640 N.Y.S.2d 368, 132 Lab.Cas. P 11,682

168 Misc.2d 672
Supreme Court, Monroe County, New York.

DELTA–SONIC CARWASH SYSTEMS, INC., Plaintiff,
v.
BUILDING TRADES COUNCIL, AFL–CIO, et al., Defendants.

Oct. 5, 1995.

Owner of carwashes sought injunction prohibiting union council from distributing handbills urging customers to boycott carwashes because building owner, which also allegedly owned carwashes, for hiring nonunion labor for building renovation. Following issuance of temporary restraining order, removal to federal court, and remand, the Supreme Court, Fisher, J., held that: (1) question of whether peaceable handbilling of secondary employer was protected by National Labor Relations Act (NLRA) was matter to be left in first instance to National Labor Relations Board (NLRB), and (2) action was preempted under *Machinists*, since council's activity was intended to be left unregulated by Congressional scheme.

Motion denied.

West Headnotes (16)

[1] Labor and Employment
Preemption

States
Labor and Employment

When it is clear or may fairly be assumed that activities which state purports to regulate are protected by section of National Labor Relations Act (NLRA) setting forth rights of employees, or constitute unfair labor practice under section of NLRA setting forth unfair labor practices, due regard for the federal enactment requires that state jurisdiction must yield. National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158.

Cases that cite this headnote

[2] Labor and Employment
Unfair Labor Practice Claims in General

Courts are not primary tribunals to adjudicate issues such as whether activities which state purports to regulate are protected by, or constitute unfair labor practice under, National Labor Relations Act (NLRA), so as to be preempted; it is essential to administration of NLRA that these determinations be left in first instance to National Labor Relations Board (NLRB). National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158.

Cases that cite this headnote

[3] Labor and Employment
Exclusive, Concurrent, and Conflicting Jurisdiction

States
Labor and Employment

Under *Garmon* preemption scheme, if National Labor Relations Board (NLRB) decides, subject to appropriate federal judicial review, that conduct is protected by section of National Labor Relations Act (NLRA) setting forth rights of employees, or is prohibited by section of NLRA setting forth unfair labor practices, then matter is at end, and states are ousted of all jurisdiction. National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158.

Cases that cite this headnote

[4] Labor and Employment
Preemption

Labor and Employment
Exclusive, Concurrent, and Conflicting Jurisdiction

States
Labor and Employment

Under *Garmon* preemption scheme, National Labor Relations Board (NLRB) may decide that activity is neither protected nor prohibited by National Labor Relations Act (NLRA), and thereby raise question whether such activity may be regulated by states, or is subject to *Machinists* preemption doctrine. National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158.

Cases that cite this headnote

[5] Labor and Employment

Exclusive, Concurrent, and Conflicting Jurisdiction

States

Labor and Employment

Under *Garmon* preemption scheme, in absence of clear determination, subject to judicial review, by National Labor Relations Board (NLRB) that activity is neither protected nor prohibited by National Labor Relations Act (NLRA), or of compelling precedent applied to essentially undisputed facts, it is not for Supreme Court to decide whether such activities are subject to state jurisdiction. National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158.

Cases that cite this headnote

[6] Labor and Employment

Secondary Activity

Peaceable handbilling directed to secondary employer was not prohibited labor practice under National Labor Relations Act (NLRA). National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

Cases that cite this headnote

[7] Labor and Employment

Secondary Activities

Under *Garmon*, whether peaceable handbilling of secondary employer was protected by "mutual aid and protection" ambit of section of National Labor Relations Act (NLRA) setting forth rights of employees was matter to be left in first instance to National Labor Relations Board (NLRB). National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

Cases that cite this headnote

[8] Labor and Employment

Exclusive, Concurrent, and Conflicting Jurisdiction

States

Labor and Employment

Under *Garmon*, if state law regulates conduct that is actually protected by National Labor Relations Act (NLRA), preemption follows as matter of substantive right. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

Cases that cite this headnote

[9] Labor and Employment

Construction and Operation of Statutes, Ordinances, and Regulations, in General

National Labor Relations Act (NLRA) creates rights in labor and management both against one another and against state. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Cases that cite this headnote

