Annual Survey of Massachusetts Law

Volume 1967 Article 15

1-1-1967

Chapter 12: Labor Relations Law

Robert M. Segal

CHAPTER 12

Labor Relations Law

ROBERT M. SEGAL

§12.1. General. This chapter consists of the decisions of the United States Supreme Court, the United States Court of Appeals for the First Circuit, the United States District Court for the District of Massachusetts and the Supreme Judicial Court, and legislation concerned with labor relations law during the 1967 SURVEY year — September 1, 1966 through August 31, 1967.

A. UNITED STATES SUPREME COURT DECISIONS

§12.2. Work preservation clauses. In *National Woodwork Manufacturers Ass'n v. NLRB*,[1] the Supreme Court upheld a collective bargaining provision between the Carpenters Union and the Association of Construction Contractors in the Philadelphia area, which provided that no member of the union would handle prefabricated doors. The work of cutting and fitting doors had traditionally been performed on the job site by the carpenters involved. In reversing in part the Court of Appeals for the Seventh Circuit,[2] the Supreme Court upheld the NLRB's decision[3] that the refusal to handle prefitted doors was designed to preserve work for the employees involved and, therefore, was a primary and not a secondary dispute. It was, thus, not violative of Section 8(e) and its corollary, Section 8(b)(4)(A) of the National Labor Relations Act. Section 8(e) was not intended to prohibit agreements made and maintained to preserve for employees work traditionally done by them.[4]

The Court also upheld the Board's finding that the enforcement of the rule did not violate Section 8(b)(4)(B) which prohibits boycotts or refusals to handle. The enforcement of the contract was directed against the contractor who had control over the project and not against any other employer. Hence, the action of the employees was

ROBERT M. SEGAL is a partner in the law firm of Segal & Flamm in Boston. He is co-chairman of the Labor Management Relations Committee of the Boston Bar Association, former chairman of the Labor Relations Law Section of the American Bar Association, and a lecturer on Labor Law at the Harvard Business School.

The author wishes to acknowledge the invaluable assistance of his associate, John D. O'Reilly, III.

§12.2 [1] 386 U.S. 612, *rehearing denied*, 387 U.S. 926 (1967).
[2] 354 F.2d 594 (7th Cir. 1965).
[3] 149 N.L.R.B. 646 (1964).
[4] 386 U.S. at 640-641.

primary in nature, in that the confrontation was only with their immediate employer. The Board's decision that the enforcement of the rule against three other contractors who had no control over the work because of project specifications was violative of Section 8(b)(4)-(B) was not appealed by the union.[5]

In a companion case, *Houston Insulation Contractors Ass'n v. NLRB*,[6] the Court, reversing in part the Court of Appeals for the Fifth Circuit,[7] upheld the Board's decision[8] that a no-subcontract clause is legal in the construction industry and can be enforced both by the local entitled to the construction work on the job site and by members of a sister local employed by the same manufacturer.[9] The Court of Appeals had reversed the Board, in part, reasoning that enforcement action by a sister local violated Section 8(b)(4)(B) by forcing the employer to cease doing business with the subcontractor. In reversing, the United States Supreme Court reasoned that any situation created by employees which involves their employer is a dispute which is their own and is not secondary.[10] Therefore, such action is not a violation of Section 8(b)(4)(B), which states that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Both *National Woodwork* and *Houston Insulation* give a special place, especially in the construction industry, to work preservation clauses. These clauses, provided the relationship involved is primary, are protected against an attack from the secondary boycott sections of the National Labor Relations Act.[11] Where the tactical object of the agreement or the boycott is the employer of the employees, and the agreement or boycott is for the benefit of those employees, then the clause and its enforcement are legitimate. On the other hand, where the objective is "tactically calculated to satisfy union objectives elsewhere," the use of economic pressure is forbidden.[12] "The touchstone," it is

[5] This "control test" of the NLRB was not before the Court, but the fact that the dissenters in this case and Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664 (1967), speak of control as irrelevant, and the fact that the thrust of the majority's argument would not allow the introduction of a third party with "control" of the work assignment to render secondary that which would otherwise be a primary work preservation dispute, call into question the viability of this doctrine.

[6] 386 U.S. 664 (1967).

[7] 357 F.2d 182 (5th Cir. 1966).

[8] 148 N.L.R.B. 866 (1964).

[9] The majority read Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945), noted in 1963 Ann. Surv. Mass. Law §14.4; 1965 Ann. Surv. Mass. Law §15.2, as prohibiting boycott activities which have the object of affecting conditions elsewhere than with one's own employer. The Houston case was limited to exercising economic pressure by one group of employees to secure benefits for other employees of the same employer.

[10] 386 U.S. at 668-669.

[11] Labor Management Relations Act §8(b)(4)(B), 29 U.S.C. §158(b)(4)(B) (1964), as amended. [Hereinafter cited as LMRA.]

[12] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. at 644.

stated, "is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."[13]

§12.3. **Right of union to impose fines.** The United States Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*,[1] upheld the right of a union to impose fines and seek damages in a court action against its members who, in violation of a union rule, crossed the union's authorized picket lines during a lawful strike. The National Labor Relations Board had found that even if the conduct was "restraint and coercion" and prevented the union members from exercising rights, guaranteed in Section 7, to "refrain from" concerted activities, the fines were not a violation of Section 8(b)(1)(A).[2] The Board reasoned that to rule otherwise would be a prohibited imposition on the right of a labor organization to prescribe its own membership rules.[3] The Court of Appeals for the Seventh Circuit reversed,[4] holding that the local's conduct violated Section 8(b)(1)(A). The Supreme Court, in reversing the court of appeals, held that even if this action could be characterized as restraint and coercion, it is not the "restraint and coercion" forbidden by Section 8(b)(1)(A).[5] Unlike the NLRB, the Court did not rely upon the proviso[6] to that section, but concluded from the legislative history that it was never the intent of the section to impose restrictions on the union's traditional power, as an incident or corollary of the contract between the union and its members, to impose reasonable fines and seek their enforceability in the courts.

§12.4. **Inherently destructive behavior.** In *NLRB v. Great Dane Trailers, Inc.*,[1] the employer refused to pay striking employees vacation benefits accrued under a terminated collective bargaining agreement. The employer announced an intention to pay such benefits to non-strikers. The Board held that such action constituted a discrimination in terms and conditions of employment which would discourage union membership and was, therefore, an unfair labor practice under Section 8(a)(3).[2] The Court of Appeals for the Fifth

[13] Id. at 645.

§12.3. [1] 388 U.S. 175 (1967), noted in 9 B.C. Ind. & Com. L. Rev. 221 (1967).
[2] 149 N.L.R.B. 67 (1964).
[3] Id. at 69.
[4] 358 F.2d 656 (7th Cir. 1966).
[5] "Restraint and coercion" previously had been limited to physical force and threats and to economic reprisals in Perry Norvell, 80 N.L.R.B. 225, 239 (1948). In NLRB v. Drivers Local 639, 362 U.S. 274 (1960), the United States Supreme Court made it clear that economic pressure through picketing, recognitional or otherwise, was not within the orbit of Section 8(b)(1).
[6] The provisio to Section 8 states in relevant part: ". . . *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

§12.4 [1] 338 U.S. 26 (1967), noted in 9 B.C. Ind. & Com. L. Rev. 213 (1967).
[2] 150 N.L.R.B. 438 (1964).

