[Cite as *Humility of Mary Health Partners v. Sheet Metal Workers' Local Union No. 33,* 2010-Ohio-868.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

HUMILITY OF MARY HEALTH PARTNERS dba ST. ELIZABETH HEALTH CENTER,	)	
	)	CASE NO. 09 MA 91
PLAINTIFF-APPELLANT,	)	
- VS -	)	O P I N I O N
SHEET METAL WORKERS' LOCAL UNION NO. 33,	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 09CV175.

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 3, 2010

VUKOVICH, P.J.

¶{1} Plaintiff-appellant Humility of Mary Health Partners dba St. Elizabeth Health Center (HMHP) appeals the decision of the Mahoning County Common Pleas Court dismissing its certified complaint for injunctive relief against defendant-appellee Sheet Metal Workers' Local Union No. 33 (the union) because it found that the conduct asserted to cause injury to HMHP arguably was prohibited by Section 8 of the National Labor Relations Act (NLRA). Thus, the court found that it was without jurisdiction to hear the complaint and accordingly dismissed the complaint. The issue presented in this appeal is whether the trial court's determination that the National Labor Relations Board (NLRB) has exclusive jurisdiction to hear the matter was correct. For the reasons stated below, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On January 16, 2009, HMHP filed a verified complaint for injunctive relief against the union. In the complaint HMHP asserted that the union took up two metered parking spaces in front of the IBM building located at 250 Federal Plaza East in Youngstown, Ohio. HMHP leases the majority of space in the IBM building; HMHP's financial, payroll and other support services are located there. In the two parking spaces the union had a large banner that stated, "SHAME ON JANET THOMPSON" and a 30 to 40 foot inflated rat (banner and rat campaign).

¶{3} Janet Thompson works for HMHP in the IBM building as the "Regional Director of Revenue Cycle Integrity." Thompson also owns Thompson Heating and Cooling Company, which is located in the Youngstown/Warren community. Thompson Heating and Cooling is nonunion and the union was trying to unionize it. HMHP claims that the union's banner and rat campaign are an attempt to pressure HMHP through negative publicity to protect its "goodwill" by terminating Thompson or forcing her to recognize the union at Thompson Heating and Cooling. HMHP asserts in the complaint that the banner and rat campaign are creating "an unfounded and unwarranted defamatory negative inference and perception of HMHP's business

practices that is detrimental to its goodwill in the Youngstown community."[1] In way of damages, HMHP sought a temporary restraining order and a preliminary and permanent injunction; it did not seek any monetary damages.

¶{4} On the same day the complaint was filed, the TRO was granted. Five days later, the union filed a motion to dissolve the TRO based on First Amendment principles. 01/21/09 Motion. HMHP filed a motion in opposition to the motion to dissolve. 01/21/09 Motion. A hearing was held that day on the motions and at the hearing, in addition to arguing First Amendment principles, the union also argued that the action was preempted by the NLRA. In response to that argument, HMHP filed a supplemental memorandum in opposition to the motion to dissolve the TRO. 01/22/09 Motion.

¶{5} The magistrate issued its decision the next day. It explained that the NLRA Section 8(b)(4), the secondary boycott provision, protects neutral employers from becoming enmeshed in a dispute simply because they happen to conduct business with the primary employer who is having a dispute with its employees. It further explained that generally the NLRB has exclusive jurisdiction over issues that fall within the scope of the NLRA. Thus, when an activity is arguably within the compass of Section 7 or 8 of the NLRA, the state's jurisdiction is displaced. The magistrate then determined that HMHP was a neutral employer and that the actions of the union arguably fell within the NLRA. Thus, it found that preemption applied, and as such, Mahoning County Common Pleas Court lacked jurisdiction over the claims raised. 01/23/09 J.E.

¶{6} HMHP filed objections to the magistrate's findings and reasons. The trial court found no merit with the objections, adopted the magistrate's decision, and found that it lacked jurisdiction over the verified complaint. 06/03/09 J.E. HMHP timely appeals from that decision.

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[1]The complaint also asserted that HMHP believes that the union representatives have created and circulated a handbill which states among other things, "Don't support Ms. Thompson or Humility of Mary Health Partners!" The union has stated in a filing and at oral argument that handbills were not circulated. While HMHP does not dispute that, it also does not confirm it. However, the issue in the filings center on the rat and banner, and not the alleged handbill. Thus, for purposes of this opinion only the rat and banner are discussed.

