INJUNCTIONS AGAINST MASS PICKETING— A GAP IN THE PRE-EMPTION DOCTRINE

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Mass picketing and violence in labor disputes are almost universally condemned. Clark Kerr of the University of California in referring in 1957 to the problem of violence in labor disputes, made these comments:

> Violence also is to be condemned. It has decreased greatly as a union tactic, however, and is subject to control by the many devices civilized man has created to insure law and order.[1]

Two such devices are (1) the enforcement of local criminal laws by the police and (2) the issuance of injunctions by the courts. Understandably, therefore, consternation was created among Massachusetts employers in 1960, when a lower court denied an injunction against mass picketing in the *Bethlehem* case,[2] although the police were unable to cope with the situation.

The reason for the denial of the injunction was the court's interpretation of a statutory provision requiring an employer to make every reasonable effort to settle the labor dispute by negotiation or arbitration as a condition precedent to injunctive relief. Similarly, in the subsequent *General Electric* case[3] in Massachusetts the employer's conduct relative to the settlement of the dispute was held to bar issuance of an injunction against mass picketing. A bill filed with the 1961 Massachusetts legislature to remedy the effect of these decisions failed of passage by a tie vote.[4] The vital question that is raised is whether it is sound public policy to have the state court's power to grant or deny injunctive relief against mass picketing and

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1 Kerr, Unions and Union Leaders of Their Own Choosing 6 (Fund for the Republic, 1957).

2 Bethlehem Steel Co. v. Kehoe, Equity No. 76496, Suffolk Super. Ct. Mass., Feb. 12, 1960.

3 General Electric v. McQueeney, Equity No. 77426, Suffolk Super. Ct. Mass., Oct. 21, 1960.

4 S. 233, Mass. Senate, 1961. This bill would have amended section 9A(4) of Mass. Gen. Laws Ann. ch. 214 (1958) by adding at the end thereof the following language: "except that the requirements of this subsection shall not apply where the basis of the equitable relief sought is confined to one or more of the following: mass picketing, violence, physical injury to persons or tangible property, picketing which wrongfully interferes with peaceful entrance to or egress from private property, or seizure or occupation of private property."

violence depend upon the court's evaluation of how the employer conducted himself in the handling of the labor dispute.

The Bethlehem Steel strike began on January 23, 1960. That strike was accompanied by mass picketing and violence at the company's Quincy Yard. The massed pickets physically prevented the company's executives and supervisory staff, including the General Manager, from entering the Quincy Yard. The company promptly filed a petition with the Massachusetts Superior Court seeking an order of the court to restrain the union's illegal conduct. In a twelve page decision handed down by a three judge panel[5] on February 12, 1960, after seven days of hearing and sixteen days after the bill in equity was filed, the requested relief was denied.

In its decision, the court stated:

> Commencing on January 23, 1960, and continuously thereafter to the present, the respondents, members of Local No. 5, have, without right and in violation of law, established and maintained a system of mass picketing at the entrances to the Quincy Yard and to the Main Office Building whereby Company employees who have no labor dispute with the Company, and other persons doing business with the Company, have been prevented from entering the Yard and Main Office Building without the consent of the Union.
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> In order to secure relief, the Company must prove certain facts required by G.L. (Ter. Ed.), ch. 214, § 9A. We find that the Company has abundantly proved that unlawful acts have been committed by the respondents and that further unlawful acts have been threatened and will be committed by the respondents unless restrained; that substantial and irreparable injury to the Company's property will follow; that, as to each item of relief granted, greater injury will be inflicted upon the Company by denial of relief than will be inflicted upon the respondents by granting relief; and that the Company has no adequate remedy at law. The public officers charged with the duty of protecting the Company's property are unable or unwilling to furnish adequate protection.
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> Although the conduct of the respondents is lawless, unlawful and in some instances criminal, the Court is powerless to grant a temporary restraining order or injunctive relief unless the Company has complied with the provisions of G.L. (Ter. Ed.), ch. 214, § 9A(4).

[5] A Massachusetts statute enacted in 1959 requires the assignment of three judges to hear any case involving a labor dispute. Mass. Gen. Laws Ann. ch. 212, § 30 (Supp. 1961) (Acts 1959 ch. 600).

Section 9A(4), to which the court was referring, provides as follows:

> 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.[6]

The opinion of the court then reviews at length, and in detail, the course of the negotiations between the company and the union and concluded that "the Company failed to make every reasonable effort in good faith to settle the dispute" in these respects:

> 1. The company unilaterally posted certain notices relating to conditions of employment during the negotiations. These notices were posted after the collective bargaining agreement had expired. The company continued certain conditions of employment as provided in the expired agreement, changed some conditions in line with its proposals for a new agreement and announced that certain provisions of the expired agreement (such as union security, check-off and arbitration) would not be in effect until there was a new agreement with the union.
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> 2. The company's proposals for a new agreement would place the company "in a substantially better competitive position than any other shipbuilder on the east coast."

The opinion further stated that "the Company refused to make any concessions with respect to its proposals."

The court also found that the union had proposed arbitration and "this was rejected categorically." But, having found that the company had negotiated with the union and that the parties had met with state and federal conciliators, the court was faced with the question whether the requirements of negotiation or conciliation or arbitration in section 9A(4) were alternative or additive, namely whether the statutory conditions were met if any one of the three methods were employed or whether all three must be satisfied. The court held that the requirements were additive, that is, that every reasonable effort must be made to settle the dispute by all three methods mentioned in the statute.

The opinion of the court then concludes with these paragraphs:

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[6] Mass. Gen. Laws Ann. ch. 214, § 9A(4) (1958), originally enacted as Acts 1935 ch. 407.

