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POLITICAL SUBDIVISIONS–QUALIFICATIONS FOR EXCLUSION FROM THE LABOR-MANAGEMENT RELATIONS ACT

Since the enactment in 1947 of the Taft-Hartley Act[1] [hereinafter referred to as the Act] as an amendment to the National Labor Relations Act[2] the application of federal preemption of state jurisdiction[3] over labor disputes has been vital to the development of a more uniform administration of labor problems.[4] Beyond the preemptive rights which were actually conferred on the National Labor Relations Board [hereinafter referred to as the Board] by the Act,[5] the Supreme Court has expanded the Board's power to preempt state jurisdiction to include the administration of those labor disputes which are merely "arguably" within the purview of sections 7 and 8 of the Act.[6] Nevertheless, even in disputes arising under sections 7 and 8, before the Board

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[1]Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 141 *et seq.* (1964).

[2]Act of July 5, 1935, 49 Stat. 449.

[3]*See* Labor Management Relations Act § 10(e), 29 U.S.C. § 160(e) (1964). Unless otherwise provided for in the Act, by the use of the phrase "affecting commerce," Congress has given the Board power to preempt state labor laws which conflict with the Act. By expressly wording this section of the Act to cover enterprises "affecting commerce," Congress apparently manifested its intent that the Act be extended to the full limit of its constitutional power to regulate commerce among the states. Ever since the case of *Wickard v. Filburn,* 317 U.S. 111 (1942), the meaning of "affecting commerce" has been continually expanding, so that today there are very few business enterprises which can claim that they have no discernible effect upon commerce between the states.

[4]*See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).

[5]*See* Labor-Management Relations Act § 10(e), 29 U.S.C. § 160(e) (1964).

[6]*See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959):

> When an *activity* is arguably subject to §7 or §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.

Id. at 245 (emphasis added).

More recently, Chief Justice Burger and Justices White and Stewart have indicated that the Court may reconsider this holding if the proper facts are again presented before the Court. In their opinion "only labor activity determined to be actually, rather than arguably protected under federal law should be immune from state judicial control." International Longshore Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 202 (1970). In any case, the arguably protected rule only applies to parties over whom the Board has jurisdiction and even then it is subject to several exceptions. For example, if the state interest in regulating conduct arguably within § 7 and § 8 of the Act yet also deeply rooted in state laws is not overriden by "clearly expressed congressional direction" the state may still assume jurisdiction. 359 U.S. at 244, 247. *See also Fulton v. Emerson Electric Co.,* 420 F.2d 527, 530 (5th Cir. 1969) where the court held that the Board does not have jurisdiction over a dispute which is arguably within § 7 and § 8 of the Act where the facts transcend the employer-employee relationship.

may determine if the conduct of the parties to a labor dispute is arguably subject to its jurisdiction, it must establish jurisdiction over the parties themselves; the Act was never intended to affect all parties within the nation's labor force with uniformity.[7] Instead, it has been estimated that the Act affected barely fifty per cent of the nation's work force.[8] Accordingly, where the jurisdiction of the Board turns on the status of the parties involved in the labor dispute, neither Congress nor the Supreme Court has intimated that in the interests of uniform application of the Act the jurisdictional rights of the Board may be expanded to encompass parties who are merely arguably within the purview of the Act. Therefore, with regard to parties seeking to be excluded from the Board's jurisdiction, the Board must find that the party is not "actually" excluded[9] from the Act before it may rightfully find that it has jurisdiction over him. In particular, employers which are state "political subdivisions", and their employees, are expressly excluded from the scope of the Act and thereby from the Board's jurisdiction by sections 2(2) and (2)3.

> The term 'employer' . . . shall not include . . . any State or political subdivision thereof. . . .[10]
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> . . .
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> The term 'employee' . . . shall not include any individual employed . . . by any other person who is not an employer as herein defined.[11]

Consequently, labor disputes involving the employees of a state political subdivision are not subject to the jurisdiction of the Board, and such employees have recourse only to state remedies.

Likewise, an employer who is a political subdivision is excluded from the jurisdiction of the Board and may welcome the opportunity to seek the shelter of state labor laws. However, when an employer claiming political subdivision status seeks to be excluded from the Board's jurisdiction, he must bear the burden of proof in an administrative proceeding before the Board to establish that he is "actually" a political

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[7]*See, e.g.*, Labor-Management Relations Act § 2(2), 29 U.S.C. § 152(2) (1964), excluding employers such as the United States government, wholly owned government corporations, Federal Reserve banks, states and their political subdivisions, non-profit hospitals, and interstate railroads subject to the Railway Labor Act.

[8]Rosenthal, *Exclusions of Employees under the Taft-Hartley Act*, 4 IND. & LAB. REL. REV. 556 (1951).

[9]*Cf.* Creekmore v. Public Belt R.R. Comm'n, 134 F.2d 576, 577 (5th Cir. 1943). The federal courts can only exert jurisdiction over employers who actually *are* included within the purview of the Fair Labor Standards Act, not those employers who *should have been* included.

[10]Labor-Management Relations Act § 2(2), 29 U.S.C. § 152(2) (1964).