[10] Labor and Employment

Secondary Activity

States

Labor Organizations;Members, Officers, and Dues

Even if action challenging union council's conduct of peaceable handbilling directed to secondary employer was not preempted under *Garmon*, it was preempted under *Machinists*, since such activity was intended to

be left unregulated by Congressional scheme. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Cases that cite this headnote

[11] Labor and Employment

Interference, Restraint, or Coercion in General

Rights protected against state interference by National Labor Relations Act (NLRA) are not limited to those explicitly set forth in section of NLRA setting forth rights of employees as protected against private interference. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

Cases that cite this headnote

[12] Labor and Employment

Preemption

States

Labor and Employment

Machinists doctrine preempts state law and state causes of action concerning conduct that Congress intended to be unregulated. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Cases that cite this headnote

[13] Labor and Employment

Interference, Restraint, or Coercion in General

States

Labor Organizations;Members, Officers, and Dues

Machinists preemption doctrine concerns activity that was neither arguably protected against employer interference by sections of National Labor Relations Act (NLRA) setting forth employees' rights and prohibiting interference with, restraint, or coercion of employees in exercise of such rights, nor arguably prohibited as unfair labor practice by NLRA. National Labor Relations Act, §§ 7, 8(a)(1), (b), as amended, 29 U.S.C.A. §§ 157, 158(a)(1), (b).

Cases that cite this headnote

[14] Labor and Employment

Preemption

States

Labor and Employment

Machinists preemption rule denies both state and federal government the authority to abridge a personal liberty, and recognizes interest in being free of governmental regulation of peaceful methods of putting economic pressure on one another, as right specifically conferred on employers and employees by National Labor Relations Act (NLRA). National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Cases that cite this headnote

[15] Labor and Employment

Preemption

States

Labor and Employment

Conduct not prohibited by section of National Labor Relations Act (NLRA) setting forth unfair labor practices, and either arguably protected by NLRA section setting forth employees' rights or intended to be left unregulated by state or federal government, necessarily is of substantial concern to NLRA scheme, for purposes of *Machinists* preemption. National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158.

Cases that cite this headnote

[16] Labor and Employment

Preemption

States

Labor and Employment

While *Machinists* preemption does not involve in first instance a balancing of state and federal interests, appreciation of state's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress intended conduct to be unregulated. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

Cases that cite this headnote

Attorneys and Law Firms

****370** ***673** Nicholas J. Sargent, P. C., Buffalo, for plaintiff.

(Jules L. Smith, of counsel), Blitman & King, Rochester, for defendants.

Opinion

KENNETH R. FISHER, Justice.

Plaintiff ("Delta–Sonic") commenced this action seeking an order enjoining defendant (the "Council") from distributing handbills ****371** outside of Delta–Sonic carwashes in the Rochester area. *See* N.Y.Labor Law § 807 (governing the general availability of injunctive relief in labor disputes). A temporary restraining order was issued by Administrative Supreme Court Justice Charles Willis enjoining the Council from distributing its handbills pending a preliminary injunction hearing. The Council thereafter removed Delta–Sonic's action to federal court on the ground that the complaint stated a cause of action under § 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187.

Delta–Sonic moved for a remand to state court on the ground that a federal question did not exist on the face of the complaint and, therefore, federal court lacked jurisdiction. Delta–Sonic's motion for a remand was granted in a decision of Chief Judge Michael A. Telesca. A statement of the facts appearing below is taken largely from Chief Judge Telesca's decision.

674 *BACKGROUND

The Council represents the Operating Engineers, Carpenters, Bricklayers, Electricians, Plumbers, Painters and other construction unions, and has approximately 40,000 members. Convinced that Benderson Corporation ("Benderson"), the owner of Marine Midland Plaza, hired non-union labor at substandard wages to renovate that building, the Council decided to initiate a protest against Benderson and petition it to hire only union labor for the renovation project.

Based upon its understanding that Benderson also owns Delta–Sonic carwashes, the Council planned to distribute handbills to carwash customers at Delta–Sonic locations in Rochester in an effort to gain sympathetic public reaction to its protest that non-union labor was being used for Marine Midland Plaza renovations. The proposed handbills stated that Benderson owned Delta–Sonic and requested that consumers not patronize Delta–Sonic until Benderson hired union labor for the renovation. The Council's handbilling campaign was scheduled to begin on July 28, 1995.

