April 21, 1999

TO THE HONORABLE MEMBERS OF THE STATE ASSEMBLY:

Please accept this letter, and the analysis set forth herein (which does not purport to be exhaustive), as a

PROTEST TO AB 1268,
INTRODUCED BY ASSEMBLY MEMBER KUEHL,
FEBRUARY 26, 1999; AMENDED APRIL 14, 1999

I. INTRODUCTION

THE PROPOSED AMENDMENTS TO THE EXISTING LAWS MAY BE BROADLY CHARACTERIZED IN ONE OF TWO CATEGORIES:

1) AN ATTEMPT TO LIMIT THE LIABILITY OF UNION OFFICERS AND UNIONS FOR UNLAWFUL CONDUCT, INCLUDING VIOLENCE, COMMITTED BY UNION OFFICERS, MEMBERS AND/OR THEIR AGENTS

2) AN ATTEMPT TO DETER EMPLOYERS FROM SEEKING INJUNCTIONS IN SITUATIONS WHERE A UNION ENGAGES IN UNLAWFUL CONDUCT, INCLUDING VIOLENCE

As a policy matter, there is no reason to make the statutory changes proposed. The Moscone Act, Code of Civil Proc. §527.3(e), which has been around since 1975, effectively weighs management's right to conduct business during a labor dispute against organized labor's ability to exercise rights granted to them under the National Labor Relations Act -- it is only when unions cross the line that the laws in question come into play. Ironically, it was enacted to promote the rights of workers and to prevent unnecessary interference by the courts in labor disputes. In practice, this statute has effectively served its intended goals, and there is no reason to alter the statutory scheme.

As a matter of law, California Courts have previously rejected using section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, which requires "clear proof" of actual participation in, approval of, or ratification of union members' misconduct as the governing
standard in state law tort case. See, e.g. J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, 208 Cal.App.3d 430 (1989). No reported California decision attempts to apply this federal standard to a Moscone Act injunction case.

The Norris-LaGuardia Act was enacted in 1932. Behind section 6, "[the] driving force . . . was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." Mine Workers v. Gibbs (1966) 383 U.S. 715, 736-737. Section 6 by its terms applied to actions in the federal courts, and was held to apply to state tort claims being heard in the federal courts. (Ibid.)

However, Congress did not intend to shield unions from all liability for wrongdoing. "On its face, section 6 . . . is concerned only with requiring 'clear proof' that the person or organization charged actually participated in . . . 'such acts.' Nothing . . . suggests that a new and different standard of proof was being prescribed for all issues in actions against a union . . . involved in a labor dispute . . . [ para. ] . . . We find no support in the legislative material that Congress intended broadly to modify the standard of proof where union and employer are sued separately or together in civil actions for damages incurred in the course of labor disputes." Ramsey v. Mine Workers (1971) 401 U.S. 302, 309-310. As noted above, it has never been suggested that the section 6 standard of proof be applicable in this state to injunctive actions.

In enacting the National Management Relations Act in 1947, Congress referred to ordinary agency standards for "the responsibility of a union for the acts of its members and officers . . . rather than the more stringent standards of section 6." Gibbs, supra, 383 U.S. at p.736.

AB 1268 would require the courts to apply the strict federal standard in state injunction cases on the ground that California follows federal labor law in many respects.

California has indeed acted to adopt federal labor law in part. In 1975, the Legislature enacted the Agricultural Labor Relations Act, Labor Code section 1140 et seq., based on the National Labor Relations Act. California also adopted section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104) as the Moscone Act, Code of Civil Procedure section 527.3. Section 527.3 limited the ex parte injunctive relief that could be granted by the court.

