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P. S. Guss dba Photo Sound Products  
Manufacturing Company v. Utah Labor Relations  
Board and United Steelworkers of America, CIO :  
Brief of Appellant

Utah Supreme Court

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Peter W. Billings; Fabian, Clendenin, Moffat & Mabey; Attorneys for Appellant;

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STATE OF UTAH

P. S. GUSS dba PHOTO SOUND  
PRODUCTS MANUFACTURING  
COMPANY,

*Appellant,*

vs.

UTAH LABOR RELATIONS  
BOARD and UNITED STEEL-  
WORKERS OF AMERICA, CIO,

*Respondents.*

Case No. 8393

BRIEF OF APPELLANT

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# TABLE OF CONTENTS

	<i>Page</i>
Statement of Facts.....	1
Statement of Points .....	5
Argument .....	6
I. THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OF THE LABOR RELATIONS OF PHOTO SOUND PRODUCTS MANUFACTURING COMPANY. ....	6
II. ACTION OF THE NATIONAL LABOR RELATIONS BOARD IN DECLINING TO EXERCISE ITS JURISDICTION DOES NOT CONVEY JURISDICTION TO THE UTAH BOARD. ....	11
A. The National Labor Relations Board has not ceded jurisdiction. ....	11
B. The refusal of the National Labor Relations Board to exercise its jurisdiction, does not create jurisdiction in the State Board. ....	15
Conclusion .....	26

# INDEX OF AUTHORITIES

## CASES

Adelphia Cons. Co. vs. Bldg. & Con. Trades Council of Philadelphia, 27 Labor Cases, par. 68,843 (Pa., 1954).....	15
Algoma Plywood Co. vs. WERB, 336 U.S. 301 (Wis., 1949)....	20
Allen-Bradley Local 1111 vs. WERB, 315 U.S. 740 (Wis. 1942) .....	20
Amalgamated Assoc. of Street, Electric & Ry. Employees AFO vs. WERB, 340 U.S. 416 (1951) .....	19, 20
Amazon Cotton Mills Co. vs. Textile Union, 167 F. 2d 183 (CA 4 1948) .....	22
Auto Workers vs. Wis. Board, 336 U.S. 245 (1949).....	20
Bethlehem Steel Company vs. New York State Labor Relations Board, 330 U.S. 767 (1946) .....	8, 18
Building Trades Council vs. Kinard, 346 U.S. 933 (Ala., 1954)	18
Garner vs. Teamsters Union, 346 U.S. 485 (Pa., 1953).....	9
Haleston Drug Stores vs. NLRB, 187 F. 2d 418, (CA 9, 1951) .....	17
Kinard Construction vs. Building Trades Council, 64 So. 2d 400 .....	18

LaCrosse Telephone Company vs. WERB, 336 U.S. 18 (1949) .....	8, 9, 12
NLRB vs. Building & Construction Trades Council, 341 U.S. 675, (1951) .....	17
NLRB vs. Fainblatt, 306 U.S. 1 (1939) .....	6
NLRB vs. Star Beef Co., 193 F. 2d 8 (1951).....	17, 18
Nettleton Co. vs. United Shoemakers of America, CIO, 28 Labor Cases, par. 69,211 (N.Y., March, 1955).....	14
New York State Labor Relations Board vs. Wags Transpor- tation Company, 130 N.Y. Supp. 2d 731.....	12, 13, 22
Pittsburg Railways vs. Division 85, Amalgamated Ass'n. of Street Ry. Employees of America, 357 Pa. 379, 54 At. 2d 891, 174 ALR 1045 .....	10
Plankinton Packing Company vs. WERB, 338 U.S. 953 (1950) .....	8, 9
Retail Clerks Local 1564 AFL vs. Your Food Stores of Santa Fe, Inc. (CA 10, August 4, 1955) 28 CCH Labor Cases, par. 69,415 .....	22
Santa Cruz Packing Co. vs. NLRB, 303 U.S. 453 (1938).....	7
Universal Car & Service Co. vs. IAM (Mich., 1954), 27 Labor Cases, par. 68,825 .....	22, 23
Utah Labor Relations Board vs. Utah Valley Hospital, 235 P. 2d 520 (1951) .....	21
Utah Valley Hospital vs. Utah Labor Relations Board, 199 F. 2d 6 (1952) .....	21
WERB vs. Chauffeurs, Teamsters, etc., 66 N.W. 2d 218 (Wis., 1954) .....	14, 15
Your Food Stores vs. Retail Clerks, 121 F. Supp. 339 (1954)....	22

