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May 8, 1995

Senator Charles M. Begley
Representative Pamela H. Hatch
Co-chairs, Joint Standing Committee on Labor
State House Station #115
Augusta, ME 04333

Dear Senator Begley and Representative Hatch:

I am writing in response to your letter of April 12, 1995, inquiring whether Legislative Document 686, "AN ACT to Prohibit the Employment of Professional Strikebreakers," and a proposed Committee Amendment to Legislative Document 316, "AN ACT to Forbid an Employer from Hiring Replacement Workers During a Strike" would, if enacted into law, be unconstitutional under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, as preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 115 et seq. For the reasons which follow, it is the Opinion of this Department that it is very likely that both of the proposals in question would be found to be unconstitutional.

L.D. 686 proposes to amend an existing statute, 26 M.R.S.A. § 851 et seq., which contains various prohibitions relating to the employment of professional strikebreakers. The proposal would add a new prohibition containing a new definition of a professional strikebreaker[1] and would substitute the remedy of a civil injunction for the current provision making professional strikebreaking activity a crime. 26 M.R.S.A. § 856. The proposed Committee Amendment to L.D. 316, a copy of which is attached, would amend the provisions of another Maine statute relating

[1]The existing statute defines a professional strikebreaker to be one who "customarily and repeatedly offers himself for employment in place of any employee involved in a labor strike or lockout." 26 M.R.S.A. §§ 852-855. L.D. 686 would add a prohibition against "professional strikebreaking activity," defined to mean the offering and supply of more than 100 strikebreakers on at least three occasions within the previous five years.

to the hiring of replacement workers, 26 M.R.S.A. § 591 et seq., eliminating provisions prohibiting the employment of replacement workers during a labor dispute, strike or lockout, 26 M.R.S.A. § 595(3), (4), and substituting therefor a requirement that employers insert a provision into contracts of workers hired as replacements for striking employees that if the strike is settled or if the striking employees offer unconditionally to return to work, the business in question will not be obliged to retain the replacement workers in preference to the strikers.

In 1987, this Department rendered advice to the Legislature with regard to a bill similar in nature to L.D. 686, which would have authorized civil injunctions against the use of professional strikebreakers in Maine.[2] Op. Me. Att'y Gen. 87-10, a copy of which is attached. In that Opinion, this Department advised that, based on the state of the law at that time, it was not clear that a law aimed solely at professional strikebreakers, as distinguished from one relating to the hiring of strikebreakers in general, would be preempted. Since that time, the courts in several states have addressed the question of whether the hiring of strikebreakers generally is preempted by the NLRA, most notably the Supreme Judicial Court of Maine. In Opinion of the Justices, 571 A.2d 805 (Me. 1989), the Supreme Judicial Court advised the Legislature that a proposed law prohibiting the use of replacement workers for a period of 45 days after the beginning of a strike would be preempted under the so-called Morton-Machinists doctrine established by the United States Supreme Court in Teamsters Local 20 v. Morton, 377 U.S. 252 (1962) and Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976). Under that doctrine, described at Op. Me. Att'y Gen. 87-10 at 3, a state law will be found to be preempted if it seeks to deny one of the combatants in a labor dispute an economic weapon which Congress intended should be available. In the Opinion of the Justices, the Supreme Judicial Court found that the hiring of replacement workers by an employer during a strike is such an economic weapon. Opinion of the Justices, supra, 517 A.2d at 808-809. Thus, it advised that a law seeking to prevent the hiring of replacement workers for a fixed period at the outset of a strike would interfere with the employment of such an economic weapon and would be preempted. Id. Since the court's decision, three other courts have similarly ruled that a state prohibition on the hiring of replacement workers is preempted. Charlesgate Nursing Center v. Rhode Island, 723 F. Supp. 859 (D.R.I. 1989); Midwest Motor Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 120, 512 N.W.2d 881 (Minn. 1994); City of Columbus v. Guay, 577 N.W.2d 122 (Ohio Ct. App. 1989).