In an effort to pre-empt the Council's protest, Delta–Sonic filed this action alleging that the Council's handbill distribution campaign constituted tortious interference with its business because the information contained in the handbill was misleading and would injure Delta–Sonic's business. Delta–Sonic is emphatic that it is not affiliated with Benderson and has no "unity of interest" with it and, therefore, it could not be considered a proper target of the Council's protest.

After issuance of the TRO enjoining the Council from picketing, handbilling or protesting at Delta–Sonic locations pending a hearing, and removal to federal court, Chief Judge Telesca granted Delta–Sonic's remand motion, holding (1) that Delta–Sonic's complaint alleges on its face only a New York state law cause of action for infringement of its property right to carry on unobstructed business activities, *Barclay's Ice Cream Co., Ltd. v. Local No. 757,* 51 A.D.2d 516, 517, 378 N.Y.S.2d 395 (1st Dept.1976), *aff'd,* 41 N.Y.2d 269, 392 N.Y.S.2d 278, 360 N.E.2d 956 (1977), *cert. denied,*

436 U.S. 925, 98 S.Ct. 2818, 56 L.Ed.2d 767 (1978); *David Harp Restaurant Management, Inc. v. Cromwell,* 183 A.D.2d 423, 586 N.Y.S.2d 210 (1st Dept.1992), (2) that peaceful handbilling activity is not a prohibited labor practice under the NLRA and, therefore, the Council's protest (which would not involve threats, coercion, or a restraining of Delta–Sonic customers) would not be actionable under section 8(b)(4), 29 U.S.C. § 158(b)(4); *DeBartolo Corporation v. Florida Gulf Coast Building and Construction,* 485 U.S. 568, 576–78, 108 S.Ct. 1392, 1398–99, 99 L.Ed.2d 645 (1988), (3) that the LMRA only permits ***675** recovery of monetary damages, whereas Delta–Sonic sought only injunctive relief against the Council, 29 U.S.C. § 187; *Table Talk Pies of Westchester v. Strauss,* 237 F.Supp. 514 (S.D.N.Y.1964), and (4) that the Council's separate contention that the state action is preempted by federal labor law, *see San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) (state court tort action preempted where labor activity is arguably protected or prohibited under federal labor law); ****372** *Sears Roebuck & Company v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (same); *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (preemption where labor activity is not expressly protected or prohibited by federal labor law), is only a defense to the state court action and therefore may not support removal to federal court, *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 14, 103 S.Ct. 2841, 2848–49, 77 L.Ed.2d 420 (1983) ("a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case"). In an observation relevant to the issues this court must now decide, Chief Judge Telesca stated that the preemption defense, and the Council's defense to the state court action that injunctive relief against handbilling would violate its First Amendment rights, "can ... be raised and determined in state court."

Delta–Sonic moves in this court for a preliminary injunction. The Council responds that the mechanisms and procedures of the Labor Management Relations Act (29 U.S.C. §§ 141–187), not state law, should govern this dispute, and that a preliminary injunction would violate defendants' rights to engage in free speech protected by the federal and state constitutions. The Council also contends that Supreme Court lacks jurisdiction to issue an injunction because of the anti-injunction statute, N.Y.Labor Law § 807(1), and because Delta–Sonic cannot show irreparable harm or a likelihood of success on the merits. Finally, the Council contends that Delta–Sonic does not plead a valid cause of action. This court agrees with the preemption argument, and therefore does not reach the constitutional and other arguments presented in defense by the Council.

DISCUSSION

The Council's position on preemption may be summed up as follows: Because consumer handbilling of secondary employers is not prohibited by Section 8(b)(4) of the LMRA, *DeBartolo Corporation v. Florida Gulf Coast Building and Construction,* 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988), ***676** it is arguably permitted under Section 8(b)(4)(ii)(B), and is also "arguably protected" under Section 7 of the LMRA. When the labor activity at issue in the case is arguably permitted or arguably protected in such manner, the case is preempted to the LMRA scheme. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964). Delta–Sonic, on the other hand, contends that the Council's proposed handbilling activity is not "arguably" subject to the LMRA, "either by way of protection or prohibition," and that "it may [not] rationally be concluded that the conduct in question is activity conducted for the purpose and within the scope of recognized labor union objectives ... [because instead] it is conduct outside that scope although engaged in by the members of a labor union." *Barclay's Ice Cream Co., Ltd. v. Local No. 757,* 41 N.Y.2d 269, 272, 392 N.Y.S.2d 278, 360 N.E.2d 956 (1977).

