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Libel in Labor Disputes - Federal Versus State Jurisdiction

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attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by the [local] federal judge of long experience. . . ."[29] In *Bernhardt v. Polygraphic Co.*[30] the Supreme Court said, "Since the federal judge making these findings is from the local bar, we give special weight to his statement of what the local law is."[31]

The court's decision in *Paul Revere* appears to be incorrect. Holding in conflict with statements made in *Continental Cas. Co.*, the court fails to heed the restrictions placed upon federal courts in the exercise of diversity jurisdiction. Throughout its opinion the majority seems to exert its best efforts, not toward determining what Texas law is or will be, but toward defeating the proposition that a pilot of a plane may also be a passenger of that plane. It is probable that a definition of "passenger" that would include the pilot was contrary to the personal views of the majority of the judges and that this affected the decision. The cause of the error is unimportant. What is important is that the parties have not been given the result that would have been rendered in a Texas court. This error will have a continuing effect if, as is likely, federal district courts follow the Fifth Circuit's interpretation of "passenger" and Texas lower courts follow *Warren* and construe "passenger" in the sense of occupant. In *Paul Revere* the Fifth Circuit violated the *Erie* mandate that in diversity cases the role of a federal court is that of an interpreter of state law, not that of a creator of state law.

Overton S. Anderson

Libel in Labor Disputes — Federal Versus State Jurisdiction

Since the enactment of the National Labor Relations Act,[1] a recurring problem in the labor field has been the extent to which the act supersedes state jurisdiction. The purpose of the act was to establish an equilibrium between state and federal interests in the collective

[29] *Id.* at 282.
[30] 350 U.S. 198 (1956).
[31] *Id.* at 204.

[1] Act of July 5, 1935, 49 Stat. 29 U.S.C. §§ 151-60 (hereafter referred to as the act or NLRA). The Relevant Provisions are:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that

bargaining process. The recent case of *Linn v. Union Plant Guard Workers*,[2] involving the presence of libel in labor disputes, threatens this equilibrium.

States are free to maintain actions arising from labor disputes until Congress by its constitutional powers expressly or impliedly excludes state action through legislation. Due to the failure of Congress to establish any guidelines either in the language of the National Labor Relations Act or in its legislative history, a major problem is whether Congress intended to pre-empt state action in certain areas of labor disputes.[3] As the United States Supreme Court has pointed out, "the . . . Act . . . leaves much to the states, though Congress has refrained from telling how much."[4] This "penumbral area," as Mr. Justice Frankfurter called it, "is of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."[5]

The doctrine of pre-emption found its "elucidating litigation" in

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such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) 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;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances.

[2] 383 U.S. 53 (1966).

[3] The purpose of the act was explained in Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953), where the Court said:

> Congress [in the NLRA] did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal [National Labor Relations Board] and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed 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 towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

[4] *Id.* at 488.

[5] International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

the case of *San Diego Bldg. Trades Council v. Garmon.*[6] The Court decided in *Garmon* that "when an activity is *arguably* subject to section 7 or section 8 of the act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[7] To allow the states to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with national labor policy.[8] The Court, however, recognized two exceptions to this strong policy favoring federal pre-emption. First, when the activity is merely a "peripheral" concern of the act,[9] the states need not yield their jurisdiction. Second, when the regulated conduct touches interests "deeply rooted in local feeling and responsibility,"[10] it cannot be inferred that the states are pre-empted in the absence of a clear congressional intention.

By interpreting the intent of Congress in passing the NLRA, the Court in *Garmon* noted that the extent to which the variegated laws of the several states are displaced by a single, uniform, national rule is in the first instance left to the Board to decide and that the Court is only concerned with classes of situations.[11] The problem of just what "classes" of cases do or do not fall within the pre-emption doctrine was faced recently by the Supreme Court in the *Linn* case in which an action for libel arose from a labor union organizing campaign. These campaigns frequently result in a heated contest in which derogatory accusations are made by and against each side.[12]

The fact that the defamatory statement is made during a labor dispute raises the federal interest in maintaining uniform regulation

[6] 359 U.S. 236 (1959). See also Plumbers' Union v. Borden, 373 U.S. 690 (1963), in which a state court could not exercise jurisdiction in a tort action seeking damages for malicious interference by the union with the plaintiff's right to pursue a lawful occupation.