## STATUTES

29 USC § 151-166, 49 Stat. 457 .....	6
Labor Management Relations Act of 1947, 61 Stat. 136.....	6
National Labor Relations Act §8 (a) (1), (3) and (5).....	7
National Labor Relations Act § 10 (a), as amended.....	11

## PERIODICALS AND GOVERNMENT PUBLICATIONS

H.R. Rep. No. 235 80th Cong. 1st Session, p. 44.....	19
Sen. Rep. No. 11211 83rd Cong. 2d Sess. p. 28.....	26
Labor Law Journal, Jan. 1955, p. 3 .....	24
Labor Law Journal, May, 1955, p. 279.....	26
43 Georgetown Law Review, p. 67 .....	26
67 Harvard Law Review, 1297 .....	26
102 Pennsylvania Law Review, 959.....	26

IN THE SUPREME COURT  
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STATE OF UTAH

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P. S. GUSS dba PHOTO SOUND  
PRODUCTS MANUFACTURING  
COMPANY,

*Appellant,*

vs.

UTAH LABOR RELATIONS  
BOARD and UNITED STEEL-  
WORKERS OF AMERICA, CIO,

*Respondents.*

Case No. 8393

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STATEMENT OF FACTS

This matter comes before the court on a Writ of Review to review an order of the Utah Labor Relations Board directed against Philip S. Guss doing business as Photo Sound Products Manufacturing Company, a sole proprietorship, requiring him to reinstate certain ex-employees and to bargain collectively with United Steelworkers of America, CIO. The Petition for Writ of Review questions the jurisdiction of the Utah Labor Relations Board under the circumstances of this case to issue such an order.

P. S. Guss is a Utah resident engaged in business in Salt Lake City under the trade name of Photo Sound

Products Manufacturing Company, hereinafter referred to as Photo Sound. Photo Sound was set up by Mr. Guss to perform contracts for the United States Air Force for the design and manufacture of specialized photographic equipment. That is and was its only function. (R. 121) The business during the period in question involved three Air Force contracts; one for chemical mixers in the amount of \$84,896.73, one for printers in the amount of \$37,222.42, and one for print straighteners in the amount of \$29,906.35. (R. 125) To perform these contracts for the Air Force, Photo Sound purchased from sources outside the state, stainless steel in an amount "a little less than \$50,000" (R.133). The finished products were shipped to the Air Force at Wright-Patterson Field, Dayton, Ohio and other Air Force bases, including Hill Field, Utah, and other bases outside the state. (R. 124)

Shortly after the company started operating the United Steelworkers of America, CIO, in December of 1953, filed with the National Labor Relations Board, a petition for certification under the National Labor Relations Act of that union as the bargaining representatives for all of the employees of the company, except clerical and supervisory employees, as defined in the National Labor Relations Act, as amended. (R. 230) At the time for hearing on the petition on January 19, 1954 (R. 176) the company and the union entered into an agreement for a consent election to be conducted by the National Labor Relations Board. (R. 233) Among other things, this agreement recited that the employer,

Photo Sound, was “engaged in commerce within the meaning of Section 3(6)(7) of the National Labor Relation Act.” (R. 233, par. 8)

The election was conducted by the National Board on April 26, 1954 and was won by the union, 15 to 11. (R. 233) Under date of May 4, 1954, the United Steelworkers of America, CIO, were duly certified by the National Labor Relations Board pursuant to section 9(a) of the National Labor Relations Act. (R.234)

Although no request to bargain was made by the union until May 6, 1954 (R. 236) (and although it had won the election), on May 14, 1954, the union filed a charge against Photo Sound with the National Labor Relations Board (R. 290) under sections 8(a) (1), (3) and (5) of the National Labor Relations Act, as amended, alleging that the company had been guilty of unfair labor practices, including interference with the election, discriminatory discharges and refusal to bargain. Also during this period, the union published in the May, 1954 issue of the Utah CIO News (R. 291) a scurrilous attack upon Philip S. Guss and Photo Sound. Because of this hostile attitude of the union, Guss concluded that counsel should be present at all collective bargaining negotiations. Such was the case in the negotiations which proceeded between the union and the company between June 1, 1954 and the end of July of that year.