[1] **[2]** "When 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." *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). "At times it has not been clear whether the particular activity regulated by the States was governed by [00fa] § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* 359 U.S. at 244–45, 79 S.Ct. at 779.

[3] **[4]** **[5]** Under the *Garmon* scheme, "[i]f the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the states are ousted of all jurisdiction." *Id.* 359 U.S. at 245, 79 S.Ct. at 780. "Or, the Board may decide that ****373** an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States," *id.* 359 U.S. at 245, 79 S.Ct. at 780, or is subject to a second doctrine of pre-emption. [1] But "[i]n the absence of the Board's clear determination [subject to judicial review] that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such ***677** activities are subject to state jurisdiction." *Id.* 359 U.S. at 246, 79 S.Ct. at 780; *see also, Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 225, 113 S.Ct. 1190, 1194, 122 L.Ed.2d 565 (1993) ("*Garmon* pre-emption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits"); *Breininger v. Sheet Metal Workers International Association Local Union No. 6,* 493 U.S. 67, 74, 110 S.Ct. 424, 429, 107 L.Ed.2d 388 (1989) ("as a general matter, neither state nor federal courts possess jurisdiction over claims based on activity that is 'arguably' subject to §§ 7 or 8 of the NLRA.")

[6] Delta–Sonic's argument, that the Council's proposed activity is clearly outside both § 7 and § 8, and that therefore there is nothing to defer to the National Labor Relations Board (NLRB), is premised on the twin view that the Council's proposed handbilling is not a prohibited labor practice under the NLRA, *DeBartolo Corporation v. Florida Gulf Coast Trades Council,* 485 U.S. 568, 576–78, 108 S.Ct. 1392, 1398–99, 99 L.Ed.2d 645 (1988), and that the handbilling is concomitantly not a protected labor activity either. *Edward J. DeBartolo Corporation v. NLRB,* 463 U.S. 147, 103 S.Ct. 2926, 77 L.Ed.2d 535 (1983). The first stated premise is correct, but Delta–Sonic is in error on the second premise. Even if Delta–Sonic was correct in regard to the second premise, however, analysis would turn to a second pre-emption doctrine noted above, the so-called *Machinists* preemption, named after the case of *Lodge 76, International Association of Machinists and Aerospace Workers, AFL–CIO v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) and *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), the doctrinal origins and rationale of which is largely ignored by Delta–Sonic. The court treats Delta–Sonic's argument under *Garmon* preemption principles first, and then turns to whether, even if Delta–Sonic was right that it is settled that § 7 does not cover the Council's proposed handbilling, *Machinists* preemption would nevertheless preclude this action.

[7] The Supreme Court has not decided that peaceable handbilling is unprotected under § 7 of the Act. Rather, in the case relied on by Delta–Sonic, it decided only that handbilling directed at a secondary entity not in a producer-distributer relationship with the object of the primary labor dispute is activity outside the "publicity proviso" of § 8(b)(4). *Edward J. DeBartolo Corporation v. NLRB,* 463 U.S. at 153–54, 155–56, 103 S.Ct. at 2930–31, 2931–32. Neither *DeBartolo* case considered whether peaceable handbilling directed to a secondary employer is protected under § 7 of the Act. Contrary to Delta–Sonic's argument, that issue is quite independent of the producer-distributer criterion triggering the publicity proviso of § 8(b)(4). Delta–Sonic cites no other case in support of its argument ***678** that it has been definitively decided that handbilling in these circumstances is not protected under § 7 of the Act. Thus, we are left with the Council's assertion that *DeBartolo* 's holding concerning handbilling of secondary employers leads to the certain conclusion that such activity is "arguably protected" under § 7 of the LMRA. [2]

