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Chapter 15: Labor Relations

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CHAPTER 15

Labor Relations Law

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§15.1. Federal legislation. To the date of this writing, there has been no labor legislation enacted during the past year. The repeal of Section 14(b) of Taft-Hartley,[1] which section permits states to enact so-called right to work clauses outlawing union security arrangements, has passed the House but is still pending in the Senate. The amendments to the federal minimum wage law are still in Congress.[2] At the same time, the 89th Congress has passed the labor-supported Medicare,[3] voting rights,[4] education,[5] and antipoverty[6] bills. In addition, Title VII of the Civil Rights Act of 1964[7] became effective on July 2, 1965, providing for equal employment opportunity[8] and the new federal commission has been issuing regulations in this field.[9]

A. U.S. Supreme Court Decisions

§15.2. Antitrust laws and labor. The problem of reconciling the objectives of collective bargaining and national labor policy with our national antitrust laws was presented to the United States Supreme Court in two important cases. In the first case, *United Mine Workers v. Pennington*,[1] the basic issue was whether the union could enter into a labor contract with a multiemployer bargaining unit and as part of the agreement undertake to impose the same standards on other small coal producers irrespective of their ability to pay and even though both

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§15.1. [1] 61 Stat. 151, 29 U.S.C. §164(b) (1964).
[2] H.R. 10518.
[3] Pub. L. 89-97, 79 Stat. 286 (1965), amending 42 U.S.C. §§301 et seq. (1964).
[4] Pub. L. 89-110, 79 Stat. 437 (1965).
[5] Pub. L. 89-10, 79 Stat. 27 (1965), amending 20 U.S.C. §§236 et seq. (1964).
[6] Pub. L. 89-117, 79 Stat. 451 (1965); Pub. L. 89-15, 79 Stat. 75 (1965); Pub. L. 89-4, 79 Stat. 5 (1965).
[7] 78 Stat. 253 (1965), 42 U.S.C. §2000(e) (1964).
[8] This section is discussed in detail in 1964 Ann. Surv. Mass. Law §15.1.
[9] Title 29, Labor, Chapter XIV, Part 1601 (Procedural Regulations), Part 1602 (Records and Reports), June 20, 1965.

§15.2. [1] 380 U.S. 657, 85 Sup. Ct. 1585, 1607, 14 L. Ed. 2d 626 (1965).

parties knew that the result would be to drive marginal producers out of business.[2] The Court divided, with three Justices reversing the lower court's conviction on an evidential point but holding that the antitrust laws applied;[3] this opinion concluded that national labor policy precluded the union and employers in one bargaining unit from bargaining about wages for other units in the industry. Three other judges concurred in reversing but the opinion saw the case as a mere reaffirmation of the *Allen Bradley* case,[4] that a union-employer combination that had as its purpose the removal from the market of marginal producers was automatically a violation of the Sherman Act despite the objective of the elimination of price competition based on labor standards; the opinion also stated that an industry-wide agreement by a union and employers setting up a wage structure beyond the financial ability of marginal operators to pay and made to force marginal producers out was a prima facie violation of the antitrust laws. Justice Goldberg and two Justices wrote a dissent from the opinions of the other Justices but concurred in the reversal on the evidential point.

In *Local No. 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co.*,[5] the question was whether the union could impose a collective bargaining agreement with a multiparty bargaining unit, restricting the hours that retail food stores could sell meat, on Jewel Tea Co. without violating the antitrust laws even though the restraint on competition was immediate and apparent. The gist of the complaint was that the multiparty employer unit had conspired with the union to restrict the sale of meat to certain hours, while the union was the enforcing agency. The Court held that absent a conspiracy, the marketing restriction was so intimately tied in with wages, hours, and working conditions that it fell within the protection of the national labor policy and hence did not violate the Sherman Act; it held that though the restriction on marketing hours had a direct impact on the product market, the concern of the union was immediate and direct as problems of job security and working conditions of the meat cutters at Jewel Tea were involved. The dissent by Justices Douglas, Black, and Clark held that the agreement itself showed that the union had induced the employers to use their economic power to hurt others

[2] In this case there was the additional question how this alleged conspiracy between the union and the employers could be proved.