Since it is now clear that the state may not prohibit the hiring of replacement workers generally, the only question raised by L.D. 686 (as well as by the existing statute, 26 M.R.S.A. § 851 et seq.) is whether it would make any difference for

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[2]The bill was vetoed by Governor McKernan, and did not become law.

preemption purposes if the replacement workers in question were "professional strikebreakers." As indicated in Op. Me. Att'y Gen. 87-10 at 3, n.4, this question has been the subject of the decisions of two intermediate state appellate courts. In Michigan Chamber of Commerce v. Michigan, 115 L.R.R.M. 2887 (Mich. Ct. App. 1984), a Michigan intermediate appellate court held that prohibiting the use of professional strikebreakers was invalidated under the Morton-Machinists doctrine. In Warren v. Louisiana Department of Labor, 90 L.R.R.M. 2393 (La. Ct. App. 1975), however, a professional strikebreaker statute survived constitutional challenge. In that case, the Louisiana Court of Appeals did not discuss the Morton-Machinists doctrine, but rather sustained the statute against a challenge under a different NLRA preemption doctrine, deriving from the case of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), described in Op. Me. Att'y Gen. 87-10 at 3. The court found that the Louisiana statute fitted within an exception to the Garmon doctrine carved out by the Supreme Court, wherein a state statute may be sustained if it can be shown to "touch interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." Warren v. Louisiana Department of Labor, supra, 90 L.R.R.M. at 2394-2395, citing Garmon, supra, 359 U.S. at 244. The court reasoned that since the Louisiana statute was intended to prevent violence, it satisfied the Garmon exception.

While research does not disclose any additional cases dealing with professional strikebreakers that have been decided since this Department's 1987 Opinion, several courts have considered the anti-violence argument relied on by the Louisiana intermediate appellate court in the context of prohibitions against replacement workers generally, and have found it unpersuasive. Most important among these cases is the Opinion of the Justices in Maine, which found that the prohibition on hiring replacement workers for 45 days after the commencement of a strike could not be justified as a means of reducing violence. Opinion of the Justices, supra, 571 A.2d at 809. Similar arguments were rejected by the United States District Court in Rhode Island, Charlesgate Nursing Center v. Rhode Island, supra, 723 F. Supp. at 866, as well as the Minnesota Supreme Court, Midwest Motor Express, Inc. v. IBT, Local 120, supra, 512 N.W.2d at 887-888, and an Ohio intermediate appellate court, City of Columbus v. Guay, supra, 577 N.E.2d at 124-125. As a result, this Department must now conclude that the Warren case is not likely to be followed by either the federal or Maine courts, and that legislation prohibiting the use of professional strikebreakers in Maine will very likely be found to be preempted.

With regard to the proposed Committee Amendment to L.D. 316, the situation is only somewhat less clear. As indicated above, that proposal would

repeal existing law relating to the hiring of replacement workers[3] and replace it with a provision in effect preventing employers from hiring permanent replacement workers. This Department understands that this proposal is based upon the decision of the United States Supreme Court in Belknap, Inc. v. Hale, 463 U.S. 491 (1983). In that case, the Supreme Court held that a state was not preempted under the NLRA from allowing replacement workers to sue for breach of contract if an employer hired them on a permanent basis and then discharged them in order to accommodate returning strikers. This Department is unable to see, however, how the Belknap decision ultimately would allow the proposed Committee Amendment to avoid preemption. In effect, the Committee Amendment would not forbid hiring replacement workers but it would forbid hiring permanent replacement workers. In Belknap, however, the Supreme Court recognized that federal law permits the hiring of permanent, as well as temporary, replacement workers. Belknap, Inc. v. Hale, supra, 463 U.S. at 500. As a result, the Committee Amendment would, in this Department's view, be likely to be found to operate as a limitation on one of the economic weapons which the Supreme Court has recognized an employer may use in the course of a labor struggle. That being the case, it appears likely that the proposed Committee Amendment to L.D. 316 would also be found by the courts to be preempted.

I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

Andrew Ketterer

ANDREW KETTERER
Attorney General

AK:sw
Attachments

cc: Representative Douglas J. Ahearne
Sponsor, Legislative Document 316
Representative Roland B. Samson
Sponsor, Legislative Document 686

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[3]Those provisions, 26 M.R.S.A. § 595(3), (4), were found to be preempted by the NLRA by the Kennebec County Superior Court in 1989, Hayden Brook Logging, Inc. v. State of Maine, No. CV-88-391 (Me. Super. Ct., Ken. Cty., Oct. 12, 1989), but that decision was vacated by the Supreme Judicial Court on the ground that the underlying dispute was not justiciable. Hayden Brook Logging, Inc. v. State of Maine, 574 A.2d 301 (Me. 1990).