ASSIGNMENT OF ERROR

¶{7} "THE TRIAL COURT'S JURISDICTION OVER APPELLANT'S VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF TO PREVENT A LOSS OF BUSINESS GOODWILL UNDER OHIO COMMON LAW IS NOT PREEMPTED BY THE N.L.R.A."

¶{8} The union moved to dismiss the verified complaint asserting that the trial court's jurisdiction over the verified complaint was preempted by the NLRA, and therefore, the matter could only be brought before the NLRB.[2] Or in other words, the union claims that the trial court lacked subject matter jurisdiction. Subject matter jurisdiction refers to a court's power to adjudicate the merits of a case. *Pratts v. Hurley,* 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. A motion to dismiss for lack of subject-matter jurisdiction inherently raises questions of law. *Morway v. Durkin*, 181 Ohio App.3d 195, 2009-Ohio-932, ¶18. We review de novo the issue of subject matter jurisdiction without any deference to the trial court's determination. Id.

¶{9} As can be seen, the issue in this case centers on preemption and whether the NLRA preempts state action. The Ohio Supreme Court has discussed preemption and the NLRA at length in *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.,* 98 Ohio St.3d 214, 2002-Ohio-7213. *Trades Council* explained the history of preemption as it applies to the NLRA. Id. at ¶46-51. It explained that "Congress has neither exercised its full authority to occupy the entire field in the area of labor relations nor clearly delineated the extent to which state regulation must yield to this subordinating federal legislation. See *Weber v. Anheuser-Busch, Inc.* (1955), 348 U.S. 468, 480-481." Id. at ¶49. *Trades Council* then explained early approaches taken by courts for determining whether the NLRA preempted stated regulation. Id. at ¶51, quoting *Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge* (1971), 403 U.S. 274, 289-291. The court then explained that there are two leading preemption tests – *Garmon* preemption and *Machinists* preemption. *Trades Council*, 98 Ohio St.3d 214, 2002-Ohio-7213, at ¶52-57.

[2]HMHP stresses the fact that the union did not raise the jurisdiction argument in the motion to dismiss, which was solely based on the First Amendment, but rather argued it as an afterthought at the hearing. It does not matter when the issue was raised, because subject matter jurisdiction can be raised at any time. *State ex rel. Bond v. Velotta*, 91 Ohio St.3d 418, 2001-Ohio-91.

¶{10} Under the *Garmon* preemption, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." Id. at ¶53 quoting *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon* (1959), 359 U.S. 236, 244.

¶{11} This means that states cannot regulate activity that the NLRA arguably protects or prohibits. Yet, things that fall beyond the scope of Section 7 or 8 of the NLRA could be controllable by the states. For instance, violence and threats to public order fall outside Section 7 or 8 of the NLRA and it has been held that the states are permitted to enjoin such conduct. *Garmon*, 359 U.S. at 247, citing *Youngdahl v. Rainfair, Inc.* (1957), 355 U.S. 131; *N.L.R.B. v. Roywood* (C.A.5, 1970), 429 F.2d 964, 968-969.

¶{12} However, that does not mean that all activity that is neither protected nor prohibited by the NLRA can be controlled by the states. "Certain concerted activities were intentionally left unprotected and unrestricted under the Act because Congress meant for them to be unfettered by the exercise of *any* governmental or regulatory power, including that of the NLRB." *Trades Council*, 98 Ohio St.3d 214, 2002-Ohio-7213, at ¶55.

¶{13} This led to the second line of preemption analysis – *Machinists*. The crucial inquiry under this analysis is "whether Congress intended that the conduct involved be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" *Lodge 76, Internatl. Assn. of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Emp. Relations Comm.* (1976), 427 U.S. 132, 140, quoting *Natl. Labor Relations Bd. v. Nash-Finch Co.* (1971), 404 U.S. 138. The *Machinists* analysis is primarily invoked in cases involving the use of self-help economic weapons such as strikes, lockouts or concerted refusal to work overtime. *Trades Council*, 98 Ohio St.3d 214, 2002-Ohio-7213, at ¶56, citing *Machinists*, 427 U.S. 132 and *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould Inc.* (1986), 475 U.S. 282, 290. Thus, as

Trades Council indicated, states are prohibited from imposing additional restrictions on economic weapons of self-help. *Trades Council*, 98 Ohio St.3d 214, 2002-Ohio-7213, at ¶56, citing *Golden State Transit Corp. v. Los Angeles* (1986), 475 U.S. 608, 615; *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton* (1964), 377 U.S. 252 (peaceful secondary picketing).

