STATE REGULATION OF UNPROTECTED UNION ACTIVITY: BYPASSING THE "ARGUABLY SUBJECT" TEST WITH NLRB ADVISORY OPINIONS

RECENT Supreme Court decisions defining the extent to which state regulation of labor relations has been preempted by federal legislation seem to have neutralized the broad principle, enunciated twelve years ago in the *Briggs-Stratton* decision,[1] that the states may regulate union conduct which is neither protected by section 7 nor prohibited by section 8 of the National Labor Relations Act.[2] Section 7 grants employees the right to form labor organizations and to act in concert for the purpose of collective bargaining; the act protects the free exercise of these rights by prohibiting employer reprisals against employees engaged in the protected activities.[3] It is now well settled that, absent violence or other dangers peculiarly the concern of the states' police power, states cannot regulate union activity protected by section 7.[4] Similarly immune from state regulation are activities prohibited under the unfair labor practice provisions of section 8.[5] Some forms of concerted union activity, while not prohibited by federal law, are of such questionable status as weapons in labor management disputes that they fall outside the protection of section 7, and may therefore be subject to reprisals by management. These include, for example, partial strikes such as the slowdown [6] or the intermittent work stoppage.[7] It is in this area of union activity that the states' power to regulate, at one time upheld by the Supreme Court, has been made unclear.

In *Briggs-Stratton,* the Supreme Court expressly permitted Wisconsin to outlaw a partial strike which was held to be neither protected nor prohibited by the federal act.[8] A union attempting to bring pressure to bear on an employer during contract negotiations engaged in a series of intermittent work stop-

1. International Union, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

2. 49 Stat. 449, 452 (1935), as amended, 29 U.S.C. §§ 157, 158 (1958).

3. Section 8(a)(1), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1958).

4. International Union, UAW v. O'Brien, 339 U.S. 454 (1950); Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945).

5. *E.g.,* Garner v. Teamsters Union, 346 U.S. 485 (1953).

6. *E.g.,* Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360, 367-68 (1952); Elk Lumber Co., 91 N.L.R.B. 333 (1950); see International Union, UAW v. Wisconsin Employment Relations Bd. (Stolper Steel), 258 Wis. 481, 46 N.W.2d 185 (1951).

7. *E.g.,* International Union, UAW v. Wisconsin Employment Relations Bd. [Briggs-Stratton], 336 U.S. 245 (1949); Valley City Furniture Co., 110 N.L.R.B. 1589, 1592-95 (1954); Kohler Co., 108 N.L.R.B. 207, 218-21 (1954); Pacific Tel. & Tel. Co., 107 N.L.R.B. 1547 (1954).

8. International Union, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

pages. The employer secured an order from the state labor board directing the union to cease and desist from using such tactics, and the Supreme Court of Wisconsin affirmed.[9] The United States Supreme Court upheld the issuance of the order, rejecting the union's claim that Wisconsin's Employment Peace Act—the authority for the state board's action——was preempted by federal labor legislation.[10] Although violence was involved in the dispute and was enjoined by the state board's order,[11] the Supreme Court's holding was not based on the states' recognized power to regulate instances of violence.[12] As the Court itself noted, the union had not appealed the portion of the order prohibiting violence;[13] thus the sole question presented was whether the state could regulate the nonviolent concerted activities involved. The Court stated that federal legislation does not withdraw state police powers over such activities unless Congress clearly manifests an intent to preempt the field; moreover it seemed to indicate that exclusion of the states from this area might be affected only by affirmative federal regulation.[14] The Court then found that the partial strike in question was neither a protected activity under section 7 nor an unfair labor practice outlawed by section 8. Thus, because such conduct must be "governable by the state or it is entirely ungoverned,"[15] the Court found the Wisconsin Board's order to be a valid exercise of state regulatory power.

