

# The Burger Court Opinion Writing Database

*Sears, Roebuck & Co. v. Carpenters*  
436 U.S. 180 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

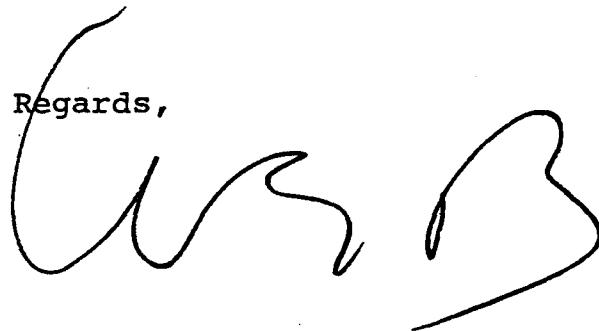
April 10, 1978

Dear John:

Re: 76-750 Sears, Roebuck & Co. v. San Diego  
County District Council of Carpenters

I join.

Regards,



Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 11, 1978

Re: 76-750 - Sears v. San Diego

Dear John:

No problem for me.

Regards,

*CRB*

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

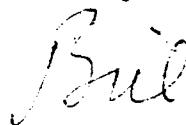
March 27, 1978

RE: No. 76-750 Sears, Roebuck & Co. v. San Diego County  
District Council of Carpenters

Dear John:

In due course I shall circulate a dissent in the  
above.

Sincerely,



Mr. Justice Stevens

cc: The Conference

WJB  
Please see me  
JW

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/1/78

No. 76-750--Sears Roebuck & Co. v. San Diego County Council

MR. JUSTICE BRENNAN, dissenting.

Recirculated: \_\_\_\_\_

The Court concedes that both the objective and the location of the Union's peaceful, non-obstructive picketing of Sears' store may have been protected under the National Labor Relations Act.<sup>1/</sup> Therefore, despite the Court's transparent effort to disguise it, faithful application of the principles of labor law pre-emption established in San Diego Trades Council v. Garmon, 359 U.S. 236 (1959)<sup>2/</sup>, would compel the conclusion that the California Superior Court was powerless to enjoin the Union from picketing on Sears' property; that the trespass was arguably protected is determinative of the state court's lack of jurisdiction, whether or not pre-emption limits an employer's remedies. See Longshoremen v. Ariadne Shipping Co., 397 U.S. 195, 200-201 (1970); Garmon, supra; Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); Guss v. Utah Labor Rel. Bd., 353 U.S. 1 (1957).<sup>3/</sup>

By holding that the arguably protected character of union activity will no longer be sufficient to pre-empt state court jurisdiction, the Court creates an exception of indeterminant dimensions to a principle of labor law pre-emption that has

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 10, 1978

Re: No. 76-750, Sears, Roebuck & Co. v.  
Carpenters

Dear John,

It seems to me you have written a very effective opinion in this most difficult area. Especially as amplified by Harry's helpful concurrence, I think you may well be right. At the Conference, however, I expressed the other view and shall, accordingly, await Bill Brennan's dissent.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 4, 1978

No. 76-750 - Sears, Roebuck & Co.  
v. San Diego County Council

Dear Bill,

I joined Byron's separate opinion in the Ariadne case, but that was a losing cause. It seems to me that your excellent dissenting opinion accurately sets out the established law of federal pre-emption in the labor area, and on that basis I ask you to add my name to it.

Sincerely yours,

PS

Mr. Justice Brennan

Copies to the Conference

✓

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 30, 1978

Re: 76-750 - Sears, Roebuck and Co.  
v. San Diego County  
District Council of  
Carpenters

---

Dear John:

I am in essential agreement with  
your proposed opinion in this case and  
anticipate joining it. There are one or  
two things I should like to chat about  
when you have a moment.