Circuit denied enforcement of the Board's order believing that the possibility of motivation by legitimate business purposes was sufficient to overcome the "unfair labor practice."[3] The Supreme Court reversed with directions to enforce the Board's order. The Court held that the employer's conduct was inherently destructive, i.e., "conduct [which] carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended.' "[4]

Even in the light of legitimate motivation, therefore, the action would be a violation of Section 8(a)(3).[5] If, on the other hand, the employer's conduct results in a "comparatively slight" infringement on employee rights, a showing of substantial and legitimate business motivation creates a presumption of legality.[6]

§12.5. **Board's power to construe a contract.** In two other cases decided during the 1967 SURVEY year, the United States Supreme Court clarified the relation between the use of grievance and arbitration procedures and recourse to the Board to construe a contract in unfair labor practice cases. In *NLRB v. C & C Plywood*,[1] the Court upheld the power of the Board to construe a contract, but only insofar as it was necessary to determine the existence of an unfair labor practice. In the instant case, the employer had instituted a premium pay plan at an identical rate for workers previously possessing different pay rates. This action was taken during the contract term without prior consultation with the union. Although the contract provided for grievances, but not for final arbitration, and although the employer maintained that he had a contractual right to take unilateral action, the Board found that the employer refused to bargain collectively[2] and interfered with rights guaranteed to the employees.[3] This ruling was reversed by the Court of Appeals for the Ninth Circuit[4] on the grounds that the Board did not have jurisdiction to decide a case which depended upon the meaning of the collective bargaining agreement. The Supreme Court, in reversing, held that although Congress never intended the NLRB to have plenary power to determine the rights of parties under all collective agreements,[5] this did not deny jurisdiction to the Board to interpret a contract where a statutory right is at stake.[6]

3 363 F.2d 130 (5th Cir. 1966).

4 388 U.S. at 33, quoting, in part, Labor Board v. Erie Resistor Corp., 373 U.S. 221, 228 (1963), noted in 1963 Ann. Surv. Mass. Law §14.8.

5 388 U.S. at 33-34.

6 Id. at 34.

§12.5 1 385 U.S. 421, *rehearing denied*, 386 U.S. 939 (1967), noted in 8 B.C. Ind. & Com. L. Rev. 997 (1967).

2 LMRA §8(a)(5).

3 Id. §8(c)(1).

4 351 F.2d 224 (9th Cir. 1965).

5 See LMRA §301.

6 The Board's policy of deferring to an arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and

In the second case, *NLRB v. Acme Industrial Co.*,[7] the Supreme Court, in reversing the Court of Appeals for the Seventh Circuit, upheld the Board's finding of a violation of refusal to bargain[8] where the company refused to give the union requested information relative to the removal of specific equipment. The company claimed it was justified by the contract to withhold such information and, in any case, the contract had an arbitration clause for any grievances. The court of appeals[9] refused to enforce the Board's cease-and-desist order, maintaining that since there is a provision for binding arbitration of differences, the Board had no jurisdiction. In reversing, the Supreme Court noted that the Board does not, in this instance, encroach upon an arbitrator's prerogative to construe a contract, because the information requested was relevant to the union's evaluation of the alleged grievance. This may represent the full circle from *NLRB v. Truitt Manufacturing Co.*,[10] which held that each case must turn upon its particular facts. The result of the present case is to require the parties to conform to good bargaining practice by furnishing relevant information, which will "be of use to the union in carrying out its statutory duties and responsibilities."[11] This entire area of concurrent jurisdiction of arbitrators and the Board is open to many questions, including the jurisdiction and power of the Board when the contractual provision for arbitration is urged as a defense to a charge of unfair labor practices.

§12.6. Preemption. The question of preemption was again before the Court in *Vaca v. Sipes*.[1] The case involved a suit in the state court by a union member alleging that the refusal by the union to take his grievance to the final step of arbitration was arbitrary, capricious and without just and reasonable cause. His discharge was based on grounds of poor health, but since there was conflicting medical evidence the union filed and processed a grievance. When a new doctor's report did not support the union member, the union declined to take the matter to arbitration. The employee brought suit against the union in the state court and won compensatory and punitive damages. The Supreme Court of Missouri upheld the jurisdiction of the state court.[2] Although the union action is at least arguably an unfair labor practice, subject to the NLRB,[3] the United States Supreme Court held that the duty of fair representation is a judicially developed doctrine

---

policies of the Act." Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955), does not deprive the Board of jurisdiction under Section 10(a). See International Harvester Co., 138 N.L.R.B. 923, 925-926 (1962).

7 385 U.S. 432 (1967).

8 LMRA §8(a)(5).

9 351 F.2d 258 (7th Cir. 1965).

10 351 U.S. 149 (1956).

11 385 U.S. at 437.

§12.6. 1 386 U.S. 171 (1967), noted in 8 B.C. Ind. & Com. L. Rev. 662 (1967).

2 397 S.W.2d 658 (Mo. 1965).

3 LMRA §8(b)(1)(a). See also Miranda Fuel, 140 N.L.R.B. 181 (1962).

subject to the jurisdiction of the state courts.[4] The Court outlined the federal standards of fair representation as follows: (1) a union may not arbitrarily refuse to process a grievance; (2) a breach of the duty occurs when a union's conduct is arbitrary, discriminatory, or in bad faith; (3) the individual employee has no absolute right to have his grievance taken to arbitration; and (4) the arbitration procedure assumes that each party will endeavor in good faith to settle grievances short of arbitration.[5] In the instant case, the Court reversed for failure to apply a federal standard, since the state court did not take into account that a meritorious grievance might not be processed in good faith. This case leaves open many questions including the problem of remedies, the problem of separate suits against the employer and the possible inconsistent results by the NLRB and the courts in separate cases.[6]

B. First Circuit Court of Appeals Decisions

§12.7. **Bargaining unit.** The insistence by the Court of Appeals for the First Circuit that the National Labor Relations Board articulate with precision its reasons for selecting a particular unit of employees for a bargaining unit was again manifested in this Survey year. In *NLRB v. Purity Food Stores, Inc.*,[1] the court rejected the Board's conclusion that a single retail food store in a chain of seven stores was an appropriate bargaining unit. In the court's view, the findings of the Board as to the extent of centralization of the chain store's integrated operations[2] were incompatible with the Board's determination that the unionization of one store would not unduly disrupt the operation of the chain.[3] The reluctance of the court to accept the Board's determination may have been influenced by the fact that within the past five years the position of the Board on this question has undergone complete reversal.

