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by *Joseph R. Grodin**

One of my colleagues, upon hearing of this endeavor, asked how I could write a chapter on developments in California labor law when there aren't any. Presumably, what he meant was that the field is so occupied by federal regulations that there is little room for development on a state level. His point, though exaggerated, is well taken.

The Labor Management Relations Act[1] covers a broad range of activities which affect interstate commerce, declaring some to be protected and prohibiting others as unfair labor practices, and vests the National Labor Relations Board with jurisdiction to make determinations and provide remedies. According to the pre-emption doctrine as declared by the United States Supreme Court, the jurisdiction of the NLRB

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1. 29 U.S.C.A. §§ 141 et seq.

is exclusive, in both substance and remedy. Whenever an activity is "arguably" protected or prohibited by the federal act, courts (both state and federal) must yield.[2] Since there are few matters in the labor field which are not reasonably arguable, the pre-emptive effect is substantial.

The LMRA does vest federal courts with original jurisdiction in certain matters, principally the enforcement of collective bargaining agreements under section 301[3] and the provision of damages for certain unfair labor practices under section 303.[4] State courts are held to exercise jurisdiction concurrently.[5] In suits brought in state courts under section 301, the courts are bound to apply principles and precedents of federal law,[6] subject to Supreme Court review.[7] Thus, within the perimeters of the LMRA, for both jurisdiction and substantive rules, federal law predominates.

This does not mean, however, that developments in labor law at the state level are without significance. It is state courts which must determine their jurisdiction in particular cases, and, subject to Supreme Court review, such decisions play a major role in shaping the extent and application of the pre-emption doctrine. With respect to those cases in which they may assert concurrent jurisdiction with federal courts, state courts are frequently called upon to exercise judicial creativity on questions where federal principles, though theoretically applicable, are virtually nonexistent.[8]

2. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959).

3. The union party to the agreement must be one which represents employees in an industry affecting commerce as defined in the act.

4. Section 303 incorporates by reference section 8(b)(4) of the Act, which makes it all unfair labor practice for a union to engage in certain activity, principally secondary boycotts and jurisdictional (work assignment) disputes. These are the only unfair labor practices for which the Act provides judicial relief through damage suits.

5. See McCarroll v. Los Angeles County District Council, 49 Cal.2d 45, 315 P.2d 322 (1957), cert. den. 355 U.S. 932, 2 L.Ed.2d 415, 78 S.Ct. 413.

6. Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337 (6th Cir. [1967]) cert. granted 389 U.S. 819, 19 L.Ed.2d 68, 88 S.Ct. 103 (1967), affd. 390 U.S. 557, 20 L.Ed.2d 126, 88 S.Ct. 1235.

7. Local 174 v. Lucas Flour Co., 369 U.S. 95, 7 L.Ed.2d 593, 82 S.Ct. 571 (1961); Dowd Box Co. v. Courtney, 368 U.S. 502, 7 L.Ed.2d 483, 82 S.Ct. 519 (1961).

8. The Supreme Court has said: "The range of judicial inventiveness will

Finally, there are situations and areas in which neither the pre-emption principles nor the judicial uniformity principle preclude the application of state law by state courts or agencies. This may be the case, for example: (1) where the impact upon interstate commerce is so slight that the NLRB has declined to assert jurisdiction or has indicated by published rule or decision that it would decline;[9] (2) where the particular employment relationship is excluded from coverage under the Act (as with farm labor[10] and public employees); or (3) where the subject matter is deemed to be of "merely peripheral concern"[11] of the Act but of substantial concern under state policy, such as the regulation of violence or mass picketing, or in litigation over exclusively internal union affairs.[12]

Application of the Pre-Emption Principle

In earlier years, perhaps the principal contribution of the California courts to the pre-emption doctrine was in providing opinions which the United States Supreme Court struck down in the landmark *Garmon*[13] cases. Recently, however, California courts have fully accepted the implications of the pre-

be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." Textile Workers Union v. Lincoln Mills, 353 U.S. 448 at 457, 1 L.Ed.2d 972 at 981, 77 S.Ct. 912 at 918 (1957).