In *Garner v. Teamsters Union*,[16] however, the Court seemed to disallow the state regulatory power approved in *Briggs-Stratton*. The Pennsylvania court of first instance had enjoined a union's peaceful picketing; it had found that the union's purpose was to coerce an employer into compelling his employees to join the union, an unfair labor practice under Pennsylvania law.[17] On appeal, however, the state supreme court found that the activity fell within the exclusive jurisdiction of the NLRB.[18] The Supreme Court of the United States affirmed this finding of preemption. The Court stated that the picketing in question would have been subject to section 8(b)(2) of the federal act,[19] the operative provision of which is almost identical to the Penn-

9. International Union, UAW v. Wisconsin Employment Relations Bd., 250 Wis. 550, 27 N.W.2d 875 (1947).

10. 336 U.S. 245, 264-65 (1949).

11. 250 Wis. at 569a, 27 N.W.2d at 884.

12. *E.g.*, Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd., 237 Wis. 164, 295 N.W. 791 (1941), *aff'd*, 315 U.S. 740 (1942). For the most recent discussion of the violence exception, see San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247-48 (1959).

13. 336 U.S. at 250 n.8.

14. *Id.* at 253.

15. *Id.* at 254.

16. 346 U.S. 485 (1953).

17. Garner v. Teamsters Union, 62 Dauphin County Rep. 339 (Pa. C.P. 1951).

18. Garner v. Teamsters Union, 373 Pa. 19, 94 A.2d 893 (1953).

19. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958).

sylvania statute involved.[20] If, as the Court seemed to believe,[21] the picketing was prohibited by section 8, its holding of preemption would not necessarily have been in conflict with the *Briggs-Stratton* decision. Activities prohibited by the federal statute are regulated by the NLRB, and the bar against concurrent state regulation of such activities flows from the desire to avoid regulation by "a multiplicity of tribunals and a diversity of procedures."[22] By definition, the "neither protected nor prohibited" activities in *Briggs-Stratton* were outside the jurisdiction of the NLRB, and thus did not create the danger of conflicting state and federal regulation feared by *Garner*. Indeed, the *Garner* Court at one point seemed to approve *Briggs-Stratton*, commenting that "injurious conduct which the National Labor Relations Board is without express power to prevent" is regulable by the states.[23] Later in the opinion, however, the Court suggested that Taft-Hartley might preclude all state regulation, appearing to conclude that federal preemption did not demand the express congressional mandate which the earlier decision had required. Here the Court reasoned that, by outlawing certain types of picketing, Taft-Hartley impliedly left all others, whether protected or unprotected, free of any "methods and sources of restraint," and that any state regulation would therefore impinge on this implicit federal policy.[24]

The authority of *Briggs-Stratton* is further questioned by the opinion in *San Diego Bldg. Trades Council v. Garmon*,[25] which expanded the primary jurisdiction notions touched on in *Garner*. The earlier case had stated that, due to the danger of conflicting remedies, states could not regulate any activity subject to regulation by the Board. *Garmon* went further to hold that states could not act in any case involving activity "arguably subject" to sections 7 or 8, since, to take jurisdiction, the state tribunal would first have to

20. PA. STAT. ANN. tit. 43, § 211.6(c) (1952), the relevant state provision, is almost the same as Labor Management Relations Act § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958), which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Section 8(b)(2), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958), the federal provision involved in *Garner*, makes it an unfair labor practice for a union to discriminate against an employee through the medium of the employer—by coercing the employer to commit an 8(a)(3) unfair labor practice against the employee.

21. The Court, while apparently unwilling to state that the picketing involved constituted an unfair labor practice, said, "Congress has taken in hand this particular type of controversy where it affects interstate commerce." 346 U.S. at 488.

22. *Id.* at 490-91.

23. *Id.* at 488.

24. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processess to fall within its prohibitions. . . . For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits. *Id.* at 499-500.