[3] Justice White stated that the union was liable if it joined or conspired with a group of employers to eliminate competitors even though the union part was to impose uniform wages on all the industry. This extended the Allen Bradley decision, 325 U.S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939 (1945), to cover conspiracies to eliminate competition based on labor standards, although he acknowledged that a union could seek unilaterally to enforce a uniform wage policy, for the elimination of competition based on wages was not the kind of restraint the Sherman Act intended to proscribe.

[4] Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939 (1945).

[5] 381 U.S. 676, 85 Sup. Ct. 1596, 1607, 14 L. Ed. 2d 640 (1965).

who wanted to sell meat after 6:00 P.M. and thus was an obvious violation of the Sherman Act.

The opinion in both cases of Justices Goldberg, Harlan, and Stewart pointed out the ill-starred and checkered history of judicial intervention using the antitrust laws in labor matters. It asserted that Congressional policy since 1930 reflects a decision to exempt collective bargaining activities about mandatory subjects of bargaining from judicial scrutiny under the antitrust laws and to leave abuses by unions to the prohibitions in various labor statutes. It also pointed out that labor statutes reveal that business competition based on wage competition is not our labor policy and Congress has approved mandatory collective bargaining in good faith about wages, hours, and conditions of employment.

In the two cases, the members of the Court have drawn the battle lines among themselves regarding antitrust laws and collective bargaining. The Court has accepted as appropriate the recognized antitrust principles that conspiracies can be proved solely by indirect evidence; juries may be able to infer conspiracies from multiemployer or pattern agreements imposed on marginal producers. Any discussions at the bargaining table about the competitive impact of wages on other employers may be valid evidence of the conspiracy, subjecting companies and unions to jury-determined treble damages and criminal and civil sanctions. "Favored nations" clauses are now illegal, as are oral union assurances to employers that it will not grant more favorable terms to other employers.

§15.3. The Court and the NLRB. The National Labor Relations Board achieved mixed success in its cases before the Court during the past year. In two lockout cases, the Court reversed the Board. In *American Ship Building Co. v. NLRB*,[1] the Court reversed the Board and held that an employer can temporarily lay off employees solely as a means of bringing economic pressure to support its bargaining position for a favorable settlement after an impasse has developed. This may well be the other side of the coin of *NLRB v. Insurance Agents' Int'l Union*,[2] where the Court held that the Act did not make the Board the arbiter of the sort of economic weapons unions can use to pressure management into accepting bargaining demands.

The doctrine has been well established that, to avoid the effects of a whiplash strike and to preserve the integrity of the employers' bargaining unit, the members of a multiemployer bargaining unit may resort to a unit-wide lockout.[3] It has been equally well established that a strike-bound employer may hire replacements during the strike.[4] These doctrines were merged and extended by the Court this past term

§15.3. [1] 380 U.S. 300, 85 Sup. Ct. 955, 13 L. Ed. 2d 855 (1965).
[2] 361 U.S. 477, 80 Sup. Ct. 419, 4 L. Ed. 2d 454 (1960).
[3] NLRB v. Truck Drivers Union, 353 U.S. 87, 77 Sup. Ct. 643, 1 L. Ed. 2d 676 (1957).
[4] NLRB v. Mackay Radio & Television Co., 304 U.S. 333, 58 Sup. Ct. 904, 82 L. Ed. 1381 (1938).

in *NLRB v. Brown*,[5] to allow the employers also to hire temporary replacements pending a whiplash strike on the rationale that, if the struck member is entitled to hire replacements, the other members who exercise their right to lockout will be prejudiced by loss of trade if they also may not continue operation. However, the Court went to great lengths to limit the right to hire replacements to cases where there was an absence of antiunion motivation behind the business decision to continue operations. Moreover, whereas the struck employer could clearly hire permanent replacements for the economic strikers,[6] the majority opinion implicitly, and the concurring opinion expressly, stated that locked-out employees apparently may not be permanently replaced.

In a much-awaited and -prognosticated decision of *Textile Workers Union v. Darlington Manufacturing Co.*,[7] the Court determined that an employer may terminate his entire business for any purpose without violating the Act even when the termination is based on an unwillingness to comply with the NLRA's requirements that he recognize and bargain with a certified union. The Court held that an employer does not have the right to close out parts of his business if motivated by a purpose to "chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing will likely have that effect." By way of dicta, the Court indicated it would apply the same rules to an employer who shuts down an entire plant but whose relation with other plants was of such a substantial nature that it could be reasonably concluded that the closing of one plant would have a restraining effect on the employees at another plant.[8]

In *Fibreboard Paper Products Corp. v. NLRB*,[9] the Court upheld the NLRB's position that a company's business decision to subcontract maintenance work in a plant involving the replacement of employees in the unit with a subcontractor to do the same work is subject to the statutory duty to bargain collectively over job security.[10]

The question of the conflict between a legitimate business reason and interference with concerted activities also arose in *NLRB v. Bur-*

5 380 U.S. 278, 85 Sup. Ct. 980, 13 L. Ed. 2d 839 (1965).

