JAMES E. TIERNEY
ATTORNEY GENERAL

87-10

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

June 26, 1987

Representative Dan A. Gwadosky
Maine House of Representatives
State House
Augusta, Maine 04333

Dear Representative Gwadosky:

You have inquired whether Legislative Document 1690, "AN ACT to Provide Civil Enforcement of the Anti-strikebreaker Law to Encourage the Settlement and Peaceful Resolution of Labor Disputes," if enacted into law, would be unconstitutional under the Supremacy Clause of the United States Constitution, Article VI, Clause 2. Specifically, you have asked whether it would be preempted by the United States Congress through its enactment of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. L.D. 1690 was enacted by both Houses of the 113th Legislature during its current session, but was returned to the Legislature by Governor John R. McKernan without his signature or approval.[1/] The bill is now awaiting a determination by the Legislature as to whether it will override the Governor's veto. For the reasons which follow, it is the Opinion of this Department that in view of the difficulty of predicting whether the United States Supreme Court will find a particular state statute to be preempted, particularly in the area of labor law, see, e.g., Fort Halifax Packing Co. v. Coyne, -- U.S. --, 55 U.S.L.W. 4699 (June 1, 1987), the Legislature should not refrain enacting this bill on preemption grounds.

The effect of L.D. 1690, if enacted, would be quite simple. The bill prohibits employers from hiring any person or organization "which customarily or repeatedly offers himself or others for employment to perform the duties normally assigned to employees involved in a labor dispute, strike or lockout." It further prohibits the recruiting, procuring, supplying or

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[1/] See attached message of the Governor.

referring for employment of such persons or organizations. The bill does not prohibit an employer from hiring any person or organization other than one who has been employed during labor disputes in the past. The bill is thus aimed at so-called "professional strikebreakers"; it does not attempt to prevent companies involved in labor disputes from hiring permanent new employees to replace the striking or locked out workers, nor does it prevent companies from hiring temporary workers if those workers have not engaged in "strikebreaking" activities in the past.

In general, the bill appears to have been motivated by the use in Maine from time to time of organizations from elsewhere in the country who stand ready to supply temporary workers to employers who are undergoing labor disputes. It does not appear to be aimed at preventing Maine employers from replacing striking workers with other workers who may be available locally, even on a temporary basis.[2/]

Any analysis of the preemption of state law by an act of the United States Congress must always begin with the observation that because of considerations of federalism woven into the fabric of the United States Constitution, the preemption of state law is not favored by the Courts. Thus, before finding a state law to have been preempted by an Act of Congress, the Courts generally insist that there be a clear expression of congressional intent to preempt. Absent such a clear statement, the Courts will find preemption only "'where compliance with both federal and state regulations is a physical impossibility . . . ' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle of the accomplishment of the full purpose and objectives of Congress.' Hines v. Davidowitz, 312 U.S. 52, 67 (1941) . . . " Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978), quoted with approval in CTS Corporation v. Dynamics Corporation of America, --U.S. --, --, 55 U.S.L.W. 4478, 4480 (April 21, 1987).

In the area of preemption under the NLRA, it is first important to point out that there is very little in the way of an expression of congressional intent to be found in the Act, which was passed in 1935. See the observations of Justice (now Chief Justice) Rehnquist dissenting in Golden State Transit Corp. v. City of Los Angeles, --U.S.--, --, 106 S.Ct. 1395, 1403 (1986). Nonetheless, the Courts have, over the last half

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[2/] It should be noted that Maine has had in force for many years a statute which makes "professional strikebreaking" a crime. 26 M.R.S.A. §§ 851-856, enacted by P.L. 1965, c. 189. L.D. 1690 would simply add a civil injunctive remedy to that statute.

century, developed a substantial body of preemption law under the NRLA. This body of law generally subdivides into two distinct doctrines. The first, the so-called Garmon doctrine, holds that state law is preempted if it concerns conduct which is "actually or arguably either prohibited or protected by the [NLRA]." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). If the conduct has actually been prohibited or protected by the Congress, state law is preempted because to allow it to stand would interfere with the "integrated scheme of regulation" established by the NLRA. See Golden State Transit Corp. v. City of Los Angeles, 106 S.Ct. at 1398. Moreover, if the state law deals with conduct even arguably prohibited or protected by the NLRA, it is preempted since to find otherwise would be to infringe on the primary jurisdiction of the National Labor Relations Board to determine the boundaries of the "integrated scheme of federal regulation." Brown v. Hotel & Restaurant Employees Union, 468 U.S. 491, 502-503 (1984).

