§14.1. Federal law: Labor arbitration. The most discussed development in labor relations law during the 1960 survey year was the handing down of three decisions on labor arbitration by the Supreme Court of the United States in June, 1960. In the American Manufacturing case, the union brought an action in federal district court under Section 301 of the Labor-Management Relations Act, 1947, to compel arbitration of a dispute over the employer's refusal to grant an employee's request to return to work following an absence due to an industrial accident. The company claimed that the employee was not physically able to do the work and, in any event, was estopped from claiming his job because he had settled his workmen's compensation claim on the basis that he was twenty-five per cent permanently, partially disabled. The union's grievance, which the company refused to arbitrate, claimed the employee was entitled to return to his job under the seniority clause of the collective bargaining agreement. The federal district court and the court of appeals upheld the company on the basis that the grievance was "a frivolous patently baseless one, not subject to arbitration" under the agreement. The Supreme Court reversed.

The collective bargaining agreement contained a usual type of grievance procedure and provision for arbitration of any dispute "as to the meaning, interpretation and application of the provisions of this agreement." The seniority clause recognized seniority as a factor, when ability and efficiency were equal, in respect to layoff, re-employment, transfer, and promotion. The Supreme Court stated that the function of the courts is limited to ascertaining whether a claim is being asserted, whether frivolous or not, which "on its face" is governed by the contract, and that it is not the business of the courts to weigh the merits of

LAWRENCE M. KEARNS is a partner in the firm of Morgan, Brown, Kearns & Joy, Boston. He is co-author (with Donald A. Shaw) of Labor Relations Guide for Massachusetts (1950 with 1957 Supp.).

the grievance. The Supreme Court specifically repudiated the New York "Cutler-Hammer doctrine," which held frivolous claims not arbitrable on the theory that if the meaning of the contract provision is beyond dispute, there is nothing to arbitrate.

The second Supreme Court decision was the Warrior Navigation Company case. There the union sought to arbitrate whether the company's contracting out of work, with a consequent reduction in the work force, constituted a partial lockout. The agreement contained a no-strike no-lockout clause and an arbitration clause that specifically stated that issues "which are strictly a function of management" were not arbitrable. The lower federal courts upheld management's contention that contracting out work was strictly a function of management and consequently not arbitrable under the agreement. Again, the Supreme Court reversed. In the view of the Supreme Court, the one who claims that the parties excluded from court determination, not only the decision on the merits of the grievance but also its arbitrability must bear the burden of clearly so demonstrating. Doubts are to be resolved in favor of coverage; "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." 6

The third decision, handed down the same day as the other two, was the Enterprise case. Here the parties had gone to arbitration on the question of the discharge of a group of employees who had engaged in a walkout during the term of the collective bargaining agreement. The union took the case to arbitration several months after the agreement had expired. The arbitrator found the discharges were not justified but the employees' improper conduct warranted ten days' suspension without pay. He ordered reinstatement with back pay except for the ten-day penalty.

The company refused to comply with the award. The federal district court granted the union's request for an order to comply. The court of appeals, while upholding the arbitrator's decision on the merits and the award of back pay up to the date of contract expiration, held unenforceable the order of reinstatement and any back pay subsequent to the expiration of the agreement. The Supreme Court reversed the court of appeals on this point, thus sustaining the arbitrator's award of

5 It appeared that the company had contracted out work for 19 years and the union had repeatedly and unsuccessfully sought to negotiate a contract provision to prevent contracting out.
6 363 U.S. 574, 582-583, 80 Sup. Ct. 1347, 1353, 4 L. Ed. 2d 1409, 1417 (1960).
reinstatement and back pay.\(^8\) The Supreme Court appears to say that the question whether wrongfully discharged employees could be reinstated after the agreement had expired and granted back pay up to the date reinstated is a question of interpretation of the agreement and therefore one for the arbitrator to determine.

The language of the three opinions and the many sweeping statements by way of dicta have caused much comment.\(^9\) Mr. Justice Douglas\(^10\) adopts the theory that labor arbitration is not an adjudicatory process comparable to commercial arbitration, but rather is a part of the continuing collective bargaining process — a system of industrial self-government — to which the arbitrator brings “his informed judgment to bear in order to reach a fair solution of a problem.” He also adopts the theory that the no-strike clause is the quid pro quo for the arbitration clause,\(^11\) and concludes that when there is an absolute no-strike clause “everything that management does is subject to the agreement” and all questions on which the parties disagree are arbitrable “apart from matters which the parties specifically exclude.” Another view expressed by Mr. Justice Douglas is that the practices of the industry and the shop, referred to as “the industrial common law,” are “a part of the collective bargaining agreement although not expressed in it” and are a “source of law” for labor arbitrators. The Court’s opinion also states that an arbitrator needs flexibility in formulating remedies to meet a wide variety of situations.