Interestingly enough, the Legislature did not enact the provisions of section 6 of the Norris-LaGuardia Act, although the declared public policy was stated in edited but almost identical language to the policy statement of Congress in the Norris-LaGuardia Act. 29 U.S.C. § 102.
This choice on the part of the Legislature cannot be considered to be inadvertent. Clearly, had the Legislature wanted the provisions of section 6 of the Norris-LaGuardia Act to be applicable to state court injunction actions, the drafters could have so provided. There is no reason to modify the statute at this point -- especially where there has been no showing by any party, or any findings made by this Legislature, that Employers routinely misuse the Moscone Act with an intent of harming labor organizations. Rather, existing case law demonstrates Employers seek injunctions to protect themselves, and Courts grant injunctions only in severe cases where the unlawful union conduct threatens the Employer's business operations.

The governing legal standard in labor dispute injunction cases should remain untouched. A union's responsibility for the acts of its agents is well established in California. A labor union is an unincorporated association. An unincorporated association is liable for its own torts as if the association were a natural person. An unincorporated association acts through its officers, agents, or employees. When they are acting within the scope of their office, agency, or employment, their actions bind the association. (Corp. Code, § 24000 et seq.; Marshall v. International Longshoremen's & Warehousemen's Union (1962) 57 Cal.2d 781 [22 Cal.Rptr. 211, 371 P.2d 987]; Inglis v. Operating Engineers Local Union No. 12 (1962) 58 Cal.2d 269 [23 Cal.Rptr. 403, 373 P.2d 467]; Coats v. Construction & Gen. Laborers Local No. 185 (1971) 15 Cal.App.3d 908 [93 Cal.Rptr. 639].)

From a practical standpoint, there are two fundamental difficulties with the proposed bill. First, the changes would make it virtually impossible to enjoin violence or other misconduct in connection with a strike or picketing because even if the perpetrator could be identified, an employer could never prove that the union or its "agents" directed the action. Up to this point, under most circumstances, all that an employer could reasonably expect to prove is that the perpetrator was on a union picket line, or that he was in the group of strikers. Unions routinely deny their members have engaged in any unlawful conduct. The Moscone Act properly places the burden of controlling picket line misconduct squarely where it belongs, on the union and its agents. They are the ones who direct and control strikes and picketing, and the Courts must be able to restrain and enjoin them when violence occurs during a labor dispute. Under the statutory changes, however, unions may turn a blind eye to the misdeeds of pickets and union adherents, and their willful ignorance will result in heightened violence that the Courts will not be able to control.

A second problem results from the inclusion of police in the injunction process. As a further practical matter, police are often reluctant to intervene in labor disputes, despite violence, vandalism and other misconduct, because they are sensitized to the rights of employees to engage in peaceful, if boisterous, strike activity. A precursor to any effective police control of picket line misconduct is an appropriate, limited injunction, issued by the
Superior Court. The proposed statute places the cart before the horse, requiring police to control labor violence without the necessary tools, and then denying them the tools because their control has been ineffective. The reality is that police simply cannot maintain a full-time presence at the site of picketing or strikes, and to require them to "explain" to a Superior Court Judge why they have not done their job properly in the first place as a prerequisite to injunctive relief would mean that such relief would rarely, if ever, be granted.

The necessary and apparently intended effect of these changes is thus to provide unions with a powerful new weapon against employers. Under the statute, unions could condone or even foster an atmosphere of violence, fear and intimidation, all without the slightest worry that they will be held accountable for such.

Wholly apart from the practical problems with the legislation, the proposed legislation's conceptual underpinnings are fundamentally flawed. It purports to "conform" state laws with "existing federal laws" -- particularly the Norris-LaGuardia Act. However, the "Legislative Purpose" of the proposed bill is based on a misunderstanding of federal labor law.

1) Under the National Labor Relations Act, employees are allowed to band together and put economic pressure on their employers by withholding labor or stopping work.

2) Employees are never allowed to engage in violent behavior, or to block ingress or egress to their employer's premises, or to engage in any number of other unlawful acts such as vandalism or breach of the peace. See Code of Civil Procedure section 527.3(e).