> We find that, negotiation and mediation having reached an impasse, the Company failed to make every reasonable effort to settle the dispute with the aid of available governmental machinery for voluntary arbitration. This is fatal to its case, even in this situation where not only unlawful but criminal acts have been committed and will continue to be committed, causing irreparable loss to the Company. In consequence of the provisions of ch. 214, sec. 9A(4) of the General Laws, above quoted, the Court is helpless to prevent such criminal and illegal acts.
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> Except for the failure on the part of the Company to comply with the provisions of said section (4), temporary restraining orders would be granted against all the respondents. The other necessary facts have been proved. In not granting a temporary restraining order, the Court does not condone the conduct of the respondents. However, the applicable statute enacted by the Legislature makes certain requirements a condition precedent to the granting of relief that cannot be disregarded, no matter how compelling the other facts are.

On March 10, 1960, the court handed down a second decision denying the application for a preliminary injunction and set forth these statements in its second opinion:

> 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. The law, however, by virtue of General Laws (Ter. Ed.), ch. 214, § 9A(4), does require that a person seeking a restraining order or injunctive relief must 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.
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> 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 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 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).

An appeal of the court's ruling was subsequently dismissed on the ground the case had become moot because of a settlement of the strike.

After the denial of relief by the Massachusetts Superior Court, the company filed charges with the National Labor Relations Board alleging that the mass picketing and violence were unfair labor practices under Section 8(b)(1) of the National Labor Relations Act.[7] The union had also filed charges with the Board alleging that the company's conduct constituted an unfair labor practice of refusal to bargain collectively in good faith under Section 8(a)(5) of the National Labor Relations Act.[8]

In an unprecedented action, the General Counsel of the National Labor Relations Board, in an exercise of discretionary authority under the act, applied for, and obtained from, the federal District Court for Massachusetts injunctions restraining the union from engaging in mass picketing and violence and enjoining the company from refusing to bargain collectively as required by federal statute.[9]

The company's National Labor Relations Board case against the union was then heard by a trial examiner who upheld the company's charges. Subsequently, the National Labor Relations Board handed

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[7] Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1958).

[8] Id. at § 158(a)(5).

[9] Alpert v. Bethlehem Steel Co., Civil No. 60-217-S, D. Mass.

Under Section 10(j) of the National Labor Relations Act, 49 Stat. 449 (1935), as reenacted, 61 Stat. 136 (1947), as last amended, 29 U.S.C. §§ 151-68 (1958), the NLRB has discretionary authority to seek injunctive relief against unfair labor practices after a Board complaint issues and pending its hearing and determination of the Board's complaint. Except where the Board is required to seek an immediate injunction, as in secondary boycott cases (§ 8(b)(4) cases) (49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(4) (1958)) the Board usually proceeds with its hearing and disposition of the case, and then proceeds in the United States Court of Appeals for enforcement of its order if the party does not comply with its order. Reliance upon the Board's discretionary authority to obtain federal court relief to remedy the unfair labor practice of mass picketing under § 8(b)(1) (49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (b)(1) (1958)) would not be a sure or prompt remedy in the light of the Board's reluctance to exercise its discretionary authority and the fact that all such cases are handled primarily by the Board's Washington office with the assistance of the regional office.

down its decision and order adopting the trial examiner's report and holding the union's mass picketing and violence to have been illegal.[10]

The union's National Labor Relations Board charges of bad faith bargaining against the company were heard by another trial examiner. He found that, except for one point, the company had not failed to bargain collectively in good faith under the federal act. The one point, which he held to constitute a violation of the statutory duty to bargain, was the provision in the company's proposed agreement which would have required grievances to be signed by the individual employees raising them. This point was not even mentioned by the three judge Massachusetts court.

On October 25, 1961, the Board handed down its decision[11] sustaining in full the trial examiner's recommendations. All five Board members participated in the decision and they unanimously held, contrary to the three judges in Massachusetts, that the employer's conduct did not constitute bad faith bargaining except for the one point mentioned by the trial examiner and on which the Massachusetts judges did not comment.

The three judge panel of the Massachusetts court based its decision as to the requirement for arbitration being additive rather than alternative on these three grounds:

> 1. A decision of the Supreme Court of the United States in the *Toledo* case[12] which so interpreted the parallel provision of the Norris-LaGuardia Act[13] in a case where the Railway Labor Act[14] was involved. The Massachusetts three judge court stated that the *Toledo* case "is controlling in this instant case and we are bound by it." It may be noted that this conclusion is debatable.[15]

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[10] Locals 5 and 90, Industrial Union of Marine Workers, AFL-CIO, and Bethlehem Steel Co., 130 N.L.R.B. No. 39, 47 L.R.R.M. 1297 (Feb. 17, 1961).

[11] Bethlehem Steel Co. and Local 151, American Federation of Technical Engineers, AFL-CIO, 133 N.L.R.B. No. 136, 49 L.R.R.M. 1018 (October 25, 1961); Bethlehem Steel Co. and Industrial Union of Marine Workers, AFL-CIO, 133 N.L.R.B. No. 138, 49 L.R.R.M. 1016 (October 25, 1961).

[12] Enterprise Lodge No. 27 v. Toledo, Peoria & Western R.R., 321 U.S. 50 (1944).

[13] 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1958).

[14] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63, 181-88 (1958).

[15] The construction of a state statute is a matter for the courts of the state. 50 Am. Jur. Statutes § 323 (1944). 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. Compare, for example, Colonial Press, Inc. v. Ellis, 321 Mass. 495, 74 N.E.2d 1, 20 L.R.R.M. 237 (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. Furthermore, the *Toledo* case was decided in 1944, and the pre-emption doctrine in the *Garmon* case was amended in 1950. In addition, there is a strong factual distinction between a railroad's refusal to use Railway Labor Act procedures and an ordinary employer's refusal to arbitrate.

2. "Significant intimations" in two decisions of the Massachusetts Supreme Judicial Court.[16] Whether such "intimations" are "significant", as stated by the court, is open to question.[17]

3. The provision of the Cox-Phillips Act[18] that the Massachusetts anti-injunction act is to be "construed liberally in aid of its purpose which is to limit and curtail the use of injunctions in labor disputes." But it may be answered that the main concern of the Cox-Phillips Act was to liberalize the lawful objectives of peaceful strikes and peaceful picketing and to add provisions for notice before obtaining a temporary restraining order. Nothing in that act was de-

[16] Davis Bros. Fisheries Co. v. Pimental, 322 Mass. 499, 508, 78 N.E.2d 93, 98 (1948); Thayer Co. v. Binnal, 326 Mass. 467, 479, 95 N.E.2d 193, 201 (1950).