****374 [8] [9]** Whether the Council's urged syllogism has merit is precisely the sort of question *Garmon* directs courts to defer to the NLRB. The Council contends that peaceable handbilling of a secondary employer's potential consumers is protected by § 7, which allows employees to "engage in concerted ... activities for the purpose of ... mutual aid and protection." 29 U.S.C. § 157. If the Council is correct, Delta–Sonic's proposed injunction would involve a state regulation of conduct protected by the NLRA. But the *Garmon* rule is "that '[i]f the state law regulates conduct that is actually protected by federal law ... pre-emption follows ... as a matter of substantive right.' " *Golden State Transit Corporation v. City of Los Angeles,* 493 U.S. 103, 110, 110 S.Ct. 444, 450, 107 L.Ed.2d 420 (1989) (quoting *Brown v. Hotel Employees,* 468 U.S. 491, 503, 104 S.Ct. 3179, 3186, 82 L.Ed.2d 373 (1984)). "The NLRA ... creates rights in labor and management both against one another and against the State." *Id.* 493 U.S. at 109, 110 S.Ct. at 450. Whether peaceable handbilling of a secondary employer, which is not prohibited by § 8(b)(4), is also protected because it comes within § 7's "for the purpose of ... mutual aid and protection" ambit, or whether indeed that language in § 7 was intended to embrace particular ***679** types and kinds of activities in a specific sense, are matters to "be left in the first instance to the National Labor Relations Board" unless they are the subject of "compelling precedent applied to essentially undisputed facts." *Garmon,* 359 U.S. at 244–45, 246, 79 S.Ct. at 779–80, 780. No such compelling precedent has been called to the court's attention.

[10] [11] [12] [13] [14] Even if it was definitively decided that the Council's proposed activity is not "protected" under § 7, though clearly not prohibited under § 8, a second pre-emption doctrine, the so-called *Machinists* doctrine, is invoked by the peaceable nature of the Council's proposed handbilling activity, as noted above. "The rights protected against state interference ... are not limited to those explicitly set forth in § 7 as protected against private interference." *Golden State Transit Corporation v. City of Los Angeles,* 493 U.S. at 110, 110 S.Ct. at 450. Thus, the *Machinists* doctrine "pre-empt[s] state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 724, 749, 105 S.Ct. 2380, 2394, 85 L.Ed.2d 728 (1985). It concerns "activity that was neither arguably protected against employer interference by sections 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by section 8(b) of that Act." *Id.* 471 U.S. at 749, 105 S.Ct. at 2394 (quoted in *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 409 n. 8, 108 S.Ct. 1877, 1883 n. 8, 100 L.Ed.2d 410 (1988)). Under this separate pre-emption rule, it is recognized "that certain types of peaceful conduct 'must be free of regulation.' " *Golden State Transit Corporation v. City of Los Angeles,* 493 U.S. at 111, 110 S.Ct. at 451 (quoting *Machinists,* 427 U.S. at 155, 96 S.Ct. at 2560). The *Machinists* rule "denies either sovereign the authority to abridge a personal liberty," and recognizes "the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another' ... [as a] right specifically conferred on employers and employees by the NLRA." ****375** *Id.* 493 U.S. at 112, 110 S.Ct. at 452 (quoting *Machinists,* 427 U.S. at 154, 96 S.Ct. at 2560).

In *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton,* 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964), relied on by the Council and a pre-emption case following the *Machinists* formula developed subsequently, the Supreme Court "struck down an Ohio labor law that prohibited a type of secondary boycott neither prohibited nor protected under the NLRA." *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. at 750, 105 S.Ct. at 2394. The Court found it necessary to determine, "even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited," ***680** whether Congress foreclosed the field concerning regulation of such conduct by enactment of the NLRA. *Morton,* 377 U.S. at 258, 84 S.Ct. at 1257. The Court determined that, with respect to the peaceful secondary employer activity at issue in *Morton,* "[a]llowing its use is part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Id.* 377 U.S. at 259, 84 S.Ct. at 1258. In the *Machinists* case itself, the Court made clear that its prior view, "that state power is not pre-empted as to peaceful conduct neither protected by section 7 nor prohibited by section 8 of the federal Act" was in error. *Machinists,* 427 U.S. at 141, 96 S.Ct. at 2553. This followed because "a particular activity might be 'protected' by federal law not only when it fell within § 7, but also when it was an

activity that Congress intended to be 'unrestricted by *any* governmental power to regulate' because it was among the permissible 'economic weapons in reserve ... actual exercise [of which] on occasion by the parties' " is part of the balance Congress intended to put in place. *Machinists,* 427 U.S. at 141, 96 S.Ct. at 2554 (emphasis in original).

