

Annual Survey of Massachusetts Law

Volume 1954

Article 22

1-1-1954

Chapter 16: Labor Relations

Lawrence M. Kearns

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/asml>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Kearns, Lawrence M. (1954) "Chapter 16: Labor Relations," *Annual Survey of Massachusetts Law*: Vol. 1954, Article 22.

C H A P T E R 1 6

Labor Relations

LAWRENCE M. KEARNS

The most important development in Massachusetts labor law during the survey year was not the result of any decision of the Massachusetts Supreme Judicial Court or any act of the Massachusetts legislature. The decision of the Supreme Court of the United States in the *Garner* case narrowed the jurisdiction of state courts in respect to issuing injunctions in certain labor disputes. On the other hand, the adoption of new jurisdictional standards by the National Labor Relations Board removed many small employers from federal regulation of their labor relations. These two developments in federal law thus create a Janus-like situation under which the area of state action in labor disputes is contracted in one sphere and expanded in another.

A. FEDERAL-STATE JURISDICTION

§16.1. Before the *Garner* case. When the National Labor Relations Act (Wagner Act) was passed in 1935 it regulated only conduct by an employer. In 1947 the Taft-Hartley Act amended the Wagner Act by adding, as unfair labor practices, certain union acts, such as picketing which constitutes a secondary boycott. For several years it was generally believed that when an employer was faced with union conduct which violated both the Taft-Hartley Act and Massachusetts law he had a choice of remedies: he could file an unfair labor practice charge with the National Labor Relations Board, as a result of which the Board could proceed to have the conduct enjoined in the federal courts, or he could file his own bill in equity for injunctive relief in the Superior Court of Massachusetts. This approach was based on the theory, now overturned by the Supreme Court, that the federal statute was designed to enforce public rights, whereas the state court action was a remedy for enforcing the private tort rights of the individual employer.

Although the Supreme Court¹ ruled in 1949 that a state could not

LAWRENCE M. KEARNS is a partner in the law firm of Morgan, Brown & Kearns, Boston. He is the coauthor (with Donald A. Shaw) of *Labor Relations Guide for Massachusetts* (1950).

§16.1. ¹ *International Union, USW (AFL), Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949).

abridge the rights of employees to self-organization and collective bargaining guaranteed by Section 7 of the NLRA, the idea of concurrent jurisdiction so far as a state proscribing union conduct also violative of the federal act was still prevalent in 1950 when the Cox-Phillips Act² was enacted by the Massachusetts legislature. This law defined what were to be lawful and unlawful labor disputes in Massachusetts; and the unions, employer associations, professors, and legislators vitally concerned with this law all assumed that they were dealing with labor disputes affecting interstate as well as intrastate commerce. The statute itself shows evidence of this thinking since it includes, as unlawful labor disputes, controversies over a demand that an employer commit "an unfair labor practice either in violation of chapter one hundred and fifty A [the Massachusetts Labor Relations Act], or in violation of the National Labor Relations Act,"³ and controversies over a demand that an employer recognize one union if another union has been certified by the State Labor Relations Commission "or by the National Labor Relations Board."⁴

But union lawyers were not asleep. They began to think of the doctrine of federal supremacy. While labor leaders were denouncing the Taft-Hartley Act as a "slave labor law," their lawyers began to argue before various state courts in labor dispute cases that enactment of the Taft-Hartley Act had pre-empted the labor law field and that state courts were therefore without jurisdiction to enjoin union conduct. Their efforts were crowned with notable success in the *Garner* case.

§16.2. **The Garner case.** In *Garner*¹ the lower court in Pennsylvania had enjoined peaceful picketing which it found was for the purpose of coercing the employer into compelling his employees to join the union, such coercion being a violation of both Pennsylvania law and the Taft-Hartley Act. The Supreme Court of Pennsylvania reversed the lower court on the ground that the Taft-Hartley Act had pre-empted the field. On writ of certiorari, the Supreme Court of the United States unanimously approved the judgment of the Supreme Court of Pennsylvania.

It is clear from the decision that a state court may not enjoin peaceful picketing which is violative of the NLRA, and hence within the exclusive jurisdiction of the NLRB, such as secondary boycotts, jurisdictional disputes, and at least some types of recognition picketing — for example, picketing by one union when another union has been certified and picketing to force the employer to compel employees to join a union which is not the representative of the majority of the employees. To this extent, the jurisdiction of Massachusetts courts to enjoin such picketing, although it constitutes a violation of the Cox-Phillips Act, is curtailed. Clear also is the Supreme Court's dictum that "mass

² Acts of 1950, c. 452.