The second doctrine, deriving from Teamsters-Local 20 v. Morton, 377 U.S. 252 (1962) and reaffirmed in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), proscribes state law which intrudes into certain areas of collective bargaining which the Congress intended to be unregulated. More precisely, the Morton doctrine applies when a state law seeks to deny to one of the combatants in a labor dispute an economic weapon which Congress intended should be available. See Golden State Transit Corp. v. City of Los Angeles, 106 S.Ct. at 1398-99. In order to survive constitutional scrutiny, therefore, L.D. 1690 would have to survive both tests.

As noted above, the Garmon doctrine applies to conduct that is either arguably protected or arguably prohibited by the NLRA. The "arguably protected" branch of the Garmon doctrine is not applicable because the hiring of replacements is not a right that is protected by Section 7 of the NLRA.[3/] With respect to the "arguably prohibited" branch of the Garmon test, the question presented is whether prohibiting the use of so-called professional strikebreakers would constitute an "unfair labor practice," under Section 8 of the NLRA, 29 U.S.C. § 158. If the use of such strikebreakers is (or is arguably) an unfair labor practice prohibited by Section 8, any state action with regard to such a practice would be preempted.

[3/] There is a distinction between conduct that is affirmatively protected by the NLRA and conduct that is merely permitted under the NLRA. See Belknap, Inc. v. State, 463 U.S. 491 (1983). The "arguably protected" branch of the Garmon doctrine applies only to conduct that is affirmatively protected.

It does not appear, however, that the use of professional strikebreakers is expressly prohibited by Section 8. The Supreme Court has held that it is not an unfair labor practice to hire replacement workers during an economic strike. NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 307, 345 (1938). Nor does it appear that there are any cases holding that there would be a different result if the replacement workers were professional strikebreakers.[4/] In the absence of any judicial authority directly dealing with this phenomenon, therefore, it is difficult for this office to conclude that L.D. 1690 would be found to violate the Garmon doctrine.

With regard to the Morton doctrine, the situation is similar. Here, in order to find preemption, a Court would have to determine that the use of professional strikebreakers was a weapon which Congress intended that employers in so-called economic strikes (that is, strikes not involving unfair labor practices) be entitled to have. It is clear, as indicated by Governor McKernan in his veto message, that employers are fully entitled to hire new employees during the course of a labor dispute, NLRB v. MacKay Radio & Telegraph Co., 304 U.S. at 346, but it is also clear that such employees must be permanent if their existence is to be used to deny returning workers their jobs. Belknap, Inc. v. Hale, 463 U.S. at 500. With regard to temporary employees, the Supreme Court has determined that the hiring of such workers does not violate federal law, id., but has not determined that state law prohibiting such action would be preempted. Moreover, even if a state law broadly prohibiting the hiring of strikebreakers generally might post significant preemption problems, Chamber of Commerce v. State, 445 A.2d 353 (N.J. 1982), it is not at all clear that a law aimed solely at professional strikebreakers -- workers who travel around the country for the express purpose of serving as employees in facilities which are the subject of labor disputes -- would meet a similar fate.[5/] In short, it is not at all clear that the use of professional strikebreakers is a

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[4/] It does appear that an employer may not decline to rehire striking workers at the conclusion of the strike unless it has hired the replacement workers on a permanent basis. e.g., NLRB v. Mars Sales and Equipment Co., 626 F.2d 567, 572-73 (7th Cir. 1980).

[5/] Lower state court decisions have not been consistent. A Louisiana anti-strikebreaker statute has been sustained against pre-emption challenge, Warren v. Louisiana Department of Labor, 90 LRRM 2393 (La. Ct. App. 1975), but a Michigan law, similar to Maine's, was struck down, apparently on Morton grounds. Michigan Chamber of Commerce v. Michigan, 115 LRRM 2887 (Mich. Ct. App. 1984).

weapon which Congress intended to secure to employers. Thus, it is difficult to predict at present whether the prohibitions of use of such strikebreakers by a state would be preempted under the Morton doctrine.

In view of this uncertainty, and in view of the general pre-disposition of the Courts, outlined above, not to invalidate state law in the absence of clear congressional policy, this office cannot conclude that L.D. 1690 would be preempted. Accordingly, we would not discourage its enactment by the Legislature.

