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Ninth Circuit Finds State Trespass and Nuisance Laws Not Preempted by Secondary Boycott Law

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In a recent decision involving the interplay between California law and federal labor law, the U.S. Court of Appeals for the Ninth Circuit ruled that state trespass and nuisance laws are not preempted by the federal secondary boycott law. Thus, the owner of a California mall will be permitted to sue a local union of the United Brotherhood of Carpenters to enjoin alleged violations of the mall's "time, place and manner" restrictions in front of a store that was being renovated by a nonunion contractor for one of the mall's tenants. The mall's complaint alleged that union members marched in a circle in front of the tenant's store, yelling, chanting, blowing whistles, damaging a construction barricade, hitting their picket signs against a mall railing, and cat-calling and making sexually provocative gestures toward female patrons. *Retail Property Trust v. United Brotherhood of Carpenters*, 768 F.3d 938 (9th Cir. 2014).

The mall's owner initially filed a lawsuit for injunctive relief in a California state court, but the union removed the case to federal district court, where a federal judge found the case was preempted by the secondary boycott law. The Ninth Circuit reversed that decision, however, and remanded the case to the district court with instructions to either rule on the mall's trespass and nuisance claims or send the matter back to the state court.

Mall's "Time, Place and Manner" Restrictions

Although the mall in this case is privately owned, it maintains a policy of accommodating speech-related activities on its property. The mall adopted "time, place and manner" restrictions to comply with California's *Pruneyard* doctrine, which protects speech and petitioning, reasonably exercised, in privately owned shopping centers. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979).

The *Pruneyard* doctrine was reaffirmed by the California Supreme Court in 2012, but at the same time it was limited by the court to areas in a mall where members of the public are invited to congregate. The court explained in that case that the "public forum" portion of a shopping center is limited to areas that have been designed and furnished to permit and encourage the public to congregate and socialize at leisure, and that a private sidewalk in front of a customer entrance to a retail store in a shopping center is not a public forum. *Ralphs Grocery Company v. UFCW*, 55 Cal.4th 1083 (2012).

The mall's rules in *Retail Property Trust*, which were more lenient than those required under the redefined *Pruneyard* doctrine, permitted labor unions to conduct their activities in an area chosen by the mall that was proximately located to the targeted employer or business. But the union's alleged disruptive activities in this case, as described above, far exceeded the mall's lenient rules for expressive activity.

Secondary Boycott Law

The federal secondary boycott law prohibits a labor organization from threatening, coercing or restraining any person engaged in commerce, where an object is to force or require that person to cease doing business with another person. This conduct is an unfair labor practice under Section 8(b)(4)(B) of the National Labor Relations Act. The facts of this case involved a potential secondary boycott violation because the mall's complaint alleged that the union threatened to force the mall to shut down the tenant's construction project if it did not prevent the tenant from hiring nonunion subcontractors.

Conduct that violates Section 8(b)(4)(B) of the NLRA is also unlawful under Section 303 of the Labor Management Relations Act, which allows the aggrieved person—the mall's owner in this case—to sue in federal district court for damages resulting from the unlawful conduct. Such an action, however, does not include injunctive relief as a remedy, which the mall owner needed to stop the union's allegedly unlawful activities.

Federal Preemption

Within the context of the NLRA, the federal courts apply two types of preemption, which prohibit legal action taken by state courts. The first, known as *Garmon* preemption, prevents a state from interfering with the National Labor Relations Board's interpretation and enforcement of the NLRA. The second, known as *Machinists* preemption, prevents a state from regulating union or employer conduct that Congress intended to be unregulated and controlled by the economic force of the parties. *See Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

In this case, the Ninth Circuit found that neither of the preemption doctrines applied, thus clearing the way for the mall's owner to pursue its action for an injunction under the state trespass and nuisance laws to restrain the union's conduct. The court explained that *Garmon* preemption deals specifically with when a labor matter must be brought before the NLRB. In this case, the mall had no right to invoke the NLRB's jurisdiction, and the union—which could have brought the matter before that agency—failed to do so. In addition, the court explained that *Machinists* preemption did not apply because the mall's trespass and nuisance claims would not impinge on any area of labor conduct designed to be free.

Regarding *Machinists* preemption, the court further explained that trespass and nuisance are labor-neutral torts, and instead of directly regulating relations between unions and employers, they deal with noneconomic interests that are deeply rooted in local feeling and responsibility. Also, the court explained that the mall did not claim the right to quash all union protest activity, only threatening activity that was not a weapon of self-help that Congress intended to leave available to unions. Finally, the types of peaceful protest activities that *Machinists* preemption does protect from state interference were left available by the mall's modest "time, place and manner" restrictions.

Other Issues Involving Injunctive Relief

On remand of this case, it appears that the trial court will rule on the availability of injunctive relief for the mall's owner against the union's alleged disruptive activities. In that regard, the union might rely on two California statutes in an attempt to avoid an injunction—Code of Civil Procedure Section 527.3 (known as the Moscone Act) and Labor Code Section 1138.1. The California Supreme Court upheld both of these statutes in the *Ralphs* decision discussed above, rejecting an argument that they violate the federal Constitution on free speech and equal protection grounds because they favor union speech over speech on other subjects. The U.S. Court of Appeals for the D.C. Circuit had previously ruled to the contrary with regard to the Moscone Act. *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004).

A strong argument can be made that these California statutes are preempted by the *Machinists* preemption doctrine discussed above, because they protect union activity in an area that Congress intended to be unregulated by the states and controlled by the economic force of the parties. Unfortunately, the *Machinists* preemption doctrine was not considered by the California Supreme Court in the *Ralphs* decision. Perhaps this case will provide an opportunity for the courts to decide this important issue.

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