25. 359 U.S. 236 (1959).

interpret those sections in order to find whether or not the activity actually was subject to federal regulation.[26] The Court reasoned that the regulatory scheme established by Congress dictates that only the NLRB can make the initial determination whether activity is governed by section 7 or 8.[27] Since the *Briggs-Stratton* Court itself undertook to decide whether the activity before it was protected or prohibited by the federal act, the *Garmon* opinion criticized *Briggs-Stratton*'s approach and found it "no longer of general application."[28] On the basis of this criticism, the majority opinion disavowed the entire holding in *Briggs-Stratton*, including the holding that states can regulate activities "neither protected nor prohibited" by federal law. This issue, the majority implied, remains an open question.[29]

Expanding the justified criticism of *Briggs-Stratton*'s approach into a criticism of its broader holding, however, seems unwarranted. The Court in *Briggs-Stratton* was unqualified to decide whether the partial strike was protected or prohibited because that decision involved interpretations of sections 7 and 8 which must be made in the first instance by the NLRB. But, given a decision that the activity was neither protected nor prohibited, the Court was not unqualified to decide whether such conduct should be regulated by the states.[30] This decision involves not only an analysis of the broad purposes of the federal act, but also a consideration of the corresponding interests of the states, and a determination of the means by which both the state and the federal interests can best be accommodated. These problems of federal-state relations are matters for judicial rather than administrative "expertise."[31] Thus the criticisms advanced by the majority in *Garmon* should not seriously disturb the reasons supporting the broad holding in *Briggs-Stratton*.

Notwithstanding *Garmon*, the *Garner* decision remains as a possible repudiation of *Briggs-Stratton*. The language in *Garner* which casts doubt on *Briggs-Stratton* assumes that Congress, in passing section 8(b), intended that only those activities specifically forbidden should be subject to any governmental control.[32] In support of this position, it might be argued that, because Taft-Hartley was designed to equalize the relative positions of labor and management,[33] Congress intended to preclude state regulation in order to prevent disruption of the federally-created equilibrium.[34] Before the enact-

26. *Id.* at 245.
27. *Id.* at 244-45.
28. *Id.* at 245 n.4.
29. *Id.* at 245 & n.4.
30. The concurring opinion in *Garmon* makes this point. *Id.* at 253 n.5 (Harlan, J.).
31. Indeed, the majority opinion seems to accept this distinction. See *id.* at 241-42.
32. See note 24 *supra*; Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539, 544-45 (1960).
33. See COX, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 44 (1947).
34. See, *e.g.*, Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6, 20 (1959).

ment of Taft-Hartley, however, states had regulated unprotected activity.[35] In light of this existing pattern of regulation, of which the Taft-Hartley Congress took notice, it is not likely that Congress would have attempted to wipe the slate clean without explicitly saying so. On the contrary, Congressman Hartley indicated that the bill's sponsors were aware of the need to preserve state regulatory legislation.[36] If Congress did take account of existing state regulation in striking the balance, the *Garner* interpretation might disrupt rather than protect the equilibrium which Taft-Hartley sought to create. Moreover, since unprotected activities could be regulated by the states before the passage of section 8(b), the *Garner* interpretation would stake out a new area in which unions would be free to employ self-help, unfettered by any governmental control. It seems difficult to attribute any such intent to the 80th Congress. Section 1(b) of Taft-Hartley reflects a clear policy to place labor-management relations under a rule of law,[37] and thus represents a shift from the *laissez-faire* approach of the Wagner Act.[38] Furthermore, one purpose of the 1947 act was the withdrawal of economic weapons from unions,[39] an incongruous background for legislation which ex-

35. See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1307-08 (1954); Gregory, *supra* note 32, at 541. Indeed, as *Briggs-Stratton* demonstrates, state regulation was thought to continue. See notes 8-15 *supra* and accompanying text.

36. See, *e.g.*, the following colloquy between Representative Kersten of Wisconsin and Mr. Hartley, House sponsor of the proposed legislation:

> MR. KERSTEN: . . . Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level in so far as it is possible. Can the gentleman give us assurance on that proposition . . . that that is the sense of the language and of the report?
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> MR. HARTLEY: That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that state.
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> MR. KERSTEN: And it will permit as many of these disputes to be settled at the State level as possible?
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> MR. HARTLEY: Exactly.

93 CONG. REC. 6383-84 (1947.)

37. It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. . . .

61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1958).

38. See Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322-23 (1951).

39. Section 8(b), 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b) (1958), is the clearest indication of this policy.

pands the union's right to self-help. Given this evidence, the *Garner* interpretation seems untenable without explicit evidence that Congress intended to occupy the field.

