Chapter 14: Labor Relations

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A. FEDERAL-STATE JURISDICTION

§14.1. "Piggyback" revisited. A footnote in the 1955 Annual Survey\(^1\) indicated that the so-called "piggyback" case,\(^2\) which had just then come down from the Supreme Court of the United States, would be further treated in the 1956 Survey. This was the case where the union had been enjoined by our Massachusetts courts from picketing the railroad to prevent the loading of truck trailers on railroad cars, an operation referred to as "piggybacking." The Supreme Judicial Court of Massachusetts had reasoned inter alia that since the Taft-Hartley Act specifically defined the term "employer" as excluding railroads subject to the Railway Labor Act, a secondary boycott against the railroad would not be cognizable by the National Labor Relations Board; hence, the federal pre-emption rule would not deprive Massachusetts courts of equitable jurisdiction.

The opinion of the Supreme Court of the United States, reversing the Massachusetts decision, was principally devoted to the narrow point of interpreting the railroad exclusion in the Taft-Hartley Act. Its ruling was that the exclusion applied only where the railroad was involved in a labor dispute with its own employees and that a secondary boycott against the railroad was within the NLRB's jurisdiction. Furthermore, since "any person" may file a charge with the Board the railroad was in no way precluded from filing with the Board unfair labor practice charges as to the secondary boycott.

In the course of its opinion the Supreme Court restates the general rule as to the area of exclusive federal jurisdiction in terms of whether the conduct involved is prohibited by Section 8 of the NLRA or protected by Section 7 of the act. While there are exceptions to this general rule as thus broadly stated, there is an inference from casting the issue in these terms that the states retain equitable jurisdiction to

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enjoin conduct unlawful under the laws of a state if it is neither specifically an unfair labor practice nor protected concerted activity under the federal law. For example, a breach of a collective bargaining agreement, such as a strike in violation of the no-strike clause or the refusal of a party to proceed with arbitration or to carry out an arbitration award under the grievance and arbitration provision of a contract, is not specifically an unfair labor practice under the National Labor Relations Act, as amended, but neither is such a contract breach protected concerted activity under Section 7 of that act. It would appear, therefore, that state courts have jurisdiction to enjoin wildcat strikes in violation of contract and to provide equitable remedies for compelling arbitration or enforcing labor arbitration awards if the applicable state law so permits.

§14.2. Pre-emption doctrine: Further developments. The United States Supreme Court confirmed by decision in the so-called Kohler case\(^1\) what it had stated by way of dictum in the Garner case,\(^2\) discussed in the 1954 Survey\(^3\) namely, that the states retain their traditional jurisdiction to enjoin violence, overt threats of violence (including threats of physical injury to employees and their families and the picketing of employees' homes), mass picketing and the like even though such conduct on the part of the union constitutes the unfair labor practice of coercion of employees under Section 8(b)(1) of the NLRA. The state action upheld was an order of the Wisconsin Employment Relations Board directed against the union and enforced by the Wisconsin courts rather than an injunction directly issued by a state court. But this point is immaterial. On the same day, the Supreme Court in a per curiam decision in Automobile Workers v. Anderson\(^4\) affirmed a judgment of the Minnesota Supreme Court\(^5\) which had upheld the issuance of an injunction by the lower court in Minnesota under the Minnesota Labor Relations Act. That injunction enjoined the obstructing of highways and plant entrances, interfering with vehicles and their operators, mass picketing, assaults and threats of assaults, coercion, intimidation and other interferences with employees, all considered as "violence."

Strangely enough, in the Cutter Laboratories case,\(^6\) also decided the same day, neither the majority nor minority opinions mentioned the pre-emption issue, although the point could well have been raised. There, the California Supreme Court had reversed the lower courts for sustaining an arbitration award which had ordered the reinstatement of an employee discharged because of Communist Party member-

5 McQuay, Inc. v. United Automobile Workers, 245 Minn. 274, 72 N.W.2d 81, 36 L.R.R.M. 2446 (1955).
ship. The majority based their dismissal of the writ of certiorari on the fact that no substantial federal question was involved because the California decision was "only California's construction of a local contract under local law," namely, whether the term "just cause" for discharge in the labor contract encompassed membership in the Communist Party and whether the doctrine of waiver applied. The dissenters thought the case raised important questions under the First and Fourteenth Amendments. It appears from the decision that the arbitration board had "determined that she [the employee] had been discharged for union activity ..." This would constitute an unfair labor practice under Section 8(a)(3) of the NLRA. The Court did not mention this point and, accordingly, did not discuss the question whether the lower courts of California had any jurisdiction to confirm the award and enforce it by ordering reinstatement, apart from the Communist angle of the case.