6 See note 4 *supra*.

7 380 U.S. 263, 85 Sup. Ct. 994,13 L. Ed. 2d 827 (1965).

8 For a discussion of the problems raised in the Darlington case, see Some Comments on the Right of an Employer to Go Out of Business: The Darlington Case, 4 B.C. Ind. & Comm. L. Rev. 581 (1963).

9 379 U.S. 203, 85 Sup. Ct. 398, 13 L. Ed. 2d 233 (1965).

10 The concurring opinion stresses what it believes is the narrowness of the holding; it pointed out that the Court did not decide that subcontracting decisions are as a general matter a mandatory subject for bargaining. Under these circumstances, the Court's decision seems to be limited to one group of workers being replaced by employees in the subcontractor's unit. See such subsequent decisions by the NLRB as Westinghouse Electric Corp., 150 NLRB No. 136, 58 L.R.R.M. 1257, 1965 CCH Lab. L. Rep. 9079; Fafnir Bearing Co., 151 NLRB No. 40, 58 L.R.R.M. 1397, 1965 CCH Lab. L. Rep. 9139; and American Oil Co., 151 NLRB No. 45, 58 L.R.R.M. 1412, 1965 CCH Lab. L. Rep. 9149.

nup & Sims, Inc.[11] While two employees were trying to organize, they allegedly told another employee that the union would use dynamite if it did not get enough members. The company discharged the two employees because of their alleged statements. The Court upheld the Board's determination of a violation of Section 8(a)(1) whatever the employer's motive or belief, for no managerial prerogatives were involved and the Board had been entrusted with the power of surveillance over the manner of soliciting union membership. In organization cases, the Court seems to be more inclined to defer to the Board's expertise rather than in cases where the national labor policy of collective bargaining is involved.

Finally, in *NLRB v. Metropolitan Life Insurance Co.*,[12] the Court reprimanded the Board and stated that even though it has broad discretion in determining appropriate bargaining units, "it must 'disclose the basis of its order' and 'give clear indicaton that it has exercised the discretion with which Congress has empowered it.' " The Court upheld the First Circuit's[13] refusal to enforce the Board's order for a single district office unit rather than the old state-wide unit rule for insurance companies. The Court remanded the case to the Board for a unit determination with extent of organization as merely one, but not the controlling, factor.

In three consolidated cases[14] involving the National Mediation Board, the Court upheld long-established practices in representation cases contrary to the NLRB procedures. The Court held that the Board's choice of a ballot for elections which did not provide a space for voting "no union" did not exceed its statutory authority; that an employer is not entitled to be a party to the proceeding where the NMB determines the appropriate unit; and that the NMB did not have to hold full-scale hearings in a nonadversary proceeding involving representation cases.

§15.4. Pre-emption. The Court once again set aside state court decisions which interfere with federal law absent violence or similar conduct. In *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*,[1] the state court took jurisdiction over a broadcasting station which did not meet the NLRB's jurisdictional standards[2] and enjoined peaceful picketing and union solicitation of advertisers seeking to persuade them to boycott the station. The Court reversed, holding the station was part of a chain whose volume met the Board's standards and therefore state jurisdiction was pre-empted.

11 379 U.S. 21, 85 Sup. Ct. 171, 13 L. Ed. 2d 1 (1965).
12 380 U.S. 438, 85 Sup. Ct. 1061, 13 L. Ed. 2d 951 (1965).
13 327 F.2d 906 (1st Cir. 1964).
14 Brotherhood of Railway and S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 85 Sup. Ct. 1192, 14 L. Ed. 2d 133 (1965).

§15.4. 1 380 U.S. 255, 85 Sup. Ct. 876, 13 L. Ed. 2d 789 (1965).
2 NLRB, Twenty-First Annual Report 14-15 (1956).