9. The NLRB has statutory authority to assert jurisdiction over unfair labor practices which "affect commerce", a term interpreted as coincident with the constitutional authority of congress to regulate interstate commerce. NLRB v. Fainblatt, 306 U.S. 601, 83 L.Ed. 1014, 59 S.Ct. 688 (1938). It also has statutory authority by rule of decision or published rules to decline to assert jurisdiction where it feels the impact upon commerce is "not sufficiently substantial." LMRA § 14(c)(1). State courts and agencies are free to assert jurisdiction over cases so declined. § 14(c)(2).

10. LMRA § 2(3).

11. LMRA § 2(2).

12. For a recent statement of the "peripheral concern" exceptions, see Vaca v. Sipes, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967).

13. Garmon v. San Diego Building Trades Council, 45 Cal.2d 657, 291 P.2d 1 (1955), revd, and remanded 353 U.S. 26 1 L.Ed.2d 618, 77 S.Ct. 607 (1957), 49 Cal.2d 595, 320 P.2d 473 (1958) overruled 53 Cal.2d 475 (on remand) revd. 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959).

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emption principle, and some of the decisions break new ground. For example, on the difficult issue of NLRB declination, our supreme court held in *Russell v. Electrical Workers*[14] that, while resort to the NLRB should not be required when it would obviously be futile, the party seeking relief in a state court bears the burden of showing that the NLRB, on the basis of published rules and decisions, would decline to take the case.

During 1968 the supreme court had occasion to amplify the *Russell* rule in two companion cases: *Musicians Union v. Supreme Court*[15] and *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union Local 16.*[16] Both cases involved injunctions against threatened union picketing to protest an employer's refusal to hire workmen whom the employer said he did not want or need.

In the first case, Charles Finley, owner of the Oakland Athletics baseball club, proposed to hire a union organist and a 25-piece union band for the opening game between the Athletics and the Baltimore Orioles, but the musicians union insisted that he employ a union band at all weekend games, as was the practice of other professional teams in the area. When Finley refused, the union denied its members permission to perform, placed pickets at the entrances to the Oakland Coliseum, and threatened to continue picketing on opening night. Finley and the Coliseum obtained a temporary restraining order, and thereafter a preliminary injunction, restraining picketing at the Coliseum for any purpose relating to the hiring of musicians by Charles O. Finley & Co., Inc. or others. The supreme court granted an alternative writ of prohibition restraining further proceedings in the action on the ground that the trial court lacked jurisdiction to issue the injunction; and, after argument, the court ordered the issuance of a pre-emptory writ.

Finley and the Coliseum advanced several reasons for

14. 64 Cal.2d 22, 48 Cal. Rptr. 702, 409 P.2d 926 (1966).

15. 69 Cal.2d —, 73 Cal. Rptr. 201, 447 P.2d 313 (1968).

16. 69 Cal.2d —, 73 Cal. Rptr. 213, 447 P.2d 325 (1968).

avoiding the pre-emption doctrine, each of which the supreme court rejected. First they argued that the operations of a baseball club, even though crossing state lines, should be regarded as outside the scope of the federal act by analogy to baseball's exemption from federal antitrust regulations. But the court held that exemption is based upon a judicial-legislative history peculiar to the antitrust field and has no application to the field of labor regulation, either by way of constitutional limitation or congressional intent.

Nor was the court prepared to speculate, as did respondents, that the NLRB would choose to decline jurisdiction over a baseball club. While it was true that the board had never asserted jurisdiction over a baseball club, it was also true that it had never declined to do so by "rule of decision" or "published rule" within the meaning of section 14(c). While it had declined to assert jurisdiction over some segments of the sports and entertainment industries it had asserted jurisdiction, particularly in more recent cases, over others. Thus, since there had been no prior resort to the NLRB, Finley and the Coliseum failed to sustain the burden, placed upon them by *Russell*, of establishing that the board would not hear the cause.

