs then moved for summary judgment. *Held*: Public Law 88-108 and the award issued under it preempt the Arkansas full crew law. *Chicago R.I. & Pac. R.R. Co. v. Hardin*, 239 F. Supp. 1 (W.D. Ark. 1965).

Disregarding due process and interstate commerce clause arguments as creating controversies of fact, the court stated that the high degree of national interest in resolving the dispute clothed the board and its actions in the robes of dominant federal interest. Implied but never articulated was the premise that vestment of dominant federal interest in the board gave its arbitration decision such pervasive power as to preempt state laws in the field. The primary test of such preemption was conflict between state and federal legislation, whether the clash was in policy, wording or operations. The Arkansas full crew law conflicted with the award in all three, therefore, the state legislation was struck down.

The confusion factor in the court's opinion is signicant. In forty-three pages the judges shotgun argue with a host of preemption and commerce clause cases which raise every traditional argument for striking down state laws. But the demonstration of this material's direct relevance to the case at bar is left to the mental processes of some hopefully imaginative reader. The difficulty may well stem from the fact that dispute settlement by Congressional legislation for a special compulsory arbitration board solely for the specific controversy is unique. No precedent cases exist.

The district court attempted to avoid the predicament by equating the special board with the federal agencies set up by other labor legislation, such as the National Labor Relations Board, relying heavily on *Teamsters v. Oliver*[2] and *California v. Taylor*.[3] In those cases, the Supreme Court held state law was preempted because it conflicted with and would defeat full realization of the Congressional purpose. That purpose was a uniform and pervasive national system of labor regulation by a federal administrative body with emphasis on collective bargaining procedures.

Yet it seems doubtful that Public Law 88-108 proposes such a pervasive national system of regulation and administration. The limit placed on parties by the previous notice requirement precludes

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[2] 358 U.S. 283 (1959).
[3] 353 U.S. 553 (1957).

several major interstate railroads from coverage. The award itself was regionally oriented, listing particular crew consist requirements for railroad yards in specific Arkansas cities.[4]

Furthermore, the special board ceases to exist after its award is filed in D.C. District Court, and the award is binding for only two years.[5] The board even lacks its own rules of procedure.[6] Does this board have the scope to enact the same pervasive national system of regulation as the National Labor Relations Board?

The problem here is deciding exactly what field of power Congress delegated to the board. The board's legally competent field of regulation was not defined. It should have been if an organization of dubious national prowess was to preempt state law.[7] In fact, no power to *regulate* was ever delegated. The law merely set up a compulsory arbitration board[8] of temporary existence to resolve the issues between the two parties. The board was not composed of federally paid and selected administrative personnel, but of two representatives each from the unions and railroads and three neutrals chosen by the first four.[9] The position that this group's arbitration award preempted state law seems to be granting the unions and railroads themselves power to determine preemption in their own right simply by appropriate wording of notices filed with the National Mediation Board. For the health of the federal system such problematical procedure should take place only within a well defined field of power.

Even more questionable is the easy finding that the award struck down state safety laws. The competence of the states to exercise police power is one of the most consistently followed principles of constitutional law. The Court may decide some state laws only nominally belong in such a category, but the state laws are given a presumption of validity and are never dismissed without special

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[4] Award of Arbitration Board No. 282, as cited in *Chicago, R.I. & Pac. R.R. Co. v. Hardin*, —, F. Supp. —, original copy at 16, (W.D. Ark. 1965).

[5] Public Law 88-108, Sec. Temporary binding force of the federal order involved was used by the Court in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), to show the national regulations did not form such a pervasive scheme as to preempt state law.

[6] Public Law 88-108, Sec. 4. The District Court interpreted use of Railway Labor Act procedures to signify an amending addition to that law. Yet on the face of the bill it is not obvious this was anything more than a shorthand method of supplying procedure.

[7] See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). See also *San Diego Building Trades Council v. Carman*, 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957).

[8] *Russ v. Southern Ry. Co.*, 334 F.2d 224 (C.A. Tenn. 1964).

[9] Particularized composition of the rule making body involved was a reason for holding against preemption of state laws in *Florida Lime & Avocado Growers v. Paul*, supra, note 5.

attention to rebutting the inference.[10] The Arkansas full crew statute was passed as a safety law, yet the district judges gave it no consideration as such. It was summarily treated as just another labor regulation.