In *Republic Steel Corp. v. Maddox*[3] the state court had upheld a former employee's suit under state law for severance pay allegedly due under a collective bargaining agreement without resorting to the grievance procedure. The Court reversed and held that where federal law applies, national labor policy requires that employees wishing to assert contract grievances must attempt to use the grievance procedure, unless the arbitration clause was not exclusive, before resorting to suits in state courts.

§15.5. **Internal union affairs.** In several Landrum-Griffin cases, the Court granted unions wide latitude. In *Calhoun v. Harvey*[1] the Court held that federal district courts cannot enjoin the holding of union elections but dissidents must appeal to the Secretary of Labor under Title IV after exhausting union remedies after the election is held. The Court held that Title I protected only against discrimination in nominating and voting and had nothing to do with election requirements covered under Title IV of the Act. In *American Federation of Musicians v. Wittstein*[2] the Court held that a dues increase could be approved by a weighed-voting system in conventions whereby delegates cast votes equal to their local's membership. In a 5-4 decision, the Court in *United States v. Brown*[3] held that the Bill of Attainder clause in the Constitution[4] made Section 504 of the L.M.R.A. unconstitutional, for it made it a crime for a member of the Communist Party to serve as an officer or employee of the union; the majority concluded that since the Act attached to a specific organization (the Communist Party) rather than describing activities which an organization may or may not engage in, Congress had usurped the judicial function.[5]

B. Federal Courts in Massachusetts

§15.6. **Federal decisions.** The Court of Appeals for the First Circuit twice ruled during the 1965 Survey year that the fact that discharged employees participated in strikes which were arguably in violation of Section 8(d) of the Labor Management Relations Act does not deprive them of their right to seek arbitration of their discharges.[1] The court also affirmed its standard policies of refusing to

[3] 379 U.S. 650, 85 Sup. Ct. 614, 13 L. Ed. 2d 580 (1965).

§15.5. [1] 379 U.S. 134, 85 Sup. Ct. 292, 13 L. Ed. 2d 190 (1965).
[2] 379 U.S. 171, 85 Sup. Ct. 300, 13 L. Ed. 2d 214 (1965).
[3] 381 U.S. 437, 85 Sup. Ct. 1707, 14 L. Ed. 2d 484 (1965).
[4] U.S. Const., Art. I, §9.
[5] The Court distinguished American Communications Association v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950), which had sustained the predecessor statute which had specifically conditioned union access to the Labor Board on the execution of affidavits of all union officers that they were not Communist Party members.

§15.6. [1] Wright Steel & Wire Company v. United Steelworkers of America, 346 F.2d 928 (1st Cir. 1965); Trailways of New England v. Amalgamated Transit Union, 343 F.2d 815 (1st Cir. 1965). The court subsequently refused to substitute its own

review matters that were not properly presented to the NLRB[2] and of granting considerable deference to the Board's discretionary classification of a worker as a supervisor.[3]

The Federal District Court for the District of Massachusetts ruled that the statute's allowance of concurrent jurisdiction does not prevent the removal of a suit arising under Section 301 of the Act in cases where no relief prohibited by Norris-LaGuardia is sought.[4] The evolving rule under the Landrum-Griffin Act that a union may not avoid a pending suit against it by attempting to correct retroactively the statutory violation[5] was followed by Judge Wyzanski in allowing recovery for damages until the time of the correction.[6]

Finally, in a wide-reaching opinion, the court ruled that, in the absence of an arbitration clause, an individual's claim that his employer had violated their collective bargaining agreement would be entertained, with the court assuming an arbitrator's functions.[7]

C. Massachusetts Legislation

§15.7. General labor laws. Little labor legislation of importance was enacted during this past Survey year. The state minimum wage law[1] was amended in three respects: the minimum wage for service employees who regularly receive gratuities was increased by five cents to ninety cents per hour effective September 5, 1966, and by three cents to ninety-three cents the following year on September 5, 1967;[2] the provisions for overtime at the rate of time and one-half for work in excess of forty hours were made applicable to parking lot attendants;[3] and the penalties for violations of the state minimum wage

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judgment for that of the arbitrator as to whether or not the participants in the Trailways strike were discharged for cause. Trailways, Inc. v. Amalgamated Transit Union, 353 F.2d 180 (1st Cir. 1965). See also Camden Industries Co. v. United Brotherhood of Carpenters, 60 L.R.R.M. 2525 (1st Cir. 1965); Sheet Metal Workers v. Aetna Steel Products, 246 F. Supp. 236 (D. Mass. 1965); Newton-Lowell Plastics Employees' Assn. v. Reiss Associates, C.A. 64-878-S (D. Mass., March 24, 1965).