On the other hand, the \textit{Enterprise} opinion contains this statement:

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.\(^12\)

The precise holdings in these cases can be rationalized on much narrower grounds than the sweeping language in Mr. Justice Douglas’ opinions. To what extent the broad dicta may become law when the

\(^8\) The court of appeals had also held that the back pay award was unenforceable because it did not specifically determine the amount of back pay. The Supreme Court upheld this modification, thus sending the award back to the arbitrator for such determination.

\(^9\) Professor Paul R. Hays of Columbia Law School, at the Annual Meeting of the A.B.A. Section of Labor Relations Laws, Washington, D.C., August 30, 1960, stated: “Perhaps it would be fair to say that the Court’s view of labor arbitration, as expressed in these opinions, is romantic rather than realistic and rational.”

\(^10\) Mr. Justice Douglas wrote all three opinions of the Court. Mr. Justice Brennan wrote a concurring opinion in which Mr. Justice Harlan joined. Mr. Justice Frankfurter concurred in the result. Mr. Justice Whittaker wrote dissenting opinions in Warrior and Enterprise but concurred in the result in American. Mr. Justice Black took no part in the decisions.

\(^11\) Mr. Justice Brennan stated in his concurring opinion that he does not understand the Court’s decision to depend upon this theory.

\(^12\) 363 U.S. 593, 597, 80 Sup. Ct. 1358, 1361, 4 L. Ed. 2d 1424, 1428 (1960).
Court is faced with considering them as specific issues for direct ruling in future cases is a matter of conjecture. Some believe these cases presage a complete change in the approach to labor arbitration; others take the view that while there will undoubtedly be some change, particularly in respect to the approach to arbitrability issues, it is not likely that the adjudicatory theory of labor arbitration will be abandoned in favor of the problem-solving approach when one or both parties oppose the latter approach. Arbitrators are likely to realize that awards that go far beyond the contemplation of either party and impinge upon important management or union rights may result in the parties preferring to leave to the economic pressures of a strike those issues that either considers nonarbitrable.

In Massachusetts the problem of the court’s role in the labor arbitration process is governed by the 1959 statute, an adaptation of the Uniform Arbitration Act. It is therein provided that the court may refuse to order arbitration, or stay a threatened arbitration if (1) there is no agreement to arbitrate or (2) the question for arbitration is not covered by the arbitration provision of the agreement and a dispute over the interpretation or application of the arbitration provision itself is not subject to arbitration under the agreement. It is further provided that an order to arbitrate shall not be denied, or a stay of arbitration granted “on the ground that the claim in issue lacks merit or bona fides or because no fault or grounds for the claim have been shown.” A party may request the Superior Court to vacate the award for a number of reasons stated in the statute, including a claim that the arbitrator exceeded his powers or there was no arbitration agreement, provided that the party raised this question of the arbitrability of the issue in the arbitration proceeding. There is a specific statutory provision to the effect that “the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing the award.”

The United States Supreme Court's labor arbitration decisions would appear to be applicable only to actions in the federal courts and hence would not be binding in cases arising in the courts of Massachusetts under the state statute. It seems probable that the result in the American Manufacturing case would be the same under the Massachusetts statute but the precise issues in the other two cases, being much closer on the law and the facts, could well go either way, were they before a Massachusetts court under the new statute. So far as all the sweeping Supreme Court dicta are concerned, it is at least doubtful if

14 On the other hand, it may be argued that the new federal substantive law of labor arbitration is applicable to cases in state courts that could have been brought in federal court under Section 301 of the LMRA. See Meltzer, The Supreme Court, Congress and State Jurisdiction over Labor Relations, 59 Colum. L. Rev. 269, 276-281 (1959). The opinion is there indicated that there is concurrent state and federal jurisdiction in labor arbitration cases.
they would be followed by the Massachusetts courts. While the Massachusetts statute recognizes the principle that the court's role in labor arbitration is limited, the judicial role is still an important one and the whole tenor of the Massachusetts labor arbitration statute is more in accord with the adjudicatory theory of arbitration\textsuperscript{15} than the collective bargaining, industrial self-government, or problem-solving theory adopted by Mr. Justice Douglas.