Sincerely yours,



Mr. Justice Stevens  
Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 2, 1978

Re: No. 76-750 - Sears Roebuck v. San Diego District Council

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: APR 6 1978

Recirculated: \_\_\_\_\_

No. 76-750 - Sears, Roebuck and Co. v. San Diego County  
District Council of Carpenters

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but add three observations:

1. The problem of a no-man's land in regard to trespassory picketing has been a troubling one in the past because employers have been unable to secure a Labor Board adjudication

whether the picketing was "actually protected" under § 7 of the

National Labor Relations Act except by resorting to self-help to

expel the pickets and thereby inducing the union to file an unfair

labor practice charge. The unacceptable possibility of precipitating

violence in such a situation called into serious question the practi-

ability there of the Garmon preemption test, see International

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

3  
R.  
P.  
Printed

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: 4/10/78

1st DRAFT

No. 750

76-

## SUPREME COURT OF THE UNITED STATES

Sears, Roebuck and Co.,  
Petitioner,  
v.  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
California.

[April —, 1978]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but add three observations:

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In this case, however, the NLRB as *amicus curiae* has taken a position that narrows the no-man's land in regard to trespassory picketing, namely, that an employer's mere act of informing nonemployee pickets that they are not permitted on his property "would constitute a sufficient interference with rights arguably protected by Section 7 to warrant the General Counsel, had a charge been filed by the Union, in issuing a Section 8 (a)(1) complaint" against the employer. Brief for NLRB as *Amicus Curiae* 18. Hence, if the union,

1  
pp. 2-3

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall✓  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

3rd DRAFT

4/14/78

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 76-750

Sears, Roebuck and Co.,  
Petitioner,  
v.  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
California.

[April —, 1978]

MR. JUSTICE BLACKMUN, concurring.

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: APR 20 1978

## 4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-750

Sears, Roebuck and Co.,  
Petitioner,  
*v.*  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
California,

[April —, 1978]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but add three observations:

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3, 4  
PP

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated:

5th DRAFT Recirculated: MAY 11 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-750

Sears, Roebuck and Co.,  
 Petitioner,  
 v.  
 San Diego County District Council of Carpenters. } On Writ of Certiorari to  
 } the Supreme Court of  
 } California.

[April —, 1978]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but add three observations:

1. The problem of a no-man's land in regard to trespassory picketing has been a troubling one in the past because employers have been unable to secure a Labor Board adjudication whether the picketing was "actually protected" under § 7 of the National Labor Relations Act except by resorting to self-help to expel the pickets and thereby inducing the union to file an unfair labor practice charge. The unacceptable possibility of precipitating violence in such a situation called into serious question the practicability there of the *Garmon* pre-emption test, see *International Longshoremen's Association v. Ariadne Shipping Co.*, 397 U. S. 195, 202 (1970) (WHITE, J., concurring), despite the virtues of the *Garmon* test in ensuring uniform application of the standards of the NLRA.

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 31, 1978

No. 76-750 Sears Roebuck v. San Diego District Council

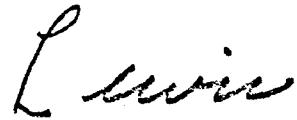
Dear John:

Please join me in your opinion for the court.

I possibly may write a brief concurrence, emphasizing the point you made at Conference. Your statement, in substance, was that although one can argue both sides of the "arguably protected" preemption issue, there is in fact a "no-man's land" when there is a trespass and its victim has no immediate access to NLRB. The state's interest - i.e., the public interest - in preventing the potential for breach of the peace that inheres in trespassatory conduct is certainly "deeply rooted in local feeling and responsibility".

But as your opinion points out, we have Garmon, Babcock & Wilcox and Hudgens on the books. Of these, Garmon is particularly difficult to apply with any degree of confidence. Given our precedents, I think you have worked this case out exceptionally well, and have emphasized that where the only opportunity for NLRB relief against a trespass is in the hands of the party committing it, state action cannot be deemed preempted.

Sincerely,



Mr. Justice Stevens

lfp/ss

cc: The Conference

4/13/78

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 13 APR 1978

Recirculated: \_\_\_\_\_

No. 76-750 Sears-Roebuck v. San Diego

MR. JUSTICE POWELL, concurring.

Although I join the Court's opinion, Mr. Justice Blackmun's concurrence prompts me to add a word as to the "no man's land" discussion with respect to trespassory picketing. Mr. Justice Blackmun, relying on the amicus brief of the NLRB, observes that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence", ante at 2, if the union - having been requested to leave the property - files a §8(a)(1) charge.