¶{14} Here, the trial court used the *Garmon* preemption analysis and found that the union's conduct arguably was prohibited under section 8 of the NLRA as an unlawful secondary boycott. HMHP asserts that the trial court erred in its application of the *Garmon* preemption because according to it the cause of action, "loss of business goodwill," does not fall under the NLRA.

¶{15} As can be seen by its argument, HMHP focuses on the cause of action, not the conduct, to argue that the trial court has jurisdiction. Such reliance, however, is misplaced. See, e.g., *Lockridge*, 403 U.S. at 292; *Pace v. Honolulu Disposal Service Inc.* (C.A.9, 2000), 227 F.3d 1150 (finding that the issue raised was within the jurisdiction of NLRB, and thus even though the party tried to make it contractual so that it would fall outside the NLRB jurisdiction, the essential claim was representational and thus only the NLRB could decide it). The *Lockridge* Court explained:

¶{16} "Pre-emption * * * is designed to shield the system from conflicting regulation of **conduct**. It is **conduct** being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U.S. at 292. (Emphasis added).

¶{17} Likewise, as can be seen by the aforementioned recitation of *Garmon* and *Machinists*, they both discuss **conduct** or **activities** when determining whether the cause is preempted by the NLRA. See, also, *Internatl. Longshoremen's Assn., AFL-CIO v. Davis* (1986), 476 U.S. 380 (discussing whether **conduct** is protected or prohibited). Thus, it is the conduct, not the cause of action that we must examine to determine whether the NLRA preempts state regulation.

¶{18} That said, as an aside we note that even if we were to focus on the cause of action and not the conduct, HMHP's argument would fail because there is no independent cause of action for "loss of business goodwill." HMHP cites to *Brakefire, Inc. v. Overbeck*, 144 Ohio Misc.2d 35, 2007-Ohio-6464, to support its argument that

there is a common law cause of action for "loss of business goodwill." While that case does deal with a party requesting an injunction, nowhere in that opinion is it stated that there is a common law cause of action for "loss of business goodwill." Rather, that case is dealing with causes of action for misappropriation of trade secrets, breach of contract, intentional interference with business relationships and intentional interference with contractual relationships. Furthermore, there are no specific Ohio cases that have stated that a "loss of business goodwill" is a common law cause of action. The Ohio state courts that have used that phrase discuss it in the final appealable order context of whether an appellant would be denied an effective or meaningful review if the order is deemed not final. *Dillon v. Big Tress, Inc.*, 9th Dist. No. 2381, 2008-Ohio-3264, ¶12-13; *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.* (2001), 141 Ohio App.3d 777, 867 (finding that it was a final appealable order because there was a lack of a meaningful review because the court would be unable to "fashion a remedy which would replace a potential loss of business goodwill"). Likewise, the Federal Sixth Circuit Court of Appeals has only used the phrase in the context of determining whether an injunction could be continued. *Langley v. Prudential Mortgage Capital Co., L.L.C.* (C.A.6, 2009), 554 F.3d 647, 649. It stated that "loss of business goodwill" can constitute irreparable harm in that context. Id. Thus, as is shown, there is no clear common law cause of action for "loss of business goodwill" in Ohio. As such, if we were required to look at the cause of action, for the above reasons, HMHP's argument would fail.

¶{19} Yet, as is discussed above, our focus is not on the cause of action, it is on the conduct of the union. Thus, with that in mind we return to our analysis of whether the conduct complained of can be regulated by the state court or whether the NLRA preempts state regulation. As aforementioned, the trial court found that the conduct was probably an unlawful secondary boycott which is prohibited by Section 8(b) of the NLRA. This section reads:

¶{20} "(b) Unfair labor practices by labor organization

¶{21} "It shall be an unfair labor practice for a labor organization or its agents—

¶{22} "* * *

¶{23} “**(4)** (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

¶{24} “**(A)** forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

¶{25} “**(B)** forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

¶{26} “**(C)** forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

¶{27} “**(D)** forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

¶{28} “*Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such

employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." Section 158, Title 29, U.S. Code. (Emphasis in Original).