3) The majority of all injunctions in the labor context are sought in state court pursuant to state law for a simple reason:

-Section 4 of the Norris-LaGuardia Act deprives federal courts of jurisdiction to issue injunctions that would prohibit certain specified acts in connection with a labor dispute -- all of which are lawful labor activities provided for or contemplated by the NLRA.

-In Boys Markets v. Retail clerks local 770, 398 U.S. 235 (1970), the Supreme Court of the United States carved out a limited exception to the no-injunction rule under the Norris-LaGuardia Act --a party can obtain an injunction if it is party to a collective bargaining agreement that contains an arbitration provision and the dispute would be arbitrable under the contract:

"A district court (i.e. a federal court) entertaining an action under section 301 (of the labor management relations act) may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an
injunction would be appropriate despite the Norris-Laguardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the district court may issue no injunctive order until it first holds that the contract does have the effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike." 398 U.S. at 254 (quoting Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 at 228).

To summarize, the purpose of a Boys Markets injunction is to facilitate the arbitration process -- thus, in order to be enjoined, a strike or other activity must involve "a grievance which both parties are contractually bound to arbitrate."

4) Under well established principles, states cannot regulate labor activities provided for by the NLRA.

5) However, violence is adjunct to picketing and is conduct that states can and do regulate.

6) Thus, trying to compare state laws related to obtaining injunctions in the face of unlawful union conduct to the Norris-Laguardia Act type injunction which would force a party to a collective bargaining agreement to arbitrate a dispute is the proverbial example of comparing apples and oranges.

7) In many disputes where violence is alleged, there is no collective bargaining relationship between the employer and the labor union -- so the Norris Laguardia Act has no applicability.

- Stated another way, there is no federal mechanism for obtaining an injunction for unlawful union conduct such as violence, blocking ingress or egress, etc.

8) The proposed statutory changes will set back the clock to a time when intimidation, violence, and threats of intimidation and violence were part and parcel of labor disputes.

II. SPECIFIC EXAMPLES OF THE FATAL FLAWS WITH AB 1268:

A. CIVIL CODE 51.7 -- ENTITLED "FREEDOM FROM VIOLENCE"

The proposed change involves deleting the right to be free from violence, or intimidation by threat of violence, committed against a person or her property because of her position in a labor dispute.
The purpose of the proposed change appears to be aimed at rendering inapplicable the penalty for violating that section (spelled out in Civil Code section 52), and to insulate labor organizations and their officers from any liability stemming from union violence.

Not only does erasing this fundamental guarantee to be free from violence jeopardize the safety of management employees, but tells rank and file union members who disagree with their union's stance in a labor dispute that their safety is not guaranteed. Like Marlon Brando's character in On The Waterfront, if you speak out, you risk violence against your person or property.

Would this Legislature even consider erasing prohibitions against violence directed at people because of their race, color, religion, ancestry, sexual orientation or age?

Then why take away the fundamental right to be free from violence based on a person's position in a labor dispute?

B. CIVIL CODE SECTION 52 -- ENTITLED "ACTIONS FOR DAMAGES AND OTHER RELIEF FOR DENIAL OF RIGHTS"

Civil Code Section 52 (B)(1) currently provides that whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to section 51 (i.e. committing violence or discriminating against a person because of her position in a labor dispute) shall be liable for exemplary damages in an amount to be determined by a jury or court.

The proposed changes would make exemplary damages available only against those found to have engaged in fraud, malice or oppression.

The intended purpose appears to be to insulate unions and their officers from damages stemming from violence in the context of a labor dispute.

It is difficult to understand why "fraud malice or oppression" should be the applicable standard. The standard should be as follows: "Has the plaintiff proven, based on a preponderance of the evidence (the "generic" civil standard of proof) that the defendant denied, aided or incited a denial, or made a discrimination or distinction against a person because of her position in a labor dispute?"

What kind of message is this Legislature sending by erasing the prohibition against violence based on a person's position in a labor dispute, and taking away a victim's remedy or making it impossible to recover?
Is this a worthwhile goal which should be legislated?