[11]Labor-Management Relations Act § 2(3), 29 U.S.C. § 152(3) (1964).

subdivision of a state.[12] If the Board's subsequent determination as to whether an employer is actually a political subdivision of a state is the result of a purely factual investigation, its decision will be conclusive if supported by substantial evidence.[13] However, where the state has already determined by statute or judicial proceeding that the party seeking the exclusion is in fact a political subdivision of that state the Board may not countermand the state law without raising a purely legal, non-factual question, of whether state law definitions[14] of a term which is otherwise undefined in the Act may be preempted. The Act itself provides that unless state law conflicts with the purposes of the Act the Board is not empowered to preempt state jurisdiction.[15] But even though a state law may not be in direct conflict with any definition of the term which is contained in the Act, it is solely within the province of the reviewing federal court to decide if the application of state law definitions would conflict with the purposes of the Act.[16]

In *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*,[17] the United States Court of Appeals for the Sixth Circuit held that the natural gas utility district of Hawkins County[18] was a

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[12]*Cf.* Sweetlake Land & Oil Co. v. NLRB, 334 F.2d 220, 223 (5th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965) (exclusions of agricultural employees). The converse of this statement is that in order for the Board to reject an employer's claim of exemption from the Board's jurisdiction, it must find that he "actually is not" excluded from the Act. Therefore, it may not be implied that if an employer fails to meet the burden of proof in order to be excluded that the Board thereby exercises jurisdiction over him because he is arguably included within the purview of the Act. Consequently, with respect to a political subdivision employer who claims to be excluded from the Act the Board must find that he is *actually* rather than *arguably* not a political subdivision.

[13]Labor-Management Relations Act § 10(e), 29 U.S.C. § 160(e) (1964): "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

[14]*But see* Amalgamated Ass'n S.E.R.M.C.E. v. Wisconsin Employment Rel. Bd., 340 U.S. 383, 398 n.25 (1951). The Court explains that with respect to those areas in which Congress particularly desired state regulation to be operative, as opposed to being preempted, Congress specifically mentions an employer who is a "State or political subdivision thereof." Admittedly, however, neither the Court nor Congress defines what is meant by this phrase.

[15]*See* Labor-Management Relations Act § 10(e), 29 U.S.C. § 160(e) (1964).

[16]Note 46 *infra*.

[17]427 F.2d 312 (6th Cir. 1970).

[18]The natural gas utility district of Hawkins County, Tennessee is one of nearly 270 utility districts in the state. Brief for Appellant at 2. The only precedent dealing with a Tennessee utility district prior to the *Hawkins County* case was rendered by the Regional Director of the Board in *West Tenn. Pub. Util. Dist. of Weakley, Carroll, and Benton Counties, Tenn.*, No. 26-RC-2972 (1967). There on precisely the same facts as *Hawkins County* the Regional Director ruled that a utility district created under Tennessee law [TENN. CODE ANN. § 6-2606 *et seq.* (Supp. 1970)] was a political subdivision. Therefore, it was held that the West Tennessee utility district

political subdivision of Tennessee. Consquently, the court denied enforcement of a Board bargaining order which had been issued against the utility district for refusing to bargain with a certified union of pipe fitters. Utility districts under Tennessee law are "municipalities"[19] created to conduct, operate and maintain systems to furnish their communities with water, sewage disposal, natural gas[20] and other proprietary services.[21] However, the Board had determined that despite the municipal nature[22] of the Hawkins County utility district, it could not be excluded from the Board's jurisdiction as a political subdivision because it did not qualify under the Board's test: a political subdivision must have been "directly created by the state" or "administered by

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was exempt from the Board's jurisdiction. Nevertheless, the Regional Director's findings in that case are not binding on the Sixth Circuit in *Hawkins County.*

[19]TENN. CODE ANN. § 6-2607 (Supp. 1970). A district incorporated under this provision is designated a "municipality."

[20]*See* TENN. CODE ANN. § 6-2608 (Supp. 1970).

[21]*See* City of High Point v. Duke Power Co., 120 F.2d 866 (4th Cir. 1941).

> A city [municipality] has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs the people; the other *proprietary,* quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality.

Id. at 870 (emphasis added).

Here the court held that in the exercise of proprietary functions, municipalities should be governed by the same rules that govern a private corporation. However, had Congress intended to differentiate the exclusions of political subdivisions on the basis of whether they performed governmental or proprietary functions it could easily have done so. *See, e.g.,* Social Security Act § 201, 42 U.S.C. § 418(b) (5) (1964) (the term 'coverage group' means employees of a political subdivision other than those engaged in proprietary functions). Furthermore the federal courts have held that where "political subdivision of a state" is used in federal statutes it is of no consequence to one's claim to such status that the functions performed by the political subdivision are proprietary rather than governmental. *See* Abad v. Puerto Rico Commun. Auth., 88 F .Supp. 34, 41 (D.P.R. 1950).

[22]Natural Gas Util. Dist. of Hawkins County, 167 N.L.R.B. 691 (1967). The natural gas utility district was organized as a municipality [*see* TENN. CODE ANN. § 6-2607 (Supp. 1970)] by petition of local property owners [*see* TENN. CODE ANN. § 6-2602 (Supp. 1970)] with the approval of the county judge or chairman of the county court [*see* TENN. CODE ANN. § 6-2604 (Supp. 1970)] who is the highest elected elected official in the county. Brief for Appellant at 15. The utility district enjoyed preferred powers of eminent domain [*see* TENN. CODE ANN. §6-2611 (1955)] and the right of exemption from state regulation [*see* TENN. CODE ANN. §6-2613 (1955)]. Further, §6-2612 of the Utility District Act vests in the district "all the powers necessary and requisite . . . capable of being delegated by the legislature." TENN. CODE ANN. §6-2612 (1955). The commissioners of the district had the power to subpoena witnesses and to administer oaths; the income from its bonds was determined by the Internal Revenue Service to be exempt from federal taxation under the exclusion for municipals (*see* 427 F.2d at 314); and for purposes of the Social Security Act, it was considered a political subdivision. *See* Social Security Act § 201, 42 U.S.C. § 418(b) (2) (1964); Brief for Appellant at 21.