During this same period, the National Labor Relations Board was investigating the charges filed with it by the union. In July, 1954, the National Labor Relations Board issued new “yardsticks” which it indicated it

would apply to determine whether it would, in a particular case, exercise the exclusive jurisdiction granted it by Congress. (NLRB Release No. R-445, July 1, 1954, and No. R-449, July 15, 1954). Applying this new yardstick, the National Board under date of July 21, 1954, declined to consider the matter of the charges filed by the United Steelworkers of America, CIO, against Photo Sound, stating:

“Further proceedings are not warranted, inasmuch as the operations of the company involved are predominately local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction. I am therefore, refusing to issue complaint in this matter.” (R. 235)

The union, in this notice, was advised that it had the right to a review of this action taken by the National Board in declining to exercise its jurisdiction, but no appeal was taken by the union. (R. 18)

On July 29, 1954, the union filed substantially the same charge with the State Board (R. 1) that it had previously filed with the National Board. No complaint was issued by the State Board until January 14, 1955 and notice of hearing thereon issued the same date. This was the first notice either Photo Sound or its counsel had that the union had filed charges with the State Board.

At the hearing on the charges before the State Board on February 7, 1955, the company presented its contention that the matter was not within the jurisdiction of the Utah Board (R. 17) and objected to the introduc-

tion of all evidence and other proceedings on the same grounds (R 2.0). At the close of the union's case, the company renewed its motion to dismiss on the ground that the proceedings were not within the jurisdiction of the State Board, but were within the exclusive jurisdiction of the National Labor Relations Board (R. 133).

The hearing examiner ruled that the business of Photo Sound affected intrastate as well as interstate commerce (R. 317), and concluded therefrom that the State Board had jurisdiction. The Utah State Labor Relations Board affirmed the ruling of the hearing examiner (R. 329) and issued an order directing Photo Sound to cease and desist from refusing to bargain collectively with the CIO and directing it to take certain affirmative action with respect to certain of its ex-employees designated in the order. This Writ of Review was obtained to question the jurisdiction of the Utah Labor Relations Board to issue such an order.

## STATEMENT OF POINTS

### POINT ONE

THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OF THE LABOR RELATIONS OF PHOTO SOUND PRODUCTS MANUFACTURING COMPANY.

### POINT TWO

ACTION OF THE NATIONAL LABOR RELATIONS BOARD IN DECLINING TO EXERCISE ITS JURISDICTION DOES NOT CONVEY JURISDICTION TO THE UTAH BOARD.

A. The National Labor Relations Board has not ceded jurisdiction.

B. The refusal of the National Labor Relations Board to exercise its jurisdiction, does not create jurisdiction in the State Board.

## ARGUMENT

### POINT ONE

THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OF THE LABOR RELATIONS OF PHOTO SOUND PRODUCTS MANUFACTURING COMPANY.

The judicial plowing of the field of federal-state relationship in the administration of labor relations since the enactment of the Wagner Labor Relations Act in 1935<sup>1</sup> and its amendment in 1947<sup>2</sup> makes it clear that the National Labor Relations Board has jurisdiction in this matter and that such jurisdiction of the National Board is exclusive, Congress having preempted the field, except for certain particular instances specifically spelled out in the Act.

Since early in NLRA history the Supreme Court has held that Congress intended to exercise the full scope of its authority under the Commerce clause in the labor relations field. In *NLRB v. Fainblatt*, 306 US 1 (1939) the Supreme Court held the power of Congress to regulate interstate commerce is plenary and extends to all such commerce, be it great or small and that;

“The Act, on its face, thus evidences the intention of Congress to exercise whatever power is constitutionally given it \* \* \* we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend upon any particular volume of commerce affected \* \* \*”

---

<sup>1</sup> 29 USC § 151-166, 49 Stat. 457.

<sup>2</sup> Labor Management Relations Act of 1947, 61 Stat. 136.

The trial examiner of the Utah Labor Relations Board, without referring to the approximately \$50,000.00 worth of purchases in interstate commerce of Photo Sound found:

“It must be conceded that the Respondent is manufacturing products almost all of which are shipped outside the State of Utah. It is also true that a large amount of the dollars expended in performing these contracts are spent for labor and the purchase of materials on a local level. It is thus apparent, that intrastate commerce as well as interstate commerce is affected by this dispute.” (R. 317)