Until 1962, the Board had ruled that, in all retail chain stores, not

[4] The Court based its finding of state jurisdiction on the reasoning set out in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). The concurring opinion rejected any notion of concurrent jurisdiction and held that a breach of the duty of fair representation is an unfair labor practice and subject to the exclusive jurisdiction of the NLRB. 386 U.S. at 198. See also Miranda Fuel Co., 140 N.L.R.B. 181 (1962), noted in 1963 Ann. Surv. Mass. Law §14.8; Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964).

[5] See 386 U.S. 171 (1967).

[6] This very situation may soon present itself since the discharged employee is now suing the employer for breach of contract.

§12.7. [1] 376 F.2d 497 (1st Cir. 1967).

[2] This evidence included finding that there was extensive interchange of employees among the stores, the chain used centralized personnel policies, and centralized decisions were made as to hiring and firing, wage and job classification, and merchandising.

[3] 376 F.2d at 501-502.

necessarily limited to food stores, the appropriate unit should include employees of all stores in a geographic area or administrative division of the employer.[4]

In 1962, however, the Board reconsidered this policy in its decision in *Sav-On Drugs*.[5] In that case, the union sought to represent separate units of the employer's chain of stores. The Regional Director of the NLRB, in denying the union's petition, ruled that the appropriate bargaining unit in cases involving retail chain stores, should embrace the employees of all the stores within a definable administrative division or geographic area. On appeal, the NLRB ruled:

> In our opinion that policy [the Director's] has overemphasized the administrative grouping of merchandising outlets at the expense of factors such as geographic separation of the several outlets and the local managerial autonomy of the separate outlets. . . . We have decided to modify this policy and to apply to retail chain operations the same unit policy we apply to multiplant enterprises in general. Therefore, whether a proposed unit which is confined to one of two or more retail establishments making up an employer's retail chain is appropriate will be determined in the light of all the circumstances of the case.[6]

By 1964 the destruction of the rule was completed by the Board's ruling that single-store units were presumptively appropriate.[7] Rather than accept this blanket presumption, the court now seems to be requiring an affirmative showing by the Board that the single-store unit would not create undue friction in labor relations in the operation of the entire retail chain.[8]

In an analogous situation, the NLRB recently changed its position concerning the appropriate bargaining unit for truck drivers. Traditionally, the Board had automatically included truck drivers in the more comprehensive bargaining units of warehouse employees.[9] In 1962, however, the Board ruled that such cases would henceforth be decided on the standard criteria for determining community of interest, and that each case would be decided on its merits.[10] These criteria include the following: (1) whether the workers have related or diverse activities, modes of compensation, wages, hours, supervision

4 Robert Hall Clothes, 118 N.L.R.B. 1096 (1957).

5 138 N.L.R.B. 1032 (1962).

6 Id. at 1033.

7 Frisch's Big Boy Ill–Mar, Inc., 147 N.L.R.B. 551 (1964) (representation proceeding); 151 N.L.R.B. 454 (1965) (order); *enf. denied,* NLRB v. Frisch's Big Boy Ill–Mar, Inc., 356 F.2d 895 (7th Cir. 1966).

8 The alleged failure of the Board, however, to abide by the requirements in Purity that it state with sufficient clarity the reason for its single-store determination does not serve as the basis for a district court injunction of the election in the designated bargaining unit. Big Y Supermarkets v. McCulloch, 263 F. Supp. 175 (D. Mass. 1967).

9 Challenge-Cooke Bros., 129 N.L.R.B. 1235 (1961).

10 Koester Bakery Co., 136 N.L.R.B. 1006 (1962).

or other conditions of employment; and (2) whether the workers are engaged in the same or related production process.[11]

In *NLRB v. Chamberland Farms, Inc.*,[12] the Board had determined that truck drivers could be included in the more comprehensive bargaining unit of production workers. The Board based its determination on a finding of community of interest between the truck drivers and the production workers.[13] On appeal, the court of appeals reversed, remanding the case for further findings to support the Board's determination of the existence of a community of interest. The court, in remanding, noted that the Board's reliance on the fact of uniform fringe benefits for both the truck drivers and production workers was insufficient, in itself, to support a finding of community of interest.[14]

Both *Cumberland Farms* and *Purity Foods* involved situations where the Board had recently changed its position concerning determination of the appropriate bargaining unit. Both decisions by the court of appeals may be interpreted as a dissatisfaction by the court with the Board's application of its new method of determination. It would appear that if the Board is to have any success in the courts, in upholding Board determinations, it must further define and more carefully apply the criteria it is now using in determining appropriate bargaining units.

§12.8. **Membership cards.** The First Circuit Court of Appeals was presented with several cases, during the 1967 SURVEY year, involving the interpretation and effect of union membership cards. In *NLRB v. Freeport Marble & Tile Co.*,[1] the court ruled that membership cards signed by a majority of employees may not be relied upon as a basis for a bargaining order after an election has been lost, where the purpose of the cards in question is limited to obtaining an election, rather than for unconditional membership. The court admonished the union for the lack of clarity in the wording of the membership cards,[2] and indicated a reluctance to enforce a bargaining order based on such ambiguously worded cards.[3] In *NLRB v. Gorbea, Perez & Morell*,[4] the court held that just as an employee may not be heard to complain that he intended an unconditional membership card to be limited to use in a petition for election,[5] so also will the court refuse

11 Id. at 1011.
12 370 F.2d 54 (1st Cir. 1966).
13 Id. at 57.
14 Id.

§12.8. 1 367 F.2d 371 (1st Cir. 1966).
2 Id. at 372-373.
3 Id. at 373.
4 300 F.2d 886 (1st Cir. 1962).
5 Where, however, the union solicits an unconditional membership card from an employee on the oral representation that the card is solely for the purpose of demanding an election, the courts will refuse to interpret the card as a general membership card. See Cunningham, The Congressional Labor Agenda: National Emergency Strikes and Other Problems in Search of Solution, 8 B.C. Ind. & Com. L. Rev. 735, 745-746 (1967).

to entertain a union's claim that membership cards, which are on their face conditional upon an election, were actually intended as general membership cards.[6]

In *NLRB v. Southbridge Sheet Metal Works,*[7] the union solicited membership cards from a majority of the company's non-clerical employees. The membership cards conferred upon the union the power to represent the signed employee for purposes of collective bargaining, and were to remain in "full force and effect for one year from date and thereafter, subject to thirty (30) days' written notice of my [employee's] desire to withdraw such power and authority to act for me. . . ."[8] The employer refused to bargain with the union, and the union submitted to a consent election, which it lost.

The union filed an objection to the election with the Regional Director of the NLRB.[9] The Director recommended that the election be set aside, which recommendation was adopted by the Board at a formal hearing. The employer appealed, contending that the union had waived any unfair labor practice charges by consenting to the election. In affirming the Board's decision, the court of appeals specifically adopted a Board ruling, previously announced in *Bernel Foam Products,*[10] that even if a union lost a consent election, it could seek an order to bargain based on a showing (1) that the union had a majority of employees signed before election; and (2) that this majority was destroyed by illegal conduct by the employer prior to the election.[11]

The employer challenged the validity of the membership cards solicited by the union, contending that the thirty-day notice requirement in the cards constituted an invalid restriction on the power of the employee to withdraw approval of authority of the union to bargain in behalf of the employee. Both the Board and the court conceded the restriction to be invalid.[12] The court, however, found that there was no evidence that the employees understood that their right of withdrawal was restricted. The court held that "under these circumstances, we do not think that respondent [employer] has met its burden of showing that employees underwent a change of mind or were prohibited [by the withdrawal restriction] from manifesting it."[13] It would appear, thus, that where there are patently invalid

6 300 F.2d at 888.