state appointed or publicly elected officials."[23] However, the Tennessee Supreme Court had already determined that state utility districts such as Hawkins County were "arms or instrumentalities" of Tennessee.[24] Accordingly, the Sixth Circuit, following the prior determination of the Tennessee Supreme Court,[25] held that the Board had no jurisdiction over the Hawkins County utility district on the grounds that a state has the right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute arms or instrumentalities of the state such a holding ought to be binding on federal administrative agencies.[26]

The Sixth Circuit in *Hawkins County* took cognizance of the fact that the Fourth Circuit had upheld the Board's test for finding jurisdiction over a political subdivision in the case of *NLRB v. Randolph Electric Membership Corp.*[27] That decision was based on the belief that in defining a political subdivision of a state, the federal courts should defer to the Board's expertise in discerning "economic realities" from state statutory characterization.[28] The Sixth Circuit in *Hawkins County* carefully distinguished the *Randolph* case on the facts.[29] Nevertheless, the dissent in *Hawkins County* relied entirely on the *Randolph* case and would have granted the Board jurisdiction to enforce the bargaining order against the utility district, despite the fact that the Tennessee Supreme Court had characterized the district as an arm or instrumentality of the state.[30]

Despite factual differences, however, there is an irreconcilable legal conflict between *Hawkins County* and *Randolph* as to whether, for purposes of Board jurisdiction, agency's determination or state law

[23]Natural Gas Util. Dist. of Hawkins County, 167 N.L.R.B. 691, 692 (1967).

[24]*See* First Suburb. Water Util. Dist. v. McCanless, 177 Tenn. 128, 146 S.W.2d 948 (1941).

[25]*Id.*

[26]427 F.2d at 315.

[27]343 F.2d 60 (4th Cir. 1965).

[28]*Id.* at 62.

[29]427 F.2d at 313-14. In *Randolph,* there was no holding by the North Carolina Supreme Court that electric membership corporations were political subdivisions of the state, although by statute such corporations were entitled to the same rights as any other political subdivision of the state [*see* GEN. STAT. OF N.C., § 117-19 (1964) *as amended,* GEN. STAT. OF N.C., § 117-19 (Supp. 1969)] and several successive State Attorneys General had so ruled. *NLRB v. Randolph Electric Membership Corp.,* 343 F.2d 60, 62 (4th Cir. 1965). The Hawkins County District offered its services to the community without the restriction of membership in the corporation as in *Randolph.* In *Randolph* the state did not confer on the district the power of eminent domain and its status as a political subdivision for tax purposes was somewhat unsettled. Note 22 *supra.*

[30]427 F.2d at 315.

should govern the status of an employer. Basic to the holding of the Fourth Circuit in *Randolph* is an implicit conviction that, since the Board has broad discretionary powers which are designed to enable it to administer the Act uniformly across the United States,[31] the Board's test[32] legitimately establishes uniform national standards for determining the jurisdictional status of allegedly exempt political subdivisions.[33] On the other hand, the Sixth Circuit in *Hawkins County,* disregarding the discretionary powers of the Board could find no reasonable basis under the Act for holding that state law definitions of a political subdivision would interfere with the purposes of the Act.[34]

Prior to *Randolph,* the Board had never considered it necessary for the purposes of the Act to set out any jurisdictional guidelines as to the requirements for qualification as a political subdivision.[35] In fact, rather than insisting on the necessity for a uniform definition, the Board explicitly held in *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*[36] that since political subdivisions were creatures of state law, state law definitions should determine the Board's jurisdiction.[37] The holding in *New Bedford* seems to contradict the general rule with respect to federal jurisdiction, that federal acts are applied without regard to state law;[38] however, the Board based its

[31]The fact that the Taft-Hartley Act statistically affected barely fifty per cent of the nation's working force [*see* Rosenthal, *Exclusions of Employees under the Taft-Hartley Act,* 4 IND. & LAB. REL. REV. 556 (1951)] was apparently of no consequence to the Fourth Circuit in holding for uniform application. Heretofore uniform application was only considered a legitimate practice with regard to conduct between parties who were actually within the jurisdiction of the Act. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). At least it does not deter the Fourth Circuit from insisting that the Board's test does promote the presumed Congressional intent that the Act in all circumstances be applied uniformly. Nevertheless, the Fourth Circuit may find support for this belief in the statement of policy contained in section one of the Act which implies that national interest is served by the encouragement of collective bargaining insofar as it insures the free flow of commerce among the states.

[32]Text accompanying note 23 *supra.*

[33]343 F.2d at 63.

[34]427 F.2d at 314.

[35]*See generally* New Jersey Turnpike Auth., 2-RC-2245, April 16, 1954, reported unofficially at 33 L.R.R.M. 1528 (created by the Legislature and governed by members appointed by the Governor); *In re* Oxnard Harbor Dist., 34 N.L.R.B. 1285 (1941) (district formed by petition of voters and governed by elected members of district); Mobile S.S. Ass'n, 8 N.L.R.B. 1297 (1938) (port authority directly created by the state legislation).

[36]127 N.L.R.B. 1322 (1960).

[37]*Id.* at 1324.