[17] In both the *Davis* and *Thayer* cases, the lower court judge found that there had been compliance by the petitioner-employer with all the pre-requisites for injunctive relief under § 9, including the provisions of § 9A(4). In both cases, injunctions were granted and the action of the trial court was sustained.

In the *Davis* case the Supreme Judicial Court stated: "We assume in favor of the defendants, *without decision*, that there must be a reasonable effort to settle the dispute by all of the methods mentioned and not merely by one of them." 322 Mass. at 508, 78 N.E.2d at 98. (Emphasis supplied.) (Citing the *Toledo* case.) The court then goes on to state that the judge's finding that the plaintiff "has made every reasonable effort to settle . . . [the] dispute", satisfied the requirements of the statute and was not plainly wrong. There is nothing in the opinion to indicate, one way or the other, whether the employer expressed a willingness to arbitrate. The basic labor dispute involved a question of representation; the grounds for granting the injunction were that the strike was for a closed shop. The court also stated: "There is no evidence that the picketing at any time was other than peaceful, or that the number of pickets employed was excessive." Id. at 504, 78 N.E.2d at 96.

In the *Thayer* case, the opinion of the Supreme Judicial Court states: "But notwithstanding the defendant's contention to the contrary, the sum total of all the findings set forth above is that the judge, before entering final decrees, made findings sufficient to demonstrate that there was compliance with Section 9A. In this respect, we are of the opinion that the findings that the plaintiffs have not failed to comply with any obligation imposed upon them by law and that they have made every reasonable effort to settle these disputes by negotiation and 'with the aid of available governmental machinery'—which, we think, includes that adapted for mediation and arbitration—show that the plaintiffs are not barred from relief by (4) of Sec. 9A." 326 Mass. at 479, 95 N.E.2d at 201. The opinion also contains this language: "He further ruled that the plaintiffs were not required to seek any remedy, administrative *or otherwise*, before bringing these suits. He found, however, that the plaintiffs had appeared before the State board of conciliation and arbitration but that efforts to settle the controversy failed because of defendants' insistence that the Local be recognized as the collective bargaining agent." Id. at 477, 95 N.E.2d at 200. (Emphasis supplied.)

The most interesting sidelight of the *Thayer* case is that there was an NLRB case pending at the same time. The Board found the company had committed unfair labor practices, H. N. Thayer Co., 99 N.L.R.B. 1122, June 30, 1952, enforced, N.L.R.B. v. Thayer Co., 213 F.2d 748, 34 L.R.R.M. 2250 (1st Cir. 1954), cert. denied, 348 U.S. 883 (1954). Thus, as it ultimately turned out, the judge of the lower Massachusetts court was wrong in his finding that the company had not failed to comply with any obligations imposed upon them by law—if § 9A(4) means that all the requirements of the National Labor Relations Act are embraced within the legal obligation referred to in § 9A(4) as the judges in the Massachusetts *General Electric* case ruled.

[18] Mass. Gen. Laws Ann. ch. 214, § 9A (1958).

signed to favor the use of mass picketing and violence in labor disputes.

A strike of the employees of General Electric Company at its plants at Lynn, West Lynn, and Everett, Massachusetts, a bargaining unit containing approximately 10,700 employees, commenced on October 2, 1960. On October 5, 1960, the company filed a bill of complaint in the Massachusetts Superior Court seeking to restrain alleged violence on the picket line, mass picketing and injury to persons and property.[19] Hearings began before a three judge panel on October 6 and continued for over a week. On October 21, 1960, sixteen days after the petition for immediate relief was sought from the court, a three judge panel issued an eleven page decision denying the applicaton for a temporary restraining order on the grounds the company had failed to comply with section 9A(4).

The three judge panel concluded that the company had failed to make every reasonable effort to settle the dispute because:

1. "There is no sufficient reason for the Company's refusal" to accept the proposal of the federal conciliators to continue bargaining with the assistance of a panel of mediators while maintaining the *status quo*.
2. "There is no sufficient reason for the Company's refusal" to accept the union's request for a fifteen day extension of the expiring collective bargaining agreement.
3. "There are no sufficient reasons for the refusal of the Company to accept" the union's offer to submit the dispute to fact finding or arbitration.

The judges also found that the company had failed to comply with the obligation imposed upon it by law in that it violated its duty to bargain collectively with the IUE negotiating committee by dealing directly with an IUE local business agent at its Schenectady, New York plant.

The G. E. strike ended before any appeal could be taken. Thus, there is no decision of the Supreme Judicial Court on the correctness of the interpretation and application of section 9A(4) in either the *Bethlehem* or *General Electric* cases.

What is the situation with respect to comparable statutory restrictions in other states? First of all, there are no anti-injunction acts in twenty-seven states. In the twenty-three states (including Massachusetts) having some statutory conditions specifically relating to the issuance of injunctions in labor disputes, the statutory provisions in ten of such states[20] contain no provision comparable to

[19] See note 3 supra.