§14.2. Massachusetts: Injunctions; Bethlehem and General Electric. Newspaper headlines publicized the denial of injunctive relief by the Superior Court in 1960 in the labor disputes at the Quincy Shipyard of Bethlehem Steel Company and the Lynn plant of General Electric Company. In both cases the companies sought injunctions against mass picketing and violence. In the \textit{Bethlehem} case\textsuperscript{1} the hearing before the three-judge court on the application for a temporary restraining order took seven court days. The court found that the conduct complained of was "lawless, unlawful and in some instances criminal" and that all but one of the conditions precedent for granting equitable relief in labor disputes had been met.\textsuperscript{2} The one condition precedent that the court found had not been complied with and that was fatal to the company's case was Section 9A(4) of G.L., c. 214, providing inter alia that the complainant must have made "every reasonable effort to settle such dispute either by negotiation or with the aid of any governmental machinery of mediation or voluntary arbitration."\textsuperscript{3}

The subsidiary findings were: (1) the company had failed to make every reasonable effort in good faith to settle the dispute by negotiation because (a) it had posted unilaterally a notice, after the expiration of the collective bargaining agreement, putting into effect certain company proposals modifying previous conditions of employment and (b) the company's contract proposals would place it in a substantially

\textsuperscript{15} In the light of Mr. Justice Douglas' assertion that the process of labor arbitration is vastly different in judicial theory from that of commercial arbitration, it is interesting to compare the Massachusetts labor arbitration statute, G.L., c. 150C, added by Acts of 1959, c. 552, with the Uniform Arbitration Act for Commercial Disputes Act, enacted in Massachusetts in 1960 as G.L., c. 251, by Acts of 1960, c. 374. Although there are some differences, the two acts are generally comparable both in substance and form.

§14.2. 1 Bethlehem Steel Co. v. Robert J. Kehoe, Suffolk Superior Court, Equity No. 76496, Feb. 12, 1960.

\textsuperscript{2} These conditions precedent are specified notice and hearing, filing of a bond and findings of unlawful action requiring restraint, substantial and irreparable injury, greater injury to complainant by denial of relief than upon defendants by granting it, no adequate remedy at law, and inability or unwillingness of the police to provide protection.

\textsuperscript{3} Section 9A(4) of G.L., c. 214, reads in full as follows: "(4) No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."
better competitive position than any other east coast shipbuilder; and (2) the company did not make every effort to settle the dispute with the aid of any governmental machinery for voluntary arbitration because it categorically rejected the union's proposal to arbitrate the dispute. In the course of its lengthy report the court also found that the company had refused to make any concessions with respect to its proposal for contract changes.

Several weeks later the court issued a second report. This one related to the denial of a preliminary injunction. In this report it stated:

At the hearing on the application for a restraining order we did not rule, and do not now rule that the refusal of the Bethlehem Steel Company to recede from any of its original proposals or to make any concessions or to compromise any of its proposals constituted a failure to make every reasonable effort to settle the dispute by negotiation. . . . We previously ruled, and we now again rule, that this requires negotiation in good faith and that failure so to negotiate bars the granting of injunctive relief.

We did not rule at the previous hearing, and do not now rule, that Section 9A (4) requires a person seeking a restraining order or injunctive relief to submit the dispute to arbitration. We did rule, and now again rule, that the requirements of Section 9A (4) are additive and not alternative. The law, while not requiring a person seeking injunctive relief to submit the dispute to arbitration, does require such person to make every reasonable effort to settle the dispute with the aid of available governmental machinery for voluntary arbitration. This means, and we so rule, that such person must in good faith discuss, and consider the likelihood of, settling the dispute by this means. The Bethlehem Steel Company categorically rejected the proposals of Locals 5, 90, and 151 to arbitrate. We ruled previously, and now again rule, that the refusal of the Company to discuss, or to consider for discussion, any proposal for arbitration is fatal and bars injunctive relief in consequence of the provisions of Section 9A(4).

In respect to whether negotiation, mediation, “or” arbitration are alternative or additive means that must be employed in an effort to settle the dispute, the court ruled they were additive, citing the Toledo case of the Supreme Court of the United States, which so held in 1940 in construing identical language under the Norris-LaGuardia Act in a case involving a railroad subject to the Railway Labor Act. The Massachusetts three-judge court was of the opinion that the Toledo case was “controlling” and “we are bound by it.” It also cited “significant intimations” in two decisions of the Massachusetts Supreme Judicial

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Court, and the language added to the anti-injunction act in 1950 by the Cox-Phillips Act, to the effect that the act is to be construed "liberally in aid of its purpose which is to limit and curtail the use of injunctions in labor disputes."