[7] *Id.* at 245. (Emphasis added.)

[8] *Id.* at 246.

[9] International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 622-23 (1958), held that the reinstatement of a union member and damages including mental suffering for breach of contract between the member and the union were not withdrawn from the state court under the act because "the state court proceedings deal with arbitrariness and misconduct vis-à-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms." See Isaacson, *Labor Relations Law: Federal versus State Jurisdiction,* 42 A.B.A.J. 415 (1956).

[10] UAW v. Russell, 356 U.S. 634 (1958) and Auto Constr. Workers v. Laburnum Corp., 347 U.S. 656 (1954) illustrate this exception. This conduct has also been enjoined by state courts in Youngdahl v. Rainfair, 355 U.S. 131 (1957) and UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

[11] 359 U.S. at 241.

[12] Such epithets as "liar, scab, and unfair" are common parlance in a labor controversy. See Cafeteria Employees Union v. Angelos, 320 U.S. 293, 295 (1943), in which the Court stated that "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

of labor relations as outlined in the NLRA. But there is also a state interest involved. A state has a responsibility to protect its citizens from defamatory remarks which tend to injure reputation, to diminish the esteem or goodwill in which a person is held, or to excite adverse feelings or opinions against him.[13] Protection of this interest is provided by the various state laws of defamation.

I. Linn v. Union Plant Guard Workers

In *Linn*, the precise question before the Supreme Court was whether the NLRA barred the maintenance of a civil action for libel under state law by an official of an employer subject to the act. On December 17, 1962, Linn, assistant manager of the North Central Region of Pinkerton's National Detective Agency, Inc., filed a complaint in federal district court against the United Plant Guard Workers. The complaint alleged that, during a campaign to organize Pinkerton's employees in Detroit, the defendant had circulated leaflets containing defamatory comments.[14] The complaint also alleged that Linn was one of the managers referred to in this material and that the statements were false and defamatory, all of which was known by the defendant. Linn prayed for $1,000,000 in damages caused by the libelous statements.[15]

On the ground that the matter was within the exclusive jurisdiction of the National Labor Relations Board, the union moved to dismiss the complaint.[16] The district court dismissed the case, holding

[13] Prosser, Torts, § 106, at 756 (3d ed. 1964).

[14] The leaflets circulated to the employees contained the following:

> (7) Now we find out that Pinkerton's has had a large volume of work in Saginaw. They have had it for years.
>
> United Plant Guard Workers now has evidence.
>
> A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> B. Employing 52 men.
>
> C. Some of these jobs are 10 years Old!
>
> (8) Making you feel kind of sick & foolish.
>
> (9) The men in Saginaw were deprived of their *right* to *vote* in three N.L.R.B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton manegers (sic) were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail! [Emphasis in original.]

[15] The only basis of federal jurisdiction was diversity of citizenship. Therefore, any relief granted would have to be predicated on state law, in this case the law of Michigan where the alleged defamation occurred. Erie Ry. v. Tompkins, 304 U.S. 64 (1938).

[16] Prior to the filing of the complaint, Pinkerton's had filed unfair labor charges with the Regional Director of the Board, claiming that the circulation by the union of the leaflets restrained and coerced Pinkerton's employees in the exercise of their § 7 rights in violation of § 8(b)(1)(A), 49 Stat. 449 (1935), 29 U.S.C. § 158. The Regional Director declined to issue a complaint, stating that there was no evidence showing that the union was involved in the drafting or circulation of the leaflets since the employee responsible for the material was not an officer, member, or agent of the union. The General Counsel sustained this finding, holding that the charge against the union was wholly without basis.

that even if the union were responsible for the distribution of the leaflets, the conduct would constitute a matter "arguably" subject to the NLRA; therefore, according to *Garmon*, the state's jurisdiction was pre-empted. On appeal, the Sixth Circuit affirmed, stating that, even if the statements were in fact false, libelous, and damaging to Linn, state jurisdiction would still be pre-empted.[17]

On writ of certiorari, the Supreme Court, with some reservations, reversed and remanded the case. It decided that, where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the state court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him.[18] The Court reasoned that the exercise of state jurisdiction in *Linn* fell within both exceptions in *Garmon*.