[38]*See* Jerome v. United States, 318 U.S. 101, 104 (1943) (interpreting the word "felony" as it is used in a federal statute). *But cf.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (if a right which is protected by state law is in no way regulated by federal law, the state is free to regulate its own creations).

decision on a controversial[39] United States Supreme Court exception to this rule. In *Reconstruction Finance Corp. v. Beaver County*,[40] which involved an analogous question as to whether state or federal law should determine the definition of an undefined federal statutory term[41] the Court held that, inasmuch as the definition of the term "real property" was rooted in state common law, the words "real property" in a federal statute would be defined according to forum state law and not according to federal prescriptions.[42] There would seem to

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[39]*See* New Bedford, Woods Hole, Martha's Vineyard and Nantucket S.S. Auth., 127 N.L.R.B. 1322 (1960). The Board based its decision on the holding in *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946). The Fourth Circuit contended that *Beaver County* interpreted a law which Congress did not intend to operate with national uniformity. Therefore, because Congress sought uniform solutions to national labor disputes in enacting the Act, the Board in *New Bedford* was in error in applying the holding but not the *ratio decidendi* of *Beaver County*. Possibly due to the fact that the Act was never intended to affect the nation's working force uniformly, the Sixth Circuit in *Hawkins County* rejected this reasoning. It appears the Fourth Circuit's reasoning was rejected because, although a uniform effect was not anticipated by the law which was interpreted in *Beaver County*, there was no indication that the means of achieving that diverse effect were not to be uniformly applied. In any case, the Sixth Circuit held that the Board did not err in *New Bedford* in applying *Beaver County* to a dispute arising under the Act.

[40]328 U.S. 204 (1946).

[41]*Id.* at 210. *See also* Commissioner v. Stern, 357 U.S. 39 (1958); Board of County Comm'rs. v. United States, 308 U.S. 343 (1939). In *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), the Court applied state law to define "children" although the issue arose in connection with the right to renew a copyright—a peculiarly federal subject. The Court held that, especially in regard to relationships which are primarily a matter of state concern, the federal courts in applying federal law must refer to the law of the state which created the legal relationship referred to without definition in a federal statute. The validity of this holding has not been jeopardized by the Court's subsequent decision in *Glona v. American Guarantee & Liability Co.*, 391 U.S. 73, 75-76 (1968). In *Glona* the Court found that the word "child" could not be defined by state law in a diversity action because there was no rationale for a state law which was contrary to a biological relationship. Furthermore, the holding in *De Sylva* is evidence of a Supreme Court policy that originated in 1916 with the case of *Seaboard Air Line Railway v. Kenny*, 240 U.S. 489 (1916) which arose under the Federal Employers Liability Act. Here the Court relied on North Carolina law to determine the meaning of "next of kin" in the statute. Moreover the Court held in *United States v. Yazell*, 382 U.S. 341, 353 (1966), that even in light of *Wissner v. Wissner*, 338 U.S. 655 (1950), the *De Sylva* rule was still applicable. In *Wissner* California sought to apply its community property rule in derogation of the federal statutory policy that soldiers have an absolute right to name a beneficiary of their National Service Life Insurance, but the Court held that the California rule would *directly* have undercut congressional intent.

[42]Reconstruction Finance Co. v. Beaver County, 328 U.S. 204, 210 (1946). *Cf.* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959) (Inasmuch as the unlawful activity of the parties to the labor dispute is provided a remedy which is deeply rooted in state law, the state may not automatically be denied jurisdiction simply because the activity of the parties is also "arguably" within §§ 7 & 8 of the Act).

be no legal relationship which is more uniquely rooted in state law than the determination of what shall be a state political subdivision.

Yet in the interest of uniformity, and even at the expense of preempting state law, the Board has insisted in both *Randolph*[43] (successfully) and *Hawkins County*[44] (unsuccessfully) that its "directly created by the state" test for granting an employer an exclusion as a state political subdivision is consistent with the purposes of the Act. Nevertheless, the Board's statutory interpretation is not subject to the deference which the reviewing federal courts give to a finding of fact by the Board.[45] Despite the privilege of the reviewing federal courts to disregard[46] a novel statutory interpretation[47] which the Board has projected, they are not so privileged as to completely disregard other reliable sources such as the decisions of the federal courts, the intent of Congress and the words of the statute.[48]

Because neither the language[49] nor the legislative history[50] of the Act discloses a definition of "political subdivision," the Board is admittedly faced with the problem of defining the term. Accordingly, in deference to the supposed Congressional desire for a uniform applica-

[43]343 F.2d at 62.

[44]427 F.2d at 313.

[45]Notes 13 *supra* and 46 *infra*. The Supreme Court has interpreted the Act's grant of authority to the Board with respect to finding *facts* or applying facts to *settled law* to mean that if the Board's finding rests on a choice between "two fairly conflicting views" the reviewing federal court may not reverse simply because as an original matter it might have decided the question differently. *See* NLRB v. United Ins. Co. of America, 390 U.S. 254, 260 (1968); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). However, a similar standard for a federal agency's interpretation of a statute has been applied. *See* Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968). In this case the Supreme Court allowed the federal agency's interpretation of the undefined statutory term "area" to stand because the agency's interpretation was reasonable in light of the permissible alternatives for defining the term. The case is distinguishable from *Hawkins County* because the agency's interpretation in no way attempted to preempt a state law. Consequently, it is submitted that the Supreme Court's decision only applies to fact situations where there is no law of any source whatever to define a statutory term, in which cases the federal agency may act within the bounds of reason.

[46]*See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 482 (1951) quoting from the Administrative Procedure Act, 5 U.S.C. § 1010(e) (1964): "So far as necessary to decision and where presented, the reviewing [federal] court shall decide all relevant questions of law."

[47]This interpretation is novel so far as the Sixth Circuit is concerned for as recently as 1967 it had been held that utility districts of Tennessee were political subdivisions. Note 18 *supra*. Yet even in the absence of this holding of the Regional Director it has not been held that the decision of the Fourth Circuit is entitled to any more weight than the decision of one state supreme court on another.

[48]Notes 49-103 and accompanying text *infra*.

[49]*See* Labor-Management Relations Act § 2(2), 29 U.S.C. § 152(2) (1964).