The Bethlehem strike was settled while an appeal to the Supreme Judicial Court was pending and the appeal was dismissed as moot.7

In the General Electric case,8 a different three-judge court also found that Section 9A(4) had not been complied with. The court based its conclusion on these findings: (1) The company failed to make every reasonable effort to settle the labor dispute with the aid of federal mediation because the mediators did not appear on the scene until ten days before the contract expiration date and there was no fair opportunity for them to advance a settlement, and the proposal of the federal mediators for using a panel of mediators was rejected by the company; (2) the company violated its duty to bargain with the international union as required by the National Labor Relations Act by dealing with business agent Jandreau of the Schenectady local, thus bypassing the international negotiating committee and, therefore, failed to comply with an obligation imposed by law; (3) there was no sufficient reason for the company's refusal to accept the union's proposal for a fifteen-day extension of the agreement; (4) there was no sufficient reason for the company's refusal to accept the offer of the union that the issues be settled by submission to either (a) a fact-finding board for nonbinding recommendations or (b) to binding arbitration. The court found that the company's decision was attributable to its position that neither fact-finding nor voluntary arbitration is a useful procedure to employ in an effort to settle a labor-management dispute.

Here, unlike the situation in Bethlehem, General Electric did not immediately reject the union's proposal for fact-finding or arbitration but replied in writing setting forth in detail a statement of reasons for rejecting this proposal. The three-judge court states: "If the Company had accepted the IUE proposals [for fact-finding or arbitration] there would have been no strike on October 1." It would seem, therefore, that the three-judge court in General Electric went further than the three-judge court in Bethlehem, since it places noncompliance with

7 In an action brought by the NLRB under Section 10(j) of the NLRA, the Federal District Court for Massachusetts enjoined the unions from mass picketing and violence as constituting unfair labor practices under Section 8(b)(1) of that act and also ordered Bethlehem to bargain in good faith. Alpert v. Bethlehem Steel Co., Fed. Dist. Ct., Dist. Mass., Civil No. 60-217-S, April 11, 1960. Proceedings under Section 10(j) for equitable relief pending the board's hearing are discretionary with the board and are rarely instituted. An NLRB trial examiner, after hearing, has recommended rejection of all bad-faith bargaining charges against Bethlehem except for its insistence on a contract provision requiring grievances be signed by the individual employees involved. (Case No. 2-CA-6866 and 6867, 95 D.L.R. D-1, May 16, 1960). Another trial examiner upheld the mass picketing and violence charges against the unions (Cases Nos. 1-CB-635 and 636, August 23, 1960) and that case is also pending before the board.

8 General Electric Co. v. Thomas B. McQueeney, Suffolk Superior Court, Equity No. 77426, October 21, 1960.
Section 9A(4) on nonacceptance of the union's proposals for fact-finding and arbitration rather than on the narrower grounds of "categorical" rejection without consideration or reasons, which appeared to be the interpretation in the second Bethlehem report.

The General Electric strike ended shortly after the three-judge court's decision and no appeal was taken.

The conclusion of the three judges in Bethlehem that the Toledo case was controlling and binding would appear open to serious question. The construction of a state statute is a matter for the courts of the state. Although a decision by the highest federal court construing identical language in a federal statute is obviously persuasive, it still would not prevent the state court from adopting a different construction.

Section 9A(4) has been on the statute books since 1935 and these cases are the first in which this section has been the controlling issue. There is no direct holding by the Supreme Judicial Court and the "significant intimations" referred to are arguable.

Those supporting these decisions argue that Section 9A(4) is an adaptation of the equitable doctrine of clean hands. Those opposed argue that the obligation of an employer in interstate commerce to bar gain collectively in good faith is determined by the National Labor Relations Board, and the employer should not be compelled to arbitrate the merits of the labor dispute as a condition precedent to obtaining relief against such lawless conduct as mass picketing and violence.

Apart from the important question of public policy as to whether, if these decisions have correctly interpreted and applied the law, it is a sound, wise and desirable state for the law to be in, one observation may fairly be made. A chief argument of proponents of anti-injunction laws was that judges were deciding whether union conduct should be enjoined as unlawful on the basis of their economic predilections or whether there was "justification" for the union's objective — a broad and vague concept. In the Bethlehem and General Electric cases the result would appear to turn on the hindsight opinion of judges as to whether a company's conduct in its dealings with the union during the labor dispute measure up to the judges' concept of what constitutes "reasonable efforts to settle" the labor dispute — certainly a mercurial criterion reasonably comparable to the flexibility of the "justification" concept. Employers' criticism of the present situation is, in this respect, comparable to the unions' criticism of quite the opposite situation in an earlier day.

§14.3. Massachusetts: Picketing for closed shop; Unlawful objective. An intriguing question of legal theory is presented by Seekonk

10 Compare, for example, Colonial Press, Inc. v. Ellis, 321 Mass. 495, 74 N.E.2d 1, 20 L.R.R.M. 2370 (1947), in which the Supreme Judicial Court declined to accept at face value the United States Supreme Court's earlier statements that peaceful picketing was constitutionally protected free speech, a doctrine subsequently modified by the latter Court.
11 Frankfurter and Green, The Labor Injunction (1930).
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Family Drive-in Theatre, Inc. v. Madino.\(^1\) Can an employer not subject to the National Labor Relations Act commit an unfair labor practice in violation of that act? Although this question is basic to the opinion of the Supreme Judicial Court in this case, and the Court's answer appears to be in the affirmative, the question is not discussed by the Court.