¶{29} As can be seen, while Section 8 of the NLRA does not use the words "secondary boycott," it does effectively prohibit secondary boycotts in certain situations. See *Morton*, 377 U.S. 252; *Machinist*, 427 U.S. 132. See, generally, *Edward J. DeBartlo Corp. v N.L.R.B.* (1983), 463 U.S. 147; *N.L.R.B. v. Retail Store Employees Union, Local 1001* (1980), 447 U.S. 607. While the term is elusive of any concrete definition, it has been explained that a secondary boycott is an attempt to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employee. *National Woodwork Mfrs. Ass'n v. N. L. R. B.* (1967), 386 U.S. 612, 624; 39A Ohio Jurisprudence 3d, Employment, Section 701 (stating that the term "secondary boycott" does not have a concrete definition).

¶{30} "'The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.'" *National Woodwork Mfrs. Ass'n*, 386 U.S. at fn. 26 quoting *International Bro. of Electrical Workers, No. 501 v. National Labor Relations Board* (C.A.2, 1950), 181 F.2d 34, 37 (Judge Learned Hand).

¶{31} As stated above, under the *Garmon* analysis, preemption applies if the conduct **arguably** is prohibited or protected by the NLRA. Considering the facts of the case before this court, the union's conduct arguably was prohibited by Section 8 of the

NLRA. The rat and banner outside of HMHP's financial building was arguably involving them in the labor dispute. It could be deemed that this conduct was an attempt to have HMHP, Thompson's employer, to pressure her through threat of losing her job to unionize her business, Thompson Heating and Cooling. As the trial court noted, HMHP is a neutral employer because from the filings it does not appear that HMHP conducts any business with Thompson Heating and Cooling Company, other than employing its owner in a capacity unrelated to Thompson Heating and Cooling Company.

¶{32} Consequently, since the conduct arguably constitutes a secondary boycott under the NLRA, the NLRB has exclusive jurisdiction.[3] Thus, the trial court was correct in deferring to the NLRB under the *Garmon* analysis. The United States Supreme Court has explained that if there is arguably a case for preemption, the state court must "defer to the Board, and only if the Board decides that the conduct is not protected or prohibited may the [state] court entertain the litigation." *Longshoremen's*, 476 U.S. at 397.

¶{33} That said, HMHP argues that preemption does not apply under *Machinists*. Thus, despite our finding that the trial court correctly determined under *Garmon* analysis that preemption does apply, we will look to see whether *Machinists* would indicate that preemption does not apply.

¶{34} At the outset, it is noted that HMHP does not cite to *Machinists* for its often cited holding on self-help economic weapons, i.e. whether Congress intended the conduct involved to be unregulated by both federal and state law because the conduct is left to be controlled by the free play of economic forces. We note that this analysis would not help HMHP because it focuses on conduct that is not to be regulated by the federal **or** state governments. Rather, HMHP's argument is that the NLRA does not preempt state regulation of the conduct here, and that the state can

[3]In addition to arguing that the *Garmon* analysis indicates that preemption applies, the union asserted that since HMHP also filed a compliant with the NLRB, HMHP was admitting that the trial court does not have jurisdiction. This argument is not persuasive. The Fifth Circuit Court of Appeals has stated, "[t]he question whether the Board has a case actually requiring decision before it bears no relation to the question whether this suit concerns conduct arguably protected by the Act." *Roywood Corp.*, 429 F.2d at 969.

regulate the conduct. Thus, *Machinists'* holding on self-help economic weapons does not aid their argument.

¶{35} Instead of citing it for the proposition on self-help economic weapons, HMHP cites *Machinists* for one of its general statements of law. Specifically, its description of the two categories of cases that have found preemption to apply:

¶{36} "Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: 1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and 2) those that reflect conduct 'that the (application of state law by) state courts would restrict the exercise of rights guaranteed by the Federal Act.'" *Machinists*, 427 U.S. at 138.

¶{37} Despite HMHP's insistence to the contrary, we find that this case falls under the first category. As discussed above under *Garmon*, the conduct arguably falls within the NLRA. Thus, it is possible to find that the NLRB could find under the NLRA that this conduct was permitted or prohibited. Furthermore, for sake of argument, it is assumed that there is an Ohio common law cause of action for "loss of business goodwill" and that that action is not covered under the NLRA. If that is the case then the state court could find under that law that the conduct was permitted or prohibited. This could lead to the state and federal level disagreeing on whether the conduct is permitted or prohibited, i.e. two different results for the same conduct. Therefore, HMHP's argument regarding *Machinists* fails. This assignment of error lacks merit.

¶{38} For the foregoing reasons, the judgment of the trial court is hereby affirmed. The trial court correctly determined that the claim must be brought before the NLRB because the conduct in question was arguably prohibited by the NLRA.

Waite, J., concurs.
DeGenaro, J., concurs.