³ G.L., c. 149, §20C(e)(1).

⁴ Id. §20C(e)(3).

§16.2. ¹ *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 74 Sup. Ct. 161, 98 L. Ed. 228 (1953).

picketing, threatening of employees, obstructing streets and highways or picketing homes" may be enjoined by the states (although mass picketing and violence by a union affecting employees are also violative of the Taft-Hartley Act) because the states have traditionally and historically exercised police powers to prevent breaches of the peace, to maintain public safety and order, and to regulate the use of highways and streets. To this extent the equitable jurisdiction of Massachusetts courts in labor disputes is confirmed.

Not so clear from the decision is the jurisdiction of Massachusetts courts to enjoin strikes or picketing, defined as unlawful labor disputes under the Cox-Phillips Act, arising out of a demand (1) that the employer commit a criminal offense or violate the Massachusetts anti-discrimination law, or (2) that the employer include in a collective bargaining agreement any provision the execution or performance of which would be unlawful. And what is the status of a strike or picketing in violation of the no-strike clause of a collective bargaining agreement? The conduct described is not specifically a union unfair labor practice under the Taft-Hartley Act, although under some circumstances it conceivably could be. On the other hand, this type of conduct would not generally be protected concerted activity under Section 7 of the NLRA. Only the future will determine (1) whether such union conduct is to be considered as "governable by the State or it is entirely ungoverned," in which case the Supreme Court of the United States asserts in the *Garner* decision that it declines to find an implied exclusion of state powers; or (2) whether picketing not falling within the specific prohibition of the Taft-Hartley Act is beyond state restraint on the theory later expressed in the same opinion that "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing" (except where prohibited by the federal act) and the states may not "impinge on the area of labor combat designed to be free." ²

In a decision ³ since *Garner* the Supreme Court affirmed the jurisdiction of a state court in a civil action for damages against tortious conduct of a union, thus emphasizing the fact that *Garner* relates only to equitable relief.

§16.3. Narrowing of NLRB jurisdiction. The broad jurisdiction of the National Labor Relations Act brings within the NLRB's power all business "affecting" interstate commerce. While the Board has always asserted the right to decline to exercise its full jurisdiction when as a matter of policy it determines that the exercise of jurisdiction would not effectuate the policies of the act, the Board has until recently generally pursued a policy of exercising wide jurisdiction. For example, it has taken jurisdiction of laundries, automobile agencies, taxicabs, local transit lines, and some retail stores. On July 15, 1954, the Board issued a statement setting forth in detail a new list of juris-

² 346 U.S. at 500, 74 Sup. Ct. at 171, 98 L. Ed. at 244 (1953).

³ *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 Sup. Ct. 833, 98 L. Ed. 1025 (1954).

dictional criteria¹ which has removed hundreds of companies from Board jurisdiction. In Massachusetts, the effect is to bring these employers and unions within the scope of the Massachusetts Labor Relations Act.² Furthermore, these employers would seem to have an equitable remedy in the state courts against union conduct unlawful under the Cox-Phillips Act, since the *Garner* decision would not appear to be applicable in such a situation. Although questions have been raised in some quarters to the effect that if a company is within the jurisdiction of the NLRA, the Board's declination to exercise jurisdiction creates a no-man's land in which the state still cannot act because of the *Garner* case, it is more probable that a company which is subject to the jurisdiction of the NLRA but over which the Board declines to take jurisdiction under its amended policy will be fully subject to the labor laws of Massachusetts. The State Labor Relations Act is by its terms inapplicable to any unfair labor practice governed exclusively by the NLRA unless the NLRB has declined jurisdiction.³

B. THE SLICHTER ACT AMENDMENTS

§16.4. **Background of the act.** A law relative to the "peaceful settlement of industrial disputes dangerous to the public health and safety" was enacted in Massachusetts in 1947.¹ This law is commonly referred to as the Slichter Act because its enactment was recommended by a special committee, appointed by the Governor, of which Professor Sumner H. Slichter of the Harvard Business School was the chairman.