The facts in the case were that the union peacefully picketed an open-air moving picture theatre to compel the company to maintain a closed shop, that is, to hire only members of the union as projectionists. The projectionists employed by the company were not members of the union. The union's picket signs read: "This theatre does not employ union moving picture machine operators of Local 223 IATSE, AFL-CIO."

The Court held that the union's demand for a closed shop was for an unlawful objective and that the picketing in support of that objective was unlawful and may be enjoined.\(^2\) Section 20C(e) of G.L., c. 149, provides, in part, that the term "unlawful labor dispute" includes any controversy arising out of a demand "that an employer commit an unfair labor practice either in violation of Chapter 150A, or in violation of the National Labor Relations Act." The reasoning of the Court's opinion is that a closed shop violates the National Labor Relations Act.

The opinion does not state whether the company was subject to the jurisdiction of the National Labor Relations Board. It seems obvious that it was not, and, in any event, the doctrine of federal pre-emption would seem clearly to preclude equitable relief in the state court if the National Labor Relations Board had jurisdiction.\(^3\) The Court correctly concluded that a closed shop violates the National Labor Relations Act,\(^4\) but failed to note that the Massachusetts Labor Relations Act\(^5\) permits a closed shop under certain conditions and with specific statutory remedies designed to alleviate abuses when there is a closed shop.

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\(^2\) The Superior Court had entered a final decree permanently enjoining the union from picketing, on the basis of a master's report. Neither the master nor the Superior Court made all the findings required by G.L., c. 214, §9A, in labor cases. For this reason, the Supreme Judicial Court reversed and remanded the case for further hearing by a three-judge court. The Court thus followed Poirer v. Superior Court, 337 Mass. 522, 150 N.E.2d 558 (1958), which held that the required findings must be made regardless of whether the labor dispute is lawful or unlawful. See 1958 Ann. Surv. Mass. Law §15.2.


\(^4\) Section 8(a)(3) of the N.L.R.A., as amended by Taft-Hartley, permits a form of union shop (requiring present employees or new employees to join the union in thirty days) limited, however, to maintenance of financial good standing in the union. A closed shop requires that all employees, including those being hired, be union members.

\(^5\) G.L., c. 150A.
union as well as a closed shop, or when the union engages in arbitrary action to deprive individuals of union membership.\textsuperscript{6} One of the conditions for a valid closed shop agreement under the Massachusetts statute is that the union be designated as bargaining agent by a majority of the employees in the appropriate unit.\textsuperscript{7} In the Seekonk case, it appears that the union was not the majority representative and, hence, the company would have committed an unfair labor practice under the Massachusetts Labor Relations Act had it granted the union's demand, which was found to be the object of the picketing. It would seem that the case could have been decided on this basis, thus avoiding the doubtful reasoning that an employer not subject to the federal act can still be said to be forced to commit an unfair labor practice in violation of that act. The latter reasoning could well have many ramifications.\textsuperscript{8}

\textbf{§14.4. Massachusetts: Reporting of health and welfare funds.} As noted in the 1959 \textit{Annual Survey},\textsuperscript{1} several cases were then pending that involved the scope of the Health, Welfare and Retirement Funds Law.\textsuperscript{2} In the 1960 Survey year the Supreme Judicial Court resolved the issue in two companion cases.\textsuperscript{3} It held that the statute does not

\begin{itemize}
  \item \textsuperscript{6} Id. §§4(3), 4(6), 6A-6C.
  \item \textsuperscript{7} Id. §4(5).
  \item \textsuperscript{8} If a union were the majority representative of the employees in an appropriate unit and the company were not subject to the NLRA, it would be lawful for the union and the employer to enter into a closed shop agreement under G.L., c. 150A, §4(5). Yet if such a union strikes or pickets for a closed shop, lawful under state law, the reasoning of the Seekonk case would make the strike and picketing unlawful. This was the state of the Massachusetts law prior to the enactment of the 1950 amendments to the statute, commonly referred to as the Cox-Phillips Act. Acts of 1950, c. 452. Most observers thought that one of the results of the 1950 amendments was to make lawful a strike and picketing for a demand that, if granted, would be a lawful agreement. The reason §20C(e)(1) of G.L., c. 149, referred to an unlawful labor dispute as including a demand that an employer commit an unfair labor practice "in violation of the National Labor Relations Act" as well as the State Labor Relations Act, appears to be that in 1950 the prevailing opinion was that state courts had jurisdiction to enjoin unlawful conduct by unions against companies that were subject to federal jurisdiction. It was not until the Garner case, in 1953, that the Supreme Court of the United States enunciated its doctrine of federal pre-emption. Compare Shaw and Kears, Labor Relations Guide for Massachusetts 87 (1950), with 1954 Ann. Surv. Mass. Law §16.1.