Even if the NLRB would assert jurisdiction over the business operations of the Oakland Atheltics, it was argued, the pre-emption principle is inapplicable because the threatened picketing by the union, which had no prior dealings with the ball club and which represented none of its current employees, was simply outside the scope of the Act, either by way of protection or prohibition. But, as the court pointed out, the Act's definition of "employee" includes any employee, and not only the employees of a particular employer,[17] and its definition of "labor dispute" includes "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of

17. LMRA § 2(3).

employer and employee."[18] Thus with reference to the objective sought, the union's picketing to obtain employment opportunity for its members, while not prohibited by section 8 of the Act, was "arguably" protected as a "concerted activity" for employees' "mutual aid or protection" under section 7.[19] At the same time, the means by which the picketing was conducted, according to the allegations of one complaint, "arguably" violated the secondary boycott proscriptions in section 8 by failing to conform to the board's requirements for picketing a "situs" occupied by both a "primary" employer (Finley) and a "neutral" or "secondary" employer (Coliseum), and thereby illegally inducing a secondary work stoppage. Whether the picketing was in fact protected or prohibited was a question for the NLRB, not the state court, to determine.

Finley and the Coliseum next contended that the injunction was justified without reference to the pre-emption doctrine on the ground that it was necessary to protect public safety and order against the turmoil that would ensue if picketing were allowed, particularly on opening night. On this issue the court's opinion was most emphatic:

> The fact that holding the game in the face of the picketing might pose a threat to public safety and order does not convert peaceful picketing that the state may not enjoin into "the kind of mass picketing and overt threats of violence which under the *Allen-Bradley* local case give the state court jurisdiction". . . . The picketing, peaceful in itself, would have caused the ensuing turmoil no more than Finley's decision to hold the game would have. It was for the Board, therefore, to regulate the economic struggle between Finley and petitioners.[20]

18. 29 U.S.C.A. § 152(9).

19. While § 8(b)(6) of the Act proscribes union activity to obtain payment "in the nature of an exaction, for services which are not performed or not to be performed" that language has been held not to extend to demands that workmen be employed, even though the employer regards their work as redundant. NLRB v. Gamble Enterprises, 345 U.S. 117, 97 L.Ed. 864, 73 S.Ct. 560 (1953).

20. 69 Cal.2d at —, 73 Cal. Rptr. at 211, 447 P.2d at 323.

Finally, it was asserted that the court had jurisdiction to issue the injunction in order to prevent trespass upon the property of the Coliseum. It was on this issue that the court's opinion broke new ground for California. This question had been before the United States Supreme Court in *Amalgamated Meat Cutters v. Fairlawn Meats.*[1] In this case the court struck down an injunction against picketing which was arguably prohibited by the Act, and therefore not subject to state court jurisdiction, even though one of the grounds for the injunction had been that the picketing trespassed upon the employer's property; but at the same time the court left open the question of "whether a state may frame and enforce an injunction aimed narrowly at a trespass of this sort."[2]

Several state courts have answered this question in the negative, on the ground that the trespass issue is inextricably related to board jurisdiction, and California now joins that company. "There may be circumstances", the court concedes, "in which the use of trespass laws in labor controversies would reach activities that would have 'no relevance to the board's function' " but in the instant case, where the injunction relies upon the law of trespass, "not to ensure public safety and order, but to institute ground rules governing the economic struggle betweeen the union and the real parties in interest", it trespasses upon the jurisdiction of the board. This is so because "the propriety of labor activity on private property has been a persistent issue in disputes before the Board, and the Board has the power in appropriate cases to authorize such activity."[3]

Consolidated Theatres, involved a quite similar pre-emption issue: whether a state court had jurisdiction to enjoin picketing by the Stagehands Union to compel a moving picture theatre, when showing first-run pictures, to hire a maintenance man whom the theatre said it did not want or need. The court found the picketing to be arguably protected under

1. 353 U.S. 20, 1 L.Ed.2d 613, 77 S.Ct. 604 (1957) reh. den. 353 U.S. 948, 1 L.Ed.2d 857, 77 S.Ct. 822 (1957).