Although *Briggs-Stratton* may be good law today insofar as it authorizes state regulation of concerted activity which is held by the NLRB to be neither protected nor prohibited, the states' power to act in this area may be assaulted from another quarter by the *Garmon* ruling that states cannot take jurisdiction if the activity in question is "arguably subject" to sections 7 or 8. The "arguably subject" test is a necessary adjunct of the institutional framework of federal labor regulation. According to the Court in *Garmon*, Congress entrusted the interpretation and elaboration of its legislation to a centralized agency, capable of developing an understanding of federal policies and an expertness in unraveling the facts of complex labor disputes.[40] Decisions delimiting the outer boundaries of sections 7 and 8, therefore, must be made in the first instance by the NLRB. If those outer boundaries were clearly defined, state courts and agencies would have no difficulty in assuming jurisdiction over the "neither . . . nor" activities which *Briggs-Stratton* allows them to regulate. But whenever the applicability of sections 7 or 8 to a particular activity is not clear, a state tribunal cannot take jurisdiction unless it first interprets those sections to find that they do not apply—an act which would impinge upon the primary interpretive function of the NLRB. Thus it is necessary to prohibit regulation of activities "arguably subject" to the NLRB's jurisdiction, at least until there is a "clear Board determination that an activity is neither protected nor prohibited,"[41] or until such a decision can be based on "compelling precedent applied to essentially undisputed facts."[42]

The "arguably subject" test cuts deeply into the area left open to state regulation by *Briggs-Stratton*. It is practically impossible to obtain a clear NLRB determination that a particular activity is neither protected nor prohibited without submitting the dispute in question to the Board's formal adjudicatory processes. The undefined status of the partial strike, perhaps the most significant allegedly "neither . . . nor" activity, illustrates this difficulty. Although *Briggs-Stratton* held clearly that partial strikes were neither protected nor prohibited,[43] that part of the holding was disowned by both the majority and the concurrence in *Garmon*.[44] In fact, the NLRB recently took the position that partial strikes are a *per se* unfair labor practice in violation of section 8(b)(3)'s duty to bargain in good faith.[45] Although the Supreme Court rejected the Board's position in *NLRB v. Insurance Agents Int'l*

40. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

41. *Id.* at 246.

42. *Ibid.*

43. International Union, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245, 264-65 (1949).

44. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 n.4, 253 n.5 (1959).

45. Textile Workers Union (Personal Products Corp.), 108 N.L.R.B. 743 (1954), *enforcement denied in part*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956).

Union,[46] the Court's opinion intimates that it was not returning to the *Briggs-Stratton* view that partial strikes are categorically not prohibited.[47] Rather, the status of such activity now seems to be a question to be determined in each case. Partial strikes may also be prohibited as unfair labor practices in other circumstances. Section 8(d) of Taft-Hartley makes it an unfair labor practice to strike for the purpose of terminating or modifying an existing collective bargaining agreement, unless the union first gives the employer 60 days notice of the proposed termination or modification.[48] Since section 501(2) defines "strike" to include "any concerted slow down or other concerted interruption of operations by employees,"[49] a partial strike without proper notice can violate 8(d). By the same reasoning, a partial strike may also be prohibited by sections 8(b)(1) and 8(b)(4) when the union's purpose is one proscribed by those sections.[50] The section 7 status of partial strikes is similarly unclear. In *Insurance Agents* the Court expressly left open the question whether partial strikes were protected by section 7;[51] it adhered to the notion first expressed in *Garmon* that *Briggs-Stratton*'s answer to this question, being a primary determination which should have been made by the Board, was no longer authoritative.[52] Resolution of this issue may be even more difficult to obtain in a particular case than would the answer to a section 8 question. The structure of the statute is such as to allow the Board to pass upon section 7 questions in only a few cases—those in which an employer retaliates against the allegedly "protected" activity.[53]

Since the various forms of partial strike activity can cause serious damage to the employer, often without affording the opportunity to take counter

46. 361 U.S. 477 (1960). In this case, the union, whose agents were attempting to negotiate a new collective bargaining contract with the company, engaged in a series of on-the-job activities designed to harass management. Among the union's tactics were refusal to solicit new business, reporting late for work, engaging in "sit-in-mornings," picketing at specified times at the direction of the union, and soliciting policyholders' signatures on petitions addressed to the company. The company filed a charge, and the Board held the union's activities a refusal to bargain, under Labor Management Relations Act § 8(b)(3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958), entering a cease-and-desist order, 119 N.L.R.B. 768 (1957). The District of Columbia Circuit denied enforcement of the order, 260 F.2d 736 (D.C. Cir. 1958).