California has always been on the forefront of protecting the individual’s rights. It seems ironic that in this context, based entirely on political motives, the Legislature seeks to take away an individual’s right to be free of violence.

C. THE MOSCONÉ ACT WORKS

The existing statutory scheme is fully adequate to protect the interests of all persons in labor disputes, including unions, employees, employers and members of the public who may be caught in the cross-fire. The following historical analysis is provided for texture.

Although picketing or other concerted activities may be carried out in furtherance of lawful objections and are allowed under the National Labor Relations Act, state courts retain the power to regulate and control such activities. In particular, the United States Supreme Court has long held that state courts retain jurisdiction and may act within their discretionary power to enjoin acts by labor organizations which disturb the peace, intimidate patrons or employees or obstruct or attempt to obstruct free ingress and egress to and from an employer’s property. Youngdahl v. Rainfair, Inc. (1957) 355 U.S. 131, 78 S.Ct. 206; United Auto Workers v. Wisconsin Employment Relations Board (1956) 351 U.S. 266, 76 S.Ct. 794. In United Auto Workers, the Supreme Court specifically recognized that state courts have the power to:

prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genius local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. [footnotes omitted.]

Where such concerted activity becomes enmeshed with elements of breach of the peace, intimidation and obstruction, such conduct may be entirely enjoined by a court without infringement upon the constitutional right of free speech. Milk Wagon Drivers Union v. Meadowmoor Diaries (1941) 312 U.S. 287, 61 S.Ct. 552, rehearing denied 312 U.S. 715, 61 S.Ct. 804. In these instances, states may exercise their historic powers over such traditional local matters as public safety and order and the obstruction of streets and highways in cases involving mass picketing, and intimidation of employees or members of the public. Garner v. Teamsters Chauffeurs and Helpers (1953) 346 U.S. 485, 74 S.Ct. 161.

It is also well established under California law that state courts may enjoin unions from mass picketing and obstruction to ingress and egress which threaten public health and safety.
Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 69, n.5; City and County of San Francisco v. United Assn. of Journeymen etc. of United States & Canada (1986) 42 Cal.3d 810, 819. Beginning as early as 1909, the California Supreme Court held than an injunction would issue if the means of picketing involved, or threatened to involve, illegal activity. Pierce v. Stableman's Union (1909) 156 Cal.70. Subsequently, in Steiner v. Long Beach Local No. 128 (1942) 19 Cal.2d 676, the California Supreme Court recognized that:

[T]he constitutional guarantee of freedom of speech extends no further than to confer upon workmen the right to publicize the facts of an industrial controversy by peaceful and truthful means. Labor has no sanctuary in any federal right when it departs from the bounds of peaceful persuasion and resorts to acts of violence, physical intimidation or false statement. Under such circumstances, picketing loses its character as an appeal to reason and becomes a weapon of illegal coercion.

These principles both authorize and require courts to enjoin acts of violence or acts which amount to physical intimidation.

Id. at 682.

These principles have been codified-in the state of California under the Moscone Act thus empowering California courts to enjoin picketing that:

is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity.

Cal. Code Civ. Proc. §527.3(e). These provisions are consistent with common law under which the judiciary has exercised its power to prohibit unlawful picketing and other concerted activity. M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, Bartenders, Hotel, Motel and Club Service Workers and Dining Room Employees Union (1981) 124 Cal.App.3d 666, 680 (supports rule that "unlawful activities, such as violence, intimidation, and obstruction may be enjoined by the courts"); International Molders

1/ The facts of M Restaurants, Inc. warrant mention as they are a "real world" example of when a swift injunction is needed. During the course of a labor dispute between a restaurant and several unions, the union stationed between 50 and 100 persons at various entrances to the (continued...)
and Allied Workers Union Local 164 v. Superior Court (1977) 70 Cal.App.3d 395, 402 ("law enunciated in §527.3 does not differ from case law in this area").