I hope the foregoing is of some assistance to you. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Governor John R. McKernan, Jr.

Senator Dennis L. Dutremble
Representative Edward A. McHenry
Chairmen, Joint Standing Committee on Labor

Representative Harlan R. Baker
Sponsor, Legislative Document 1690

Legislative Council

STATE OF MAINE
OFFICE OF THE GOVERNOR
AUGUSTA, MAINE
04333

JOHN R. MCKERNAN, JR.
GOVERNOR

June 19, 1987

TO: The Honorable Members of the 113th Maine Legislature

I am returning, without my signature or approval, L.D. 1690, "AN ACT to Provide Civil Enforcement of the Anti-Strikebreaker Law to Encourage the Settlement and Peaceful Resolution of Labor Disputes." My decision to veto this bill has been particularly difficult in light of the unfolding events at the International Paper Company's Jay, Maine plant. I am indeed mindful of the perception that my rejection of this legislation may create, even though this measure would not apply to that situation. My personal abhorrence of having Maine jobs potentially being filled, even temporarily, by "non-resident contractors" is a sad reminder of what can happen when the collective bargaining process breaks down. We all suffer when there is labor-management strife.

I have every hope that management and labor both will strive to reach a mutually acceptable compromise as early as humanly possible, and I implore each side to bargain in good faith. I pledge to do whatever I can to assist in resolving this strike. Despite my personal, strong objection to certain potential hiring practices, I nonetheless must act upon what I believe to be the correct course regarding this bill on its merits alone. That course, to me, is clear. This bill goes beyond acceptable limits and beyond the apparent legislative intent to prohibit professional "strikebreaking" activity.

This bill would expand upon current statutory restrictions by prohibiting a struck employer from contracting with a company that previously has offered its services to other companies involved in labor disputes, strikes or lockouts, without regard to the type and nature of those services or the general business purpose for which any such company exists. The only exceptions to this broad prohibition regard special maintenance or security contractees. Such an overreaching proscription, which effectively includes companies otherwise never considered to employ professional "strikebreakers," unacceptably hampers an employer's legal right to fill vacated positions. Moreover, by effectively preventing an employer from operating during a strike, the bill substantially

hinders the collective bargaining process by changing the incentives to bargain in good faith.

The United States Supreme Court already has ruled in a landmark decision that an employer has a right to hire and maintain replacements for striking employees. National Labor Relations Board v. MacKay Radio and Telegraph Co., 304 U.S. 333 (1937), at 346. Subsequent Supreme Court and lower court decisions have reaffirmed this right and further have recognized such rights in labor dispute and lockout situations. Additionally, the National Labor Relations Board consistently has recognized such a right.

I have expressed my concerns about the dangers of direct state entanglement in a private, collective bargaining process which is controlled by federal law. These concerns are worth noting here. Employers and labor organizations both have legitimate tools available to them when engaging in collective bargaining. Employees can provide considerable incentive to resolve disputes by means of a very powerful weapon -- the strike. Employers can respond, where allowed by federal law, by hiring replacements. This balance has been recognized federally as a just and reasonable one. That balance would be unjustly and adversely disrupted by reducing either side's incentives to continue the bargaining process in good faith.

Just as I oppose sweeping prohibitions of an employer's right to operate during a strike, I would also oppose, and veto, any legislation which attempted to allow an employer to fire a striking worker or which attempted to prevent or regulate in any manner a striking worker's right to seek other employment. If legislation was presented which regulated firms whose sole business was to provide replacement employees for striking workers and the Maine Supreme Judicial Court ruled or advised that such legislation did not violate federal law, I would accept legitimate, so-called "anti-strikebreaker" legislation. I cannot, however, endorse legislation, whether intended or not, which prohibits otherwise innocent companies from providing services to a struck employer.

I realize that some may use this veto to fuel the passions of union leaders or members, but I must do what is right for Maine in both the long and short term. As for the situation in Jay, I implore the parties to negotiate in good faith, to

consider what is in the best interests of our State. In this respect, I support totally the recently passed Joint Resolution of the Legislature, urging the parties to find an agreement which would "allow the workers to return to their normal livelihood."

Because of the reservations and objections outlined above, however, I am in opposition to L.D. 1690 and urge you to sustain my veto.

Sincerely,

John R. McKernan, Jr.
Governor

JRM/lmc

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