Since the Board found that interstate commerce as well as intrastate is affected by the dispute between Photo Sound and the CIO, it is clear that the labor relations of Photo Sound Products Manufacturing Company, and particularly charges of discrimination and refusal to bargain, matters expressly dealt with by Section 8(a) (1), (3) and (5) of the National Act, are within the National Board's exclusive jurisdiction. *Santa Cruz Packing Co. vs. NLRB*, 303 US 453, (1938). Other cases holding on facts similar to those established with respect to Photo Sound, that the National Labor Relations Board has jurisdiction and has exercised such jurisdiction, might be cited *ad infinitum*, but as the principle is so clear, this brief will not be unduly lengthened by such enumeration. In almost every case affecting interstate commerce, both intrastate commerce and local labor are involved, but unless the doctrine of *de minimis* be “maximized” to an extent far beyond that recognized by

the courts, the National Board's jurisdiction attaches, and that jurisdiction is exclusive. *Bethlehem Steel Company vs. New York State Labor Relations Board*, 330 US 767 (1946), *LaCrosse Telephone Company vs. Wisconsin Employment Relations Board*, 336 US 18 (1948) and *Plakinton Packing Company vs. Wisconsin Employment Relations Board*, 338 US 953 (1950).

In the *Bethlehem Steel* case, the issue of the federal-state relationship was first adjudicated by the Supreme Court. The issue there was whether the New York Board could certify a formen's union in an industry subject to the National Labor Relations Act where the National Board had refused to certify such union as a matter of Board policy. The Supreme Court held that certification of such union by the State Board was invalid as in conflict with the National Act and the Commerce Clause of the Constitution. In so holding the Supreme Court stated:

“Comparison of the state and federal statutes, will show that both governments have laid hold of the same relation for regulation, and it involves the same employers and the same employees. Each is delegated through administrative authority, a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections, and determining the appropriate unit for bargaining in the same plant. \* \* \* We therefore conclude, that it is beyond the power

of New York to apply its policies to these Appellants, as attempted herein.”

In *LaCrosse Telephone Co. vs. Wisconsin Board*, supra, the Supreme Court of Wisconsin had held that the Wisconsin Board could exercise its jurisdiction to determine and certify appropriate bargaining units until the National Board undertook to act. The Supreme Court of the United States rejected this view on the authority of the *Bethlehem Steel* case.

The *Plankinton Packing Co.* case was one involving unfair labor practices, rather than certification of appropriate bargaining units. The Supreme Court of the United States, in a per curiam decision, citing the *Bethlehem Steel* and *LaCrosse Telephone Company* case, held the Wisconsin Board to be without jurisdiction in such a matter.

In *Garner vs. Teamsters Union*, 346 US 485, (1953) the Supreme Court applied the same principle to state courts as it had to state boards in the *Bethlehem Steel* and *LaCrosse Telephone* cases, and held that the Pennsylvania court had no jurisdiction to enjoin picketing practices which were in violation of both state and federal law. The Supreme Court said:

“Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to provide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint, notice and hearing thereon, including judicial relief, pending

a final administrative order. Congress evidently considered that centralized administration of specially designated procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward local controversies. \* \* \*

A multiplicity of tribunals and a diversity of procedure are quite as apt to produce incompatible or conflicting adjudication, as are different rules of substantive law. *The same reasoning that prohibit Federal Courts from intervening in such cases, except by way of review, or by application of the Federal Board, precludes state courts from doing so. [citing cases] And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the confines of the Federal Board, also exclude state courts from like action.*” (emphasis supplied.)

The rule established by the Supreme Court of the United States has been aptly summarized by the Pennsylvania Supreme Court in *Pittsburg Railways vs. Division 85, Amalgamated Association of Street Railway Employees of America*, 357 Pa. 379, 54 At. 2d 891, 174 ALR 1045:

“The clear implication of the decision of the Supreme Court of the United States in *Bethlehem Steel vs. New York State Labor Relations Board*, 330 US 767, is that wherever the employer-employee relationship is one over which Congress has power of regulation and with regard to which Congress has acted, state power is suspended and cannot constitutionally be exercised. \* \* \* The criterion to determine the validity of the exercise of state power is not whether the agency admini-

stering federal law has acted upon the relationship in a given case; rather it is whether Congress has asserted its power to regulate that relationship.”

The question of the exclusive jurisdiction of the National Board, being so clearly established by the Supreme Court of the United States, which has the final word on this question, the only issue remaining in the case at bar concerning the invalidity of the Utah Board’s order in this matter, is whether in any way the action of the National Board in declining to exercise its jurisdiction to consider the unfair labor practice charge conveys any jurisdiction to the Utah State Board. It is the position of Photo Sound that it does not.