§16.3. ¹ NLRB Press Release R-449, 34 Lab. Rel. Rep. 261 (1954). These standards eliminate all public restaurants and create various specific dollar criteria as a basis for taking jurisdiction of retail stores, public utility and transit systems, interstate trucking firms, multistate enterprises, service establishments, suppliers, manufacturers, and national defense contractors. For example, a small manufacturing plant in Massachusetts would no longer be subject to NLRB jurisdiction if its direct out-of-state shipments are less than \$50,000 a year and its annual intrastate sales which become part of the stream of interstate commerce amount to less than \$100,000. NLRB jurisdiction will no longer be exercised over a company solely because it is operating under a franchise from a national enterprise or over an office building solely because the tenants thereof are subject to Board jurisdiction.

² There is a decision in New York to the effect that the New York Labor Relations Board has no jurisdiction in a case affecting interstate commerce, even though the NLRB has declined jurisdiction, unless there is a formal cession of jurisdiction by the NLRB to the state agency (and there has been none). *New York State Labor Relations Board v. Wags Transportation System*, 130 N.Y.S.2d 731, 33 L.R.R.M. 2855 (Sup. Ct., N.Y. County, 1954). The Massachusetts Labor Relations Commission, on the other hand, takes jurisdiction of any case affecting interstate commerce if it is within the area within which the NLRB declines jurisdiction. This practice has not yet been finally tested in the courts of Massachusetts. The United States Court of Appeals for the First Circuit made it clear in *Almeida Bus Lines v. Curran*, 209 F.2d 680, 33 L.R.R.M. 2409 (1954), that the issue of the Massachusetts Labor Relations Commission's jurisdiction is litigable in the courts of Massachusetts in the first instance and not in the lower federal courts.

³ G.L., c. 150A, §10 (b).

§16.4. ¹ G.L., c. 150A, §10 (b)

The act covers only industrial disputes in which the distribution of food, fuel, water, electric light and power, gas, and hospital and medical services are involved.

The basic provisions of the 1947 law, which remain unchanged, may be briefly summarized. In the event that a labor dispute threatens a substantial interruption in the production or distribution of essential goods or services which the Governor finds creates an emergency, he may invoke either or both of the following procedures: (1) he may appoint a moderator, who endeavors to persuade the parties to submit the dispute to arbitration, or (2) he may appoint an emergency board, to which the parties are requested (but not required) to submit the dispute for a recommended settlement. A strike is prohibited during the course of these procedures.

If these procedures fail, or if the Governor determines that they cannot be applied, he may (1) seize the plant or facilities, or (2) make arrangements with either or both of the parties for continued operation of the facilities. If no emergency board was appointed prior to the seizure, the Governor may appoint a board after seizure and put its recommendations into effect. If there was a pre-seizure board which made recommendations not accepted by the parties, the Governor may put such recommendations in effect after seizure. Strikes during the period of seizure are unlawful. Seizure ends when the parties have settled their dispute or the Governor determines that the emergency has terminated.

§16.5. Proposals for amendment. At the 1953 convention of the Massachusetts Federation of Labor, a resolution was passed urging the repeal of the Slichter Act. This stemmed from the invocation of the act by the Governor in several cases, one of which involved the milk distributing industry. The AFL filed a bill (Senate No. 332 (1954)) designed to repeal the act. The Greater Boston Chamber of Commerce, through its counsel John J. Roddy, also presented a bill (House No. 1684 (1954)) which proposed a number of amendments designed to clarify and improve the act. The Governor proposed two amendments in his Annual Message in 1954 and submitted a bill (House No. 2437 (1954)) designed to broaden the power of moderators and permit labor and management to choose their representatives on the emergency board under the act. After hearings on these bills, the Senate Committee on Labor and Industries, of which Senator C. Henry Glosky was chairman, proposed a new bill incorporating features of House No. 1684 and House No. 2437 along with several new proposals. This committee bill was introduced after consultation with representatives of all interested groups and Professor Archibald Cox of the Harvard Law School, who had drafted the original act.¹ The committee bill was enacted.² The constructiveness of the legislation is indicated by the fact that not only did representatives of business associations support

§16.5. ¹ Among others consulted were Professor Sumner H. Slichter, Robert Segal, Counsel for the Massachusetts Federation of Labor, and the author.

² Acts of 1954, c. 557.

the bill finally enacted, but labor generally approved it. For example, the AFL's legislative agent in his convention report stated that while the changes were "not nearly as comprehensive as desired by the Federation, they will improve the existing statute."³

§16.6. Governor's action; Hearing before declaring an emergency; Partial seizures. The Governor is now directed to hold an informal hearing (unless he deems it impracticable) before he invokes the act.¹ At this hearing, which is held before the Governor, the Commissioner of Labor and Industries, and the Commissioner of Public Safety, the parties to the dispute will have the right to be heard upon the sole issue of whether an emergency is involved. Under the original provisions of the act the Governor could invoke it on the certification of the Commissioner of Labor and Industries.