Delta–Sonic seeks to avoid each of these alternative resolutions of this case by interposing two arguments. First, Delta–Sonic protests that the secondary employer activity upheld in *Morton* involved customers and suppliers of the employer with whom the union had its primary dispute. The peaceful persuasion was directed at reducing the customers' and suppliers' business with the primary employer, not at reducing the customers' and suppliers' business with the outside world. Delta–Sonic suggests that a ruling of this court permitting the peaceful handbilling proposed by the Council here would be unprecedented, and would permit unions to select employers as union targets for consumer boycotts on the basis of their economic importance to the community, the ability of such a boycott to garner press coverage, or other factors wholly unrelated to the targeted company's involvement in the union's dispute.

Whether Delta–Sonic is indeed intimately connected in an economic sense to Benderson Development by virtue of the Benderson children's activities in both corporations is the subject of substantial dispute. But there is more than wholly speculative evidence, some of it uncontroverted, that common management personnel composed of Benderson family members exists as between Delta–Sonic and Benderson Development. ***681** *Cf. Park Terrace Caterers, Inc. v. McDonough,* 9 A.D.2d 113, 114, 191 N.Y.S.2d 1001 (1st Dept.1959) ("The existence or nonexistence of such a unity of interest is not dependent upon whether nonunion goods rather than nonunion services are involved, or upon whether a formal contractual relationship subsists between the parties picketed and those in contention with the union, or whether such parties are in the same business"); *Bergen Bindery v. Local 1,* 79 L.R.R.M. (BNA) 2776, 68 Lab.Cas. ¶ 52,778 (Sup.Ct.N.Y.Co. January 3, 1972) (1972 WL 16609) (and cases cited therein). But the *Garmon* and *Machinists* pre-emption doctrines, and the *Morton* holding in regard to secondary employer activity in particular, do not depend upon any unity of interest analysis. In regard to *Garmon,* the question for this case is only whether the activity proposed by the Council is arguably protected by § 7. In regard to *Machinists,* the question is whether, if the proposed conduct is not prohibited by § 8, and not protected by § 7, it is otherwise intended by Congress to be left unregulated by either sovereign. The unity of interest analysis proffered by Delta–Sonic is not properly a part of either determination.

[15] **[16]** Related to the first objection is Delta–Sonic's second objection, that the Council's proposed activity in regard to secondary ****376** employer handbilling concerns conduct outside the NLRA preclusion because it "involve [s] 'conduct touch[ing] interests so deeply rooted in local feeling and responsibility that ... we could not infer that Congress had deprived the states of the power to act.' " *Machinists,* 427 U.S. at 136, 96 S.Ct. at 2551 (quoting *Garmon,* 359 U.S. at 244, 79 S.Ct. at 779). But the Council's proposed handbilling is peaceable in nature, involving no element of violence, forceful intimidation, or coercion which might properly be of concern to the states. *Id.* 427 U.S. at 136–37 & nn. 2–3, 96 S.Ct. at 2551–52 & nn. 2–3; *New York Telephone Company v. New York State Department of Labor,* 440 U.S. 519, 539–40 & n. 33, 99 S.Ct. 1328, 1340–41 & n. 33, 59 L.Ed.2d 553 (1979). Nor does the Council's proposed handbilling involve, after revisions were made to meet the objections of plaintiff, any measure of malicious defamation cognizable in a labor dispute under state law. *Wolf Street Supermarkets, Inc. v. McPartland,* 108 A.D.2d 25, 31–32, 487 N.Y.S.2d 442 (4th Dept.1985). Finally, it cannot be said that the proposed handbilling is only of "peripheral concern" to the NLRA scheme. *Garmon,* 359 U.S. at 243, 79 S.Ct. at 779. Conduct not prohibited by § 8, and either arguably protected by § 7 or intended to be left unregulated by either sovereign, necessarily is of substantial concern ***682** to the NLRA scheme. [3] Accordingly, there is merit to the Counsel's contention that these two exceptions to pre-emption are not invoked when peaceful union activity is proposed. *See Morton,* 377 U.S. at 257, 84 S.Ct. at 1257 (contrasting "cases involving union violence" where the states' paramount interest in preserving domestic tranquility "has been permitted to prevail by reason of controlling considerations which are entirely absent in the present case"); *Wolf Street Supermarkets, Inc. v. McPartland,* 108 A.D.2d 25, 30, 487 N.Y.S.2d 442

(4th Dept.1985) ("Absent proof of more than isolated or sporadic incidents of violence or of damages proximately linked to specific conduct, claims for tortious interference with contractual relations have been repeatedly dismissed as preempted"); *id.* 108 A.D.2d at 31–32, 487 N.Y.S.2d 442 ("Defamation is merely a peripheral concern of the Federal labor laws provided the State remedy is limited 'to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage' ") (quoting *Linn v. United Plant Guard Workers,* 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582 (1966)).