Code of Civil Procedure section 527.3, entitled "injunctions in labor disputes," subsection (e) now provides:

It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity.

These are the "real world" evils which occur on picket lines, and during labor disputes. Of course, "disorderly conduct" and "unlawful activity" include violence and vandalism.

Code of Civil Procedure Section 527.3(b) provides that "no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which . . . prohibits any person or persons . . . from" exercising their rights under the NLRA. This includes "peaceful picketing". See Subsection (b)(2).

Code of Civil Procedure section 527, entitled "Time for granting injunction, Notice; Preliminary Injunction, Temporary Restraining Order", provides that before granting any restraining order, the other side must be provided with notice (absent exceptional circumstances), and the applicant must make a sufficient evidentiary showing.

If a temporary restraining order is granted without notice to the opposing party, it will be made returnable on an order requiring cause to be shown not later than 15 days, or if good cause is shown, 22 days from the date the temporary restraining order issued.

1/ (...continued)

restaurant. The pickets circled the restaurant entrances and blocked the doorways making it difficult for customers to enter the restaurant. Potential customers were also jeered and booed when they attempted to enter the restaurant, and cheered when they did not enter. Also, the restaurant's president and manager were threatened, one by a man who said he represented the unions, and the other in anonymous phone calls. A preliminary injunction was issued enjoining the unions from blocking access or deliveries to the restaurant, threatening or committing acts of intimidation and physical violence, and disturbing the peace. The injunction also limited the number and spacing of picketers, prohibiting any persons in excess of three at each entrance any closer than 10 feet from the entrance, with pickets 15 feet apart and moving.
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Section 527 provides numerous procedural and substantive safeguards to ensure that the party against whom the injunction is sought has its "day in court".

There is no basis for a claim that these procedural and other safeguards are in any way inadequate, or that they limit unions and their agents from engaging in any legitimate activities. Indeed, these statutes plainly do not regulate, nor can they regulate, the essential purpose of strike and picketing activity, which is to put economic pressure on an employer through employees withholding services, and through peaceful appeals to customers and the public not to patronize or do business with the employer. These purposes are not furthered in any legitimate way by making it easy to engage in, encourage, or condone picket line or strike violence.

D. PROPOSED AMENDMENTS TO THE LABOR CODE SEEK TO GUT CODE OF CIVIL PROCEDURE SECTIONS 527 AND 527.3 -- BUT ONLY WHERE AN INJUNCTION IS BEING SOUGHT IN A LABOR DISPUTE

The proposed changes specifically provide unions and their agents insulation from legitimate injunctive relief where strike and picketing violence (i.e. unlawful conduct) occurs.

The only conclusion which can be drawn is that the proposed amendments to the Labor Code (Chapter 10, commencing with Section 1138 to Part 3 of Division 2 of the Labor Code) are designed to benefit one interest group only -- organized labor -- by devising a statutory scheme which serves two unworthy purposes: (1) deterring Employers from seeking injunctions to stop and prevent unlawful union conduct; and (2) making it practically impossible for a court to issue a timely injunction which would stop the unlawful union conduct.

Thus, the statutory changes would establish a legal system which encourages unions to engage in unlawful conduct since preventing and/or stopping such conduct would be virtually impossible. We submit that this is not a worthwhile area to legislate, and would open the flood gates to a new and tumultuous era of union misconduct in the area of labor disputes.

1. Proposed Labor Code Section 1138 -- Designed to Insulate Unions And Their Officers From Liability For Violence

This proposed statute is interesting not for what it protects, but for whom it protects. It provides in relevant part that "no officer or member of any association or organization, and no association or organization, participating 'or interested' in a labor dispute, shall be held responsible or liable in any court... for the unlawful acts of individual
officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of those acts." (Emphasis supplied.)