## POINT TWO

**ACTION OF THE NATIONAL LABOR RELATIONS BOARD IN DECLINING TO EXERCISE ITS JURISDICTION DOES NOT CONVEY JURISDICTION TO THE UTAH BOARD.**

**A. The National Labor Relations Board has not ceded jurisdiction.**

Section 10 (a) of the National Labor Relations Act as amended in 1947 provides:

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manu-

facturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.”

There is no contention here that the National Board has entered into an agreement with the Utah Board to cede its jurisdiction. In the *LaCrosse Telephone case*, the Supreme Court referred to this provision and stated:

“The result we have reached is not changed by the Labor Management Relations Act of 1947. That Act grants the National Board authority, under specified conditions, to cede its jurisdiction to a state agency, but it does not appear that there has been any cession of jurisdiction to Wisconsin by the National Board in any representation proceeding.”

The New York court, in *New York State Labor Relations Board vs. Wags Transportation Company*, 130 N.Y. Supp. 2d 731 makes clear that section 10(a) defines the only procedure for ceding of federal jurisdiction to a state board. The court there said:

“In adopting the proviso of section 10(a), the clear policy of Congress was to prevent the application of state law and procedure which did not conform to the Taft-Hartley Act. Congress was not unaware of the early practice of ceding practice to local boards. Indeed, it considered the method desirable, but limitations were placed upon such cession. Apparently, Congress decided

it was more important to have no cession than to have it without complying with the standard prescribed. A secondary purpose may well have been to encourage state legislation to adopt the Taft-Hartley provisions. \* \* \*

“It follows quite logically that Congress provided in section 10(a) the sole means of transferring to state jurisdiction activities which are subject to the National Labor Relations Act as amended. \* \* \*

“It is important that since the *Bethlehem* decision, Congress enacted the proviso to section 10(a) which prescribes the exclusive means for transferring the jurisdiction of the National Board to a state agency.

“This case involves a company subject to the National Act and Board. The substantive unfair labor practices are the same under federal and state acts.

“It only remains to decide whether the restrictive proviso on cession comes within the general rule stated in the *Bethlehem* case, that state action is precluded ‘if it is clear that Congress has intended no regulation except its own.’

“Section 10(a) does prohibit cession except on specified terms. The fact that there are limited exceptions does not vitiate the power of Congress to prevent state action. Indeed, the proviso withdrew from the National Board the authority it had exercised prior to 1947 to cede jurisdiction on its own terms.

“The Respondent correctly argues, in effect, that the National Board cannot do by abdication what it cannot do by agreement.”

See also *A. E. Nettleton Co. vs. United Shoemakers of America, CIO*, 28 Labor Cases, para. 69,211 (N.Y. March, 1955).

This position has been recognized by the Wisconsin Supreme Court, another jurisdiction where the state-federal jurisdictional question over labor relations has been litigated numerous times. In *Wisconsin Employment Relations Board vs. Chauffeurs, Teamsters, etc.*, 66 N.W. 2d 218 (1954) an unfair labor practice charge had been filed with the Wisconsin Board by the company against the union. The union filed an answer alleging that under the National Act its activities were regulated by and subject to the exclusive jurisdiction of the National Board. The State Board made findings and conclusions to the effect that the picketing was in violation of Wisconsin statutes and filed a petition for enforcement of its order in the Circuit Court for Milwaukee County. A temporary restraining order was issued by that court and subsequently that court entered a judgment enforcing the court order. The matter was then appealed to the Wisconsin Supreme Court where the decision of the lower court and of the State Board was reversed. The Wisconsin Court made it clear that where activity of a labor union in picketing to coerce an employer to interfere with an employee's rights to refrain from joining or assisting a labor union constitutes an unfair labor practice under both the National Act and the State Act, the National Board has exclusive jurisdiction and a state board or court may not act in such a case. It held that where the unfair labor prac-

tice complained of was unlawful under both the state and the national acts a state board or court could have jurisdiction only if the state statute was similar to the National Act and the National Board had ceded its jurisdiction to the state agency under the provisions of Section 10(a) of the National Act. The Wisconsin Court said:

“If the laws are analagous the only result is that in its discretion the National Board may cede jurisdiction to the state. *Section 10(a) of the Act, as amended, makes it clear that the state does not have jurisdiction of this type of case in its own right.*” (emphasis supplied.)

To the same effect is a decision of the Pennsylvania Court of Common Pleas in *Adelphia Cons. Co. vs. Building and Con. Trades Council of Philadelphia*, 27 Labor Cases, par. 68,843 (Penn., 1954).