7 65 L.R.R.M. 2916 (1st Cir. 1967).

8 Id. at 2919.

9 The union objected to activities of the employer which it alleged were in violation of LMRA §8(a)(1).

10 146 N.L.R.B. 1277 (1964).

11 65 L.R.R.M. at 2917.

12 Id. at 2919. The court admonished the union for the invalid language in the cards in the following language: "We cannot emphasize too strongly our disapproval of such clauses, and we express our hope that the Board will make all feasible efforts to bring about the elimination of such unwarranted representations on authorization cards." Id.

13 Id.

restrictions on solicited membership cards, these cards may still be used as a basis for a bargaining order, unless the employer can carry the burden of proving that the invalid restrictions affected employee action.

§12.9. **Other litigation.** In three per curiam opinions, the circuit court affirmed decisions of the NLRB. In the first, *NLRB v. McCormick Longmeadow Stone Co.*,[1] the court held that evidence, including evidence of the employer's opposition to unionization of his employees and of the employer's remarks to the employee after discharging him, supported the NLRB's finding that the discharge was discriminatory under Section 8(a)(3) of the act[2] even though the employee was also guilty of conduct which would have warranted discharge. In *Machaby v. NLRB*,[3] the court upheld the Board's dismissal of a union's complaint of an unfair labor practice. A union steward had instructed the employees that if they were asked to work in a particular locality, which in reality was not "dangerous," they were to see him and he would "advise" them not to work there. This was an improper instruction and adequate cause for discharge. In the third case, *NLRB v. Tower Iron Works Inc.*,[4] the court enforced a Board order forbidding the employer from recognizing an independent union unless and until it won a Board-conducted election. The independent union had been recognized at a time when the international union, which dealt with the multi-employer association of which the employer had been a member for over ten years, had not been notified of the dissolution of the association. The international union was, in fact, affirmatively misled by the employer into believing that the association was still in existence and had therefore continued to attempt to deal with the association rather than with the individual employer. In effect, the employer had not only frustrated any further joint bargaining, but also deterred its employees from separate bargaining.

C. District Court for Massachusetts Decisions

§12.10. **Jurisdiction.** In two petitions by the National Labor Relations Board, the district court indicated that, before issuing injunctive relief pending the completion of a Board hearing, it would insist on something more than the statutory requirement of "reasonable cause to believe" that a violation of the National Labor Relations Act has occurred.[1] Not only must it be clear that the applicable law has been

§12.9. [1] 374 F.2d 81 (1st Cir. 1967). See also NLRB v. Pioneer Plastics Corp., 65 L.R.R.M. 2676 (1st Cir. 1967), *cert. denied*, 389 U.S. 929; NLRB v. Gass, 65 L.R.R.M. 2221 (1st Cir. 1967).
[2] 374 F.2d at 82.
[3] 377 F.2d 59 (1st Cir. 1967).
[4] 366 F.2d 189 (1st Cir. 1966).

§12.10. [1] Hoban v. Local 4, Operating Engineers, 65 L.R.R.M. 3009, 3011 (D. Mass. 1967).

violated, it must also be shown that injunctive relief would be "just and proper" under the circumstances of the case.[2] Among the factors which determine the propriety of such injunctive relief are whether the conduct was a clear violation of the law and whether the violation is causing irreparable injury.[3]

Two cases of first impression contributed to the seemingly endless litany of cases under Section 301 of the National Labor Relations Act. In *Keay v. Eastern Air Lines*,[4] a petition to set aside an arbitration award, a matter ordinarily within the state court's jurisdiction,[5] was dismissed since the award came within the coverage of the Railway Labor Act provision for exclusive review in a federal court.[6] As the federal court's removal jurisdiction was dependent on the state court's original jurisdiction, the petition was dismissed.[7] In *United States Lines Co. v. International Longshoremen's Ass'n*,[8] the court ruled that it had admiralty jurisdiction over a suit for breach of a collective bargaining agreement of a maritime nature. In such suits, however, the evolving principles formulated under Section 301 will be applicable with the one outstanding exception that in admiralty trials the parties do not have the full right to a trial by jury.

§12.11. Excelsior rule. The much debated and litigated *Excelsior*[1] rule, which requires an employer to furnish the name and address of each employee before an election, was upheld in *NLRB v. Wyman Gordon Co.*,[2] in which the court joined the majority of jurisdictions[3] ruling that such a rule was enforceable as a valid exercise of the Board's rule-making powers. This insures reasonable means of access to voters in an election without violating either the employees' right to privacy or those provisions of the act prohibiting an employer from delivering a "thing of value" to a union representative.[4]

§12.12. Other litigation. In *Local 2, Telephone Workers v. International Brotherhood of Telephone Workers*,[1] the district court interpreted Section 462 of the Labor Management Reporting and Disclosure

2 Id.

3 Greene v. Pollard Co., 258 F. Supp. 475 (D. Mass. 1966). In secondary boycott injunctions the irreparable injury must apparently be inflicted on the neutral party rather than the primary employer. Hoban v. Local 205, U.E., 64 L.R.R.M. 2142 (D. Mass. 1966).

4 267 F. Supp. 77 (D. Mass. 1967).

5 See Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

6 45 U.S.C. §159 (1964).

7 See Freeman v. Bee Machine Co., 319 U.S. 448 (1943).

8 265 F. Supp. 666 (D. Mass. 1966).

§12.11. 1 See Excelsior Underwear, 156 N.L.R.B. 1236 (1966).

2 65 L.R.R.M. 2763 (D. Mass. 1967).

3 Since the court's decision two additional decisions have approved the Excelsior doctrine. NLRB v. Hanes Hosiery Division, 66 L.R.R.M. 2264 (4th Cir. 1967); NLRB v. Beech-Nut Life Savers, 66 L.R.R.M. 2327 (S.D.N.Y. 1967).

4 65 L.R.R.M. at 2766.

§12.12. 1 261 F. Supp. 433 (D. Mass. 1966).

Act[2] as prohibiting an international union from imposing a trusteeship on an affiliated local unless the international constitution or by-laws expressly state the procedure to be followed in such proceedings. The recitation in the union constitution that trusteeships may be imposed by the international was held to be insufficient when not coupled with a statement of the manner or procedure under which the trusteeship should be imposed.

In *Local Joint Executive Board v. Joden Inc.*,[3] the court determined that principles of federal law which require a successor employer to abide by the arbitration provisions of his predecessor's collective bargaining agreement[4] apply to an employer whose operation is too small to come within the Labor Board's self-imposed jurisdictional standards,[5] yet which has more than a de minimis effect on interstate commerce.