47. 361 U.S. at 493-94 n.23.

48. Labor Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

49. Labor Management Relations Act § 501(2), 61 Stat. 161 (1947), 29 U.S.C. § 142(2) (1958).

50. Labor Management Relations Act §§ 8(b)(1), 8(b)(4), 61 Stat. 141 (1947), 29 U.S.C. §§ 158(b)(1), 158(b)(4) (1958).

51. 361 U.S. at 492 & n.22.

52. *Id.* at 493-94 n.23.

53. The sole way presently to obtain a Board hearing dealing with a right under § 7 is to bring an unfair labor practice charge against the employer, under §§ 8(a)(1) or 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1958), or against the union under § 8(b)(1), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1) (1958).

measures or even to inflict the normal no-work-no-pay hardships of a strike,[54] the states would seem to have a legitmate interest in regulating this activity. But the necessity of first resorting to a formal NLRB proceeding to resolve the "protected-prohibited" issue will probably sap the practical value of state remedies. If the employer is petitioning the state court to enjoin a partial strike, he cannot afford to wait more than a year [55] for the NLRB to determine that the state court is not preempted. Instead, the employer will probably be forced to capitulate during the delay.[56] While a damage remedy might be available after the NLRB determination, suit on the stale claim, by disrupting rehabilitated employee relations, may cost more than it is worth. If effective state regulation of the "neither . . . nor" area is to be achieved, therefore, a speedier procedure for obtaining NLRB adjudication must be devised.

This might be accomplished by establishing a procedure through which the NLRB could render advisory opinons. Many administrative agencies utilize such procedures to give informal guidance on such issues as: the application of federal securities acts to certain business dealings;[57] duties on prospective imports;[58] and the application of the tax laws to a wide range of transac-

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54. The effect on production of the intermittent work stoppage, or "quickie" strike, was described in International Union, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245, 249 (1949):

> This procedure [*e.g.*, the intermittent work stoppage] was publicly described by the Union leaders as a new technique for bringing pressure upon the employer . . . . [T]hese tactics . . . did interfere with production and put strong economic pressure upon the employer, who was disabled thereby from making any dependable production plans or delivery commitments.

See Cox, *supra* note 38, at 339.

The "slowdown" is another effective means of applying economic pressure to an employer. In International Union, UAW v. Wisconsin Employment Relations Bd. (Stolper Steel), 258 Wis. 481, 46 N.W.2d 185 (1951), for example, the employees were able, while retaining their positions, to cut production to 80% of its former level. *Id.* at 492, 46 N.W.2d at 190. Yet the employer in a "slowdown" situation is faced with the difficulty of identifying the employees engaged in the activity; if he does not wish to discharge his entire work force he may be left remediless, absent state regulation such as that of *Stolper*.

55. The time lapse between the filing of a charge and final Board decision in the average contested case is 475 days. See REPORT OF THE ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW TO THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, S. Doc. No. 81, 86th Cong., 2d Sess., at pp. 1-2 (1960).

56. This appears to be the suggestion of Mr. Justice Harlan, concurring in *Garmon*:

> Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective.

359 U.S. at 253.

57. 17 C.F.R. § 202.1 (1949); see Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 IOWA L. REV. 241 (1941).

58. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATION OF THE CUSTOMS LAWS 89-91 (1941).

tions.[59] Indeed, pursuant to section 701 of the Landrum-Griffin Act of 1959,[60] which permits state regulation if the Board finds that the effect of the labor dispute on commerce is not "sufficiently substantial to warrant the exercise of its jurisdiction," parties in state courts or agencies may, upon filing commerce data with the NLRB, secure an advisory opinion on whether the Board would assert jurisdiction over the case.[61] While the Board's power to deny jurisdiction on these grounds is explicitly granted by the new statute (although the power is probably inherent),[62] the advisory opinion procedure itself is fashioned under the Board's general authority to promulgate rules and regulations under section 6 of the National Labor Relations Act.[63] Thus section 6 appears to be sufficient authority to enable the Board to issue advisory opinions about jurisdictional matters which could be decided in actual cases before it. It might, therefore, authorize an advisory opinion procedure by which the NLRB could resolve questions of its substantive jurisdicion under sections 7 and 8.

Such opinions would not in every case be a determination on the merits, but only an initial determination of jurisdiction. The advisory ruling that certain conduct is within the NLRB's jurisdiction because it is "protected" or "prohibited" could be given the significance of a complaint issued by a regional director. No formal order would issue without invocation of the Board's normal unfair labor practice procedures. After a full hearing on the merits, the trial examiner or the Board would remain free to decide the case on its record. Admittedly, to the extent that a final decision might contradict an advisory opinion, and hold that that the activity was in fact "unprotected" all the while, the advisory opinion procedure would not advance the litigant very far in his search for effective relief. But the advantages of this procedure are to be found elsewhere. If the advisory opinion should characterize the activity in question as neither protected nor prohibited the ruling would be dispositive; it would then be tantamount to a refusal by the General Counsel to issue a complaint in an unfair labor practice case—the end of the matter as far as the NLRB is concerned.[64] In these cases, state courts or agencies will be given jurisdiction over labor disputes which otherwise would fall into the "no law land" created by *Garmon* and its "arguably subject" test.

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59. See BITTKER, FEDERAL INCOME ESTATE AND GIFT TAXATION 28-29 (1958).

60. Labor Management Reporting and Disclosure Act, 73 Stat. 541, 29 U.S.C. § 164(c) (Supp. I, 1959).

61. 29 C.F.R. § 102.98 (Supp. 1960).

62. The Supreme Court appears to have recognized such a power in NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 684 (1951):

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

63. National Labor Relations Act § 6, 49 Stat. 452 (1935), 29 U.S.C. § 156 (1958).

64. See notes 66-69 *infra*, and accompanying text.

The obvious objection to such advisory opinions is that the summary procedure necessary for their speedy issuance is not appropriate for deciding the complex factual and legal questions often presented by disputes involving sections 7 and 8. Indeed, the complexity of labor problems and the Board's unique ability to deal with them is one of the basic reasons advanced for protecting the Board's primary jurisdiction.[65] It might seem ironic to insist upon referring a problem to the Board, and then to provide that only a small portion of the Board's expert machinery will be brought to bear upon it.

Yet this is in fact what often happens in the Board's normal adjudicatory processes. The initial determination on the merits of any unfair labor practice charge is made, not by the Board members or a Trial Examiner, but by a Regional Director acting as an agent of the General Counsel. The Taft-Hartley act separates the prosecutory and adjudicatory functions of the NLRB, placing the former under the exclusive control of the General Counsel.[66] When an unfair labor practice charge is filed and the respondent has answered the charge, a field examiner from the regional office makes an informal investigation of the alleged facts of the dispute.[67] On the basis of this investigation, the Regional Director can refuse to issue a complaint if he finds that there is insufficient evidence of the facts alleged, or that the facts as alleged do not constitute a violation of the act.[68] This decision may be appealed within ten days to the General Counsel, whose decision is final.[69] Although the independent authority of the General Counsel in issuing complaints has frequently been criticized,[70] it has survived one attempt at repeal [71] and must be regarded as an essential feature of NLRB procedure.

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65. The Board can develop the sort of expertise as a factfinder which the courts, because they may not confine their business to a single field, may not.

> [Congress] went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.

Garner v. Teamsters Union, 346 U.S. 485, 490 (1953).

66. Labor Management Relations Act § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153(d) (1958).

67. 29 C.F.R. § 101.4 (Supp. 1960).

68. 29 C.F.R. § 101.5 (Supp. 1960).