[20] Ariz. Rev. Stat. Ann. § 12—1808 (1956); Ill. Ann. Stat. ch. 48, § 2(a) (Smith-

section 9A(4) of the Massachusetts statute or Section 8 of the Norris-LaGuardia Act. In the anti-injunction act in Pennsylvania, there is a special statutory exception excluding from the coverage of the statute cases where the union is seizing, holding, damaging or destroying a plant, equipment or machinery to compel the employer to accede to its demands.[21] Presumably this statutory exception was mainly intended to permit injunctions against sit-down strikes without complying with the statutory conditions applicable to injunctions in other types of labor disputes. The Supreme Court of Pennsylvania has held that this statutory exception removes cases involving mass picketing from the purview of the anti-injunction act since the words "seize or hold" property includes prevention of free ingress and egress.[22]

This leaves eleven states where the statutory provisions are such that a situation comparable to that in Massachusetts might arise. These states are: Connecticut, Idaho, Indiana, Louisiana, Maryland, New Jersey, New York, Oregon, Rhode Island, Utah, and Wisconsin. The statutory provision in each of the above-noted eleven states is identical with section 9A(4) of the Massachusetts statute and Section 8 of the Norris-LaGuardia Act except in Rhode Island, Connecticut, and Wisconsin.[23]

In the Rhode Island statute[24] the comparable section reads exactly

Hurd 1952); Kan. Gen. Stat. Ann. §§ 60-1104 to 60-1107 (1949); Me. Rev. Stat. Ann. ch. 107, § 36 (1954); Minn. Stat. §§ 185.01 to 185.20 (1957)—this is an old "Little Norris-LaGuardia Act" and may be modified by later legislation; N.Y. Stat. Ann. §§ 59-2-1 to 59-2-2 (1953)—this is a modified type of "Little Norris-LaGuardia Act" which requires a hearing and showing of irreparable injuries before granting an injunction; N.D. Rev. Code §§ 34-0801 to 34-0813 (1943); Okla. Stat. Ann. tit. 40, § 166 (1954); Wash. Rev. Code §§ 49.32.010 to 49.32.910 (1956); Wyo. Stat. Ann. §§ 27-239 to 27-245 (1957).

[21] Pa. Stat. Ann. tit. 43, § 206d(d) (1957). This section relieves an employer from meeting the requirements of the anti-injunction law as follows:

> Where in the course of a labor dispute as herein defined, an employee, or employees acting in concert, or a labor organization, or the members, officers, agents, or representatives of a labor organization or anyone acting for such organization, seize, hold, damage, or destroy the plant, equipment or machinery, or other property of the employer with the intention of compelling the employer to accede to any demands, conditions, or terms of employment, or for collective bargaining.

[22] Carnegie-Illinois Steel Corp. v. United Steelworkers, 353 Pa. 420, 45 A.2d 853 (1946); Westinghouse Electric Corp. v. United Electrical Workers, 383 Pa. 297, 118 A.2d 180 (1955).

[23] Idaho Code Ann. § 44-707 (1948); Ind. Ann. Stat. § 40-508 (1952); La. Rev. Stat. § 23.845 (1950); Md. Ann. Code art. 100, § 69 (1957); N.J. Stat. Ann. § 2A: 15-54 (1952); N.Y. Civ. Prac. Act § 876-a(4); Ore. Rev. Stat. § 662.100 (1959); Utah Code Ann. § 34-1-29 (1953).

[24] R.I. Gen. Laws Ann. § 28-10-4 (1956):

> No relief shall be granted to any complainant who has failed to comply with an obligation imposed by law which is involved in the labor dispute in question, and who has failed to make every reasonable effort to settle such dispute either by negotiation and with the aid of any available governmental machinery of mediation or voluntary arbitration *when imposed by contract or by law.* (Emphasis supplied.)

the same as section 9A(4) except for the addition of the following seven words: "when imposed by law or by contract." With the addition of these words, it seems clear that even arbitrary refusal of an employer to arbitrate would not preclude injunctive relief against mass picketing and violence. Under the language of the Rhode Island statute the company's compliance with the condition precedent to obtaining injunctive relief, so far as having resorted to voluntary arbitration is concerned, would be confined to a showing that it had not declined to use voluntary arbitration if required by contract or law. There is no federal law requiring arbitration and no law of the state of Rhode Island requiring it. So far as contractual arbitration is concerned, such requirement would exist during the term of an agreement where there is a grievance arbitration provision in the agreement. The typical situation, however, where mass picketing and violence would be involved in a labor dispute would be after termination of the contract and in respect to the union's demands for a new contract. Thus, while the Rhode Island statute would cause a different result from that in Massachusetts as interpreted by the three judge courts on the point of prior willingness to submit to arbitration, there would still exist under the Rhode Island statute the question of interpreting what the preliminary requirement of the employer is, for complying with "an obligation imposed by law which is involved in the labor dispute in question", as well as what reasonable efforts must be made to settle the dispute by negotiation and whether the requirements of negotiation, conciliation, and arbitration are alternative or additive. There are no reported decisions in Rhode Island involving this particular section of its statute.

The Connecticut statutory provision is an unusual one and provides that "no temporary injunction shall be made permanent unless the plaintiff shall allege and prove . . . willingness to submit such labor dispute to arbitration or mediation."[25] Presumably, temporary injunctive relief may be obtained without alleging and proving willingness to submit the labor dispute to arbitration and mediation and it is only when the employer seeks to make the temporary injunction permanent that he must make such proof. A lower court in Connecticut has held the requirements of "arbitration or mediation" to be additive rather than alternative,[26] but there appears to be no decision by the highest court in Connecticut on the point.

Wisconsin's anti-injunction law contains a section comparable to section 9A(4) of the Massachusetts act,[27] but the practical situ-

[25] Conn. Gen. Stat. Ann. § 31-117 (1958).

[26] Landers, Frary & Clark v. Local 207, United Electrical Workers, 19 Conn. Supp. 402, 115 A.2d 464 (Super. Ct. 1955).