Still another doctrine of doubtful validity espoused by the learned judges is the inference of preemption of the full crew law on the ground that Public Law 88-108 did not expressly allow concurrent state legislation. The supporting citation from *Cloverleaf Butter Co. v. Patterson*[11] is merely dictum, since that case struck down a state law preventing entrance into interstate commerce of goods already taxed for the purpose by the Internal Revenue Code. And two more recent decisions have said that Congressional silence implies validity of state action.[12]

The conflict test of preemption of state action as used in our case—turning primarily on the court's unstated concept of the effect of national interest on the state's competence to act concurrently—has been a productive divining rod for the modern court. Conflict between federal and state legislation disclosed by superimposing the wording of one upon the other is of ambiguous substance.[13] But the judges are persuasive when they find that the state statute conflicts with or stands as an obstacle to "national policy." Behind the argument is a non-technical balancing operation: Is the federal interest sufficiently great that state competence in the immediate area limited to the point of being preempted? An illustrating case is *Paul v. United States*,[14] where the national interest in the lowest possible price for government purchases created a conflict with California minimum price laws, although the controlling federal statute was open to the interpretation that no such preemption had been intended by the

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[10] *Teamsters v. Oliver*, supra, note 2, at 297, the district court's leading case, distinguished itself from the case at bar: "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation. . . ."

The Tenth Amendment states a presumption for state law.

In classic cases where state laws were considered invalid as safety measures, lengthy discussion were given to the bases for second-guessing the state legislatures: *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

[11] 315 U.S. 148 (1942).

[12] *Florida Lime and Avocado Growers v. Paul, supra*, note 5; *De Veau v. Braisted*, 363 U.S. 144 (1960).

[13] Especially here. The judges used the plain and unambiguous meaning rule as authority for the statement that the award's *minimum* of x crewmen was in obvious conflict with the full crew law requirement of x + 1. This seems to follow Mr. Justice Douglas's principle that it is ridiculous to base a decision on a mere matter of interpretation of the controlling statute. Douglas, J., dissenting in *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, at 322 (1960). Against the district court's use of superimposition of wording as showing conflict, *California v. Zook*, 36 U.S. 725 (1949).

[14] 371 U.S. 245 (1963).

policy. *Teamsters v. Oliver*[15] held that the national interest in effective execution of collective bargaining procedures as expressed in the Wagner and Taft-Hartly Acts precluded the application of state policy limiting the solution the parties' agreement could provide. Here the dominant interest scales tipped to the national side and the state law was found to stand as an obstacle although it seems the Ohio law could easily have been upheld as valid exercise of police power restricting NLRB operation but not to a degree justifying preemption. An alternative was in fact the holding in *De Veau v. Braisted.*[16] The Court stated preemption is not a problem in physics but one of *adjustment* because of the interdependence and interaction of state and federal interests. Again in *Florida Lime and Avocado Growers v. Paul*[17] and *Parker v. Brown*[18] state interest in local economic regulation was held valid as against federal rules easily construable as pervasive national schemes. Thus the conflict with dominant national interest doctrine is fruitful but yields alternative results depending on the valuation of the respective interests in the particular case.[19] It is never done, however, without a far more penetrating analysis of those interests than was done by this court.

It must also be noted that the easy finding of conflict with national policy or interest runs against a long tradition of concurrent state legislation. This same Arkansas full crew law has been three times held by the Supreme Court not to interfers with the same national interest in the free flow of interstate commerce.[20] In one case where the national interest was already strong enough to have preempted the field of railroad safety equipment,[21] state law requiring cabooses on interstate trains for the safety of crew members was upheld.[22] And Mr. Justice Frankfurter, dissenting in *Farmer Ed. & Coop. Union v. WDAY, Inc.*, reminds us that concurrent jurisdiction is "clearly admitted by the whole tenor" of the constitution, and the clear doctrine of the *Federalist Papers* is that no state law will be stricken unless it is "absolutely and totally contradictory and repugnant."[23]

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[15] 358 U.S. 283 (1959).
[16] *Supra*, note 12.
[17] *Supra*, note 5.
[18] 317 U.S. 341 (1943).
[19] In addition to cases in text; *Head v. Board of Examiners*, 374 U.S. 424 (1963), compared with *Farmers Ed. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1960).
[20] *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249 (1931); *St. Louis & Iron Mtn. Ry. v. Arkansas*, 240 U.S. 518 (1916); *Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453 (1911).
[21] *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605 (1926).
[22] *Terminal R.R. Association, Inc. v. Bhd. of R.R. Trainmen*, 318 U.S. 1 (1943).
[23] *Supra*, note 19, at 542.