The Court limited the availability of state remedies for libel to those instances in which the defamatory statements were circulated with malice and caused actual damage. To effectuate this limitation, the standards enunciated in *New York Times v. Sullivan*[19] were adopted by voluntary analogy, rather than by constitutional compulsion of the First Amendment.[20] In that case, the New York Times had published allegedly defamatory statements concerning the conduct of public officials in Montgomery, Alabama. Interested primarily with the constitutional guarantees of the freedom of political criticism, the Supreme Court held that a public official cannot recover damages for a defamatory statement relating to his official conduct unless he proves that the statement was made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether or not it was false.[21] The *Linn* case thus extends the principle of *New York Times v. Sullivan* to the field of labor relations, via the path of pre-emption.[22]

[17] 337 F.2d 68 (6th Cir. 1964).

[18] 383 U.S. at 55.

[19] 376 U.S. 254 (1964).

[20] 383 U.S. at 65.

[21] New York Times v. Sullivan, 376 U.S. 254, 279 (1964). A similar rule had been adopted by a number of state courts as early as Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). This rule was extended to criminal defamation suits in Garrison v. Louisiana, 379 U.S. 64 (1964), in which the Court held that an action for defamation by eight judges against a district attorney for libelous statements under the Louisiana criminal defamation statute was not maintainable to the extent that it permitted punishment of true statements made with actual malice and false statements made only with "ill will" or without a reasonable belief in their truth. The *New York Times* standard was also applied in Rosenblatt v. Baer, 383 U.S. 75 (1966), by defining "public official" in such a manner as to include the head of a government-owned recreation center.

[22] 383 U.S. at 89.

II. Analysis

The Court in *Linn* tried to balance the two extremes represented by the conflicting state and federal interests. To allow state actions for defamation arising in a labor dispute to be maintained without restrictions would deter the free labor debate guaranteed by the act and place an effective union-busting weapon in the hands of management.[23] But the other extreme—barring all state defamation suits in such circumstances—would leave the injured person without remedy for damaging statements made in the course of a labor dispute which certainly was not the intent of Congress when it passed the act.

A. *Peripheral Concern*

After reviewing the Board's treatment of derogatory statements circulated during labor controversies, the Court concluded that the exercise of state jurisdiction appears to be within the first exception of *Garmon* as merely a "peripheral" concern of the act, if limited to cases in which "actual malice" can be shown. The Board has continuously adhered to the policy that it does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements."[24] Recognizing that defamatory statements are commonplace in these heated election campaigns,[25] the Board cannot impose strict standards of fairness and preciseness if the exchange of information and opinions is to be freely encouraged as the act intended. The Board, however, does have the power to set aside an election when grossly unfair campaign tactics are used by either side.[26] It does this only when (1) a material fact has been misrepresented, (2) there has been insufficient opportunity for the other party to reply, and (3) the misrepresentation has had an impact on the free choice of the employees participating in the election.[27]

[23] This extreme was adopted in Joint Council 53, Teamsters Union v. Meyer, 416 Pa. 401, 206 A.2d 382 (1965), *petition for cert. dismissed*, 382 U.S. 897 (1966). In this case, the Supreme Court of Pennsylvania held that one union's suit for defamation against another union during an election campaign was not pre-empted because the state's interest in the protection of reputation is so substantial that the pre-emption doctrine is totally inapplicable to suits for defamation. It is submitted that this case should be remanded for a determination of the factual issues relevant to the standard adopted in the *Linn* case.