2. 353 U.S. at 24, 1 L.Ed.2d at 616, 77 S.Ct. at 606.

3. 69 Cal.2d at —, 73 Cal. Rptr. at 212, 447 P.2d at 324.

section 7 of the Act, not only because it was designed to create additional employment opportunities for members, (as in the *Musicians Union* case) but also because it served to protect existing jobs at other theatres against the threat by the owners of those theatres to eliminate maintenance men unless all first-run theatres were signed to the same requirement. The court also found the picketing to be arguably prohibited by section 8(b)(6) of the Act, on the basis of evidence that maintenance men who were "employed" did little or no actual work.[3a]

On the basis of the *Russell* rule, these findings provided sufficient basis to overturn the injunction unless the theatre had demonstrated through published regulations and decisions that the board would decline to assert jurisdiction; the court refused to apply the *Russell* rule because the union did not raise the pre-emption argument at the trial level, and the transcript was totally lacking in evidence on that point. It therefore remanded the case for trial, with instructions that it be dismissed if *Consolidated* does not bear its burden of showing board declination.

Collective Bargaining Agreements and Arbitration

Section 301 of the Taft-Hartley Act gives federal courts jurisdiction over suits for violation of contracts between an employer and a labor organization which represents employees in an industry "affecting commerce" as defined in the Act; and, as previously noted, it has been held that state courts have concurrent jurisdiction in such cases, subject to the application of federal law.

Section 301 includes the enforcement of agreements to arbitrate and of arbitration awards,[4] matters which are covered extensively by California's Arbitration Act.[5] This Act prescribes the procedure for bringing petitions to compel arbitration, or to confirm, modify, or set aside arbitration awards. It includes time limits within which such action can be taken,

3a. See footnote 19, supra, page 544.

4. Textile Workers v. Lincoln Mills, 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957).

5. Cal. Code Civ. Pro. §§ 1280–1294.2.

and also specifies the grounds upon which the petition should be granted or denied. There is serious question whether the Arbitration Act applies in cases subject to section 301 of the Taft-Hartley Act. So far that question has not been squarely considered by the courts; indeed, it has been largely ignored.

For example, under federal principles, an order to arbitrate a grievance is not to be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[6] Courts are precluded from inquiring into the merits of a dispute. Moreover, the Supreme Court held in *John Wiley & Sons v. Livingston*[7] that so-called "procedural" issues, such as whether contractual grievance procedures leading to arbitration have been complied with, or excused, or whether unexcused failure to comply avoids the duty to arbitrate, cannot ordinarily be answered without consideration of the merits and should, therefore, be referred to the arbitrator.

The California Arbitration Act is generally in accord with these principles, but section 1281.2 provides, inter alia, that an order to arbitrate should be denied if the court determines that the right to compel arbitration has been waived by the petitioner.

In *Martinez Typographical Union v. Silversun Corp.*[8] a union sought to compel arbitration of a dispute,[9] but the trial court denied relief on the basis of waiver, finding that the union had failed to request arbitration for a substantial period of time, even after notice that the company was about to sell its business. The union remained silent until after the sale had been consummated and the company no longer had the physical facilities with which to comply with the union's demand. On appeal, the union argued that the question of

6. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 (1960).

7. 376 U.S. 543, 11 L.Ed.2d 898, 84 S.Ct. 909 (1964).

8. 256 Cal. App.2d 255, 63 Cal. Rptr. 760, (1967).