Inasmuch as there is nothing in the record indicating a cession by the National Board to the Utah State Board of jurisdiction over Photo Sound, the only question is, could the state board, by the mere fact of the refusal of the National Board to exercise its jurisdiction, obtain jurisdiction?

**B. The refusal of the National Labor Relations Board to exercise its jurisdiction, does not create jurisdiction in the State Board.**

Under the authorities cited and quoted above, it is incontravertible that the National Board would and does have jurisdiction in this matter. The only new fact in the case is that the National Board, midway in its handling of the labor relations of Photo Sound, for budgetary

or other reasons, best known to the board, changed its policy and declined to exercise its jurisdiction in this and other cases involving businesses the size and nature of Photo Sound. It has not, by the adoption of these new standards or “yardsticks,” held that it no longer has jurisdiction.

Similar yardsticks in the exercise of its discretion to take jurisdiction were first announced by the National Board in October, 1950. In a press release dated October 5, 1950, the Board announced:

“The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.

“The Board has long been of the opinion that it would better effectuate the purposes of the act and promote the prompt handling of major cases, *not to exercise its jurisdiction to the fullest possible extent under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.* This policy should in our opinion be maintained.

“The Board thereby reiterated its policy of *not exercising jurisdiction despite its power to do so, over businesses so local in character that a sufficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy and public funds.*”  
(emphasis supplied.)

The right of the National Board to use discretion in determining whether to exercise its jurisdiction under

such yardsticks has been upheld, *Haleston Drug Stores vs. NLRB*, 187 Fed. 2d, 418, (CA 9, 1951), and has been recognized in a left-handed way by the Supreme Court of the United States in *NLRB vs. Building and Construction Trades Council*, 341 U.S. 675, (1951) where it said:

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

In 1954, effective July 1 and July 15 of that year, the National Board made an announcement of a revision of its yardsticks which affected its discretion to exercise its jurisdiction. In that press release the Board stated:

“The National Labor Relations Board today announced seven changes in its standards for determining whether the Board will take jurisdiction of a case. The earlier standards were adopted in October, 1950. The Board has discretion in which cases of those affecting interstate commerce it will exercise jurisdiction.”

It was only after this latest revision of its yardsticks that the National Board declined to assert its jurisdiction over the unfair labor practice charges filed with it by the CIO against Photo Sound.

The true nature of this exercise of discretion not to act was made clear by the First Circuit in *NLRB vs. Star Beef Company*, 193 Fed. 2d 8 (1951). In that case the employer contended that because the Board had declined to assert jurisdiction in the past, it could not now do so in the application of a different administrative policy. The court said:

“*The simple answer to this is that the Board has jurisdiction all the time. National Labor Relations Board vs. Jones and Laughlin*, 301 U.S. 1. The Board’s exercise of discretion here does not enlarge or exceed its jurisdiction so as to prejudice this respondent, since the acts complained of, if proved, would violate the act and redress can be procured under it.”

The history of the *Kinard* case (*Building Trades Council vs. Kinard*, 346 U.S. 933 (1954)) indicates the foregoing analysis is correct. In the Alabama State Court, the plaintiff was seeking an injunction contending that the National Board had indicated that under its 1950 jurisdictional standards it would decline to assert jurisdiction and that therefore, the doctrine which became fixed by the *Garner* case would not apply. The Alabama Supreme Court agreed, stating in *Kinard Construction vs. Building Trades Council*, 64 So. 2d 400, that the right of the plaintiff to an injunction is controlled by the question of whether the labor union was shown to have committed an unfair labor practice under the Act and its effect on commerce is within the limits set by the Board for the exercise of its jurisdiction. The Supreme Court of the United States reversed (*Building Trades Council vs. Kinard*, *supra*).

The Supreme Court of the United States applied the same approach in the *Bethlehem Steel* case when it denied the right of the state board to act. *Bethlehem Steel vs. New York State Labor Relations Board*, *supra*, stating:

“It is clear that the failure of the National Labor Relations Board to entertain foremen’s

petitions was of the latter class. [where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute] There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. Re Soss Mfg. Co. 56 NLRB(F) 348. *It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes.* Re Maryland Drydock Co. 49 NLRB(F) 733. We cannot, therefore, deal with this as a case where Federal power has been delegated but lies dormant and unexercised. (emphasis supplied.)