Transcribed into plain English, this means that where a single union member engages in violent or other unlawful conduct in the context of a labor dispute, only that individual may be enjoined in the absence of "clear proof" that the union or its other agents were involved. As a practical matter, such proof could almost never be obtained. Neither the union agent in charge of a picket line, nor the loyal union member engaging in the violent act, are likely to admit that the act was directed by the union.

The only relief that could be obtained in this scenario is an injunction against a single individual. Judicial power to protect employers, their employees and the public from acts of violence would be effectively emasculated by this piecemeal and almost certainly ineffective approach.

Furthermore, such an approach would be contrary to all notions of agency law, and would be absurd if suggested in any other context. For example, imagine a bill that limited liability for corporations and their officers for sexual harassment or racial discrimination, "except upon clear proof of actual participation in, or actual authorization of those acts." One could never expect to prove that a corporation "authorized" an act of sexual harassment. A similar standard in that context would effectively insulate the corporation from the acts of its employees.

Take another example. An employer hires a driver who is known to drink on the job. The driver hits and kills a pedestrian while working. According to the language of proposed Labor Code section 1138, the "association or organization" and its "officers" would not be liable unless there was "clear proof" that they authorized the driver to drink and hit a pedestrian. Other examples would include toxic dumping, unsafe working conditions, etc.

The question thus should be posed: Why is the legislature expending valuable time and resources drafting laws aimed solely at insulating labor bosses from responsibility stemming from violence committed by their members? What kind of message does that send?

2. Proposed Labor Code Section 1138.1 -- Designed to Prevent Courts From Issuing Injunctions Aimed Solely At Curbing Unlawful Union Conduct

As noted above, Code of Civil Procedure Section 527.3 and existing case law provide mechanisms to secure injunctions for unlawful union conduct in the context of labor disputes. Proposed Labor Code Section 1138.1, which directly contradicts the
procedures for obtaining an injunction set forth in Code of Civil Procedure Section 527, creates impossibly high hurdles which must be cleared before a Court can act.

Proposed Labor Code Section 1138.1 provides that "no court of this state shall have authority to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute" unless:

(1) there has been a hearing of witnesses in "open court", with the opportunity for cross-examination, in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered and

(2) findings of facts by the court of all of the following:

a. unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained; (an injunction can only issue against the person making the threat or engaging in the unlawful activity -- not the organization [i.e. union] to which the person belongs);

b. that substantial and irreparable injury to complainant's property will follow;

c. that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief that will be inflicted upon defendants by the granting of relief;

d. that complainant has no adequate remedy at law; and

e. that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Further, the proposed Labor Code section provides for intricate and time consuming procedures, such as notice to the chief public official of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property.

In plain English, according to this proposed statute, before a court can issue an injunction, there must be a full trial on the merits, a written decision with detailed findings of fact, and a finding by the Court that the police cannot, or will not, prevent the violence. Even when these formidable hurdles are met, the injunction reaches only the individuals who might have been caught engaging in picket line or strike misconduct. The union is free to continue violent acts with other picketers without fear of contempt
proceedings, because they cannot be enjoined in the absence of proof that will never be available. The obvious purpose and effect of this statutory change is to provide unions with a powerful weapon, violence and intimidation, which the courts will be powerless to control much less stop.

The provision concerning temporary injunctive relief is no solution, but is rather a "Band-Aid." According to subsection (b) of the proposed legislation, if a complainant alleges that unless a temporary restraining order is issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, a temporary restraining order may be issued upon testimony under oath, sufficient if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of those five days. Further, the complainant must post a bond sufficient to "recompense" those enjoined for "any loss, expense, or damage caused by the 'improvident or erroneous' issuance of the order or injunction, including all reasonable costs, together with reasonably attorney's fee, and expense of defense against the order or . . . injunction." These extreme measures (posting a bond, potential liability for the union's attorney's fees, etc.) are clearly intended to deter Employers from seeking injunctive relief to remedy unlawful union conduct.