[24] Stewart-Warner Corp., 102 N.L.R.B. 1153, 1158 (1953).

[25] See Cafeteria Employees' Union v. Angelos, 320 U.S. 293 (1943). In addition, these statements are generally uttered in "a moment of animal exuberance." Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941).

[26] See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964).

[27] See Hollywood Ceramics Co., 140 N.L.R.B. 221, 223-24 (1962); F. H. Snow Canning Co., 119 N.L.R.B .714, 717-18 (1957).

The Board has intimated that the protection of section 7 would not be extended to defamatory statements uttered with actual malice, "a deliberate intention to falsify," or "a malevolent desire to injure."[28] But because the Board might not protect such statements, it does not follow that the conduct would be merely "peripheral" to the act so as to fall within the first exception of *Garmon*. It is, at the very least, arguable that the Board might find false statements during an election campaign to be a violation of section 8 or to warrant setting aside the election if not protected by section 7.[29] Furthermore, the conduct does not come within the definition of "peripheral" established in *International Ass'n of Machinists v. Gonzales*[30] which was the basis of the *Garmon* exception. In *Gonzales* the Court distinguished between disputes involving union members and the union itself and disputes involving union and management. If the "nexus" of the dispute is of the former type, it is peripheral; if the latter, state action is pre-empted. It is not contended that this is the only definition of peripherality, but the facts in *Linn* do not lend themselves to a decision that the action would be within the *Garmon* exception. As Professor Kadish noted in his review of the *Linn* case, "it is difficult to understand how the scope of permissible argument and persuasion in the course of an election campaign can be regarded as peripheral to the concerns of the NLRA. Even a passing reference to its history and structure reveals that this matter lies close to the core of the Act, rather than its periphery."[31]

The statements in *Linn* were relevant to the campaign and pertained to the subject matter of the election. They were directed toward the conduct of the company and not against any single individual. Had they been remarks which were not pertinent to the campaign, *i.e.*, concerning matters more remote from the dispute or of a more personalized nature, the exception might be justified.

B. *State Concern*

The Court was, perhaps, more justified in concluding that state

[28] See Bettcher Mfg. Corp., 76 N.L.R.B. 526 (1948); Atlantic Towing Co., 75 N.L.R.B. 1169 (1948). In Maryland Drydock Co. v. N.L.R.B., 183 F.2d 538 (4th Cir. 1950), the court set aside an order of the Board, holding that it is an unfair labor practice for an employer to prohibit distribution of defamatory union literature on company property even when there is no evidence that discipline, order, and efficiency of employees was actually affected. The court, however, found in this case that the defamatory statements had no reasonable connection with any proper union activity—it was an attack upon the organization of a supervisors' association.

[29] Address by Sanford H. Kadish, Professor of Law, University of California, Berkeley, before the section of labor relations law, American Bar Association, *Labor Law Decisions of the Supreme Court, 1965 Term*, 62 LRR 298 (August 15, 1966 BNA).

[30] *Supra* note 9.

[31] *Supra* note 29.

jurisdiction should be allowed under the second exception of *Garmon*. Malicious libel in any context should not be condoned, and the overriding interest of a state in protecting its residents from such libel fits the requisites of the second exception, as in the case of violent conduct. It has for a long time been recognized that the function of libel suits is to prevent violence by transferring battle on the field to battle in the courtroom.[32] And the Board's arguable lack of authority to grant effective relief[33] aggravates the state's concern. But taking into consideration the common occurrence of defamatory statements in labor disputes, the threat of violence is appreciable only in extreme cases. Although the Court rejected the Government's suggestion,[34] as amicus curiae, to limit liability to "grave" defamations —those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct—such a limitation would be in line with other decisions concerned with the violent conduct exception to the *Garmon* rule.[35] The limitation would permit the state to protect its deeply rooted responsibility as in other defamation cases not involving labor disputes, and yet it would minimize the possibility of conflict with federal regulation.