[27] Wis. Stat. Ann. § 103.57 (1957). This section is similar to § 9A(4) of the Massachusetts act except that the following language is added at the end of the Wis-

ation in Wisconsin is materially affected by the Wisconsin Labor Relations Act[28] which gives authority to the Wisconsin Employment Relations Board to enjoin mass picketing and violence. Under such procedure the employer himself may not go directly to the court for equitable relief but files his charge with the board which, if investigation sustains the charge, proceeds to issue an order restraining the unlawful conduct. The order is enforceable by the Wisconsin courts. In the well-publicized Kohler strike, the Wisconsin board restrained mass picketing and violence and its order was upheld by the Wisconsin courts and the Supreme Court of the United States.[29] The procedure in Wisconsin is comparable to that under the National Labor Relations Act where the National Labor Relations Board may find mass picketing and violence to be an unfair labor practice under section 8(b)(1) of the act and may obtain an injunction in the federal court. Since the state board action is confined to mass picketing and violence, the action is not pre-empted by the federal act, so that the situation is one of concurrent jurisdiction. The National Labor Relations Board, however, has rarely used its discretionary authority to seek preliminary injunctive relief in the federal courts and enforcement of a Board order by the Court of Appeals after Board hearings would be obviously so delayed in time as to be of little practical value to an employer at the time the mass picketing and violence occurs.[30] Wisconsin is the only state to have handled the problem of mass picketing and violence through unfair labor practice proceedings of a state board.[31]

In New Jersey, where the anti-injunction act contains a section identical to section 9A(4),[32] the lower courts have held (contrary to the *Bethlehem* and *G. E.* decisions in Massachusetts) that the section requires no more than a reasonable effort to settle the labor dispute by any one of the three alternative methods of negotiation, conciliation or arbitration.[33] As in Massachusetts, there is no decision by the highest court of New Jersey on this point.

Surprisingly enough, although the New York anti-injunction law

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consin section: ". . . but the court shall not be required to await the action of any such tribunal if irreparable injury is threatened."

[28] Wis. Stat. Ann. §§ 111.01 to 111.19 (1957).

[29] 351 U.S. 266 (1956).

[30] See note 9 supra.

[31] The Massachusetts Labor Relations Act (Mass. Gen. Laws Ann. ch. 150A, § 1-12 (1958)) provides for several union unfair labor practices, including engaging in a sit-down strike (§§ 4A and 4B), but none covering mass picketing and violence.

[32] N.J. Stat. Ann. § 2A 15-54 (1952).

[33] Phelps Dodge Copper Products Corp. v. United Electrical Workers, 138 N.J. Eq. 3, 46 A.2d 453 (1946), aff'd, 139 N.J. Eq. 97, 49 A.2d 896 (1946); Westinghouse Electric Corp. v. United Electrical Workers, 138 N.J. Eq. 44, 47 A.2d 734 (1946); Isolantite, Inc. v. United Electrical Workers, 130 N.J. Eq. 506, 22 A.2d 796 (1941), modified on other grounds, 132 N.J. Eq. 613, 29 A.2d 183 (1942).

contains a section identical with section 9A(4),[34] there does not appear to have been any reported decision in the New York appellate courts interpreting its meaning.[35] The New York appellate courts have upheld injunctions against seizure of property and violence in labor disputes, but the decisions made no allusion to the "every reasonable effort to settle" provision.[36]

There are no reported court decisions in the six other states having a 9A(4) type of statutory provision.[37] Thus, in the twelve states, including Massachusetts, in which the issue might be raised under the state anti-injunction statute, there is no decision by the highest court of any of these states interpreting the provision. In so far as the lower court decisions are concerned, those cases which have specifically alluded to the statutory provision in question are the ones previously referred to and the score is two to one (Massachusetts and Connecticut v. New Jersey) in favor of interpreting the requirements as additive rather than alternative, the lower New York courts not having passed on this specific point.[38]

As noted previously, section 9A(4), which was part of the original Massachusetts Anti-Injunction Act passed in 1935, and which has since remained unchanged, was taken from a parallel section of the Norris-LaGuardia Act, the federal anti-injunction law enacted in 1932.[39] The Wagner Act, officially known as the National Labor Relations Act,[40] was not passed until 1935. The latter act created the obligation upon employers to recognize a union representing a majority of its employees as exclusive bargaining agent and to bargain with it in good faith, although the prototype of this legal obligation was contained in Section 7(a) of the National Industrial Recovery Act of 1933.[41]

In Massachusetts, at least, section 9A(4) did not raise a serious problem for employers during the twenty-five years between 1935 and 1960. It was generally considered that the requirements of the section were met if the employer seeking the injunction alleged generally that

[34] N.Y. Civ. Prac. Act § 876-a(4).

[35] A lower New York court has held that a bill seeking injunctive relief under the New York anti-injunction law is defective if it fails to allege compliance with the "every reasonable effort to settle" provision. Scafidi v. Debnar, 22 N.Y.S.2d 390 (Sup. Ct. 1940). It has also been the opinion of the lower New York court that the language of this provision be given a common-sense interpretation so as to require only a "reasonable" effort on the part of the employer to comply with its provisions. Grandview Dairy, Inc. v. O'Leary, 158 Misc. 791, 285 N.Y. Supp. 841 (Sup. Ct. 1936).

[36] See, e.g., Hearn Department Stores v. Livingston, 282 App. Div. 480, 125 N.Y.S.2d 187 (1953).

[37] Idaho, Indiana, Louisiana, Maryland, Oregon and Utah.

[38] See note 35 supra. The arbitration point was not in issue in either of the New York lower court cases there cited.

[39] Note 13 supra.

[40] National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), 29 U.S.C. §§ 151-68 (1958).

[41] National Industrial Recovery Act, 48 Stat. 195 (1933).

it had complied with all legal obligations and any one of the three alternative efforts for settlement. Thus, in the typical case, the bill in equity alleged that the employer had complied with all obligations imposed by law and had negotiated with the union with the aid of the State Board of Conciliation and Arbitration and the Federal Mediation and Conciliation Service. These allegations were usually not seriously disputed by the union. Injunctions were granted against unlawful conduct, without allegation or proof that the employer had offered to arbitrate the dispute. Presumably, the same situation existed in New York and the other states having a provision identical with section 9A(4).

It should be noted that the Massachusetts Anti-Injunction Act, as well as the Norris-LaGuardia Act and the comparable statutes of the other states containing a section 9A(4) type of provision, also contains many other detailed provisions governing the issuance of injunctions in labor disputes. Briefly, these provisions[42] require notice to the union, the furnishing of a bond by the employer, a hearing, and findings by the court that:

1. Unlawful acts are being committed or threatened.
2. Substantial and irreparable injury will follow.
3. Greater injury will be inflicted on the employer by denial of relief than on the union by granting it.
4. There is no adequate remedy at law.
5. The police are unable or unwilling to furnish adequate protection.