  One of the possible effects of the reasoning in Seekonk is that a union's strike or picketing to obtain a hot cargo agreement from an intrastate company would be unlawful. See Section 8(e) of the NLRA, as amended by the Labor Reform Act.

  \textsuperscript{1} 1959 Ann. Surv. Mass. Law §13.6, n.11.
  \textsuperscript{2} G.L., c. 151D.

  In the Liberty Mutual case, another carrier had issued a group life insurance policy to Liberty covering Liberty's employees. Liberty paid the entire premium for certain basic coverage and handled additional voluntary coverage by those employees desiring it on the basis of payroll deductions. The company paid the entire annual premium in advance, with adjustments at the end of the year.

  In the John Hancock case, the plan involved was an insured pension plan han-
cover group insurance programs or other welfare plans "which do not include the creation of a trust fund in the usual sense." The regulation of the Health, Welfare and Retirement Trust Fund Board, which defined a "trust" to include a "fund, plan, program or contract . . . whether or not separately identified or segregated in any way as involving a corpus or was in the usual sense," was ruled invalid.

§14.5. Massachusetts: Employment security. During the 1960 Survey year the Supreme Judicial Court handed down three decisions involving the Employment Security Law. In Western Electric Company, Inc. v. Director of the Division of Employment Security, the granting of benefits to female employees for whom work was unavailable upon their seeking re-employment following maternity leave, was upheld. In Conley v. Director of the Division of Employment Security the Court upheld a decision of the Board of Review sustaining the denial of benefits to an individual who was found to have made "little effort to secure work." The division was held to have been justified in concluding that only six applications for work in a five-month period of unemployment was not sufficient to satisfy the statutory requirements that to be eligible for benefits, the unemployed person must be "capable of and available for work and unable to obtain work in his usual occupation or any other occupation for which he is reasonably fitted." The Court stated:

Whether an unemployed person is unable to obtain work, or is otherwise eligible for benefits, is largely a question of fact, as to which the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence.

An interesting labor relations problem existed in Meyers v. Director of the Division of Employment Security. Employee A was laid off for

ded by Hancock and covering the employees of Forbes Lithograph Company. The fact that there was on the books of the insurance company an account entitled "Pension Administration Fund" was held not to make it a trust fund within the statutory meaning as interpreted by the Court.

§14.5. 1 G.L., c. 151A.  
3 The case arose under Section 25(e) of G.L., c. 151A, which, at the time the claim was filed, disqualified an employee from receiving benefits after he had "left his work without good cause attributable to the employing unit or its agent." This provision was changed in 1958 both as to the period of disqualification and, so far as leaving work is concerned, to cases where the individual "left work voluntarily without good cause." Acts of 1958, c. 677, noted in 1958 Ann. Surv. Mass Law §15.3. It may be noted that Section 27 of G.L., c. 151A, contains a special disqualification in the case of unemployment because of pregnancy and for the period following the birth of the child.  
5 G.L., c. 151A, §24.  
lack of work. The union contended that the company had violated the collective bargaining agreement because A was senior to employee B, who was not laid off. This dispute was submitted to arbitration and the arbitrator upheld the union's contention. The award provided that employee A should be made whole for wages lost while laid off "less any amount he may have received from unemployment compensation during that period." His lost wages totaled approximately $1400; he had received approximately $600 in unemployment benefits and, therefore, was entitled to $800 under the award.

After this arbitration award, the division issued a notice of redetermination and overpayment to employee A, who appealed. A review examiner and the lower court both affirmed. The Supreme Judicial Court affirmed the decision of the lower court. The net result is that the employee will be required to pay back to the division the $600 he had received in benefits, leaving him with the $800 received from the company although his lost wages were $1400. Whether he may have any remedy under the arbitration award is problematical.8

The Court stated the question before it was whether the employee had been in "total unemployment," within the statutory meaning of that phrase, during the period in dispute. Under the statute, an individual is deemed in total unemployment in any week "in which he performs no wage-earning service whatever and for which he receives no remuneration."9 The Court held that the back pay awarded by the arbitrator was remuneration from the employer for wages during the period involved. The fact that the arbitrator deducted the amount of unemployment benefits from his award was immaterial since the award was not binding on the division or the courts. Citing a decision of the Supreme Court of the United States,10 the Court pointed out that the matter of recoupment by the state for unemployment benefits is a matter between the state and the employee.