It is difficult to reconcile the majority's decision with the language used to create the exception in *Garmon*. The purpose of the *Garmon* decision is to account for and delimit the few cases where states may award damages in torts arising out of conduct falling within the act. To expand this exception to include damages for libel leaves little ground for stopping short of any state tort designed to redress an injury.[36] As Justice Fortas stated in his dissent in *Linn*, "the majority's opinion fails to make clear why the participant's interest in protecting his reputation from the sting of words uttered as part of a labor dispute is a compelling concern which this Court must allow the States to protect, while his interest in preserving his economic well-being from illegal picketing is not."[37] Neither has a compelling state concern been found in an employee's interest in protecting his livelihood from intentional and tortious interference by a union.[38]

[32] See Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 933 (1956).

[33] The act did not empower the Board to award damages for malicious libel as it did for secondary boycotts in § 303 or to impose any other penalties for personal relief of a defamed person. The injury that a defamatory statement might cause to an individual's reputation has no relevance to the Board's function, but only the question as to whether the statements would tend to interfere with a fair and free election. See Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

[34] 383 U.S. at 65.

[35] See *supra* note 10.

[36] See *supra* note 29.

[37] 383 U.S. at 72.

[38] Local 100, United Journeymen & Apprentices v. Borden, 373 U.S. 690 (1963) and Local 207, International Ass'n of Bridge Workers, 373 U.S. 701 (1963) pre-empted this situation from state jurisdiction.

The four-judge dissenting opinion in *Linn* pointed out, "today marks the first departure from what has become a well-established rule that only where the public's compelling interest in preventing violence or the threat of violence is involved can the exclusiveness of the federal structure for resolving labor disputes be breached."[39]

C. *The Ambiguous Standard*

By adopting the single limitation of the *New York Times v. Sullivan* standard, the Court has increased the possibility of conflict between state and federal regulation. Although the standard superficially produces a unifying effect as to the various state laws of defamation,[40] the special circumstances present in a labor controversy necessitate a more definite standard in order to avoid conflict with national regulation. Actual malice as required by the standard is "an elusive, abstract concept, hard to prove and hard to disprove."[41] Also, the fine line drawn between a reckless and a merely negligent failure to verify the truth of a statement involves subtleties beyond the comprehension of some judges and juries. Furthermore, a state court with limited experience in labor relations might not recognize the commonplace occurrence of defamatory statements in union campaigns.

The allegations in *Linn*, such as "the Saginaw men will file criminal charges" and "Somebody *may* go to Jail," are rather innocuous and pallid for a labor dispute.[42] As a practical matter, these statements, though recklessly uttered, do not injure a person's reputation or arouse any substantial social interest in redressing this kind of abuse. The state court's decisions would probably reflect more the attitude of the community toward unions, and, in places where there is extreme hostility, unfair results are likely. It is not difficult to imagine a case in which the Board finds that the statements were not malicious and did not affect the election while the state court finds malice and awards, not only compensatory damages, but also large punitive damages. The union (or employer) in such case might win the election but lose the libel suit along with its funds. The danger of dis-

[39] 383 U.S. at 72.

[40] For the effect of *New York Times* and *Garrison* on Texas law which will be similar to the effect of *Linn* as to the law of defamation, see Note, *Constitutional Law—Freedom of Speech and of the Press—Criminal Liability for Criticism of Public Officials*, 19 Sw. L.J. 399 (1965).

[41] New York Times v. Sullivan, 376 U.S. 254, 293 (1964) (concurring opinion).

[42] Compare, for example, the allegations made in Blum v. International Ass'n of Machinists, 42 N.J. 389, 201 A.2d 46 (1964), where the union distributed leaflets alleging that Joe Blum, the plant manager, used the "Big Lie" tactics of Hitler and fear and threats like Russian pressures to dictate the employees' future. They alleged that Blum had discriminated, intimidated, bribed, and coerced the workers to prevent a free choice in choosing a union. The Supreme Court of New Jersey held that the libel action was not within the state's jurisdiction, but exclusively in the competence of the Board.

turbing the equilibrium between labor and management, achieved by the act, is quite apparent in such a situation.