These procedural provisions are entirely independent of section 9A(4) and, accordingly, the improvident issuance of injunctions in labor disputes does not depend upon a continuation of section 9A(4). Even if that section were repealed or modified, the heavy burden imposed upon a petitioning employer by the other sections would remain. Furthermore, the substantive grounds upon which a labor injunction may be based have been narrowed in Massachusetts by other statutory provisions,[43] and the doctrine of federal pre-emption leaves the state courts an extremely narrow area for action in respect to those employers subject to the National Labor Relations Act. But this narrow area of permitted jurisdiction expressly includes injunctions against mass picketing and violence.

Indeed, the Supreme Court of the United States places the primary responsibility for maintaining law and order in labor disputes on the several states. Beginning with *Garner v. Local No. 776, Teamsters Union*[44] in 1953, the Supreme Court has developed the doctrine

[42] Mass. Gen. Laws Ann. ch. 214, §§ 9A(1) to 9A(3) (1958).
[43] Mass. Gen. Laws Ann. ch. 149, § 20C (1958).
[44] 346 U.S. 485 (1953).

that in the interests of a uniform national labor policy federal labor legislation has pre-empted the field of labor relations law, thus denying state courts the judicial power to enjoin strikes and picketing which are either protected by, or are prohibited under, federal law, if the company involved is subject to federal jurisdiction as being an employer whose activities affect interstate commerce. But the Court carved out a specific exception to this rule in the area of maintaining law and order in labor disputes. Here the jurisdiction is left to the states. The Supreme Court stated by way of dictum in the *Garner* case:

> . . . Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state may still exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.[45]

Subsequently, in 1956, in *U.A.W. v. Wisconsin Employee Relations Board*,[46] often referred to as the *Kohler* case, the Supreme Court was faced with making a direct ruling on the issue and it ruled squarely in favor of state jurisdiction to enjoin mass picketing and violence. The Court's opinion stated:

> As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct which has been made an unfair labor practice under the federal statutes. . . . But our post Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. The conclusion has been explicit in the opinions cited. . . .
>
> The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect.
>
> We hold that Wisconsin may enjoin the violent union conduct here involved.[47]

[45] Id. at 488.
[46] 351 U.S. 266 (1956).
[47] 351 U.S. at 274-75.

The Supreme Judicial Court of Massachusetts had foreshadowed this ruling. In 1950, in *Thayer Co. v. Binall*,[48] Mr. Justice Ronan spoke for the court in these words:

> It is plain from the findings already recited that the methods adopted by the defendants in conducting these strikes were illegal . . . . A state has a solemn obligation to suppress acts of the character described in these findings, which were committed by the defendants and those acting with them in order that injuries to its citizens may be prevented, and property protected, and peace and order restored and maintained. It is immaterial in this respect whether or not the strike involved the operation of a plant affecting interstate commerce. The duty of policing strikes under the National Labor Relations Act and also under the Labor Management Relations Act remains with the states. . . .[49]

While the exception of violence and mass picketing from the doctrine of federal pre-emption in the labor relations field is now well-established, the doctrine of pre-emption itself has been strengthened and widely extended. Indeed, in this doctrine lie the seeds of a legal solution to the problem of section 9A(4). For it may now be forceably argued that the requirements of section 9A(4) are inapplicable to any employer subject to the National Labor Relations Act on pre-emption grounds.

Thus, to the extent that the reference in section 9A(4) to complying with any "obligation imposed by law in the labor dispute" would be deemed to require a finding by the state court that the employer had or had not committed an unfair labor practice under the National Labor Relations Act, such finding would be beyond state courts' jurisdiction under the pre-emption doctrine. Similarly, if the requirements to settle the dispute by good faith negotiation and conciliation are equated with the employer's obligation to bargain in good faith under the federal act, the state court would again lack jurisdiction to make a finding either way. Finally, to the extent that section 9A(4) would require the employer to do more than is required by the federal obligation to bargain in good faith, it would fall as a state requirement in conflict with the federal obligation. Thus, on the point of a willingness to arbitrate—which is not an obligation under the National Labor Relations Act—the state would be requiring a greater obligation upon the employer, as a condition precedent to exercising a state right available to litigants generally, than that imposed by federal labor statutes.

Strong support for this position is contained in the recent decision

[48] 326 Mass. 467, 95 N.E.2d 193 (1950).
[49] Id. at 480, 95 N.E.2d at 201.

of the Court of Appeals for the First Circuit in *General Electric Co. v. Callahan*.[50] This case arose out of the same G.E. strike involving the injunction proceedings previously discussed. Under a Massachusetts statute,[51] the State Board of Conciliation and Arbitration may hold a hearing to determine who is to blame for the labor dispute. After the hearing the board may make public its decision as to whom it has found to be blameworthy. There is no penalty attached, the proceeding and finding being in the nature of an enlistment of public opinion.

In the *G.E.* case, the state board issued notices scheduling a hearing under this "placing the blame" procedure. G.E. went to the federal District Court which denied the Company's request for an injunction to restrain the state board from holding the hearing. The Court of Appeals reversed. In its decision the court stated:

> The obvious statutory purpose [of the state "placing the blame" procedure] is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after "good faith" bargaining between the parties. The conflict between state and federal policy is obvious.[52]

The reasoning is obviously apt in a section 9A(4) case. If an employer subject to the National Labor Relations Act does not have to comply with a state board procedure because the state is forbidden under the pre-emption doctrine from requiring the employer to engage in any greater or different obligation than he has under the federal act, so the state may not prescribe such a requirement as a condition precedent to the use of the state's judicial processes to obtain relief available to citizens generally. And, as indicated previously, no state agency or court has the authority under the pre-emption theory to make findings either way as to an employer's compliance with its federal labor relations obligations.