Legislative intent has often been used to clear the fog in conflict questions. In fact, a typical statement of the doctrine is: "whether the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24]

Of course legislative intent is usually found by the Court from the face of the statute, which leaves us back where we started. But Congressional intent may be clearly demonstrated in the bill's legislative history and be taken from that source as a valid indicator.[25] The legislative record of Public Law 88-108 contains clear statements that the congressmen who prepared and passed it did not want state full crew laws preempted.[26] The district court's statement, that since the legislators were aware of the preemption problem but still refused to include statements in the bill allowing state action the intention was to preempt, is naive. Congressional-executive relationships are carried on in large part via the principle of administrator responsibility to the Congressional committee in his field. Inclusion of non-preemption language in the official legislation was surely thought unnecessary by the legislators.

Accurate statement of the holding of this case must await Supreme Court clarification of the doctrines and classifications involved, as it has been accepted on appeal. In the interim the ruling is that the awards promulgated by special arbitration boards established by Congress for final resolution of specific disputes will preempt all state law differing from the requirements set out therein, although the requirements are framed in minimal language.

The foundations of the holding are so insecure as to render it weak law. It is believed the court committed an inexcusable error in failing to distinguish between the nature and scope of power delegated by Congress to administrative agencies who are to regulate a whole field by long term promulgation and adjudication of rules, and the far weaker grant of power made in Public Law 88-108 to a body which was merely to arbitrate the issues of dispute between elect parties in a specific controversy. Allowing preemption of state laws,

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[24] *Teamsters v. Oliver, supra,* note 2.

[25] Such material in legislative records is placed there purposely by Congressmen as administrative guides.

[26] In an original bill the arbitration was to have been done by the ICC but the document was redrafted because there was fear the result might be taken as a precedent by the railroad industry or perhaps other labor-management disputes. S. Rep. No. 459, 88th Cong., 1st Sess. 7 (1963).

Several Congressmen state their intent both individually and collectively that state crew consist laws not be preempted, superceded, or modified. Hearings on H.J. 565 Before the Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 111 (1963); ..... Cong. Rec. 15273 (daily ed. 28 Aug. 1963); H.R, Rep. No. 713, 88th Cong., 1st Sess. 14 (1963).

nominally safety regulations, by a dubious interpretation of an arbitration award passed by a board with doubtful national power is really laying bare the health of the federal system to the evils of a wide-open Pandora's Box. If settlement of controversies involving labor and interstate commerce does require such arbitration awards to be omnipotent, let us wait until Congress speaks with more "drastic clarity."

J. Kendrick Wells

ANTI-TRUST COMMERCIAL BANKING-PRODUCT TEST FOR RESTRAINT OF TRADE AND ATTEMPT TO MONOPOLIZE UNDER THE SHERMAN ACT.—The government charged that a proposed merger between the first and fourth largest commercial banks in an isolated market, which would result in a merged bank having over one-half of the total assets, loans and deposits of all commercial banks within the area, would violate sections 1 and 2 of the Sherman Act. The district court held that no violation of either sections 1 or 2 was shown. *Held*: Reversed. When merging corporations are major competitors in a relevant market, as denoted by the percentage share of the market, the elimination of this competition constitutes a violation of section 1. *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

Recently, two important decisions have brought within the scope of anti-trust laws a new and distinct "line of commerce"—commercial banking.[1] Because of the long run historical movement of concentration in this field, this would appear to be a future fertile field of federal litigation. Accordingly, it would appear beneficial to examine what the Supreme Court considers the product market to be and whether this definition would result in a realistic test of competition in a majority of cases.

Several necessary assumptions have been made in order to narrow this discussion to the single problem of denoting the Court's definition and examining its general validity. These assumptions are that the federal courts have jurisdiction, that a reduction of competition in this field is an evil that should be prohibited, that concentration figures give a realistic picture of competition, and that the product market of commercial banking can be examined in the same way as that of any manufacturing industry.[2]

[1] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1963); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[2] The writer does not pass upon the economic validity of these assumptions, but it is believed that all are implicit in the Court's consideration of the problem.