2 NLRB v. Izzi, 343 F.2d 753 (1st Cir. 1965).

3 Vega v. NLRB, 341 F.2d 576 (1st Cir. 1965), *cert. denied* (1965); NLRB v. Cooke & Jones, 339 F.2d 580 (1st Cir. 1964).

4 Fitchburg Paper Co. v. MacDonald, 242 F. Supp. 502 (D. Mass. 1965).

5 Goldberg v. Amalgamated Union, 202 F. Supp. 844, 846 (E.D.N.Y. 1962). But cf. Wirtz v. Brunton, C.A. 64-2-E.C. (S.D. Cal. 1964).

6 Peck v. Associated Food Distributors of New England, 237 F. Supp. 113 (D. Mass. 1965).

7 Telephone Workers v. New England Tel. & Tel., 59 L.R.R.M. 2006 (D. Mass. 1965).

§15.7. 1 G.L., c. 151.

2 Acts of 1965, c. 344. (The state minimum wage law for other employees became $1.30 per hour on September 5, 1965, and goes to $1.35 on September 5, 1966, with the proviso that these rates do not become effective for employees engaged in manufacturing unless the federal minimum wage law is equal to or higher than these rates. Acts of 1964, c. 444.)

3 Acts of 1965, c. 416.

law were clarified and strengthened to cover "kickbacks."[4] The prevailing wage law was amended to clarify the record-keeping and compliance sections to require contractors and subcontractors on public works to file statements relative to wages paid to employees within fifteen days of completion of the job.[5] The "help wanted" advertising section of the labor laws[6] was strengthened by requiring in the publication of offers of employment any necessity to purchase an article and by increasing the criminal penalties for violations.[7] An advisory council was created for radiation protection.[8]

The antidiscrimination statute, General Laws, Chapter 151B, was amended to prohibit employment discrimination by employers, employment agencies, and unions based upon an individual's sex.[9]

Finally and perhaps most importantly, the legislature granted collective bargaining rights to municipal employees. In the event of a disagreement on contract terms between the employees' exclusive representatives and the municipality, the State Board of Conciliation is authorized to recommend the terms of the contract. The municipalities are prohibited from committing unfair labor practices, and the employees are expressly prohibited from engaging in a strike or slowdown.[10]

§15.8. Public employees. The 1958 drive to give collective bargaining rights to unions representing various government employees again achieved some success.[1] Housing authorities were authorized to bargain collectively and to enter into agreements with unions representing the employees, and the election provisions of the Massachusetts State Labor Relations Law were made applicable to these employees[2] with all the problems described in the 1964 SURVEY in this area.[3]

Specific benefits were again voted for special classes of public employees. Provisions were made for a maximum 42-hour work week for fire fighters in cities and towns which adopt the act.[4] Exemptions from taxes on real estate up to $8000 in assessed value were provided for widows of fire fighters[5] and for minor children of police and fire fighters killed in the line of duty. The noncontributory pension rights of laborers employed prior to July 1, 1937, who are promoted to supervisory positions in the same department in any city or town after 1937 were preserved, subject to the acceptance of this

4 Id., c. 335.
5 Id., c. 417.
6 G.L., c. 149.
7 Acts of 1965, c. 234.
8 Id., c. 484.
9 Id., c. 397.
10 Id., c. 763.

§15.8. 1 1958 Ann. Surv. Mass. Law §15.4.
2 Acts of 1965, c. 564.
3 1964 Ann. Surv. Mass. Law §15.7.
4 Acts of 1965, c. 452.
5 Id., c. 267 (widows of policemen were already provided for in the Acts of 1964, c. 715).

section by each town or city.[6] The state's contributory group insurance was extended to cover employees of the Massachusetts Parking Authority.[7] Finally, the payment of administrative costs charged to instrumentalities of the Commonwealth relative to unemployment benefits was eliminated.[8]

§15.9. Employment security. The employment security law[1] was amended in several areas: (1) the maximum weekly benefits were increased by five dollars to fifty dollars (plus six dollars for each dependent) effective October 3, 1965;[2] (2) the pregnancy disqualification was clarified to permit a pregnant woman to obtain benefits where her leave of absence exclusive of the four weeks before and after childbirth is caused by a clause in the collective bargaining agreement;[3] and (3) a person who is receiving unemployment compensation benefits and becomes ill is eligible for one week of benefits even though he fails to register or apply for work provided there is no suitable work for him.[4] At the same time, organized labor's principal legislative proposals for benefits after six weeks of a labor dispute[5] and for sickness disability benefits[6] were again defeated.