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

303j

Committee: LAB
LA: LCC
LR (item)#: 253(02)
WPP Doc. #: 7882GEA
New Title?: Y
Add Emergency?: n
Date: 04/09/95

COMMITTEE AMENDMENT "." TO L.D. 316, An Act to Forbid and Employer from Hiring Replacement Workers During a Strike

Amend the bill by changing the title to "An Act Concerning Contracts Between Employers and Replacement Workers"

Further amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

Section 1. 26 MRSA §595 is amended to read:

26 § 595. ~~Hiring of workers~~ Deterrence of violence during a labor dispute

1. **Legislative findings.** The Legislature finds that:

~~A. The practice of receiving applicants for employment, conducting interviews of job applicants or performing medical examinations of job applicants at the worksite of an employer who is currently engaged in a labor dispute with his employees tends to incite violence by bringing individuals who may be considered as replacements for workers to the physical focus of the labor dispute and by encouraging a direct confrontation between these individuals and the prior employees; and~~

B. The presence of persons carrying dangerous weapons near sites where applications for positions with an employer involved in a labor dispute are being accepted or where interviews of those job applicants are being conducted or medical examinations of those applicants are being performed creates an unacceptable risk of violence; and

C. The public safety requires the regulation of these practices to reduce the likelihood of violence.

2. **Purpose.** The purpose of this section is to reduce the potential for violence during labor disputes by prohibiting certain provocative acts and imposing penalties for failure to obey this section.

~~3.--Receiving-job-applicants-at-worksite-prohibited.--No employer-may-perform-any-of-the-following-acts-at-any-of-that employer's-plants,-facilities,-places-of-business-or-worksites where-a-labor-dispute,-strike-or-lockout-involving-the employees-of-that-employer-is-in-progress:-~~

~~A.--Receiving-persons-for-the-purpose-of-soliciting-or receiving-applications-for-employment-with-the-employer;--~~

~~B.--Conducting-or-having-conducted-interviews-of-applicants for-employment-with-the-employer;-or--~~

~~C.--Performing-or-having-performed-medical-examinations-of applicants-for-employment-with-the-employer.--~~

~~Any-employer-who-violates-this-subsection-is-subject-to-a-civil penalty-not-to-exceed-$10,000-for-each-day-the-violation continues,-payable-to-the-State,-to-be-recovered-in-a-civil action.--Upon-request,-any-court-of-competent-jurisdiction shall-also-enjoin-the-violation-under-section-5.-~~

~~The-Attorney-General,-the-Commissioner-of-Labor-or-any employee,-employees-or-bargaining-agent-of-employees-involved in-the-labor-dispute-may-file-a-civil-action-to-enforce-this subsection.--~~

~~4.--Hiring-off-site-permitted.--An-employer-involved-in-a labor-dispute,-strike-or-lockout-may-perform-hiring-activities prohibited-under-subsection-3-at-any-site-other-than-his customary-plants,-facilities,-places-of-business-or-worksites where-a-labor-dispute,-strike-or-lockout-involving-the employees-of-that-employer-is-in-progress.-~~

~~A.--The-employer-must-notify-the-law-enforcement-agencies of-the-county-and-municipality-in-which-these-activities will-be-conducted-at-least-10-days-before-commencing-hiring activities.--~~

~~B.--No-employee-of-the-employer-conducting-hiring activities-under-this-subsection-and-who-is-involved-in-the labor-dispute,-strike-or-lockout-may-picket,-congregate-or in-any-way-protest-the-hiring-activity-of-the-employer within-200-feet-of-the-building-or-structure-at-which-such activities-are-taking-place.--Violation-of-this-paragraph is-a-Class-E-crime.-~~

5. **Dangerous weapons prohibited.** It is a Class D crime for any person, including, but not limited to, security guards and persons involved in a labor dispute, strike or lockout, to be armed with a dangerous weapon, as defined in Title 17-A, section 2, subsection 9, at a site where applications for

employment with an employer involved in a labor dispute, strike or lockout are being received or where interviews of those job applicants are being conducted or where medical examinations of those job applicants are being performed.

A. A person holding a valid permit to carry a concealed firearm is not exempt from this subsection.

B. A security guard is exempt from this subsection to the extent that federal laws or rules required the security guard to be armed with a dangerous weapon at such a site.

C. A public law enforcement officer is exempt from this subsection while on active duty in the public service.

D. A security guard employed by an employer involved in a labor dispute, strike or lockout may be present at the location where applications for employment with the employer will be accepted, interviews of those applicants conducted or medical examinations of those applicants performed to the extent permitted under Title 32, chapter 93. Nothing in this section may be construed to extend or limit in any way the restrictions placed upon the location of private security guards under Title 32, chapter 93.