[50]*See* H.R. REP. NO. 245, 80th Cong., 1st Sess. 11 (1947).

tion of the Act,[51] the Fourth Circuit based its decision on dicta from the pre-Taft-Hartley holding in *NLRB v. Hearst Publications, Inc.*[52] that the Board may define the term employer according to the dictates of the "economic realities" of the situation regardless of how state or common law may characterize such employers.[53] Specifically, *Hearst* involved a determination by the Court as to the meaning of the term "employee," and the holding of that case has subsequently been overruled by Congress.[54] Nevertheless, the dicta in *Hearst* that the Board was empowered even in the absence of specific statutory authority to disregard state law definitions of "employer" and "employee" if they con-

[51]Note 31 *supra.*

[52]322 U.S. 111 (1944).

[53]*Id.* at 122-23. The Supreme Court declared in *Hearst* that so long as the Board's interpretation of a statute has a "reasonable basis in law," the reviewing federal courts should uphold its decisions. *Id.* at 131. However, since the Taft-Hartley Act the Supreme Court has not reiterated this standard. Instead, it has only been held that a "reasonable" interpretation of the *facts* will be conclusive. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); NLRB v. United Ins. Co. of America, 390 U.S. 254, 260 (1968) (extended their holding to the application of facts to *settled* law). It has not been held that the federal courts must resign themselves to a merely reasonable interpretation of the law rather than dedicating themselves to the correct interpretation of the law. However, the Fourth Circuit in *Randolph* relies on the standard of review in *Hearst* rather than subsequent standards which were proposed by the Court in *Universal Camera.* The invalidity of the "reasonable basis in law" standard is evident upon consideration of the following quotations from Justice Frankfurter's opinion in *Universal Camera*:

> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them the responsibility for assuring that the Board keeps within *reasonable* grounds. That responsibility is not less real because *it is limited to enforcing the requirement that evidence appear substantial* . . . .

340 U.S. at 490 (emphasis added).

. . . .

> It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act

Id. at 487.

. . . .

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. Administrative Procedure Act, 5 U.S.C. § 1010(e) (1964).

Id. at 481.

[54]*See* Boire v. Greyhound Corp., 376 U.S. 473, 481 n.10 (1964); H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947); 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT 309 (1947).

flicted with the purposes of the Act or with "economic realities" has not been specifically contradicted. But Congress' adverse reaction[55] to the Supreme Court's interpretation of the Act in the *Hearst* case[56] is clearly manifested by the legislative history of the Taft-Hartley amendments to the definitions of "employer" and "employee":

> It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act *whatever meaning it wished.* On the contrary, Congress intended . . . that the Board give to words not far-fetched meanings but *ordinary meanings.*[57]

Subsequent to the amendments to section 2(2), ordinary meaning, in the absence of statutory definition, has meant ordinary common law meaning. For example, the courts have interpreted the undefined word "agency" as it is found in section 2(2)[58] solely according to its common law meaning,[59] without regard to the Board's expertise in "economic realities." Implicit, therefore, in the judicial application of the common law meaning of undefined terms is a conviction of the

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[55]NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968).

[56]The Supreme Court's decision in *Hearst* was amplified by the following dicta from Justice Rutledge's opinion:

> Nothing in the statute's background, history, terms or purposes indicates its [the definition of employer] scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

322 U.S. at 123.

[57]H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947) (emphasis added). Congress also explained that in *Hearst*:

> [T]he Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board . . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. * * * To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee."

Id. at 18.

[58]"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . . ." Labor-Management Relations Act § 2(2), 29 U.S.C. § 152(2) (1964).

[59]*See* Lummus Co. v. NLRB, 339 F.2d 728, 735 (D.C. Cir. 1964); Note, *Labor Law—'Outsiders' as Agents of Employer,* 45 N.C.L. REV. 778 (1967). *See also* NLRB v. Howard Johnson Co., 317 F.2d 1 (3d Cir. 1963) (determining if restaurant chain was an agent of a political subdivision); H.R. REP. No. 245, 80th Cong., 1st Sess. 11, 68 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. 31, 36 (1954).

federal courts that unless the Act specifically changes the common law, such meanings are still applicable. Consequently, in the analogous problem of defining the undefined term "political subdivision" there is no compelling reason for not applying the term "political subdivision" in accordance with its ordinary and common law meaning.

At first glance, however, there is no "ordinary" definition of the term "political subdivision", for some states have expressly defined the term in their statutes[60] while other states have been content to leave such determinations to state judicial discretion.[61] Moreover, even in a single state a governmental unit may be considered a political subdivision for one purpose but not for another.[62] So, heretofore, in the absence of any federal law to the contrary, the ordinary and common law meaning of a state political subdivision has depended upon state legislation and court decisions. In view of these facts the *Hawkins County* case, as opposed to *Randolph,* is in accord with the implied congressional intent that the common law meaning of this term is still applicable.

However, despite the fact that there is no federal common law,[63] perhaps the "ordinary" meaning to which Congress refers is the ordinary interpretation of the term "political subdivision" as it is found in other federal statutes.[64] In this regard, the acknowledged federal

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[60]*See, e.g.,* ARIZ. CONST. art. 13, § 7 (1956); MCQUILLIN, MUNICIPAL CORPORATIONS, §§ 2.26, 2.27, 2.29 at 477-87 (3d ed. 1949).

[61]*E.g.,* State v. Corker, 67 N.J.L. 596, 52 A. 362, 365 (1902), *quoting* State *ex rel.* Lydecker v. Englewood Tp., 42 N.J.L. 154, 157 (Sup. Ct. 1879):

> [T]hey [political subdivisions] embrace a certain territory and its inhabitants, organized for the public advantage and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing.