With all respect, it seems to me that this optimistic view overlooks the realities of the situation. Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained and sometimes obstructive - without initial violence - of the target business and annoying to members of the public who wish to patronize that business. The "danger of violence" is inherent in many - though certainly not all - situations of sustained trespassory picketing.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

**STATES**  
Recirculated: 19 APR 1978

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-750

Sears, Roebuck and Co.,  
Petitioner,  
v.  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
California.

[April —, 1978]

MR. JUSTICE POWELL, concurring.

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With all respect, it seems to me that this optimistic view overlooks the realities of the situation. Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained and sometimes obstructive—without initial violence—of the target business and annoying to members of the public who wish to patronize that business. The “danger of violence” is inherent in many—though certainly not all—situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree. It is because of these factors that, absent the availability of an equivalent remedy under the National Labor Relations Act, a state court should have the authority to protect the public and private interests by preliminary relief.

In the context of trespassory picketing not otherwise viola-

## Stylistic changes Pg. 2-3

Fig. 2-3

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 21 APR 1978

Recirculated:

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-750

Sears, Roebuck and Co.,  
Petitioner,  
*v.*  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
California.

[April —, 1978]

MR. JUSTICE POWELL, concurring.

Although I join the Court's opinion, MR. JUSTICE BLACKMUN's concurrence prompts me to add a word as to the "no man's land" discussion with respect to trespassory picketing. MR. JUSTICE BLACKMUN, relying on the *amicus brief* of the NLRB, observes that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence," *ante*, at 2, if the union—having been requested to leave the property—files a § 8 (a)(1) charge.

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In the context of trespassory picketing not otherwise viola-

May 1, 1978

No. 76-750 Sears v. San Diego

Dear John:

I have just had an opportunity to look at the changes in your draft of April 26.

I do have reservations as to the invitation extended in note 33 to the Board to establish a declaratory judgment proceeding and to the Congress to enlarge the Board's authority. If the Board were given authority generally comparable to that of a state court to act immediately and to restrain unlawful conduct, the "no man's land" problem would not exist. Board procedures, however, are traditionally slow and ponderous, and the Board itself is usually insulated through semi-bureaucratic layers of the General Counsel's office and administrative judges. Thus, I doubt that either of the suggestions in note 33, without more, would change the present situation to an appreciable extent.

Although I would prefer omission of the note, what would you think of adding language substantially as follows:

"In either such event, in view of the risks incident to trespassory area standards picketing, the public interest - as well as that of the employer and the union - requires the establishment of a procedure that would assure an expeditious resolution of the issue."

Sincerely,

Mr. Justice Stevens

LFP/lab

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: 9 MAY 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
 No. 76-750  
 \_\_\_\_\_

Sears, Roebuck and Co.,  
 Petitioner,  
 v.  
 San Diego County District Council  
 of Carpenters. } On Writ of Certiorari to  
 \_\_\_\_\_  
 the Supreme Court of  
 California.

[April —, 1978]

MR. JUSTICE POWELL, concurring.

Although I join the Court's opinion, MR. JUSTICE BLACKMUN's concurrence prompts me to add a word as to the "no man's land" discussion with respect to trespassory picketing. MR. JUSTICE BLACKMUN, relying on the *amicus brief* of the National Labor Relations Board (Board), observes that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence," *ante*, at 2, if the union—having been requested to leave the property—files a § 8 (a)(1) charge.

With all respect, this optimistic view overlooks the realities of the situation. Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained and sometimes obstructive—without initial violence—of the target business and annoying to members of the public who wish to patronize that business. The "danger of violence" is inherent in many—though certainly not all—situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree. It is because of these factors that, absent the availability of an equivalent remedy under the National Labor Relations Act, a state court should have the authority to protect the public and private interests by granting preliminary relief.

In the context of trespassory picketing not otherwise viola-

Pp. 2, 3

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-750

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

Sears, Roebuck and Co.,  
Petitioner,  
v.  
San Diego County District Council  
of Carpenters.

On Writ of Certiorari to  
the Supreme Court of  
California.