9. The dispute was over the union's contention that under the applicable collective bargaining agreement the employer was obligated to pay typographers for certain make-work duties.

waiver was so related to the merits of the dispute that it would be inconsistent with federal principles, as declared in *Wiley,* to deny arbitration. The appellate court rejected the claim of inconsistency, however, on the basis of a statement in *Wiley* that a union "might abandon its right to arbitration by failing to make its claims known";[10] and it affirmed the trial court's ruling, stating that under section 1281.2, the question of waiver was one of fact for the trial court to determine.

It may be that it is not inconsistent in principle with federal law, as interpreted in *Wiley*, to allow waiver, in the sense of "abandonment" as a defense in an action to compel arbitration, and it may be that in the context of the particular facts of *Silversun* a finding of waiver, in that sense, did not conflict with any federal policy. But if the notion of federal uniformity is to have any meaning, then the definition of what constitutes "waiver", or "abandonment", must be regarded as ultimately a federal issue. For example, a defense based upon the failure of the party seeking arbitration to comply with contractual time limits in processing the grievance poses precisely the type of issue which the Supreme Court in *Wiley* held must be referred to arbitration; and for a state court to hold that such non-compliance constituted "waiver" of the right to arbitrate would be contrary to federal policy. Thus, the appellate court's characterization of the waiver issue as one of fact for the trial court, without reference to federal principles, could not be sustained.

Assertion of Individual Rights under a Labor Agreement

What might be regarded as a sub-category of section 301 actions, and in any event closely related to them, are those cases in which a member of a bargaining unit seeks relief against his union, his employer, or both on the ground that he was wrongfully denied some benefit under a collective bargaining agreement.

In *Vaca v. Sipes*,[11] the Supreme Court held that such

10. 376 U.S. at 551, 11 L.Ed.2d at 905, 84 S Ct at —.

11. 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967).

actions are maintainable in federal or state courts as section 301 actions, without regard to potential NLRB jurisdiction. However, to succeed in the face of a defense that he has failed to exhaust contractual arbitration remedies, an employee must prove that the union, as bargaining agent, breached its duty of fair representation in its handling of the employee's grievance.[12] And to do that, he must demonstrate that the union's conduct was arbitrary, discriminatory, or in bad faith.

Vaca v. Sipes involved a union's refusal to process an employee's grievance beyond the labor-management grievance machinery to third-party arbitration. Last year in *Pratt v. Local 683*,[13] a California court applied the doctrine of that case to rescue from summary judgment and demurrer a complaint which alleged that the plaintiff's union had processed his wrongly discharged grievance through the second step of the grievance procedure, but had done so in an incompetent manner, resulting at that point in a unanimous decision against him by the grievance committee. That, in itself, would be insufficient to state a cause of action under federal rules, but the complaint also alleged that the union acted "wilfully and in bad faith", and affidavits filed on the motion for summary judgment alleged personal animosity on the part of the union representative. Though the complaint was filed prior to the decision in *Vaca*, the appellate court held that these allegations were sufficient to create a factual issue under the rule of that case, in a cause of action against the union and its representative, and overruled the summary judgment which had been granted by the trial court. At the same time, the appellate court reversed judgment on a demurrer to a cause of action against the employer for wrongful discharge, stating that plaintiff should be given an opportunity to reframe his complaint under the *Vaca* rule against the employer as well.

12. See Steele v. Louisville & Nashville Ry. Co., 323 U.S. 192, 89 L.Ed. 173, 65 S.Ct. 226 (1944).

13. 260 Cal. App.2d 545, 67 Cal. Rptr. 483 (1968).

Plaintiffs in *Archuleta v. Grand Lodge*[14] did not fare as well. They had been employed by Douglas Aircraft Company at its El Segundo plant, in a bargaining unit represented by the International Association of Machinists. The work was transferred to the company's Long Beach plant, where it was being performed by employees in a bargaining unit represented by a different union, and they were terminated as a result. The IAM filed a grievance on their behalf, claiming that the work transfer was in violation of the applicable collective bargaining agreement, and the grievance was processed to third-party arbitration; but the arbitrator sustained the company's position that no violation had occurred.