[62]*See* Saint Ferdinand Sewer Dist. v. Turner, 356 Mo. 804, 203 S.W.2d 731, 732-33 (1947) (sewer district which was a political subdivision within Mo. CONST. art. 10, § 15 was not a political subdivision within Mo. CONST. art. 5, § 3). *Compare* MICH. STAT. ANN., § 5.2770(5) (1969) (political subdivision is "any... local unit of this state") *with* MICH. STAT. ANN. § 5.5000(2) (1969) (political subdivision includes "entities, whether organized and existing under charter or general law.")

[63]*See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[64]*See* Boulder Canyon Project Act, 43 U.S.C. § 617(k) (1964) (defines state political subdivision as "any... irrigation or other district, municipality, or other governmental organization" without regard for any procedural criteria for formation or operation of such governmental units). In both the INTERNAL REVENUE CODE of 1954, 26 U.S.C. § 3121 (1964), and the Social Security Act § 201, 42 U.S.C. §§ 410(k)(4)(c), 418(b)(2) (1964), "[t]he term 'political subdivision' includes an instrumentality of... a State." This may be significant since the Sixth Circuit excluded

dependence upon state law definitions[65] indicates that there is no discernible difference between the federal interpretation of state political subdivision and the common law meaning of the term. Support for this conclusion is evident from the federal courts' treatment of the phrase "political subdivisions of any state" as it appeared in the National Bankruptcy Act prior to 1940.[66] For example, a federal district court in California in applying this statutory phrase found that an irrigation district was a "state political subdivision", despite the absence of state law to support its conclusion. The district was organized for public functions; it was created by the state; its officers were publicly elected; and it had the powers of taxation and eminent domain.[67] However, in a similar fact situation in Florida, the federal district court distinguished the California case, and held that where the state law had specifically addressed the problem of what constituted a "political subdivision" for that state, such determinations were binding on the federal courts, despite the unrestricted power of Congress to establish uniform bankruptcy laws.[68]

Another federal statute in which state political subdivisions are given special treatment as employers is the Social Security Act.[69] This fact may be considered significant to the federal courts' interpretation of the term "political subdivision" in the Act in view of the Supreme Court holding that the statutory treatment of the employer-employee relationship in the National Labor Relations and Social Security Acts are analogous.[70] Where, for example, a public transportation corporation sought exclusion from the Social Security Act[71] as a "political subdivision" of Massachusetts, the federal district court disallowed the claim on the basis that the state did not have requisite control over the cor-

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the Hawkins County district on the grounds that it was an "instrumentality" of Tennessee.

[65]*See, e.g.*, Roberts v. Board of Pub. Instr., 112 F.2d 459 (5th Cir. 1940). In determining what constitutes a political subdivision under the Municipal Bankruptcy Act the court relies on the fact that "[T]he Florida statutes do not so provide, the decisions do not so hold." *Id.* at 461.

[66]Act of July 1, 1898 C. 541, § 401-04, 30 Stat. 544.

[67]*In re* Lindsay-Strathmore Irr. Dist., 21 F. Supp. 129, 133-34 (S.D. Cal. 1937).

[68]*In re* Fort Lauderdale, Fla., 23 F. Supp. 229, 234 (S.D. Fla. 1938).

[69]Social Security Act § 201, 42 U.S.C. §§ 410(k)(4)(c), § 418(b)(2) (1964).

[70]*See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947). *See also* S.S.T. 159, 1937-1 CUM. BULL. 430. A water improvement district organized under the statutes of Texas is a subdivision of the state; therefore it was held to be exempt from the Social Security Act. The Texas statute provides for the establishment of such districts upon petition of the majority of landowners situated within the proposed district, for the purpose of providing irrigation for the land included in the district, and for furnishing water for private and commercial purposes.

[71]Act of Aug. 10, 1939, ch. 666, § 905(b), 53 Stat. 1400 (now INT. REV. CODE of 1954, § 3121).

poration to justify considering it as a political subdivision.[72] It was alleged that the state was subsidizing the private transportation corporation in return for the right to appoint the board of directors. Yet, despite factual differences, this holding may be interpreted by the Board as precedent for its test requiring some element of direct state control in either the creation or administration of a "political subdivision." But significantly, the controlling state statute did not provide that simply because the Governor appointed the board of directors of a subsidized private corporation it was transformed into a "political subdivision."[73] Furthermore, it was not alleged that the federal court's holding that the transportation corporation was not a political subdivision conflicted with any state court decision.

The importance of the Board's requirement of state control over a political subdivision as a prerequisite to establishing an employer's status has not been the crucial issue where other federal courts have considered the scope of the term "political subdivision." The emphasis has been on the broad and comprehensive connotations of the term,[74] rather than on any narrow prerequisites for creating and operating a political subdivision. Accordingly, distinctions between political subdivisions which engage in proprietary as opposed to governmental functions, have been rejected as a means to discredit the legitimacy of an employer's status as a political subdivision,[75] unless the federal statute provides for such restrictions.[76] In addition, the federal courts have held that so long as the services which are rendered by the political subdivision are of a type which is by custom provided by the state[77] it is

[72]*See* Boston Elevated Ry. v. Welch, 25 F. Supp. 809, 811 (W.D. Mass. 1939); *Compare* Amalgamated Ass'n S.E.R.M.C.E. v. Missouri, 374 U.S. 74, 81 (1963) *with* United States v. United Mine Workers of America 330 U.S. 258, 289 (1947). Neither case pre-empted an established state statutory or judicial definition.

[73]Boston Elevated Ry. v. Welch, 25 F. Supp. 809, 810 (W.D. Mass. 1939).