Section 2. 26 MRSA §595-A is enacted to read:

§595-A. Contracts between employers and replacement workers. If any business operating in this State enters into an agreement with individuals or groups of employees by which they are to replace lawfully striking employees who regularly perform the majority of their work in this State, the agreement must provide that when the strike is settled or if the striking employees offer unconditionally to return to work, those replacement workers will not be retained by the business in preference to the strikers. The replacement workers may only be given post-strike rights that do not detract from the claims of the striking employees to return to their previous positions. Any agreement written or verbal, express or implied, inconsistent with this provision is not binding to the extent that it differs from this provision.

STATEMENT OF FACT

This amendment replaces the original bill with provisions that address certain legal issues related to hiring replacement workers during a labor dispute. The amendment repeals the provisions in current law that attempted to restrict an employer's right to hire replacement workers during a labor dispute. Superior Court Chief Justice Morton A. Brody declared

those provisions preempted by the National Labor Relations Act in 1989. The amendment retains only those provisions that relate directly to deterence of violence during a labor dispute.

The amendment also adds a new provision affecting a contract between an employer and replacement workers. That contract must provide that when the strike is settled or if the employees offer unconditionally to return to work, the replacement workers will not be retained in preference to the strikers.

117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document No. 686

H.P. 505 House of Representatives, February 28, 1995

An Act to Prohibit the Employment of Professional Strikebreakers.

Reference to the Committee on Labor suggested and ordered printed.

JOSEPH W. MAYO, Clerk

Presented by Representative SAMSON of Jay.
Cosponsored by Representatives: ADAMS of Portland, AHEARNE of Madawaska, BERRY of Livermore, BOUFFARD of Lewiston, BRENNAN of Portland, CHARTRAND of Rockland, CHASE of China, CHIZMAR of Lisbon, FITZPATRICK of Durham, GREEN of Monmouth, HATCH of Skowhegan, HEESCHEN of Wilton, JONES of Bar Harbor, LEMAIRE of Lewiston, LUTHER of Mexico, POVICH of Ellsworth, RICHARDSON of Portland, ROSEBUSH of East Millinocket, ROWE of Portland, SHIAH of Bowdoinham, TOWNSEND of Portland, TREAT of Gardiner, VOLENIK of Sedgwick, Senators: BUSTIN of Kennebec, FAIRCLOTH of Penobscot, MILLS of Somerset, RAND of Cumberland, RUHLIN of Penobscot.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 26 MRSA §852-A is enacted to read:

§852-A. Professional strikebreaking prohibited

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Strikebreaking activity" means the offering or supplying of persons to perform the tasks normally assigned to employees involved in a labor dispute, strike or lockout.

2. Professional strikebreaking activity prohibited. A person, partnership, union, agency, firm, corporation or other legal entity may not perform strikebreaking activities if that entity has contracted on at least 3 occasions within the previous 5 years to supply 100 or more employees to an employer involved in a labor dispute to perform tasks normally assigned to employees involved in the labor dispute.

Sec. 2. 26 MRSA §856, as enacted by PL 1965, c. 189, is repealed.

Sec. 3. 26 MRSA §856-A is enacted to read:

§856-A. Civil action; injunctive or other relief

A person, corporation or labor organization with judicial standing may bring a civil action for injunctive or other relief to enforce this subchapter.

Sec. 4. 26 MRSA §857 is enacted to read:

§857. Exemptions

This subchapter does not apply to the employment of:

1. Security guards. Security guards during a labor dispute if the security guards perform security guard duties only;

2. Special maintenance workers. Special maintenance workers employed by the seller or manufacturer of the equipment maintained or persons who have performed the maintenance work on the equipment prior to the beginning of the labor dispute, strike or lockout; and

3. Permanent employees. Permanent employees involved in the labor dispute regardless of their usual occupation or duty station.

Sec. 5. Application. This Act applies only to the prohibited activity that occurs on or after the effective date of this Act.

STATEMENT OF FACT

This bill prohibits the recruitment or employment of professional strikebreakers and defines the term "professional strikebreaking activity" so that the bill applies only to those persons or organizations that have made a practice of supplying replacement workers during labor disputes.

The prohibition may be enforced through a civil action filed by any interested party. The employment of replacement workers as security guards or as maintenance workers is exempt from the prohibition, as is the employment of permanent employees who choose to work during the strike.

Currently, the employment, during a strike, of a person who customarily and repeatedly offers services in place of a striking worker is a crime, punishable by a fine of up to $300 or 180 days in jail, or both. This bill repeals that provision.