On the other hand the Supreme Judicial Court of Massachusetts was this year specifically faced with the contention that arbitration of certain discharges should be enjoined because they involved a claim of discrimination for union activities exclusively within the NLRB's jurisdiction. The Court in Post Publishing Co. v. Cort dismissed this contention on the narrow grounds that some issues in the arbitration case involved no question within NLRB jurisdiction and the arbitration board should at least be permitted to "sweep away grounds of dispute which are not within any preëmpted field." While remarking that the Supreme Court of the United States had not passed on the jurisdiction of an arbitrator to adjudicate a contract violation which is also an unfair labor practice (the Post case was decided May 14, 1956, and the Cutter Laboratories case June 4, 1956), the Massachusetts Court by way of dictum indicated it believes an arbitrator would have jurisdiction to proceed.

On November 5, 1956, the Supreme Court in the Elle Construction case reversed a decision of the Idaho Supreme Court which had sustained an injunction against picketing in violation of the Idaho Secondary Boycott Act. This reversal was without opinion; the Supreme Court merely cited its decision in Weber v. Anheuser-Busch.

The 1957 ANNUAL SURVEY should provide additional answers to questions in this area of federal-state jurisdiction in view of the relatively large number of cases involving this issue in which the Supreme Court has granted certiorari. Included among these are several Section 301 suits including General Electric Co. v. Local 205, United Electrical Workers and Goodall-Sanford, Inc. v. United Textile 7 351 U.S. at 299, 76 Sup. Ct. at 828, 100 L. Ed. at 1197. 8 351 U.S. at 295, 76 Sup. Ct. at 826, 100 L. Ed. at 1195. 9 1956 Mass. Adv. Sh. 641, 647, 134 N.E.2d 431, 435. 10 Pocatello Building and Construction Trades Council v. Elle Construction Co., 352 U.S. 884, 77 Sup. Ct. 130, 1 L. Ed.2d 82 (1956). 11 348 U.S. 468, 75 Sup. Ct. 480, 99 L. Ed. 546 (1955). 12 233 F.2d 85, 38 L.R.R.M. 2019 (1st Cir. 1956), cert. granted, 352 U.S. 822, 77 Sup. Ct. 63, 1 L. Ed.2d 46 (1956).
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Workers, AFL. The District Court decisions in both litigations are referred to in the 1955 Survey.

B. MASSACHUSETTS DECISIONS

§14.3. Labor arbitration. In Post Publishing Co. v. Cort, the union submitted to arbitration the discharges of eighteen employees. The collective bargaining agreement provided that arbitration would be conducted pursuant to the voluntary arbitration rules of the American Arbitration Association. This association appointed an arbitrator and set a hearing date. The company brought a bill in equity to enjoin the holding of the hearing. The judge enjoined the hearing as to ten employees who admitted their discharge was solely for reasons of economy but claimed inter alia no consideration was given to their seniority. The judge found the agreement contained no provision as to seniority rights. There was no appeal from the judge's action in respect to these ten employees and the Supreme Judicial Court noted that no issue in respect to them was before the court.

As to the other eight employees, the Supreme Court upheld the lower court in its refusal to enjoin the arbitration of their discharge. The Court noted that the agreement provided for arbitration of grievances or disputes "arising from the application of this agreement" and that complaints by employees "who allege discrimination or unjust treatment" are referred to as being subject to joint committee procedure which is a part of the same paragraph as the arbitration provision.

Without deciding whether the particular discharges were arbitrable the Court states that "The arbitrator should decide the jurisdictional question in the first instance" and parties who raise the issue of jurisdiction before the arbitrator may proceed to a hearing on the


merits without waiving such issue; thus, "the right to a judicial determination will be preserved." 3 It has never been clear what procedure an employer might use to obtain such a judicial determination if the union does not choose to seek enforcement of the award in the courts but resorts to a strike and public pressure to obtain compliance. Possibly the Court is implying that there is equitable relief on the issue of an arbitrator's jurisdiction after the award is rendered or possibly an action for declaratory judgment might lie. In any event the Court stated that it saw "no irreparable injury in first, as promised, carrying out arbitration before the initial tribunal contemplated in the agreement." 4

Another issue in this same case was the claim of federal pre-emption discussed under Section 14.2 above.

The whole tenor of the Court's opinion is highly favorable toward the process of labor arbitration. Adoption of the rule that arbitrability is an issue for the arbitrator in the first instance instead of a matter for judicial determination prior to arbitration is in accord with the views of most labor arbitrators and commentators. 5

The opinion does not go into the question whether G.L., c. 150, §11, enacted in 1949, which cryptically states only that arbitration provisions in collective bargaining agreements shall be "valid," changes the common law rule that an agreement to arbitrate a future dispute may be revoked by either party at any time prior to the award. But it would appear of some significance that the Court did not see fit to make any comments which would give support to a contention that this statute had not changed the common law rule as to revocation. True, the Court stated, "We see no occasion to interrupt the normal course of the arbitration procedure voluntarily adopted by the parties themselves. In so deciding, we venture no statement as to the validity of any award." 6 This latter statement, in its context, appears to refer to the invalidity of an award which is not within the arbitrator's jurisdiction rather than one which is nugatory because the agreement to arbitrate was revoked.