In a civil action against a labor union by a workman for petition for readmission, the court in *Stone v. Local 29, Boilermakers*[6] held that the workman who conceded that he was validly suspended from union membership was not a "member" within the Landrum-Griffin Law's definition of members of a labor organization.[7] Hence, he did not have standing to bring the suit under provisions of the statute securing rights of members of a labor union.[8] The court also held that denial of his petition for readmission to membership was not a violation of the statute governing safeguards against improper disciplinary action by a labor organization.

D. Massachusetts Supreme Judicial Court Decisions

§12.13. Non-profit organizations. The Supreme Judicial Court has twice within the 1967 Survey year indicated that it had no intention of creating judicial inroads on the *Saint Luke's*[1] doctrine, wherein the operation of a non-profit hospital was held not to be a matter in industry and trade so as to be within the coverage of the Massachusetts Labor Relations Act.[2] In *Memorial Hospital v. Labor Relations Commission*,[3] the Court was faced with what was contended to be a legislative reversal of the *Saint Luke's* decision. In Chapter 576

2 29 U.S.C. §464(c) (1964).
3 262 F. Supp. 390 (D. Mass. 1966).
4 See Wiley v. Livingston, 376 U.S. 543 (1964), noted in 1964 Ann. Surv. Mass. Law §15.3.
5 See Siemons Mailing Service, 122 N.L.R.B. 81 (1958).
6 262 F. Supp. 961 (D. Mass. 1967).
7 Id. at 963.
8 Id.

§12.13. 1 Saint Luke's Hospital v. Labor Relations Comm'n, 320 Mass. 467, 70 N.E.2d 10 (1946).
2 G.L., c. 150A.
3 1967 Mass. Adv. Sh. 165, 23 N.E.2d 527.

of the Acts of 1964, Section 3,[4] hospitals were, for the first time, included in the Labor Relations Act's definition of "employer" so as to be subject to the act. Had the statutory amendment gone no further, it is likely that the courts would have construed the amendment to extend coverage of the act to all hospital employees. As the Court noted, however, the 1964 amendment's inclusion of hospitals within the definition of "employer" was coupled with the express inclusion of hospital nurses within the statutory definition of "employee." The Court concluded that the legislative intent was to limit the extension of the act's coverage to nursing employees to the exclusion of all other hospital employees.[5] In a second case, *Wheaton College v. Labor Relations Commission*,[6] the Court ruled that the Massachusetts Labor Relations Act did not extend to the joint operation of a college food facility by a non-profit educational institution and a professional food management service.

The continued application of the *Saint Luke's* doctrine when coupled with the recent enactment of legislation granting collective bargaining rights to state[7] and municipal employees[8] has created the anomalous situation whereby employees of municipal hospitals and educational facilities, long considered the most unprotected employees in the labor movement, have greater collective bargaining rights than similar employees at private hospitals and facilities. This distinction in coverage is, seemingly, based on no apparent or material difference. However, as the Court has often noted in the analogous situation involving charitable immunity from tort liability,[9] any change in the doctrine must emanate from the legislature rather than from the Court.

One point mentioned by the Court that could create procedural problems is its ruling in *Wheaton* that it was following the policy of the NLRB to decline jurisdiction over such operations.[10] The decision of the Board, however, not to assert its admitted statutory jurisdiction over such facilities as educational institutions,[11] race track enterprises,[12] real-estate brokers,[13] racehorse breeders,[14] or other employees with more than a de minimis effect on interstate commerce,[15] yet below the Board's self-imposed jurisdictional standards,[16] is an administrative one which may be asserted or waived without affecting the

4 Amending G.L., c. 150A, §2.
5 1967 Mass. Adv. Sh. at 168-169, 223 N.E.2d at 530.
6 1967 Mass. Adv. Sh. 1071, 227 N.E.2d 735, also noted in §§12.17, 17.4 *infra*.
7 G.L., c. 149, §178F.
8 Id. §§178G-178N.
9 Simpson v. Truesdale Hospital, 338 Mass. 787, 154 N.E.2d 357 (1958).
10 1967 Mass. Adv. Sh. at 1077, 227 N.E.2d at 739.
11 Massachusetts Institute of Technology, 152 N.L.R.B. 598 (1965).
12 Hialeah Race Course, Inc., 125 N.L.R.B. 388 (1959).
13 Seattle Real Estate Board, 130 N.L.R.B. 608 (1961).
14 William H. Dixon, 130 N.L.R.B. 1204 (1961).
15 NLRB v. Fainblatt, 306 U.S. 601 (1939).
16 Siemons Mailing Service, 122 N.L.R.B. 81 (1958).

jurisdiction of the Board.[17] Thus, an action would not lie to enjoin an NLRB proceeding involving Wheaton College, had the NLRB exercised its statutory jurisdiction.

In the *Wheaton* case, the employer, rather than seeking judicial review of an adverse ruling from the state Commission,[18] sought and was granted a writ of prohibition, denying the Commission jurisdiction to hear the controversy. By allowing this procedure, the Court may be inviting the ingenuity of counsel to construe some reason or policy why further situations should not be within the jurisdiction of the state Commission and, thus, stay state proceedings while a case is dragged through the courts.[19] The availability of such dilatory procedures, with the resulting adverse effect on harmonious labor relations, will hopefully result in a strict adherence to the general rule that decisions of the Commission are reviewable only after a formal decision of the Commission rather than by interlocutory appeal.

E. Massachusetts Legislation

§12.14. **General labor laws.** The Commissioner of Labor was again given the power to suspend the labor laws for women and children for two years,[1] and the general labor laws were amended to permit employment of females over eighteen years of age in hospitals.[2] An act was passed providing that the Commissioner of Labor and Industries shall set the predetermined wage rates for construction apprentices.[3] A law was finally enacted to protect the safety and minimum wage standards for migrant workers.[4] The minimum wage law was amended to include a two-year statute of limitation for criminal and civil actions.[5] Still pending before the legislature at the time of this writing was a long overdue measure to strengthen the weak law regulating the private employment agencies in Massachusetts.[6]

§12.15. **Employment security.** The Employment Security Law[1] was amended so that weekly benefits were increased by $7 or fourteen

17 NLRB v. WGOK, 66 L.R.R.M. 2338 (5th Cir. 1967).

18 In the event the union had won the election and the employer chose not to bargain, the union could obtain a bargaining order from the Commission. This later order is appealable to the courts and ordinarily any objection the employer has as to the election may be judicially reviewed only in this type of appeal. Jordan Marsh v. Labor Relations Commission, 316 Mass. 748, 56 N.E.2d 915 (1944).

19 See Leedom v. Kyne, 358 U.S. 184 (1958), noted in 1959 Ann. Surv. Mass. Law §13.10.

§12.14. 1 Acts of 1967, c. 12.
2 Id., c. 95.
3 Id.
4 Id., c. 718.
5 Id., c. 329.
6 House No. 604 (1967), to amend G.L., c. 140, §§46A-46R, as most recently amended by Acts of 1966, c. 729.