A more fundamental problem is the delay attendant upon the procedure. A full-blown evidentiary hearing, with a written decision, defeats the very purpose of preliminary injunctive relief, that the status quo be preserved, and irreparable injury be prevented, before it occurs. Under the proposed legislation, unions are free to continue a campaign of violence and intimidation while the "injunction" proceedings grind their way through a lengthy court process, probably including discovery since evidence will be taken at the hearing. By the time the decision is rendered, the employer's operations may be crippled by the union's unlawful conduct, or his employees beaten or intimidated, and their property destroyed.

Why would the legislature enact a law which makes it harder to stop and/or prevent further violations of the law? Why would the current system, which has worked for decades, be replaced by this kind of "one-sided" law that clearly favors organized labor?

3. Proposed Labor Code Section 1138.2 — Requiring All Applicants Seeking An Injunction To Prevent Unlawful Labor Activity To First Try And Negotiate With The Union Or Arbitrate

Imagine a situation where a union engages in recognitional picketing, that is picketing designed to force and employer to "recognize" the union as the bargaining representative of its employees. Each day, the demonstrations become more aggressive, and violence and
vandalism occurs. On a random Tuesday, several hundred union demonstrators show up, totally blocking egress and ingress to the employer's facility. No shipments can be hauled away or delivered. The employer's customers are left out in the cold, and many begin canceling their orders and using a competitor of the employer -- not because of any lawful union activity, but because the protesters unlawfully blocked all incoming and outgoing access to the employer's facility.

Proposed Labor Code Section 1138.2 provides that "no restraining order or injunctive relief shall be granted to any complainant involved in the labor dispute in question who has failed to comply with any obligation imposed by law . . . or who has failed to make every reasonable effort to settle that dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In plain English, this statute would create an "exhaustion of administrative remedies/bargaining requirement" which would preclude relief to those who do not comply. Thus, while the employer's business is being obliterated by unlawful union conduct, it would nevertheless have to engage in bargaining, mediation, perhaps even arbitration of the dispute that engendered the violence, and if the Court deemed the employer's efforts insufficient, injunctive relief would be denied, and the violence would continue.

Suffice it to say, courts and commentators have long recognized that labor disputes often involve heated exchanges and raised tempers. To suggest that a labor organization involved in a nasty dispute with a non-compliant employer would be eager to schedule immediate settlement meetings over conduct they inevitably dispute occurred, rather than do nothing and allow the unlawful conduct to continue, is naive. In the real world, that is simply not how these disputes play themselves out. And in a world where AB 1268 is enacted into law, union leaders would have no incentive to settle or arbitrate, since absent "clear proof" that they participated in or authorized the unlawful conduct, they and their unions face no liability for the conduct in question. The irony here is that where there are allegations of unlawful union conduct, good faith settlement negotiations have usually failed.

Finally, under established principles of federal labor law, no state law can impose a bargaining obligation on an employer who is not legally obliged to recognize a labor organization. Thus, this proposed statute is plainly preempted by the National Labor Relations Act. Wisconsin Dept. of Industry v. Gould, 475 U.S. 282 (1986).
4. **Proposed Labor Code Section 1138.3 -- Limiting The Power Of The Court To Enjoin Unlawful Acts Not "Expressly Complained of In The Complaint"

Imagine a situation where a complaint for a temporary restraining order is filed based on illegal blocking of ingress and egress, and disturbing the peace by using a loud speaker or "bull horn" in violation of local ordinances. During the lengthy wait for discovery, depositions, and a full trial on the merits and a written decision, union members throw bricks through car windows, vandalize company property, and threaten to physically beat management representatives.

According to Proposed Labor Code Section 1138.3, the only acts the Court could enjoin would be those "expressly complained of in the complaint or petition" and as "shall be expressly included in findings of fact made and filed by the court." (Of course, the Court would be precluded from making any findings of fact or enjoining any act not "expressly complained of in the complaint.") An injunction against throwing bricks would not prevent throwing stones.