[74]*See* Abad v. Puerto Rico Commun. Auth., 88 F. Supp. 34 (D. P. R. 1950). "The term 'political subdivision (sic) within the meaning of the exemption denotes any division of the State or territory which is a municipal corporation . . ." *Id.* at 40. The Second Circuit in *Commissioner v. Shamberg's Estate,* 144 F.2d 998 (2d Cir. 1944), *cert. denied,* 323 U.S. 792 (1945), had previously cited the following quotation from 30 Op. Atty. Gen. 252 (1914):

> [T]he term 'political subdivision' is broad and comprehensive and denotes any division of the State made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State... regarded as public.

144 F.2d at 1004. *See also* Commissioner of Internal Revenue v. White's Estate, 144 F.2d 1019 (2d Cir. 1944), *cert. denied,* 323 U.S. 792 (1945).

[75]*See* Abad v. Puerto Rico Commun. Auth., 88 F. Supp. 34, 41 (D.P.R. 1950).

[76]*E.g.,* Social Security Act § 201, 42 U.S.C. § 418(b)(5) (Supp. 1965).

[77]*See* Abad v. Puerto Rico Commun. Auth. 88 F. Supp. 34, 41-42 (D.P.R. 1950).

irrelevant that private corporations might just as easily have provided these services.

Nowhere in *Randolph* or *Hawkins County* did the court intimate that the services of the "political subdivision" were not customarily provided by state political subdivisions,[78] although the dissent in *Hawkins County* suggested that the distribution of natural gas is not "necessarily" a governmental function.[79] Nevertheless, the Board insisted in both *Randolph*[80] and *Hawkins County*[81] that the economic similarities between the "political subdivision" and private corporations providing the same types of services were sufficient cause to deny the request that the political subdivision be excluded from the Board's jurisdiction.

Consequently, in view of *Reconstruction Finance Corp.*,[82] the intent of Congress as revealed in the legislative history,[83] and the decisions of the Federal courts,[84] there appears to be ample precedent for holding that state law is operative for defining a state political subdivision in a federal statute. Yet it does not follow that the Sixth Circuit necessarily had to go beyond the words of the exclusion clause *itself* in order to reach the desired result that state law determinations should be binding on the Board. Since the specific group of employers which is excluded from the intended scope of the Act is described as "any State or political subdivision thereof," the meaning of the words "state political subdivision" may be ascertained by reference to the meaning of the words associated with them.[85] Accordingly, the words "political subdivision" are given particular reference to "any state," by the word "thereof," the effect being that the clause may be interpreted to read "any political subdivision *of* any state."[86] To the contrary, without the word "thereof" to qualify the words "any political subdivision" in terms

[78]*See* NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965). The Fourth Circuit based its holding on the ground that

> their [electric membership corporations'] relation to the state and their actual methods of operation do not fit the label [political subdivision] given them,

rather than on the belief that natural gas is not customarily provided for by the state. *Id.* at 64.

[79]427 F.2d at 316 (dissenting opinion).

[80]*See* 343 F.2d at 62.

[81]167 N.L.R.B. at 691-92.

[82]Notes 40-42 and accompanying text *supra*.

[83]Text accompanying notes 57-59 *supra* and note 85 *infra*.

[84]Notes 64-77 *supra*.

[85]H. BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS 194 (2d ed. 1911).

[86]The most common meaning of the word "thereof" is "of it." *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2372 (3d ed. 1961). The "it" to which "thereof" refers in this case is "any state"; hence any political subdivision *of* any state.

of "any state," it would be legitimate to attempt to formulate some uniform reference with which to associate any political subdivision. But by the use of the word "of" (as derived from "thereof"), Congress may have meant not only to indicate that the political subdivisions in question were physically attached to "any state" but also that any state may be the *maker* of any political subdivision.[87] Therefore, in light of the fact that there is no uniform procedure for making a state political subdivision,[88] it is significant that the exclusion is for *any* political subdivision of (made by) any state. Indeed, in this context the word "any" is an adjective describing "one (state-made political subdivision) out of a number, as one (state-made political subdivision) selected without restriction or limitation of choice"[89] implying that, without exception, all employers who are state-made political subdivisions are excluded from the Act. Under this interpretation of the statutory language, to refuse the exemption to only one particular state-made political subdivision would be to frustrate the apparent intention of the drafters.

Furthermore, since political subdivisions may be created by the state directly or indirectly through either the legislative or judicial process,[90] it may be concluded that insistence by the Board that all political subdivisions be created in conformity with uniform board prerequisites would neither be in accord with the common law meaning of

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[87]Compare the exclusion of "any State or political subdivision thereof" with the exclusion for "the United States or any wholly owned government corporation" which is also found in § 152(2) of the Act. In the original House version of the Taft-Hartley Act the latter exclusion was for "the United States or any instrumentality thereof." H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947). By changing the exclusion to "any wholly owned government corporation," it may be assumed that Congress intended thereby to narrow the broad connotations of the phrase "any instrumentality thereof" with reference to "the United States." Having so recognized the broad connotations of the "instrumentality thereof" phrase in one instance it seems inconceivable that Congress did not appreciate the broad connotations of the phrase "any political subdivision thereof" with reference to "any state." This is especially significant in view of the fact that the Sixth Circuit has not distinguished an "instrumentality" of a state from a "political subdivision" of a state. Consequently, an attempt by the Board to narrow the scope of the exclusion borders on judicial legislation.

[88]WEBSTER'S NEW INTERNATIONAL DICTIONARY 1565 (3d ed. 1961). The use of the word "of" is described as follows:

> 7. [U]sed as a function word to indicate the agent or doer of an act or action ... (3) after a noun indicating the *maker* or doer often with the force of a subjective genitive (plays [*of*] Shakespeare), (the mercy [*of*] the Lord), (the ruins [*of*] time). (emphasis added).