In summary, whether considered under *Garmon* pre-emption principles or *Machinists* pre-emption principles, the motion for a preliminary injunction must be denied, and the complaint, at least insofar as it seeks injunctive relief, is dismissed. Under the former theory, dismissal preserves to the NLRB primary jurisdiction to determine the question whether the Council's proposed conduct is protected under § 7. Under the latter theory, which presupposes (but does not pretermit) that the Board will find the conduct not protected, it is the court's finding that the Council's proposed conduct was intended to be left unregulated by the Congressional scheme.

***683 [The portion of this opinion observing that it is doubtful that the New York law of prima facie tort in this business context reaches non-picketing handbill activity on public property which is arguably protected **377 by First Amendment, following the rationale of *DeBartolo,* 485 U.S. at 576, 108 S.Ct. at 1398, has been deleted for publication].**

CONCLUSION

The motion for a preliminary injunction is denied.

[Portions of opinion omitted for purposes of publication.]

All Citations

168 Misc.2d 672, 640 N.Y.S.2d 368, 132 Lab.Cas. P 11,682

Footnotes

1 *See Lodge 76, International Association of Machinists and Aerospace Workers, AFL–CIO v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), discussed below.

2 The Council's further point, deleted in the quotation above, that it is also a certain conclusion that such activity is "arguably permitted" under § 8(b)(4), is without merit and cannot provide a predicate for pre-emption. If authoritative precedent establishes that an activity is not prohibited by § 8, it is surely permitted in any functional sense. It is not fair to characterize the question, at least under § 8(b)(4), as "arguable" and thereby seek pre-emption to safeguard the primary jurisdiction of the NLRB under *Garmon.* On the distinction between pre-emption based on the primary jurisdiction of the NLRB and pre-emption based on actual protection of conduct as a matter of federal substantive right, *see Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54,* 468 U.S. 491, 502–03, 104 S.Ct. 3179, 3185–86, 82 L.Ed.2d 373 (1984). *DeBartolo* is, on the § 8(b)(4) question, assuredly "compelling precedent" under the *Garmon* formula if "applied to essentially undisputed facts" as is the case here. *Garmon,* 359 U.S. at 246, 79 S.Ct. at 780. Accordingly, insofar as § 8(b)(4) touches the Council's proposed handbilling, there is no question to defer to the primary jurisdiction of the Board. Jurisdiction is pre-empted on the § 8(b)(4) question only if the activity is prohibited or arguably prohibited, not if it is clearly permitted by authoritative precedent. Unless arguably protected under § 7 of the Act, it is appropriate for the courts to "thereby raise the question whether such activity may be regulated by the States" *Garmon,* 359 U.S. at 245, 79 S.Ct. at 780, or may be subject to the *Machinists* pre-emption doctrine discussed in the text below.

3 By contrast, the state's interest in regulating peaceful and relatively unobtrusive handbilling activity directed to secondary employers is not readily apparent. While *Machinists* pre-emption "does not involve in the first instance a balancing of state and federal interests ... [a]n appreciation of the State's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated." *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. at 749 n. 27, 105 S.Ct. at 2394 n. 27. Delta–Sonic simply provides no compelling state interest rationale for local regulation of peaceable handbilling activity on public property outside a business premise. If picketing were involved, even peaceful picketing, there might be some state interest found in the New York cases by virtue of the

secondary employer nature of the activity. *Goldfinger v. Feintuch,* 276 N.Y. 281, 11 N.E.2d 910 (1937). But the Council's proposed activity here does not involve picketing, and instead may be characterized as “nonpicketing labor publicity” by mere handbilling. *DeBartolo,* 485 U.S. at 584, 108 S.Ct. at 1402. Moreover, as set forth below, finding that the state has no such interest in these circumstances avoids the troublesome constitutional issues a contrary holding would present.