The conflict of rulings between federal and state jurisdictions, which pre-emption is designed to prevent, is obvious in the *Bethlehem* case. The National Labor Relations Board unanimously ruled that the company's conduct in announcing, after the collective bargaining agreement expired, that certain provisions would not be observed—and placing into effect the proposed contract changes—did not con-

[50] 294 F.2d 60 (1st Cir. 1961).

[51] Mass. Gen. Laws Ann. ch. 150, § 3 (1958).

[52] Id. at 67.

stitute bad faith bargaining.[53] Likewise, the Board held that neither the nature of the company's proposals nor its refusal to make concessions constituted bad faith bargaining. But, the Massachusetts court had ruled directly to the contrary on these points. Yet the one point which the board held did constitute a violation of the employer's federal obligation, namely, its proposal that grievances be signed individually by the employee involved, was not even commented upon by the state court. The case serves to emphasize how unsound it is to have state courts and a federal Board ruling on the same issue, that is, whether the company bargained in good faith.

There are other reasons, too, why section 9A(4) should be inapplicable, particularly in cases involving mass picketing and violence. Whatever its original merit, changed conditions make it presently unnecessary and undesirable. When the language of section 9A(4) was first written into Section 8 of the Norris-LaGuardia Act in 1932, unions were weak. They asked for, and received, many special legislative privileges and protections frankly designed to stimulate their growth and provide a balance of power with large concentrations of capital. In the thirty years since 1932, unions have grown, matured, and become powerful.

Furthermore, in 1932, when the language referring to reasonable efforts to settle a dispute through negotiation, conciliation or arbitration was written, there was no legal duty on employers to recognize or negotiate with unions or to respect the right of employees to organize for the purposes of collective bargaining without interference or discrimination. The employer's legal duties in these respects did not arise until the Wagner Act of 1935. Thus, one can understand that in 1932 legislators would feel that at least the employer should be willing to sit down to discuss the labor dispute with the union before seeking an injunction, particularly in view of the fact that in those days what was so often sought to be enjoined was a peaceful strike and peaceful picketing, claimed unlawful under the general doctrine of a lack of justification for the union's objectives. All this has now changed.

The combination of the Norris-LaGuardia Act and the Wagner Act on the federal level resulted not only in a growth of union power, but in many instances, abuses and excesses which were intolerable. This, in turn, resulted in federal restrictions on labor in the Taft-Hartley Act of 1947[54] and the Landrum-Griffin Act of 1959.[55] But, in Massachusetts, the legislature has not updated its labor laws to

[53] Note 7 supra.

[54] Ibid.

[55] Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) Act of Sept. 14, 1959, P.L. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

provide a similar balance between the legitimate interests of unions and employers. A minimum of protection to employers in any state is the availability of prompt judicial relief against violence and mass picketing.

Let us consider for a moment the broader question of whether it is sound legal procedure to involve state court judges in the merits of a labor dispute where the judicial relief sought is limited to the maintenance of law and order. In the era prior to federal and state anti-injunction acts, courts frequently granted injunctions even in peaceful labor disputes on the grounds that the objective of the strike was "not justified". In their successful drive to limit the use of injunctions in labor disputes, unions vigorously contended that it was unfair to leave the queston of whether there was justification for a strike to the "economic predilections" of judges.

The pendulum has now swung completely the other way. Employers are now just as vigorously contending that they should not be denied the protection of the laws to prevent mass picketing and violence because of the opinions of judges that the company did not have "sufficient reasons" for rejecting certain union proposals, or had not exercised "good faith" in the course of negotiations, or failed to make "every reasonable effort" to settle the labor dispute. The type of judgment involved in reaching a conclusion on such issues obviously entails controversial labor relations opinions which, under modern jurisprudence, are generally regarded as unfamiliar to the experience of judges who themselves claim no expertise in the field of labor relations.

Rather, the national labor policy is to leave the obligations of employers and unions with respect to their handling of labor relations to an administrative agency, the National Labor Relations Board. It is for that Board to determine whether a company has failed to bargain collectively in good faith. The Board's province is confined to the field of labor relations, and its remedies are available to unions if they believe a company has committed unfair labor practices.

On the other hand, the maintenance of law and order, whether connected with a labor dispute or not, is very much within the experience of the judges of the courts. But it is an unwarranted and unfair burden to expect the court to become involved in the merits of labor relations policies and procedures. The question is not whether the opinions of the judges, as to what are reasonable efforts to settle a dispute or what constitutes good faith bargaining, are right or wrong. Nor does anyone question the sincerity of the judges' opinions. The point is that the judges should not be called upon to express their views as to the merits of labor relations issues in a case where the sole issue raised by the plaintiff is whether there exists mass picketing and violence.

Suppose the tables were turned, and the question was whether unions should be deprived of the right to strike and picket if the judges of the courts should determine that the union had not made every reasonable effort to settle the dispute, or was not justified in its demands, or had failed to bargain in good faith. It is certain that unions would make the very same argument against such a proposal, namely, that the judges should not enter into the area of opinion as to the policies and procedures followed by a party to a labor dispute.

The most troublesome part of the section 9A(4) controversy is the reference to arbitration. To deprive an employer of judicial relief against mass picketing and violence because he exercises his right to decline to arbitrate the union's demands on the terms of a new contract is an unfair penalty and interferes with the concept of free collective bargaining. The second opinion of the three judges in the *Bethlehem* case appears to require only that the employer be willing to consider a proposal for arbitration as distinguished from rejecting it categorically. But the opinion of the three judges in the *G.E.* case appears to imply that an employer is denied injunctive relief if he merely fails to accept the union's proposal to arbitrate the terms of the new agreement, even though such rejection is accompanied by reasons.

Most employers are willing to arbitrate grievances arising under an existing agreement and involving the interpretation and application of the agreement or compliance with it. The typical collective bargaining agreement spells out the grievance and arbitration procedure. This is voluntary arbitration by agreement of the parties.