§12.15. 1 G.L., c. 151A.

percent, in two steps, from $50 to $54 effective November 12, 1967, and from $54 to $57 on October 13, 1968. At the same time, the base earnings required for eligibility for benefits were increased by 28 percent from $700 to $800, to become effective on November 12, 1967, and to $900 to become effective on February 14, 1968. The amount earned in new employment, subsequent to unemployment caused by a labor dispute, in order for a person to be eligible for unemployment benefits was increased to $800.[2] A better approach to the problem of weekly benefits was adopted by Connecticut which allows a variable maximum based on the average weekly wages of industry.[3]

A special recess commission was set up to study labor's proposal to provide unemployment compensation benefits for persons out of work as a result of a labor dispute.[4] Both New York and Connecticut have laws to this effect.[5] Another special commission was voted for an overall study of the employment security system.[6]

§12.16. **Public employment.** The basic collective bargaining law for municipal employees, Chapter 763 of the Acts of 1965,[1] was amended during the 1967 SURVEY year in two important respects: (1) to limit written collective bargaining contracts in the municipal field to a maximum of three years; and (2) to allow for the designation of a common representative for school committees to deal with a superintendency union.[2]

A law was passed providing that the question of accepting the law establishing a 42-hour week for firefighters in cities and towns may be placed on the ballot in municipal elections.[3]

F. STUDENT COMMENT

§12.17. **Non-profit organizations: Trade or commerce: Wheaton College v. Labor Relations Commission.**[1] Wheaton College, a non-profit Massachusetts educational institution, had undertaken the contract obligation of providing food and dining room facilities for its

2 Acts of 1967, c. 480.
3 Conn. Gen. Stat. Ann. §31-232(a) (1960), as amended, Pub. Acts 589, §1 (1961).
4 Resolves of 1967, c. 69.
5 N.Y. Labor Law §593 (McKinney 1965); Conn. Gen. Stat. Ann. §31-236(4)(a) (1960).
6 Resolves of 1967, c. 70.

§12.16. 1 G.L., c. 149, §§178G-178N. In the first full fiscal year since the enactment of legislation granting collective bargaining rights to municipal employees, the Labor Relations Commission received and processed 199 petitions by labor organizations and municipalities seeking elections, along with thirteen charges of unfair labor practices involving municipalities. The increased burden on the Labor Relations Commission created by the new statute is best manifested by the fact that for the same period the Commission processed only 90 petitions for election and fifteen charges of unfair labor practices in private industry.
2 Acts of 1967, c. 514.
3 Id., c. 177.

§12.17. 1 1967 Mass. Adv. Sh. 1071, 227 N.E.2d 735, also noted in §12.13 *supra*.

resident students and faculty. Since 1959, Wheaton had contracted to have Saga Food Service of Massachusetts, Inc., a Massachusetts business corporation, conduct the daily operation of this food program in the college dining halls.

Students paid Wheaton a comprehensive fee for tuition, room and board, and Wheaton, in turn, paid Saga a contracted amount. Through this and similar arrangements, Saga received gross receipts of over $1.2 million a year from its program at Wheaton and from similar programs at two other Massachusetts colleges. There was no evidence that Wheaton itself realized a profit. Wheaton retained various controls over the program, including a veto power over the discharge of employees. Wheaton, therefore, was considered a joint employer with Saga in the program.[2]

In 1965, the Retail, Wholesale Department Stores Union, AFL-CIO, filed a petition with the Massachusetts Labor Relations Commission in which it sought certification, pursuant to General Laws, Chapter 150A, Section 5(c), as exclusive bargaining agent for the food program's employees. The Commission postponed hearings on the petition while the union filed a similar petition with the National Labor Relations Board. The NLRB declined to assert its jurisdiction

> . . . on the authority of *Young Men's Christian Association of Portland, Oregon*[3] . . . and *Crotty Brothers, New York, Inc.*[4] . . . and because the business of the instant employer [Saga] is directly related to and closely connected with the operation of a non-profit institution.[5] [Footnotes supplied.]

Following the NLRB dismissal, the Commission resumed hearings on the petition, denying motions to dismiss brought by Wheaton and Saga. These latter parties then petitioned the Supreme Judicial Court for a writ of prohibition to prevent the Commission from hearing the union's petition.

Saga and Wheaton argued that the state was preempted from asserting jurisdiction over their activities because the conduct involved came within federal jurisdiction by virtue of the National Labor Relations Act.[6] The Commission answered that Sections 14(c)(1) and (2) of the NLRA[7] specifically enabled it to assert jurisdiction in such matters where federal agencies decline to do so.[8] The parties also placed in issue whether the dispute presented a "question affecting

[2] See Stipulation 2, Reservation and Report at 9.

[3] 146 N.L.R.B. 20 (1964).

[4] 146 N.L.R.B. 755 (1964).

[5] Letter from Regional Director Alpert to Nutter, McClennen & Fish, Feb. 11, 1965. The Union's petition was docketed with the NLRB Regional Director as Case No. 1-RC-8219. No Regional Director decision was issued with regard to the petition; the dismissal was made in accordance with a letter sent by the Regional Director to Wheaton's counsel. Id.

[6] Brief for Petitioners at 7-11.

[7] NLRA §§14(c)(1), (2), 29 U.S.C. §§164(C)(1), (2) (1964).

[8] Brief for Respondents at 4-9.

industry and trade" as was required for the Commission to possess jurisdiction under state law.[9] The Court, assuming, without deciding, that there was no federal bar against the Commission's assertion of jurisdiction HELD: there was no "question affecting industry and trade" as required by state statute. State policy, therefore, would be controverted if the Commission were to assert jurisdiction.

The federal question raised by this case, and avoided by the Supreme Judicial Court, was whether a state agency may assert jurisdiction over an activity when the NLRB declines to assert its jurisdiction on the basis that the activity was closely involved with a non-profit, educational institution. This question is important in that it affects future judicial or legislative action on the state level.

State agencies have been held to be barred from exercising jurisdiction over any labor questions involving conduct which is "arguably protected" or "arguably prohibited" under the NLRA.[10] This, in effect, means that a state may not attempt to exercise jurisdiction over any labor disputes which might, with some degree of justification, be said to be within the coverage of the NLRA.

It was held in *San Diego Building Trades Council v. Garmon*[11] that the mere fact that the NLRB disposes of a case by declining to assert jurisdiction is no indication that the matter is not arguably within the scope of the act. This was said to be true because such a declination "does not define the nature of the activity with unclouded legal significance."[12] In *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association, AFL-CIO,*[13] it was held, however, that a state might assert jurisdiction based upon a refusal by the NLRB's General Counsel to file a charge, although this type of disposition had been cited in *Garmon* as another type which does not adequately define the nature of the activity.[14] The *Hanna* Court made clear, however, that its decision was not a departure from *Garmon* because the disposition by the NLRB had been "illuminated by explanations that do squarely define the nature of the activity"[15] and show the activity to be outside the scope of the NLRA. The Court relied heavily upon the NLRB's finding that the engineers involved there were supervisors and therefore expressly excluded by Section 2(3) of the NLRA[16] from the class of "employees" covered by the act.