D. Massachusetts Decisions

§15.10. Employment security. In *General Electric Co. v. Director of the Division of Employment Security*,[1] unemployment benefits were denied to persons whose work was subcontracted out during a strike. By subcontracting that part of his production, the employer avoided a certain and substantial stoppage in the plant's production. The Supreme Judicial Court's opinion centered on the rationale that in fact when the company was prevented from having a substantial amount of work performed at its own plant by a strike, it was a "stoppage of work" within the statutory denial of benefits, irrespective of the employer's successful maintenance of final production. Had the employer chosen to maintain production by hiring replacements rather than by subcontracting, the claimants along with the strikers might have been entitled to benefits.[2] Moreover, the Court indicated

6 Acts of 1965, c. 539.
7 Id., c. 637.
8 Id., c. 631.

§15.9. 1 G.L., c. 151A.
2 Acts of 1965, c. 649.
3 Id., c. 634.
4 Id., c. 636.
5 House No. 1139 (1965).
6 House No. 1343 (1965).

§15.10. 1 1965 Mass. Adv. Sh. 965, 208 N.E.2d 234.
2 Worcester Telegram Publishing Co. v. Director of the Division of Employment Security, 347 Mass. 505, 198 N.E.2d 892 (1964), discussed in 1964 Ann. Surv. Mass. Law §15.5. It should be noted that the picketing continued in the Telegram case and that the dispute had not ended, as implied in the 1964 Survey analysis. Furthermore, the persons are entitled to benefits as long as they were replaced regardless whether the dispute has ended.

that, unlike the strike replacement situation where any disqualification ceases upon the resumption of normal production, the disqualifications here would last for the duration of the subcontract.[3] The fact that in one case the replacement work is not done at the employer's plant apparently justified such a radically different result.

General Electric Co. v. Director of the Division of Employment Security[4] determined that new employees, who were not entitled to vacation pay when the employer shut down two weeks for vacation purposes but who upon completion of one year's service would be paid for those two weeks, were nevertheless entitled to unemployment compensation benefits. As the employees had a mere expectancy of being paid in the future, the desirability of a prompt determination of claims prompted the Court to allow the benefits and leave open for an initial administrative determination at a later time the question of the right to retain the benefits once the vacation benefits are actually received or vested.

§15.11. Statutory interpretations. In *Johnson v. United States Steel Corp.*[1] the Supreme Judicial Court refused to read an implied civil remedy into the statutory prohibition of dismissal from employment for reasons of age[2] or in the weekly wage law,[3] for it did not appear by "clear implication" that such an implied remedy was intended by the legislature. The decision was supported by the analogous tort doctrine that a mere violation of a statute does not create a private course of action but is merely evidence relevant to an independently created cause of action. Thus, a discharge in violation of the statute may be relevant in an arbitration hearing where the grievance is that the discharge was not "for cause" and was thus in violation of the collective bargaining agreement. The decision is further buttressed by the fact that the similar statutes prohibiting discharges or other discrimination based on race or sex expressly provide a private remedy.[4] On standard principles of statutory construction, the inclusion elsewhere of an express private remedy in this statute is indicative of a legislative intent to exclude such a remedy.[5]

In *John Bath & Co. v. Commonwealth,*[6] the actions of an individual executive of the defendant petitioner in discharging an employee for refusing to work morning hours prior to jury duty was held to be

3 1965 Mass. Adv. Sh. 965, 970 n.5, 208 N.E.2d 234, 238 n.5.
4 1965 Mass. Adv. Sh. 781, 207 N.E.2d 289.