After some abortive litigation and several amended complaints, plaintiffs, suing *pro per*, filed a complaint which alleged that the arbitration award was the product of fraud and collusion between the company and the union, and that on the merits they were entitled to relief. Both the company and the union were named as defendants, but only the union was served, and the company did not appear. The union's demurrer was sustained without leave to amend, and the employees appealed.

The appellate court treated the complaint as a petition to set aside an arbitration award, or alternatively to obtain money damages against the union for fraud. As to the first theory, the court held the plaintiffs had not met the requirements of the California Arbitration Act, providing that a petition to set aside an arbitration award must be brought by a party to the arbitration proceeding, and must be filed within 100 days of service of the award.[15] (The action before the court was instituted three years after service of the award on the union.) As to the second theory, the court held the complaint failed to allege the essential elements of fraud under the California law, and it affirmed the judgment of dismissal.

While the result may be defensible, the decision is defective in a number of respects, primarily in its assumption that the issue was resolvable under the state law without regard

14. 262 Cal. App.2d 202, 68 Cal. Rptr. 694 (1968).

15. Cal. Code Civ. Pro. § 1288.

to federal precedent. The action should have been viewed as one against the union for damages arising out of an alleged breach of its duty of fair representation, under the doctrine of *Vaca v. Sipes.* The provision of the California Arbitration Act to the effect that only parties to an arbitration proceeding may petition to set aside an award clearly cannot be applied to preclude relief in such a situation consistent with federal law. Moreover, since the company was not joined as defendant, and since it was a necessary party to any action to set aside the arbitration award between it and the union, the court's consideration of the action as being in part for that purpose was unnecessary. Indeed, it may be that joinder of the company is required under *Vaca*, but leaving that issue aside the questions were, or should have been, whether the complaint was timely filed and, if so, whether it alleged with sufficient specificity the elements of a breach of statutory duty by the union in the process of obtaining the award.

On the timeliness issue, the federal act contains no statute of limitations, and it has been held that resort to California's three-year limitation period on suits to enforce statutory rights is proper.[16] It is difficult to determine from the court's opinion whether that test was met. Although the suit was filed within three years after the date of service of the arbitration award, the acts complained of presumably preceded the award itself. It is also difficult to determine from the opinion whether the allegations were sufficient to meet federal standards under *Vaca*, since they are not set forth in detail; the most that can be said is that the court's analysis in terms of fraud pleadings should not have been determinative.

Public Employees

Governmental bodies are expressly excluded from coverage under the Taft-Hartley Act, and it is here that there is the greatest room, and the greatest need, for legal creativity at the state level. Unfortunately, the quality of public dis-

16. International U. of Op. Eng. v. Fischbach & Moore, Inc., 350 F.2d 936, 19 A.L.R.3d 1026 (1965), cert. den. 384 U.S. 904, 16 L.Ed.2d 358, 86 S.Ct. 1336.

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cussion in this area is often distorted by an overemphasis upon the right-to-strike issue. Whatever is eventually decided on the right of public employees to strike, still an unsettled question under California law,[17] it is doubtful that any effective means can be found to deter public employees from quitting their jobs and picketing when they become sufficiently dissatisfied with their conditions of employment to do so.[18] What is of at least equal signficance is the legal-institutional context in which disputes between such employees and their employers may be resolved, for it is that context, more than rules relating to the legality of strikes, which is likely to determine whether work stoppages will in fact occur.

The principal obstacle to effective labor relations within the public sector has been the dogma that public employment is unique, and that principles from the private sector cannot or should not be applied. There are differences, to be sure, but these are often exaggerated. The modern trend is toward extending the institutions, attitudes, and techniques which have been developed in private industry to government employees.