Congress was not unaware of this approach of the Supreme Court when it passed the Taft-Hartley Act. See H.R. Rep. No. 235 on H.R. 3020, 80th Cong. 1st Sess. p. 44. As pointed out by the Supreme Court itself in *Amalgamated Association of Street, Electric and Railway Employees vs. WERB*, 340 US 383 (1951):

“\* \* \* The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. vs. New York Labor Board*, 330 U.S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation

‘preempts the field that the act covers insofar as commerce within the meaning of the act is concerned’ and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative.”

There are two areas left to state control. One is the area which is not governed by Federal legislation. See *Allen-Bradley Local vs. Board*, 315 U.S. 740 (1942), *Auto Workers vs. Wis. Board*, 336 U.S. 245 (1949) and *Algoma Plywood Co., vs. Wis. Board*, 336 U.S. 301 (1949). The other area is where Congress has preserved the right of state action in the face of Federal legislation which would otherwise exclude it. See for example, Sec. 14(b) of the Labor Management Relations Act of 1947 authorizing the so-called “right to work” legislation.

Apparently, it was the decision of Congress to meet the possibilities of a jurisdictional hiatus raised by the *Bethlehem Steel Company* case, by authorizing the National Board to cede jurisdiction in certain circumstances to the state boards.

A statement of the Supreme Court confirms this interpretation of section 10(a). It was said in the *Algoma Plywood Co. vs. Wis. Board* case, *supra*, at 313, that the purpose of the amendment of section 10(a) in the 1947 Act to insert the proviso giving the National Labor Relations Board the power to make cession agreements was:

“... to meet situations made possible by the *Bethlehem* case where no state agency would be free to take jurisdiction of cases over which the National Board has declined jurisdiction.”

However, its desire to secure uniformity established as

a condition precedent the requirement that the state law be similar to the Taft-Hartley Act. The fact that neither Utah nor any other state has seen fit to amend its state law to conform to the National Act and thus become eligible for cession of authority from the National Board does not give the Utah State Board the right to act contrary to the express provisions of the Congressional Act. If the Utah Legislature deems the no-man's land created by the application of the Congressional rules and the decisions of the Supreme Court to be an unfortunate one, it need only amend the Utah Act to make the Utah Board eligible for delegation of authority from the National Board.

The principle involved in the case at bar should be clearly distinguishable from the issue which troubled this court in *Utah Labor Relations Board vs. Utah Valley Hospital*, 235 P. 2d 520 (1951) and the Circuit Court of Appeals for the Tenth Circuit, *Utah Valley Hospital vs. Utah Labor Relations Board*, 199 Fed. 2d 6 (1952). In the Hospital case Congress had taken away the jurisdiction of the National Board over charitable hospitals. Of course, that left the Utah Board free to act. Here, however, it is not Congress, but the National Board in its transitory use of its discretion, that denies to the union the facilities of the National Act.

In two recent state cases this distinction has been made clear. In both the state courts recognized that until Congress acted, the use of the National Board's discretion in not exercising its jurisdiction would not create

any jurisdiction in the state. *New York State Labor Relations Board vs. Wags Transportation System*, supra, *Universal Car & Service Co. vs. IAM*, (Michigan, 1954) 27 CCH Labor Cases, par. 68,825.

Finally, the latest and most authoritative decision on this federal question is the very recent decision of the Court of Appeals for the Tenth Circuit (*Retail Clerks Local 1564 AFL vs. Your Food Stores of Santa Fe, Inc.* (CA 10, August 4, 1955), 28 CCH Labor Cases, par. 69,415).

In that case, an action for an injunction against unlawful picketing was filed in the state court. The matter was then removed to the New Mexico Federal District Court where a motion to dismiss and to dissolve the temporary restraining order was granted<sup>1</sup> under authority of the *Garner and Amazon* cases. This judgment was never appealed and no motion to remand to the state court was ever filed. In July of 1954, some seven weeks after entering of the judgment in that case the Regional Director of the NLRB advised both parties by letter that the Store's interstate operations did not appear to meet any of the newly announced "standards for the assertion of jurisdiction" and that the director was therefore refusing to issue a complaint against the Store in response to the union's charges. Thereafter the union resumed its peaceful picketing and the store again instituted an action in the state court and obtained another temporary injunction. The union then instituted an action in the Federal District Court to stay the injunc-

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<sup>1</sup> *Your Food Stores vs. Retail Clerks*, 121 F. Supp. 339 (1954)

<sup>2</sup> *Amazon Cotton Mills Co. vs. Textile Union*, 167 Fed. 2 183 (CA 4 1948)

tion issued by the state court. The trial court refused to interfere with the state court injunction under its interpretation of the Federal Judicial Code.<sup>3</sup> On appeal the Circuit Court reversed, stating with respect to the point pertinent to the case at bar:

“Moreover, the refusal by the NLRB to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby re-vesting the state court with authority to proceed. Amended Section 10(a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. *Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency.* For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly preempted by Congress.” (emphasis supplied.)