Interest in labor arbitration has not been confined this past Survey year to this decision. The CIO filed a bill in the legislature seeking to enact the Uniform Arbitration Act in Massachusetts. 7 This bill was referred to a study by the Department of Labor and Industries. 8 Commissioner Ernest A. Johnson appointed an advisory committee representative of labor, management and the public which has been studying the problem with the Commissioner, and his report is due to be filed with the 1957 legislature. While a number of objections have

3 Ibid.
4 Ibid.
7 Senate No. 265 (1956).
8 Resolves of 1956, c. 90.
been voiced as to specific provisions of the Uniform Act, the general sentiment among management and labor appears to favor legislation to clarify the legal status of voluntary labor arbitration in our Commonwealth.

§14.4. Unemployment compensation: Disqualification for benefits because of labor dispute. Two cases of importance were handed down on the question of the right to unemployment benefits where there is a labor dispute. In *Adomaitis v. Director of the Division of Employment Security,*

1 during protracted collective bargaining negotiations, the union gave notice of a strike deadline of April 20, but prior to this deadline the contract was extended to permit further negotiations. Ultimately the extension expired on May 31 and a strike took place. The company was engaged in processing wool owned by its customers. As the strike deadline of April 20 approached, many customers stopped sending wool for processing and removed their unprocessed wool from the plant fearing that the wool could not be moved from the company's premises in the event of a prolonged strike. Consequently, although the company continued operation with staggered days off until the strike occurred on May 31, its operations were below normal. Employees filed claims for their partial unemployment during the period from April 20 to April 30 prior to the strike. General Laws, c. 151A, §25(b) denies benefits to an employee for "any week with respect to which the director finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory . . . ." The Court held that a labor dispute existed and that "stoppage of work" includes a partial stoppage or the blocking of "... a substantial amount of work which would otherwise be done. . . ." 2 In other words there need not be a complete stoppage of the employer's operation or a closed plant. Further, the Court adopted the "but for" rule of causation, namely, that the lack of work would not have occurred but for the labor dispute.

The decision is in accord with a recent decision of the New Jersey Supreme Court (written by Mr. Justice Brennan before his elevation to the Supreme Court of the United States).3 Decisions the other way in some other jurisdictions were based on different statutory language. The Court's decision appears to be sound, but the further refinements of the rationale may raise interesting problems. Presumably the result in *Adomaitis* would have been the same had no strike occurred, because the loss of business prior to the strike was due to the strike threat rather than to the strike itself. Still other questions may exist where no strike threat is given but the union policy is one of "no contract — no work" or where an impasse is reached and the dispute is in conciliation but no strike vote has been taken. Application of the rule may be difficult where a lay-off may be due in part to economic

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conditions in the industry generally and in part to loss of business resulting from customers' reactions to the strike threat.

The second unemployment case involving a labor dispute was *Howard Brothers Manufacturing Co. v. Director of the Division of Employment Security*. Here the employees struck in violation of a collective bargaining agreement. The company notified the employees that they were removed from the payroll and no longer considered employees. The Division of Employment Security and the Superior Court held they were entitled to unemployment benefits beginning on a date two weeks after the strike, on the theory that the labor dispute had then ended because the strikers had been replaced on their jobs by other employees. The Supreme Judicial Court reversed and ordered the director to enter an order denying all benefits to the claimants unless, since they left work with the company, they should later qualify by four weeks of covered employment as provided by G.L., c. 151A, §25(e).

The result is a sound one although the reasoning is somewhat unexpected. The Court held that the employees left their jobs voluntarily without good cause attributable to the employer. A strike is a labor dispute and the statutory disqualification for unemployment due to a labor dispute does not distinguish between lawful and unlawful labor disputes. But it would not seem to follow necessarily that no disqualification is any longer applicable to unemployment existing after the employees have been replaced. Replacement of the strikers operates as a discharge. In the case of strikers who strike in violation of their collective bargaining agreement, it could reasonably be concluded that such a serious offense constituted "deliberate misconduct in willful disregard of the employing unit's interest" (which results in the same disqualification as for voluntarily leaving one's work) and that this offense was the reason for their being discharged by replacement.