**Stated simply, this section instructs the court to ignore the evidence and rely solely on the pleadings.** California has long had a policy of "notice pleading", which provides that a pleading is sufficient to survive demurrer in most circumstances provides the other side is on notice of the conduct complained of. In this context only, "notice pleading" would be replaced with a requirement that the pleading somehow superseded the evidence.

Further, in issuing a temporary restraining order, "the courts need not wait until actual violence erupts . . . [t]o properly enjoin 'violence, threats of violence and obstructions to ingress and egress which threaten public health and safety'". *M Restaurants*, supra, 124 Cal.App.3d at 686. Thus, this proposed statute runs contrary to established principles of labor law jurisprudence.

Finally, the following question must be answered: What is the harm in enjoining unions from unlawful conduct that is proved during a trial, as opposed to only those allegations set forth in a Petition?

### III. THE PROPOSED BILL IS PREEMPTED BY THE MACHINISTS DOCTRINE OF PREEMPTION

A further and more fundamental problem with the proposed legislation is that it almost certainly is preempted by federal law. In the landmark Supreme Court decision in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court held that Congress intended that certain conduct that occurred within the context of a labor dispute
should remain unregulated by the states. Under the principles first outlined in that case, and followed in several Supreme Court decisions thereafter, states may not regulate aspects of labor disputes where such regulation has the purpose or effect of assisting one side or the other in a labor dispute. E.g., Livitsanos v. California Labor Commissioner, 512 U.S. 107 (1994). The rationale for this preemption is to prevent the states from placing their "thumb" on the balance scales established by Congress under the NLRA.

Not all state regulations that incidentally affect labor disputes are preempted under this doctrine. For example, if the Legislature were proposing to change the standards and procedures applicable to enjoining any type of public violence, whether or not it was related to or arose out of a labor dispute, it might pass Constitutional muster. In that case, the state would be applying a law of general application that incidentally affected labor disputes. E.g., Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987). However, where the statute in question specifically singles out labor unions or labor disputes for special treatment, and provides one side or the other with economic or other weapons they would not otherwise have under the NLRA, it is preempted and cannot be enforced. E.g., Wisconsin Dept. of Industry v. Gould, 475 U.S. 282 (1986).

That is precisely the purpose and effect of the proposed legislation. As discussed above, the statute effectively insulates unions and union officials from the consequences of violence, vandalism and other crimes against persons or property where the misconduct is in aid of union goals. Unions, not other organizations, would have a powerful new weapon in that even if the employer or its employees who were victimized by union violence could identify the perpetrators, a difficult task in the best of circumstances, it would be virtually impossible under the proposed statute to impute knowledge or responsibility to the union. An employer would be faced with the necessity of obtaining a specific injunction against each striker, each picketer, each union adherent, for each specific act of violence or vandalism committed. Such a standard would essentially provide unions with carte blanche to engage in violent misconduct, putting economic and coercive pressure on employers and employees who chose to refrain from union activities (which is their right under the NLRA). The Court's hands would effectively be tied by the procedural and evidentiary hurdles and roadblocks the statute would set up, and would preclude injunctive relief in all but the clearest of cases.

Furthermore, the provisions that require arbitration or mediation before injunctive relief are perhaps more improper than the rest of the proposed changes. These provisions specifically interfere with the collective bargaining process, and make the court system available only to those employers who, in the view of the Legislature, are bargaining in good faith. This type of statute is plainly outside the pale and is routinely struck down. E.g., Wisconsin Dept. of Industry v. Gould, 475 U.S. 282 (1986).
For this reason, the statute clearly has the purpose and effect of aiding unions and union adherents in their economic warfare with employers. As such, it is plainly preempted under Machinists and its progeny. For the Legislature to enact such a statute would have no purpose as it almost certainly could not be enforced once the preemption issue was fully litigated.

III. CONCLUSION

Based on the foregoing, it is respectfully requested that the members of this Assembly vote against AB 1268.

Very truly yours,

Bradford K. Newman

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