This leaves only the argument advanced by the union before the Utah State Board, in its brief filed in response to the request of the hearing examiner, that the effect of this ruling is to leave a void in which the National Board refuses to act and the State Board has no power to act. The Circuit Court answered this argument by inserting as a footnote, the following quotation from the *Universal Car Co.* case, *supra*:

“If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the

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<sup>3</sup> 124 F. Supp. 697 (1954)

day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision."

In short, the argument as to the wisdom of the vesting by Congress of the exclusive jurisdiction with the National Board and the choice of the National Board not to exercise such jurisdiction involves neither this court nor the Court of Appeals for the Tenth Circuit. Such argument should be addressed to Congress.

This point is summarized very well in an article in the January, 1955 issue of *Labor Law Journal*, at page 3 entitled "NLRB Jurisdictional Policies and the Federal-State Relationship" by Fred Witney, professor of economics at the University of Indiana. The author states:

"In the exercise of its judicial function, the Supreme Court must take federal legislation as enacted. With respect to the problem of federal-state jurisdiction, the Court must be governed by the express provisions of the national law. As demonstrated, Congress spelled out in detail those areas of labor relations over which it desired the states to exercise concurrent jurisdiction with the federal government. Congress likewise established a limited scheme whereby the N.L.R.B. could cede jurisdiction to the states. It is submitted that the Supreme Court would read much more into Section 10(a) of the federal law than actually exists if it holds that mere contraction of

jurisdiction by the N.L.R.B. permits state activity within interstate commerce. If the N.L.R.B. has created mischief by establishing a 'no-man's land' in industrial relations, it is not within the power of the Supreme Court to correct this state of affairs by a decision which would be inconsistent with the national law.

“In the last analysis, it is the Congress and not the N.L.R.B. which determines fundamental national labor policy. It would appear that ‘the criterion to determine validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case; rather, it is whether Congress has asserted its power to regulate that relationship.’ Congress, and not the ambivalent policies of an administrative agency, determines the point at which states may operate in an area reserved to the federal government by the Constitution of the United States. It might have been unwise for the national lawmakers to establish a procedure so strict and limited in character that it precludes federal cession or jurisdiction to state control. But the Supreme Court must be controlled by the provisions of national law passed pursuant to the Constitution, regardless of its merits or wisdom.”<sup>1</sup>

Congress has, in fact, given consideration to the problem. Attempts to release the strict conditions which limit the freedom of the National Labor Relations Board to cede jurisdiction under section 10(a) were made at the

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<sup>1</sup> See also 67 *Harvard Law Review*, 1297 “Federalism in the Law of Labor Relations” by Archibald Cox, June, 1954, and 43 *Georgetown Law Review*, 67, (1954), “No Man’s Land in Labor Relations—A Survey.” For an article attacking the wisdom of the Board’s policy see “NLRB Absolutism, a Dogma Revisited” *Labor Law Journal*, May, 1955, p. 279, by Roche and Henslowe. See also Hay “Federalism and Labor Relations in the United States” 102 *Pennsylvania Law Review* 959.

2nd session of the 83rd Congress. The Senate Labor Committee, acting upon the recommendation of President Eisenhower, embodied the following provision in a proposed bill to amend the Taft-Hartley law.

“Sec. 6(b) (1) The Board, in its discretion, may decline to assert jurisdiction over any labor dispute where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. (2) Nothing in this Act 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 over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.”

(See Sen. Rep. No. 11211 on S.B. 2650, 83rd Cong. 2d Sess. 28 (1954) ).

Such a provision would answer the problem raised in the case at bar. While this proposal has, up to now, shared the same fate as other Taft-Hartley amendments, it is submitted that such Congressional action is the only answer. This court can do no more than apply the law as it exists.

### CONCLUSION

For the foregoing reasons it is submitted that the Utah Labor Relations Board has no jurisdiction in the case at bar and that its order directed against Photo Sound should be reversed on that ground.

Respectfully submitted,

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