The NLRB's policy of not asserting jurisdiction in cases such as *Wheaton,* was most fully explained in *Trustees of Columbia University in the City of New York.*[17] That decision was based upon a

9 Brief for Petitioners at 3-7, Brief for Respondents at 9-13.
10 E.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
11 Id., and cases cited.
12 Id. at 246.
13 382 U.S. 181 (1965).
14 359 U.S. at 245-246.
15 382 U.S. at 192.
16 NLRA §2(3), 29 U.S.C. §152(3) (1964).
17 97 N.L.R.B. 424 (1951).

finding that Congress intended that the NLRB would not assert jurisdiction over "a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."[18] This policy of Congress was not written into the act as Congress believed that such activities would be excluded in any event because of a lack of any substantial effect on interstate commerce.[19] The Court in *Trustees of Columbia* went on to hold that, despite the fact that the policy was not written into the legislation, the NLRB, in its discretion, should implement this policy since the intent of Congress was clear.

Nonetheless, the fact that the policy is not written into the act would seem to distinguish such a case from *Hanna,* where the Court relied upon the express exclusion of supervisors from coverage by the act. The fact that the NLRB speaks of "declining to assert jurisdiction" would seem to argue in favor of the view that the NLRB does possess jurisdiction under the NLRA. State agencies, therefore, would appear to be preempted from assuming jurisdiction unless an express federal statutory provision permits such assumption of jurisdiction.

The Commission argued that Sections 14(c)(1) and (2) of the NLRA provide for such state jurisdiction in the present case. These sections state:

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction; *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.[20]

The petitioners argued, however, that in enacting these sections, Congress only intended to remove the specific "no man's land" resulting from the NLRB's refusal to accept jurisdiction over activities involving less than stated dollar amounts of trade; the NLRB adopted these monetary standards because it was not administratively feasible to accept jurisdiction over the vast number of cases within its exclusive jurisdiction. The petitioners contended that the statutory sections

[18] Id. at 427.

[19] H.R. No. 510, 80th Cong., 1st Sess. 32 (1947).

[20] NLRA §§14(c)(1), (2), 29 U.S.C. §§164(c)(1), (2) (1964).

should be narrowly construed as applying only to cases declined on the basis of a failure to meet the monetary standards.[21] Such an interpretation would seem to be supported in an explanation by the United States Supreme Court of the scope of Section 14(c)(1): "The 'standards' to which §14(c)(1) refers are the minimum dollar amounts established by the Board for jurisdictional purposes. . . ."[22] The petitioners further argued that the Board's decision to decline to assert jurisdiction over non-profit organizations' activities was not based on a failure to satisfy the monetary standards but rather was based on a decision to leave such organizations unregulated in their labor relations. Accordingly, Section 14(c)(1) and (2) would not be applicable.

It is submitted, however, that this interpretation of Sections 14(c)(1) and (2) is too narrow. The primary concern of these sections is those situations where the NLRB declines jurisdiction because of an insufficient effect on interstate commerce. In *Guss v. Utah Labor Relations Board,*[23] the Supreme Court pointed out that the NLRB may decline to assert jurisdiction on the theory that interstate commerce is not sufficiently affected, not only where the particular activity lacks sufficient monetary substance, but also where the industry involved is "more or less typically local."[24] The Court recognized that, in the absence of a specific federal provision enabling the states to assert jurisdiction in such areas, the NLRB's refusal to assert jurisdiction would result in a "no man's land" in both categories of cases.[25]

In *McColloch v. Sociedad Nacional de Marineros de Honduras,* the Supreme Court indicated that it would consider both categories of cases to be included within the scope of Section 14(c)(1) in stating that "the problem to which §14(c) is addressed is the 'no man's land' created by *Guss v. Utah Labor Relations Board. . . .*"[26] Sections 14(c)(1) and (2) would thus appear to be operative whenever the NLRB declines jurisdiction, both because its minimum monetary standards are not met or because the industry involved is local in nature.

In *Wheaton,* it seems clear that the NLRB did not decline to hear the union's petition based upon a failure to meet the monetary standards. The petitioners' contention that Saga's operations met these standards[27] went uncontested by the Commission and was assumed by the Supreme Judicial Court.[28] It is probable that Wheaton also met these standards.[29] It would appear, therefore, that the NLRB refused jurisdiction because the activity, intimately connected with

21 Brief for Petitioners at 7-11.

22 McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20 n.10 (1962).

23 353 U.S. 1 (1957).

24 Id. at 8-9.

25 Id. at 10.

26 372 U.S. 10, 20 n.10 (1962).

27 Brief for Petitioners at 7-8.

28 1967 Mass. Adv. Sh. at 1073, 227 N.E.2d at 737.

29 See Trustees of Columbia University in the City of New York, 97 N.L.R.B. 424, 425 (1951).

the non-profit, educational institution, was considered local in nature.[30] This view finds support in *Utah Labor Relations Board v. Utah Valley Hospital*,[31] where the Supreme Court of Utah found it to be a policy of the NLRA that the state, and not the federal government, should regulate non-profit educational institutions, since they are essentially local in character because they frequently assist the state in carrying out its essential functions.[32] Therefore, since the NLRB's refusal of jurisdiction would come within Section 14(c)(1), the state could assert jurisdiction under Section 14(c)(2). The Supreme Judicial Court's assumption, in *Wheaton*, that the state Board would have jurisdiction, would appear to be correct.

The Supreme Judicial Court, in *Wheaton*, however, found a bar to the state Commission's assertion of jurisdiction. The Commission asserted jurisdiction under General Laws, Chapter 150A, Section 5(c), which provides for certification of bargaining representatives in cases affecting industry and trade. The Court, however, held that the statute was inapplicable because the "non-commercial" undertakings of non-profit, educational institutions do not give rise to questions affecting "industry and trade." The Court considered the activity in this case to be non-commercial because: (1) the dining facilities were not open to the public; (2) the facilities did not realize a profit, in the sense that consumers paid more for the services than they cost; and (3) the employers and employees were engaged in the furtherance of Wheaton's educational purposes. The Court did not consider Saga's involvement relevant even though it was a commercial enterprise which did realize a profit.

The Court believed that its interpretation of the state statute was controlled by *Saint Luke's Hospital v. Labor Relations Commission*.[33] In *Saint Luke's*, a non-profit hospital sought a declaration that the Commission could not assert its jurisdiction over a union's representation petition. The hospital's employees were engaged as cafeteria, laundry and domestic workers serving the hospital's patients. The hospital itself was the sole employer and there was no evidence of any profit being realized by the hospital. The Court held that General Laws, Chapter 150A, Section 5(c), did not enable the Commis-

[30] But cf. State of Maryland v. Wirtz, 269 F. Supp. 826, 832-834 (D. Md. 1964). Assuming that the local character of these institutions was the basis of the NLRB's decision not to assert jurisdiction, it may be argued that the involvement of Saga, a commercial food supplier, should alter this result. However, since the basis of the federal policy is a specific desire to leave questions involving a non-profit educational institution's activities to the states, it would not seem an abuse of its discretion for the NLRB to effectuate this policy by declining jurisdiction even though the substantial operations of a commercial enterprise are also involved.