California has responded to these changes, but slowly. In 1961 the legislature adopted Chapter 10 of the Government Code,[19] which, in language reminiscent of LMRA, declares the right of public employees to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, and the right of such organizations to represent "their members" in such matters. The chapter prohibited public agencies from interfering with these rights, and required them "to meet and confer" upon request of employee organizations and to consider "as fully as (they) deem reasonable" such presentations as are made by the employee organizations on behalf of its members prior to arriving at a determination. However, no provision was made for selection

17. See In re Berry, 68 Cal.2d 137, 65 Cal. Rptr. 273, 436 P.2d 273 (1968). For a further discussion of this case, see York, REMEDIES, and Leahy, CONSTITUTIONAL LAW, in this volume.

18. See In re Berry, supra.

19. Cal. Gov. Code §§ 3500 et seq.

of bargaining representatives, or for exclusive representation. It was unclear to what extent the obligation of an agency to "meet and confer" implied good faith negotiations leading to an agreement, as distinguished from the unilateral consideration of proposals; and no machinery was created for dealing with disputes. Moreover, the statutory declaration of purpose contained an exceedingly ambiguous sentence to the effect that nothing in the statute was to be deemed to supersede "the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations."[20]

Through amendments to Chapter 10 adopted in 1968, the legislature clarified the situation somewhat for employees of public bodies other than the state. Public agencies are now expressly required, except in cases of emergency, to notify employee organizations of proposed action affecting their members to give them an opportunity to meet in advance. The phrase "meet and confer" was changed to "meet and confer in good faith", and the latter defined to mean "the mutual obligation personally to meet and confer in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation". If agreement is not reached, the parties may agree upon a mediator, and share the costs of mediation.

Prior to the amendments, the statute authorized public agencies to adopt reasonable rules and regulations for the administration of employer-employee relations under Chapter 10, and enumerated several subjects which were covered. Under the 1968 amendments, the rules and regulations may be adopted only after "consultation in good faith" with employee organization representatives, and the list of suggested topics is expanded to include recognition of employee organizations and additional procedures for the resolution of disputes involving "wages, hours, and other terms and conditions of employment."[1]

20. Cal. Gov. Code § 3500.

1. Cal. Gov. Code § 3505.

While the 1968 amendments are an improvement, they still leave important questions unanswered. The most critical of these is the representation issue: a governmental employer is now required to confer in good faith with a "recognized employee organization" but that term is defined redundantly to mean one "which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency",[2] and no standards are provided for determining when such acknowledgment should be granted or withheld. If the legislature contemplated that *more than* one employee organization might be recognized in the same unit of employees, then the bargaining process becomes exceedingly complicated. If the legislature contemplated that *only* one employee organization would be recognized for each bargaining unit, as in the case of private industry, then public agencies must improvise, for the statute provides no criteria for determining what units are appropriate, nor for determining whether a particular employee organization in fact represents a majority of employees in a particular unit.

In the case of teachers, special legislation known as the Winton Act[3] attempts to resolve the representation issue through establishment of "negotiating councils" composed of delegates from each teacher organization, the number of delegates being determined by the number of members. In *Berkeley Teachers Association v. Berkeley Federation of Teachers*[4] decided last year, the Winton Act was interpreted to preclude the conduct of an election to determine the proportionate representation of each organization. The court held that representation was to be determined on the basis of membership rosters alone. An election to require the teachers to choose, the court ruled, would amount to an "unwarranted interference with the relationship between the employee organization and its members"; and it expressly rejected the argument that the act was designed to adapt private sector labor law to the public sector. It is apparent

2. Cal. Gov. Code § 3501(b).

3. Cal. Education Code §§ 13080–13088; Cal. Gov. Code § 3501.

4. 254 Cal. App.2d 660, 62 Cal. Rptr. 515 (1967).

that further legislation will eventually be required in the public sector, for the situation at present is too ambiguous to be workable. Meanwhile, it can be expected that the current ambiguity will give rise to ample decisional material for next year's Trends and Developments.