Recirculated. 12 MAY 1978

[April —, 1978]

MR. JUSTICE POWELL, concurring.

Although I join the Court's opinion, MR. JUSTICE BLACKMUN's concurrence prompts me to add a word as to the "no man's land" discussion with respect to trespassory picketing. MR. JUSTICE BLACKMUN, relying on the *amicus brief* of the National Labor Relations Board (Board), observes that "there is a practicable means of getting the issue of trespassory picketing before the Board in a timely fashion without danger of violence," *ante*, at 2, if the union—having been requested to leave the property—files a § 8 (a)(1) charge.

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In the context of trespassory picketing not otherwise viola-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 30, 1978

Re: 76-750 - Sears, Roebuck & Co. v. San Diego County  
Council of Carpenters

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens  
Circulated: MAR 24 '78

**1st DRAFT**

Recirculated.

SUPREME COURT OF THE UNITED STATES

No. 750

Sears, Roebuck and Co.,  
Petitioner,  
*v.*  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
California.

[April —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question in this case is whether the National Labor Relations Act, as amended,<sup>1</sup> deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably—but not definitely—prohibited or protected by federal law.

1

On October 24, 1973, two business representatives of respondent Union visited the department store operated by petitioner (Sears) in Chula Vista, Cal., and determined that certain carpentry work was being performed by men who had not been dispatched from the Union hiring hall. Later that day, the Union agents met with the store manager and requested that Sears either arrange to have the work performed by a contractor who employed dispatched carpenters or agree in writing to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters. The Sears manager stated that he would consider the request, but he never accepted or rejected it.

129 U. S. C. §§ 151-169.

app. 18, 21, 25

## footnotes remembered

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated:

APR 26 1978

Recirculated:

## 2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 750

Sears, Roebuck and Co.,  
Petitioner,  
*v.*  
San Diego County District Council  
of Carpenters. } On Writ of Certiorari to  
the Supreme Court of  
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[April —, 1978]

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II

On October 24, 1973, two business representatives of respondent Union visited the department store operated by petitioner (Sears) in Chula Vista, Cal., and determined that certain carpentry work was being performed by men who had not been dispatched from the Union hiring hall. Later that day, the Union agents met with the store manager and requested that Sears either arrange to have the work performed by a contractor who employed dispatched carpenters or agree in writing to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters. The Sears manager stated that he would consider the request, but he never accepted or rejected it.

<sup>1</sup> 29 U. S. C. §§ 151-169.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 11, 1978

MEMORANDUM TO THE CONFERENCE

RE: No. 76-750 - Sears v. San Diego

At Lewis' suggestion, I have omitted footnote 33 on page 21. I assume this will present no problem to anyone.

Respectfully,



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 22, 1978

MEMORANDUM TO THE CONFERENCE

CASES HELD FOR 76-750, Sears, Roebuck & Co. v. San Diego County  
District Council of Carpenters

1. 77-371: Shirley v. Retail Store Employees Union

Petitioner Shirley owns a building housing two retail stores; he leases half of the building to petitioner Bonner Springs IGA (IGA), a supermarket, and the other half to a variety store. As in Sears, the building is separated from the public sidewalk by a parking lot.

Respondent represents IGA's grocery clerks. When the clerks went out on strike, the union established a picket line on the private sidewalk adjoining the IGA store. Petitioners demanded that respondent remove its pickets from the private walkway. When the union refused, petitioners sought an injunction against the continuing trespass. Relying on Garmon, the Kansas Supreme Court held that the state courts had no jurisdiction to enjoin peaceful trespassory picketing that was arguably protected by the Federal Act.

While this case differs from Sears in several respects, e.g., economic picketing by employees rather than informational or jurisdictional picketing by non-employees, respondent failed to invoke the jurisdiction of the Board in the face of petitioners' demand to discontinue the trespass. Whether or not the filing of a charge with the Board is sufficient to pre-empt state court jurisdiction over arguably protected conduct, Sears indicates that the failure to file such a charge should not operate to deprive the employer of a forum in which to adjudicate the protection issue. Accordingly, I will vote to grant, vacate, and remand for reconsideration in light of Sears. OK