[89]Notes 60-62 and accompanying text *supra*.

[90]WEBSTER'S NEW INTERNATIONAL DICTIONARY 126 (2d ed. 1952). *See generally* International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950), *rev'd on other grounds*, 341 U.S. 556 (1951). This case relates the word "any" in § 2(2) of the Act to other provisions which describe statutory terms by using "any."

the term "state political subdivision" nor the implied meaning of the exclusion clause itself. Accordingly it may be argued that the Board is merely determining what it considers to be desirable policy rather than what the statute actually says.[91] It has been held that it is not the duty of the Board to determine which employers *should be* within the purview of the Act but rather which employers *are* within its legal jurisdiction.[92] Determining which employers should be included in the Act is a unique responsibility of the legislature, not of the federal courts or the Board.[93]

Prior to the *Randolph* case, therefore, the grounds upon which the Board sought to discredit the "state political subdivision" status of both the Randolph Elecrtic Membership Corporation and the Hawkins County Natural Gas Utility District had no reasonable bases in law, apart from the uncertain limits of administrative discretion which had been given to the Board by the *Hearst* case.[94] Otherwise, the Board's prerequisites of direct state creation or administration of state political subdivisions had only been useful where the federal court sought to *include*[95] within a federal definition of a "state political subdivision" employers who were not so defined by state law. Never have these prerequisites or any other uniform federal criteria been used to *exclude* an employer who was already protected by state definitions as a "political subdivision" of that state. However, the holding in the *Hearst* case which provided precedent for the Board's reliance on "economic realities" and disregard for state law definitions of employers is of questionable validity, since both Congress and the Supreme Court[97] now consider *Hearst* to be overruled. Consequently, the holding of earlier federal cases which discounted the significance of similarities of political subdivisions and private corporations[98] may still be applicable.

[91]Notes 62-63 *supra*.

[92]*See* Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 363 (1949); Local 833, U.A.W., 116 N.L.R.B. 267, 272 (1956).

[93]*Cf.* Creekmore v. Public Belt R.R. Comm., 134 F.2d 576, 577 (5th Cir. 1943); H.R. REP. No. 245, 80th Cong., 1st Sess. 11 (1947). Here the House report explains that heretofore the Board has not applied the Act to any of the many instrumentalities of the United States "but whether or not it should do so, Congress, not the Board should decide." Likewise it may be argued that in view of this intent with regard to instrumentalities of the United States, Congress did not intend for the Board to take jurisdiction over employers who "actually *are*" state-made political subdivisions.

[94]*Cf.* Creekmore v. Public Belt R.R. Comm., 134 F.2d 576, 577 (5th Cir. 1943).

[95]Note 56 *supra*.

[96]Note 67 and accompanying text *supra*.

[97]Note 54 *supra*.

[98]*See* Boire v. Greyhound Corp., 376 U.S. 473, 481 n.10 (1964).

But the Sixth Circuit in *Hawkins County,* rather than discredit the "economic realities" test of *Randolph* and *Hearst* as an invalid means for determining the status of a state political subdivision, tried to avoid on the facts the implications that the test might have had if applied to the natural gas utility district.[99] It is, however, at least arguable that there are significant economic similarities between the utility district and private corporations.[100] Consequently, the court in *Hawkins County* could not reverse the Board on this factual issue simply because it might have decided the case differently as an original matter.[101] Instead, it reversed on the ground that, contrary to the holding in *Randolph* and *Hearst,* the Board has no basis in law for ignoring a state supreme court's definitions of a political subdivision of that state in order to preempt state jurisdiction over its political subdivisions.[102]

Despite the law prior to 1947, the legislative history of the Taft-Hartley Act indicates that Congress did not intend for the Board to give to terms in the Act "whatever meaning it wished." Therefore, in accord with the holding of *Hawkins County* and the common law of the states, which heretofore has constituted the "ordinary" meaning of the term, it appears that "state political subdivisions" are too deeply rooted in the laws of the individual states to have any meaning apart from state law definitions, whether legislative or judicial. Indeed, perhaps it was an awareness of this fact that caused Congress to precede the exclusion of "State or political subdivision" with the indiscriminate article "any" and to follow it with the determinative word "thereof" which may refer to any political subdivision which has been "made by" any state. Consequently, unless the Supreme Court should revive the thinking in the *Hearst* case, the Sixth Circuit's decision in *Hawkins County* appears to be consistent with the statutory language, the intent of Congress, and the other decisions of the federal courts.

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[99]Notes 74-77 and accompanying text *supra.*

[100]Note 29 *supra.* But if *Hearst* is still applicable it would be of no consequence that the Randolph Membership Corporation relied merely on a statute while the Hawkins County district relied on a state court decision, for the *Hearst* case discounted both state legislative and judicial definitions. 322 U.S. at 123.

[101]The power of eminent domain has been delegated to private and public utilities. *See generally* Cline v. Kansas Gas & Elec. Co., 260 F.2d 271, 273 (10th Cir. 1958); Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644, 647 (5th Cir.), *cert. denied,* 340 U.S. 829 (1950); North Carolina Pub. Serv. Co. v. Southern Power Co., 282 F. 837, 844 (4th Cir. 1922), *cert. dismissed,* 263 U.S. 508 (1924). Legislative grants of tax exemption are frequently made to private utilities. *See generally* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 215 F.2d 542, 546-547 (4th Cir. 1954), *cert. denied,* 348 U.S. 591 (1955); Bush v. Aiken Elec. Coop., Inc., 226 S.C. 442, 85 S.E.2d 716, 718 (1955).

[102]*See* NLRB v. United Ins. Co. of America, 390 U.S. 254, 260 (1968).

[103]427 F.2d at 315.