§14.6. Massachusetts: Miscellaneous decisions. Several cases during the 1960 SURVEY year involved contracts of employment. The opinion in Rhine v. International Young Men's Christian Association Col-

8 The Court stated in its opinion: "We do not have before us the issue whether, in view of our decision, [employee A] is entitled to further payment of wages under the arbitration award." Presumably it could be argued that the award still stands since an arbitrator's mistakes of law are not judicially correctible. On the other hand, it could be argued that in carrying out the award the company may not deduct the unemployment benefits from the amount of back pay because after the employee has paid them back to the state he is no longer in receipt of any statutory benefits. Apart from the doubtful question whether any provision of the new labor arbitration statute would apply as to correction or modification of the award in these circumstances, it is obvious that the time limits for pursuing any remedies under that statute would have expired. As a matter of interest, it may be noted that in a situation such as this, the unemployment benefit fund benefits, since if employee B had been laid off instead of A, as the arbitrator decided, B would have been entitled to unemployment benefits.

9 See G.L., c. 151A, §§29(a), §1(r)(2)-(3).

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lege contains a definition of probationary status. In this case, the employee would have had certain rights to continued employment had he completed his probationary period. Before the end of that period the employer offered him a specific period of employment after such probationary period with no commitment beyond the expiration of such new period. The employee accepted. It was held there was no breach of contract in refusing the employee continued employment after the expiration of the specific period of employment following the probationary period.

In another case, involving employment by a municipality, acceptance of a promotion was held not to amount to a "resignation" from the job from which promoted, and, therefore, the employee was not entitled to pay for such position for the balance of the year, although he would have been so entitled under his employment conditions had it been a resignation. The Court noted that the rule of Donlan v. City of Boston in respect to annual employment was not squarely involved and "[w]e need not decide whether the Donlan case would now be followed."

As noted later in this chapter, the Supreme Judicial Court construed the weekly payment of wage statute as creating an obligation of frequency, as well as promptness, in the payment of wages and held that it was unlawful to pay employees every other Wednesday for services performed for the preceding four working days (Thursday, Friday, Monday, and Tuesday) and for services to be performed on that Wednesday and the next six working days. The subsequent amendment to the statute has now made such a pay arrangement lawful.

There was one decision during the 1960 SURVEY year involving the Minimum Fair Wage Law, but it is of academic interest only because of a subsequent amendment to the statute. Of collateral interest to

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1 339 Mass. 610, 162 N.E.2d 56 (1959), also noted in §4.2 supra.
2 "In ordinary connotation, the word [probationary] indicates a status of experimental testing of the employee. It certainly implies no commitment for continuance of employment, if for any reason the experimental relationship leads to the conclusion that a more extended relationship may be unsatisfactory." 339 Mass. at 613, 162 N.E.2d at 59.
3 Ohrenberger v. City of Boston, 340 Mass. 22, 162 N.E.2d 774 (1959), also noted in §4.1 supra.
5 The Donlan case held that where annual employment is at a fixed annual salary payable in monthly instalments, and the employee died during vacation and at the end of the eleventh month, the estate was not entitled to the twelfth month's pay because the employee had received full compensation for services up to the date of death and the employment contract, which was entire, was terminated by death. The Court noted that its decision in Donlan had been criticized.
6 See §14.9 infra.
8 See §14.9 infra.
9 Robinson v. Pine Grove Cemetery Corp., 339 Mass 729, 162 N.E.2d 16 (1959). The case held that in an action of contract for work and labor performed between...
labor relations practitioners is a tax decision holding that old age benefits received under the federal Social Security Act are not taxable as retirement income under Massachusetts income tax law.\(^{10}\)

**B. MASSACHUSETTS LEGISLATION**

\(\text{§14.7. Collective bargaining: Public employees.}\) The trend toward extending the right of organization and collective bargaining to public employees in Massachusetts continues. The legislature has now specifically provided that a city or town, on the basis of local option, "may engage in collective bargaining with labor organizations representing its employees, except police officers, and may enter into collective bargaining agreements with such organizations."\(^1\) A 1958 statute\(^2\) recognized the right of public employees to form and join unions and "to present proposals" relative to their salaries and conditions of employment.

There are still unresolved problems in this area. There is no method for determining a question of whether the union represents the employees if there is doubt or if more than one union claims to represent them. The private employee concept of a majority representative being exclusive bargaining agent for all employees in an appropriate unit, although some employees in the unit may not be members of the union, does not apply to public employees in Massachusetts under these statutes.\(^8\) Presumably, therefore, the collective bargaining agreements for public employees, now permitted, would cover only those employees who are union members since they would be the only ones the union would be representing and the statute authorizes collective bargaining with unions "representing its [the city's or town's] employees."