[31] 235 P.2d 520 (Utah 1951). See Utah Valley Hospital v. Industrial Commission of Utah, 199 F.2d 6 (10th Cir. 1952), which held on the same facts that the state commission was not barred from asserting jurisdiction.

[32] 235 P.2d at 522-524.

[33] 320 Mass. 467, 70 N.E.2d 10 (1946).

sion to assert jurisdiction over operations which do not "affect industry and trade" and that industry and trade are not affected by a non-profit organization's "non-commercial" activities.

The Court's interpretation, in *Saint Luke's,* of Chapter 150A, Section 5(c), may be attacked as an overly narrow construction of the term "affecting industry or trade." The term "affecting" is generally given a broad statutory meaning. Thus, in a non-labor case in Massachusetts, "affected" was defined broadly as meaning "acted upon, moved, or changed."[34] Even if the hospital itself was not engaged in industry and trade, therefore, it might be argued that industry and trade would be sufficiently affected if, for example, a work stoppage by the hospital employees would produce a great effect on commercial suppliers to the hospital.[35] Under this interpretation, activities of the hospital, and of the college in the instant case, would come within the ambit of the statute, and the Commission would, therefore, have jurisdiction.

Even if the *Saint Luke's* interpretation is accepted, however, it is submitted that it should not control the present case. The *Saint Luke's* Court did not hold that the presence of a non-profit organization's non-commercial activity necessarily precludes the operation of the statute, as though a specific exclusion clause to this effect were written into the statute. The Court merely held that such activities, in themselves, bear no relation to industry and trade and, therefore, are not, on their own strength, a basis for the Commission's jurisdiction. If, however, such an activity simultaneously involves a business corporation's profit-making venture, as in the present case, it would not be inconsistent with the *Saint Luke's* decision to hold that industry and trade would be affected within the meaning of the statute. The Court, in *Wheaton,* however, did not consider the presence of a commercial employer to be relevant. Thus, the Court interpreted the Massachusetts statute as though it specifically exempted non-commercial activities in furtherance of a non-profit, educational institution's functions. Such a statutory interpretation appears to be without foundation in the language of the statute.

The *Wheaton* Court conceded that in reaching its interpretation of the statute it relied not only upon the language of the statute itself, but also upon what it said was the state's policy of not asserting jurisdiction when the activities of a non-profit organization are involved. The *Wheaton* Court cited no evidence that the state legislature ever expressed an intent that a non-profit, educational organization's non-commercial activities should be exempt from the Commission's jurisdiction. The criticism in *NLRB v. Central Dispensary & Emergency*

[34] Lyons v. Elston, 211 Mass. 478, 481, 98 N.E. 93, 94 (1912). See State of Maryland v. Wirtz, 269 F. Supp. 826, 832-834 (D. Md. 1967).

[35] This argument was advanced by the Commission in the present case, but was rejected by the Court. Brief for Respondents at 13.

Hospital[36] of a similar public policy finding in *Western Pennsylvania Hospital v. Lichliter*[37] is applicable here:

> In the interpretation of its state labor relations act the Pennsylvania court held that even though the words might be broad enough to include a hospital, nevertheless they could not conceive that the legislature intended to apply the act to such institutions. . . . We cannot understand what considerations of public policy deprive these employees of the privilege granted to the employees of other institutions.[38]

The Court, in *Wheaton,* attempted to justify its policy finding by noting that it is federal policy to decline to assert jurisdiction over such questions. The Court cited *Hathaway Bakeries, Inc. v. Labor Relations Commission,*[39] which had held that since the state labor relations statute was modeled after the federal statute, the policy found to underline the federal statute should be applied in construing the state statute. The Court, however, neglected to determine the rationale behind the federal policy. If this federal policy, as has been suggested,[40] is based upon a belief that these matters should be left to the states, it would be absurd for the state to rely on the federal policy as support for its own decision not to assert jurisdiction.

Surprisingly, the Court did not even explain the rationale behind its own policy of not asserting jurisdiction. In other jurisdictions, however, such a policy has been based most often upon a belief that the public has an interest in the smooth functioning of these worthwhile organizations and that "union organization will interfere with the kind of discipline necessary for the effective operation" of these institutions.[41] This assumption that union recognition heightens the danger of work stoppages is disputed by recent studies which tend to show that most strikes in non-profit institutions are actually a result of a thwarted demand for union recognition and that union representation minimizes the motivation to strike by allowing for alternatives such as arbitration.[42] Furthermore, the present exemption of non-profit institutions results in discrimination against the employees of such institutions, who now not only must contend with wages which are far lower than those of employees doing similar work for commercial employers, but also must work under conditions which are dramatically substandard.[43]

The Court's holding runs against the modern trend to extend the

[36] 145 F.2d 852 (D.C. Cir. 1944).
[37] 340 Pa. 382, 17 A.2d 206 (1941).
[38] 145 F.2d at 853.
[39] 316 Mass. 136, 55 N.E.2d 254 (1944).
[40] See Utah Labor Relations Board v. Utah Valley Hospital, 235 P.2d 520, 522-524 (Utah 1951).
[41] Vladeck, Collective Bargaining in Voluntary Hospitals and Other Non-Profit Operations, 19 NYU Conference on Labor 221, 232 (1966).
[42] Bader, Collective Bargaining in Hospitals and Other Non-Profit Operations, 19 NYU Conference on Labor 235, 262 (1966).
[43] Vladeck, note 41 *supra,* at 222.

privilege of collective bargaining to increasing numbers of employees of non-profit institutions.[44] While extending recognition to employees of non-profit institutions could not be accomplished without undermining the *Saint Luke's* doctrine, the fact that denying these employees the right of collective bargaining creates undesirable results would seem to be a sufficient basis for not extending the *Saint Luke's* doctrine by creating an exemption wherever a non-profit, educational institution's non-commercial activities are involved.

RAYMOND A. NOBLE

[44] See Acts of 1964, c. 567 (confers the benefits of G.L., c. 150A, §5(c), on nurses in non-profit health care facilities); N.Y. Laws 1966, c. 685 (extends guarantees of collective bargaining to various types of employees of non-profit organizations including those working in a "restaurant" of an educational institution); Johnson v. Christ Hospital, 84 N.J. Super. 541, 202 A.2d 874 (Super. Ct. Ch. 1964); Local No. 1644, AFSC & ME, AFL-CIO v. Oakwood Hospital Corp., 367 Mich. 79, 116 N.W.2d 314 (1962); Utah Labor Relations Board v. Utah Valley Hospital, 235 P.2d 520 (Utah 1951); Wisconsin Employment Relations Board v. Evangelical Deaconess Society of Wisconsin, 242 Wis. 78, 7 N.W.2d 590 (1943); Northwestern Hospital of Minneapolis v. Public Bldg. Service Employees' Union Local No. 113, 208 Minn. 389, 294 N.W. 215 (1940). But see St. Luke's Hospital v. Industrial Comm'n, 349 P.2d 995 (Colo. 1960).