69. 29 C.F.R. §§ 101.6, 102.19 (Supp. 1960).

70. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY COMMISSIONS 139-41 (1949); *Hearings on H. Res. 512 and H. Res. 516 Before the Committee on Expenditures in the Executive Departments*, 81st Cong., 2d Sess. 16, 107 (1950).

71. Reorganization Plan 12 of 1950, H.R. Doc. No. 516, 81st Cong., 2d Sess. (1950), was an attempt by the President to transfer certain functions of the General Counsel to the Chairman of the NLRB. It was opposed by the late Senator Taft because it was, *inter alia*, an attempt "to reverse by Executive action a basic matter of policy determined by Congress 3 years ago." *Hearings on H. Res. 512 and H. Res. 516 Before the Committee on Expenditures in the Executive Departments*, 81st Cong., 2d Sess. 191 (1950). Senator Taft himself had previously proposed that the Board return to its pre-1947 structure. See S.

Adaptation of this procedure to provide a mechanism for advisory opinions would not necessarily lower the quality of the NLRB's interpretive or fact-finding processes. Not every problem raised under *Garmon* is likely to conjure up new mysteries of federal labor law. The status of many activities "arguably subject" to the act would probably be considered a routine question by a Regional Director who, unlike a state court or agency, deals with such problems daily. When difficult or unsettled issues of law are presented, the Regional Director could follow the current practice of certifying those questions to the General Counsel's office before disposing of an unfair labor practice charge.[72] Moreover, on close questions of law or fact, the General Counsel will probably allow some latitude in favor of preserving the Board's jurisdiction, preferring to postpone the agency's final answer to such questions until after a full hearing and review by the Board members. Errors made in this direction will be harmless, since their only effect will be to oust the state court of jurisdiction—a result no worse than that which presently obtains under the "arguably subject" test.[73] But in that area where the facts can readily be determined and where the Regional Director or the General Counsel feels competent to interpret the law, the vagaries of the "arguably subject" test can be avoided by a relatively swift decision on the applicability of sections 7 and 8.

The Court in *Garmon* warned that it would not accept the General Counsel's refusal to assert jurisdiction as a clear NLRB ruling that certain conduct was neither protected nor prohibited.[74] A refusal to assert jurisdiction, the Court noted, need not be based on a substantive ground; the NLRB may also choose not to act when the impact of the dispute on commerce is insignificant, or when in his discretion the General Counsel does not believe that the policy of the act would be served by prosecuting the respondent.[75] This objection has in large part been obviated by the 1959 amendment which permits states to regulate when NLRB jurisdiction is refused for insufficient impact on commerce.[76] It remains valid, however, insofar as the complaint may be denied on the basis of some undefined exercise of discretion. More important, the denial of a complaint is usually not a complete definition of the activity's status. A finding that activity *X* is not an unfair labor practice does not, without more, answer the question of whether activity *X* is protected

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REP. No. 99, 81st Cong., 1st Sess., pt. 2 (1949); 95 CONG. REC. 5589, 8506, 8712, 8808 (1949). And in 1960, the REPORT OF THE ADVISORY PANEL, *op. cit. supra* note 55, recommended abandonment of what it called "the present hybrid compromise." S. Doc. No. 81, 86th Cong., 2d Sess. 4 (1960). For a brief discussion of these various proposals, see generally GELLHORN & BYSE, CASES ON ADMINISTRATIVE LAW 1024-28 (4th ed. 1960).

72. 29 C.F.R. § 101.8 (Supp. 1960).
73. See notes 41-42 *supra* and accompanying text.
74. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245-46 (1959).
75. *Ibid.*
76. See text accompanying note 60 *supra*.

by section 7.[77] But neither of these objections to the "legal significance" of a denied complaint would apply to an advisory opinion. All that is required is a clear formulation of the question to be answered by the advisory opinion: "Is this activity prohibited by section 8 or protected by section 7?" The question is within the Regional Director's competence, for it only asks him to articulate conclusions which he often makes in judging the merits of an unfair labor practice charge.

77. See note 53 *supra* and accompanying text.