Most employers are unwilling to arbitrate the terms of the collective bargaining agreement itself—in other words, the issues arising out of the union's demands which are subject to negotiation between the parties. Many unions also decline to arbitrate their contract demands. The reason for this distinction between arbitrating contract grievances and contract terms is that the former involves the resolution of disputes as to the interpretation of policies already agreed to by the parties, whereas the latter places in the hands of the arbitrator the power to determine what the policy will be. If there were no grievance and arbitration clauses in the collective bargaining agreement, disputes as to violation of the contract would have to be resolved by court action or strikes. Thus, arbitration of contract grievances provides stability through a less expensive, less time-consuming and less formal method than court action. Furthermore, there has developed a large body of arbitration rulings which is often referred to as the common law of labor relations, so that the parties and the arbitrator have some standards to go by. Typical of grievance

arbitrations are discharge cases, application of overtime clauses, wage rate changes when a method of operation changes, and lay off and promotion cases under seniority clauses.

But arbitration of contract terms is something quite different. Examples of such issues are whether the company should grant a ten per cent wage increase, or grant the union shop, or provide a certain type of seniority, or provide double time for certain hours of work, or be able to change existing work rules (such as featherbedding practices). Here the arbitrator would have no agreement of the parties on the policies—he would be making policy determinations for them.

It is not unlawful for either a company or a union to refuse to arbitrate contract terms. In fact, one of the principles on which organized businessmen and organized labor are agreed is their joint opposition to compulsory arbitration. Thus, it is unfair for the law to deprive an employer of his right to judicial relief against mass picketing and violence, because he chooses not to arbitrate contract terms. Such a state of the law places an unwarranted penalty on one party to a labor dispute for exercising his legal right to decline the placing of contract policy in the hands of a third party for final determination.

Furthermore, section 9A(4), which had its genesis in the 1932 federal statute, and as interpreted by the three judge panels, is today contrary to the concept of free collective bargaining established as national labor policy in 1935. Inherent in the concept of collective bargaining is the risk of economic sanctions if there is a failure to agree. These economic sanctions—the withdrawal of labor from working and the effects of a peaceful picket line on the employer's business, along with the effect of the workers' loss of pay—follow when the parties reach an impasse, that is, fail to agree after negotiations, and the employees exercise their rights to strike and to engage in peaceful picketing, subject to the risk of their being replaced by a non-striker.

But, when the employees go further and engage in mass picketing and violence, they have gone beyond economic warfare and into the arena of physical combat. Collective bargaining has then been subverted to dictation by physical force and violence. Collective bargaining is then no longer an interplay of relative economic strength. And, if the employer must surrender to a demand of the union for arbitration of contract terms as the price for restraining mass picketing and violence, the process of collective bargaining becomes one of compulsion rather than an exercise of the freedom to agree or disagree, after negotiations, with resolution of an impasse determinable by economic sanctions. Either party is entirely free to propose arbitration and it may be deemed a suitable method of resolving the

dispute by the other party. If so, it is truly voluntary arbitration. But arbitration of contract terms partakes of the character of compulsory arbitration when to decline it involves deprivation of the use of one's property by physical force without the right to judicial relief to restrain such force. And such a statutory interpretation is an encouragement for a union to strike, since the risk of job loss through replacements, otherwise inherent in any strike situation is minimized by the knowledge the union can resort to force and mass picketing with impunity if it but first proposes arbitration.

In some quarters it has been suggested, in defense of section 9A(4), as interpreted by the three judge panels in Massachusetts, that it is based upon the application of the equity principle of "clean hands". This contention is untenable, at least so far as any obligation to arbitrate the labor dispute is concerned.[56]

First, under this doctrine the plaintiff's lack of clean hands refers to his having engaged in some wrongful, unlawful or unconscionable conduct. But the declination to arbitrate is not an illegal or unconscionable act.

Secondly, the doctrine of "clean hands" requires a connection between the plaintiff's illegal acts and the defendant's conduct which is complained of. Thus, the declination to arbitrate has no connection with the union's use of mass picketing and violence to obtain its contract demands. It is still free to strike and picket peacefully for its demands if the employer declines arbitration. If an employer were physically to attack peaceful pickets, there would of course be a connection between such conduct and subsequent violence by the pickets. But, just because the union thinks the employer is a "bad" employer because it declines to arbitrate, this is no provocation for using force and violence. Equity does not deny relief "because of the general iniquitous conduct on the part of the complainant."[57] Thus, mass picketing and violence should be restrained regardless of anyone's opinion as to whether the particular employer and his labor relations policies are good, bad, or indifferent.

Thirdly, the doctrine of "clean hands" as a general principle of equity is still available to a court as a matter of discretion in any particular case, whether there is a section 9A(4) provision or not.

Fourthly, the argument of those who contend that the "clean hands" doctrine is applicable here, is merely another way of stating the discredited doctrine that the end justifies the means. For, if, as

[56] Both employers and unions are aware that if, during a strike, the employer seeks to hire replacements for the strikers, the bitterness of the dispute is increased. But the employer's legal right to hire permanent replacements for strikers where the strike is an economic one and not an unfair labor practice strike, has long been recognized. NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938).

[57] 19 Am. Jur. Equity § 473 (1939).

generally admitted, mass picketing and violence are illegal means for carrying on a labor dispute, they should not be legally permitted on the grounds that, in someone's opinion, the labor relations policies of a particular employer are sufficiently bad to warrant use of the illegal means.

In retrospect, therefore, we come down to a few basic principles. The maintenance of law and order during a labor dispute is a primary responsibility of the several states, first through local police action and, failing this, injunctive relief restraining mass picketing and violence. On the other hand, the employer's conduct in respect to the handling of the labor dispute itself is, under national labor policy, an exclusive matter for the National Labor Relations Board for those companies subject to its jurisdiction. Since Section 9A(4) of the Massachusetts Anti-Injunction Act as interpreted by the lower Massachusetts courts effectively nullifies these principles, the section should be amended to permit the operation of these principles, or the courts should, on pre-emption grounds, rule the section inapplicable to employers whose operations affect interstate commerce.