Having in mind that a strike in violation of contract is unprotected concerted activity under federal and state labor relations acts, this reasoning would not result in the same disqualification for economic strikers after the labor dispute had ended by replacement of the strikers. In such a case the concerted activity protected by law would not be held "deliberate misconduct."

The difficulty with the Court's reasoning is that it could apply to any strike, for in all strikes employees have left their work. But if this were to follow, the Division would presumably have to determine whether the employees struck "without good cause" attributable to the employer. This could involve the Division in the Solomon-like task of determining the justice or injustice of the strike, a task inappropriate for it to handle. Furthermore, in the field of labor relations a strike, whether protected or unprotected concerted activity, is

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5 G.L., c. 151A, §25(e)(1).
6 Id. §25(e)(2).
not ordinarily equated with voluntary quitting or absenteeism, which are the usual personnel actions considered within the "voluntary leaving" disqualification.

A question left unanswered by the Court's approach is whether the Division would be expected to apply both the labor disputes and "voluntary leaving" disqualifications. In the absence of clarification one would suppose that the Division would continue its past policies as to handling labor dispute disqualifications except for strikes in violation of contract which would now be under the "voluntary leaving" disqualification.

Curiously enough the Court disregards the company's notices to the employees as "immaterial." An employer may legally discharge employees who strike in violation of contract. The notices here seem to have been intended for such purpose. It would have been appropriate to give effect to the notices and hold that the strike in violation of contract was deliberate misconduct thus coming within the discharge disqualification.

One can readily agree with the Court that "It is not the purpose of the law to provide strike benefits for persons who have voluntarily left their job in violation of contract . . ."7 And certainly such a situation warrants the imposition of the severest disqualification permitted by the statute. The reasoning in reaching the correct result may, however, be of importance under other circumstances.

§14.5. Employment security: Separation pay. The Supreme Judicial Court upheld the opinion of the Division of Employment Security interpreting the statutory definition of remuneration in respect to separation pay in Kalen v. Director of the Division of Employment Security.1 An employee upon discharge received (1) two weeks' pay in lieu of dismissal notice, (2) $249 as a "vacation allowance," and (3) $1452.50 as severance pay. All three types of payments were held to be remuneration 2 allocable to the weeks following his discharge, the number of such weeks being determined by dividing such remuneration by his average weekly wage. The employee was then held not eligible for benefits during that number of weeks after his discharge.

C. MASSACHUSETTS LEGISLATION

§14.6. Increased benefits. While legislative enactments in 1956 in the field of labor relations were important from an economic and social point of view, they were for the most part relatively unimportant so far as the development of labor law is concerned. Benefits under

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the Employment Security Law\(^1\) and the Workman's Compensation Act\(^2\) were increased and the state minimum wage was increased.\(^3\) The general practitioner would be interested in the increase from $30 to $40 in the amount of wages and premiums exempt from attachment.\(^4\)

§14.7. Miscellaneous statutes. One of the important changes in the Employment Security Law revised the definition of "base period" (within which an employee must earn $500 to be eligible for benefits and the highest wage quarter of which determines the amount of benefits) from the first four of the last five completed quarters prior to filing a claim, to the fifty-two-week period prior to filing.\(^1\)

Under an amendment to the minimum wage law, wage boards are now specifically authorized to include in minimum wage orders an overtime rate for work over forty hours per week.\(^2\) This represented a legislative compromise in connection with a labor-sponsored measure which would have required time and a half for overtime after forty hours per week for intrastate employment generally. Although the federal Wage and Hour Law which provides for such overtime has been on the books since 1938, no state has yet passed a similar law applying generally to intrastate business.

Other legislation included a prohibition against hiring a child during a labor dispute without the written consent of his parent or guardian,\(^3\) and a requirement of registered mail notice of a labor dispute to an employment agency, if the employer involved in the dispute wishes to hire through the agency.\(^4\) The maximum age for which educational certificates are required of employees who are minors was reduced to eighteen.\(^5\) The law protecting the re-employment and seniority rights of employees on military leave was broadened to include leave for training in an organized unit of the ready reserve of the armed forces.\(^6\) A new statute clarifies the laws requiring weekly payment of wages,\(^7\) and an amendment \(^8\) to the State Labor Relations Act provides that it will not be unlawful for an employer to pay regular initiation fees, dues, and assessments to a union of which he is a member or eligible for membership. This latter particularly affects such individuals as barbers and skilled craftsmen who are employers and whose dues payments to unions heretofore were prohibited by Section 4 of the State Labor Relations Act.

2 Id., c. 735.
3 Id., c. 740.
4 Id., c. 155.

§14.7. 1 Acts of 1956, c. 719.
2 Id., c. 681.
4 Ibid.
6 Id., c. 385.
7 Id., c. 259.
8 Id., c. 286.