D. *The Problem Of Two Remedies*

The majority in *Linn* was not too concerned with the fact that two separate remedies would be available for the same conduct. The Court even felt that "it may be expected that the injured party will request both administrative and judicial relief."[43] The Court based its statement upon the fact that the Board looks only to the coercive or misleading nature of defamatory statements; while state courts consider the injury to an individual's reputation which would not interfere with the Board's jurisdiction over the merits of the labor controversy.[44] But the Court did not consider the problem posed by the majority in *Garner v. Teamsters Union.*[45] In *Garner* Mr. Justice Jackson rejected the employer's contention that the federal legislation was designed to enforce only a public right whereas the state court's power was invoked to protect only a private right. He said:

> Further, even if we were to assume, with petitioners, that distinctly private rights were enforceable by state authorities, it does not follow that the state and federal authorities may supplement each other in cases of this type. The conflict lies in *remedies, not rights.* The same [statements] may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent.[46]

For example, an employer defamed in a union election may now only sue for damages. Thus, an election which should be set aside may be left alone; while the damage suit "drags on and on in the courts, keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have."[47]

III. Conclusion

The decision of the majority in the *Linn* case will probably, as the dissenting opinion noted, "open a major breach in the wall which has heretofore confined labor disputes to the area and weaponry defined by federal labor law, except where violence or intimidation is involved."[48] Although the Court was concerned with limiting the

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[43] 383 U.S. at 66.
[44] *Id.* at 64.
[45] Garner v. Teamsters Union, 346 U.S. 485 (1953); see note 3 *supra.*
[46] Garner v. Teamsters Union, 346 U.S. 485, 498-99 (1953). (Emphasis added).
[47] United Constr. Workers v. Laburnum Constr .Corp., 347 U.S. 656, 671 (1954) (dissenting opinion).
[48] 383 U.S. at 69.

permissible scope of state defamation actions by the standard of *New York Times v. Sullivan*, it failed to give sufficient weight to the special considerations present in the labor field. Here, federal policy favoring free expression and debate is supported not only by the Constitution but also by the specific provisions of the NLRA.[49] The standard adopted is insufficient to guarantee non-interference with federal policy.

The Court has established in the field of labor law where libel is involved a type of partial pre-emption of a single cause of action. The line drawn by the Court separating activity which is or is not pre-empted divides the action of libel. Libel uttered or published with "actual malice" is not pre-empted regardless of how closely it is connected to the labor dispute or how the Board has treated it. However, if the claimant cannot prove actual malice and specific damage, his libel action is pre-empted even though under common law in the state court he would be entitled to recover. The line would have been more appropriately drawn had the Court made distinctions between libel closely related to the labor dispute and actual libel, perhaps, of a more personalized nature not connected with the dispute.

The breach in the wall is not a mere opening but is a floodgate inviting the filing, if not the complete trying, of libel actions more as a campaign tactic than in the interest of personal reputation. The suits can be used either as an aggressive weapon or as a defensive tactic. For example, in response to a defamatory publication, a libel suit seeking astronomical damages might be as effective in influencing the voters as a retraction. The suit might be dropped once the election was won or set aside. If the election were lost, the suit could be prolonged to harrass the other side, especially in situations where there is a small union and large employer or vice versa. By arming the sides with the weapon of libel suits, the Court introduces "a potentially disruptive device into the comprehensive structure created by Congress for resolving these disputes."[50]

However, a warning must be given to anyone claiming his reputation was injured by defamatory statements maliciously uttered during a labor dispute. Realizing the potentiality of conflict with national labor policy as a result of their decision, the majority inserted a saving clause in their opinion, stating that "if experience shows that a

[49] Section 8(c) provides that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964). Union members were also given express protection to criticize the management of their unions and the conduct of their officers, 73 Stat. 523 (1959), 29 U.S.C. § 411(a)(2) (1964).

[50] 383 U.S. at 69.