\(\text{§14.8. Attachment of wages.}\) The statutory provisions relating to the attachment of wages have been amended to permit this attachment only in an action brought upon a judgment.\(^1\) The statutory requirement for advance, written permission signed by a justice of the court in which the action is commenced, after notice to the defendant with

May, 1947, and February, 1950, based on failure to pay the minimum required by G.L., c. 151, it was error for the trial court to have denied the defendant's request for a ruling that there was no minimum wage in effect under G.L., c. 151, covering the wages of the plaintiff prior to January 1, 1950. Prior to that date the minimum fair wage was only that rate set forth in minimum wage orders applicable to particular occupations. Since January 1, 1950, there has been a minimum fair wage applicable generally (with a few exceptions) both to occupations covered by wage orders and those not so covered.


\(\text{\textsection 14.7.}\) 1 Acts of 1960, c. 561.

\(\text{\textsection 14.8.}\) 1 Acts of 1960, c. 235.
opportunity to be heard if he objects, remains unchanged.2 The special provision granting discretion to a justice to authorize the attachment without notice when he finds that compliance with the provisions will unreasonably delay and hamper justice is also unchanged.3 The present amount of wages exempt from attachment is $50 per week.4

14.9. Weekly payment of wages. As a result of a decision of the Supreme Judicial Court1 to the effect that it was a violation of the statute requiring weekly payment of wages to pay less frequently than weekly, although part of the wages might be paid in advance of the time required, the statute has been amended2 to permit this type of arrangement, which has been a prevalent practice among certain groups of office and clerical employees, particularly in the insurance and banking industries. The amendment provides that an employer may make payment of wages prior to the time they are required to be paid under the provisions of the statute, and these wages, together with any wages already earned and due, may be paid weekly, biweekly, or semimonthly to a salaried employee but in no event shall wages remain unpaid by an employer for more than six days from the termination of the work week in which such wages were earned by the employee. This permits, for example, the payment of two weeks’ salary on Thursday of a current work week, covering services performed in the preceding work week and the current work week, when the employee is on a Monday through Friday work week.

§14.10. Miscellaneous legislation. The 1959 session of the legislature ended on September 17, 1959, shortly after the close of the 1959 Survey year, and the 1959 Annual Survey covered the full session.1 On September 1, 1960, the end of the 1960 Survey year, the legislature was still in session and a number of important labor bills were still pending as of that date.2 An act was passed during the 1960 Survey

2 G.L., c. 246, §32.
3 Ibid.


§14.10. 1 One act signed the day the 1959 legislature ended, Acts of 1959, c. 614, while of limited application, is highly unusual and would be a significant development if there should be any legislative disposition to extend this type of enactment to other situations. Entitled "An Act Establishing Safety Orders Applicable To Longshore And Waterfront Operations," it is a lengthy and extremely detailed code governing facilities, equipment, and conduct (of both employer and employee) related to health and safety. In language and form the act is similar to regulations of the Department of Labor and Industries. A fine of $200 is provided for any violation. It is questionable whether legal requirements of the nature provided by this act should be enacted in statutory form or left to the administrative process of regulations issued and enforced by the Department of Labor and Industries.
2 A number of these were subsequently enacted and will be commented on in the 1961 Ann. Surv. Mass. Law. They are Acts of 1960, c. 738 (registration of labor replacements or strike breakers); id., c. 802 (further regulating the business of private detectives and guard agencies); id., c. 812 (extension of Sunday laws to certain
year requiring employers to indicate deductions for health and welfare funds on pay checks or pay slips of employees when requested by the employee or his representative.\(^3\) In addition to this act and those noted in the preceding three sections of this chapter, up to September 1, 1960, the legislature had passed the perennial act authorizing the Commissioner of Labor and Industries to suspend the operation of certain labor laws for another year, namely, until July 1, 1961,\(^4\) and a few other acts in the labor relations field that amended existing statutes and are not of major significance.\(^5\)

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\(^{3}\) Id., c. 246.

\(^{4}\) Id., c. 85.

\(^{5}\) Id., c. 401 (providing that payments to pension plans shall be included for the purpose of establishing minimum wage rates applicable to public works); id., c. 491 (providing that wages paid to certain employees of housing authorities are to be determined by the Commissioner of Labor and Industries); id., c. 603 (clarifying change of language in the provision of the Employment Security Law, G.L., c. 151A, §29(c), relating to the total amount of unemployment benefits payable to an individual under that law).