The section of the statute permitting the Governor to seize the plant or facility is amended² to permit partial seizure as well as full seizure.

§16.7. Moderator's action; Reviewing the merits. A moderator appointed by the Governor may now review the merits of the dispute and act as mediator or conciliator to the extent he deems appropriate, in addition to urging the parties to submit the dispute to arbitration.¹ Formerly, the statute prohibited the moderator from reviewing the merits of the dispute. In making public his findings as to the responsibility of either or both of the parties for failure to agree to arbitrate, he still may express no opinion on the merits of the dispute itself.

§16.8. Emergency board procedure clarified. The nature and details of the emergency board procedure are clarified.¹ The old law referred to the board as an "emergency board of arbitration" although actually it was a mediation board since its recommendations were not binding on the parties. The new designation of the board is "emergency board of inquiry." The emergency board is now to consist of one member designated by the employer, one member designated by the union, and a third impartial member, to represent the general public, to be selected by the other two members, or by the Governor if the other two members have not selected the third member within seventy-two hours. The new provisions make it clear that the board's recommendations are not binding on either party unless that party accepts such recommendations. There is a new time schedule for the board's procedures.

§16.9. Post-seizure board. The nature of the post-seizure board is clarified. Under the old law it was called "a special board of three arbitrators," although its recommendations were not binding on the

³ 1954 Annual Report of Massachusetts Federation of Labor (Executive Council and Officers) 37.

§16.6. ¹ Acts of 1954, c. 557, §1.

² *Id.* §4.

§16.7. ¹ Acts of 1954, c. 557, §1.

§16.8. ¹ Acts of 1954, c. 557, §1.

Commonwealth since the Governor was granted discretion as to whether he would put the board's recommendations into effect. The board is now called a "special commission." It is to be composed of "not less than three nor more than six members designated either to represent the general public or with equal numbers to represent industry, labor and the public, but in the latter event the governor before appointing the members of such commission shall request the employer to recommend the members to represent industry and the representatives of the employees to recommend the members to represent labor." ¹

The standards which the special commission is to use in making its recommendations are changed.² The old law said that the recommendations would be based on "the conditions in existence in the industry affected." The new law directs the commission to base its findings "on such of the factors normally taken into account in collective bargaining or voluntary arbitration as it deems material, including the conditions in the industry affected."

C. EMPLOYMENT SECURITY

§16.10. Court decisions. In 1954 the Supreme Judicial Court decided two cases of importance under the Massachusetts Employment Security Act. In the first ¹ the Court ruled that a finding of the Division of Employment Security, to the effect that an employee had been discharged for deliberate misconduct and hence was ineligible for benefits, was not supported by the evidence, since the sole evidence to support the finding, introduced at the hearing through the company's personnel director, was hearsay which was not corroborated by other evidence. In the second case ² it was held that the board of review in the Employment Security Division may consider all aspects of a claimant's eligibility for benefits and is not limited to points raised in the appeal. It was further held that the evidence was sufficient to sustain a finding of ineligibility where the inference could be drawn that the unemployed worker had limited her availability for work to employment equally as desirable as a former employment.

§16.11. Legislation. The 1954 legislature amended the Employment Security Act (1) by increasing the amount of weekly benefits for each dependent child from \$2 to \$3,¹ (2) by requiring that employers supply employees with statements of earnings under certain circumstances,² and (3) by providing that an employee otherwise entitled to

§16.9. ¹ Acts of 1954, c. 557, §4.

² *Ibid.*

§16.10. ¹ *Sinclair v. Director of Division of Employment Security*, 1954 Mass. Adv. Sh. 111, 117 N.E.2d 164.

² *Pizura v. Director of Division of Employment Security*, 1954 Mass. Adv. Sh. 309, 118 N.E.2d 771.

§16.11. ¹ Acts of 1954, c. 639.

² *Id.*, c. 655.

benefits will not have the amount of benefits reduced by reason of part-time earnings up to \$10 per week earned while drawing benefits.³ In other words, an employee may still draw maximum benefits of \$25 per week plus dependency benefits and still earn up to \$10 per week in other part-time employment provided such earnings and benefits do not exceed the employee's average weekly wages.

³ *Id.*, c. 673.