§15.11. 1 1964 Mass. Adv. Sh. 1325, 202 N.E.2d 816, *cert. denied,* 59 L.R.R.M. 2064 (1965).
2 G.L., c. 149, §§24A-24G.
3 Id. §148.
4 Id. §105A; c. 151B, §5.
5 Retail Clerks Int. Assn. v. Lion Dry Goods, Inc., 369 U.S. 17, 25-26, 82 Sup. Ct. 541, 546-547, 7 L. Ed. 2d 503, 508-509 (1962); cf. Rousseau v. Building Inspector of Framingham, 1965 Mass. Adv. Sh. 599, 603, 206 N.E.2d 399, 402, noted in §§14.1, 14.8, 14.17 *supra.*
6 1964 Mass. Adv. Sh. 1213, 202 N.E.2d 249.

within the statutory prohibitions of discharges because of jury duty.[7] The particular work requirements risked impairment of the employee's effectiveness as a juror in that the work would require bathing facilities for the employee to present himself properly for jury duty and no such facilities were in fact available. The action of the individual officer of the corporation in firing its employee was held to be a contempt independent of the statutory contempt. While the Court left open the question of requiring work of jurors in emergency situations and where it would be plainly compatible with an employee's jury obligations, the practice was strongly suggested of referring the legality of such work assignments to the trial judge rather than, as was done here, assuming the risk of interference with the operation of the court.

In *John Hancock Mutual Life Ins. Co. v. Commissioner of Insurance*[8] the Court formulated the novel doctrine that a state regulation which places an economic burden on a strike-bound employer is invalid on principles of federal pre-emption as it would give the union a potent economic weapon in an area which Congress left free for the operation of economic forces. Accordingly, a recently enacted statute[9] which purported to prevent certain insurance policies from lapsing during a strike of the insurance agents was held to be invalid as the company's economic bargaining position would be crippled during a strike if it were deprived of its right to demand premium payments while continuing to pay benefits. Similar economic intrusions into the labor battleground are made by the state's allowance of a tax deduction to an employer for business losses suffered during a strike of his employees or by the judicial allowance, or disallowance, of an employer's defense of impossibility of performance to a contract claim based on the inability to perform during a strike. As economic effects far more direct have received the sanction of the Court,[10] and as the Supreme Court of the United States has refused to extend the pre-emption cloak to such matters which are a peripheral concern of the federal regulation despite the fact that the state regulation may have some restriction in an area covered by the federal statute,[11] it is doubtful that the present decision standing alone will have a serious effect on the limits recognized elsewhere to the doctrine of federal pre-emption. At the same time, in light of developments in the pre-emption

7 G.L., c. 268, §14A.

8 1965 Mass. Adv. Sh. 1007, 208 N.E.2d 516, also noted in §11.3 *supra*.

9 G.L., c. 175, §187F, as adopted by Acts of 1963, c. 796.

10 See, e.g., Worcester Telegram Pub. Co. v. Director of the Division of Employment Security, 347 Mass. 505, 198 N.E.2d 892 (1964), allowing unemployment compensation to certain strikers over the objection that the Commonwealth was funding the strike.

11 San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243, 79 Sup. Ct. 773, 778, 3 L. Ed. 2d 775, 782 (1959), noted in 1963 Ann. Surv. Mass. Law §§14.5, 14.6; 1959 Ann. Surv. Mass. Law §13.9.

area,[12] the Attorney General might well have applied for a writ of certiorari to the United States Supreme Court in this case.

In *Query v. Boston & Maine R.R.*,[13] the Supreme Judicial Court reaffirmed the principle that grievances of employees under union contracts and the Railway Labor Act are governed by the union procedures and the statutory remedies under the Railroad Adjustment Board.

[12] In Local 20, Teamsters Union v. Morton, 377 U.S. 252, 258, 84 Sup. Ct. 1253, 1257, 12 L. Ed. 2d 280, 285 (1964), the Court stated that the answer to the basic question of whether "incompatible doctrines of local law must give way to principles of federal labor law" ultimately depends upon "whether the application of state law . . . would operate to frustrate the purpose of federal legislation." In the Hancock case, the purpose of federal labor legislation is hardly frustrated by giving one side or the other some economic concessions. See also 1964 Ann. Surv. Mass. Law §15.2. Moreover, the Supreme Court has subsequently rejected the dogmatic rationale that all peaceful labor activity affecting commerce is necessarily beyond the regulatory or even conjunctive power of state agencies and courts. Hanna Mining Co. v. Marine Engineers Beneficial Assn., 60 L.R.R.M. 2473 (1965).

[13] 1965 Mass. Adv. Sh. 11, 203 N.E.2d 545.