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September 7, 1999

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From: Bradford K. Newman

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Message:

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September 7, 1999

VIA FACSIMILE NO. (916) 443-0938

Rex Hime
President and CEO
California Business Properties Association
1121 L Street, Suite 809
Sacramento, CA 95814

Re: AB 1268 (As Amended)

Dear Mr. Hime:

You have requested that I provide you with an analysis of AB 1268 as amended. Stated simply, the amended version does nothing to the cure the fatal flaws with this bill. Its effect is the same -- to make it impossible to obtain a state court injunction against a labor union unless an impossible evidentiary burden is met and unrealistic procedural hurdles are cleared.

In the introduction, the amended version acknowledges the “slight-of-hand” the author is playing with the “federal” standard. It is true that under Federal Law, to obtain damages against a labor organization for the unlawful acts of its officers or members, one must show “actual participation in, or actual authorization or ratification of” the unlawful acts based upon a standard of “clear proof.” However, that is not the governing federal standard for obtaining an injunction, and consequently, the introduction to the amended bill provides:

[Federal] law also limits the authority of a court to issue a temporary or permanent injunction in a labor dispute except upon a hearing establishing specified facts and upon the filing of an undertaking....

The amended bill does not, and cannot, represent that the governing standard in federal injunction cases is “clear proof of actual participation in, or actual authorization or ratification
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of the conduct seeking to be restrained.\(^1\) Thus, this bill is built on a pyramid of faulty logic - it seeks to apply a phantom federal standard to state court injunction cases.\(^2\)

While the author has struck the proposed changes to the Civil Code, the remaining amendments to the Labor Code highlight the ludicrous nature of the arguments advanced in support of this bill. AB 1268 as amended still requires the following conditions be satisfied before an injunction can issue -- none of which are required under federal law:

(1) 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, except after hearing the testimony of witnesses in open court, with opportunity for cross-examination, in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered... (this provision is designed to cause delay and expense; 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);

(2) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection (the only purpose of this provision is to add a procedural hurdle, which wastes the time and money of the person seeking the injunction; how does a complainant demonstrate this? what is the governing standard? how many days must elapse, how much damage must be done, and how much violence must occur before the complainant can show the police are "unable" or "unwilling to

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\(^1\) No reported California decision attempts to apply this federal standard to a Moscone Act injunction case. Under current California law, employers can obtain an injunction against a union upon the usual showing of irreparable harm, the inadequacy of legal remedies and some involvement of union agents in the violence in issue.

\(^2\) There are obvious differences between injunctive relief and damages. Holding a union responsible to control picket line violence before it occurs is an entirely different matter from holding it responsible to pay for damages caused by such violence. Organized labor's claims that AB 1268 simply conforms state standards for injunctive relief to those of federal labor law is false and intellectually dishonest.
furnish adequate protection”? Most importantly, where does this requirement come from, and why should a complainant have to make this showing before relief can be afforded?);

(3) No restraining order or injunctive relief shall be granted to any complainant involved in the labor dispute in question . . . who has failed to make every reasonable effort to settle that dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration (thus, while the union blocks ingress and egress to an employer’s premises, threats of violence are made to company officials, tires are slashed, local noise ordinances are violated, bricks are being thrown through windows, vandalism is rampant, etc., the employer must spend days trying to arbitrate or “negotiate” with the union; of course, in the real world, the union will disavow any “actual participation in, or actual authorization” of the unlawful acts, and the unlawful acts will have their intended effect of crippling or ruining the employer’s business before a court can act);

(4) No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of the restraining order or injunction... (typically, it takes several months for a court to issue a written decision in any case; this requirement is designed to further delay the issuance of injunctive relief, which by its very definition, is sought in cases where the court must act immediately to avoid irreparable harm to the person seeking relief; in the real world, this will make it impossible to obtain adequate relief, since the court is required to issue a written decision filled with “findings of fact” before a temporary restraining order can issue; thus, a court would be required to clear its calendar on the day the relief is sought, solely to hear the case and then write a decision; meanwhile, the union causes havoc and destroys the employer’s business);

In sum, under the proposed bill as amended, 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.
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It is important to remember that what applies for the union also applies for employers. If the governor signs this bill, it will mark a new era in California, that will revert the state of labor relations to the 1930's, when violence and vandalism were a common part of labor disputes. Going forward, employers faced with a strike will have to resort to "self-help" remedies, such as hiring outside security services to "police" their premises. If and when violence breaks out, the Union will also face the daunting task of demonstrating, based on "clear proof", that the employer "actually participated in, or actually authorized, such acts", or producing evidence "of [the employer's] ratification of such acts after actual knowledge thereof." AB 1268 is the sort of special interest legislation that is not good for labor, management, or the individual workers of this state.

Please let me know if you require any further information.

Kindest regards.

Very truly yours,

Bradford K. Newman

BRADFORD K. NEWMAN for
Jeffers, Mangels, Butler & Marmaro LLP

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bcc: Kevin Dayton
    Government Affairs Director
    Associated Builders & Contractors, (Golden Gate Chapter)