rates because they were sufficient to cover the minimum rates of Section 6 plus one and one-half times those rates for overtime.[16]

The principal case may seem harsh because the employees, whom the employer could legally have required to work but forty hours for a lower total compensation than they had been receiving, are allowed to recover the difference between what they were paid and what they would have been paid on the basis of a 60-cent regular rate plus an equal amount as liquidated damages.[17] The court expressly admits, however, that nothing in the act prevents the reduction of wages.[18] It objects to the wage transaction here involved primarily because the employer was only too obviously endeavoring to avoid the necessity of effecting the very wage and employment adjustments the act was passed to produce.

Labor Law—New York Anti-Injunction Act—Legality of Strike against Use of Labor-Saving Device—[New York].—The plaintiff, a traveling grand opera company, employed live singers but used recordings to produce the musical accompaniment traditionally supplied by an orchestra of instrumental musicians. The American Federation of Musicians, fearing the widespread use of the mechanical reproduction of recorded music, induced the Stagehands' Union to order its members to refuse to work for the plaintiff. The six stagehands in the plaintiff's permanent employ struck, and because of the almost universal closed-shop conditions existing in theaters with respect to the Stagehands' Union the plaintiff was forced to discontinue operating. In a suit to enjoin the musicians' and stagehands' unions, a decree of the special term granting the injunction[1] was reversed by the appellate division in a three to two decision.[2] On appeal to the New York Court of Appeals, *held*, that the anti-injunction act does not apply where union activity is for an unlawful objective, and "for a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment" is such an objective. Judgment of the appellate division reversed and judgment of the special term reinstated, two judges dissenting. *Opera on Tour, Inc. v. Weber*.[3]

The New York Anti-Injunction Act, Section 876-a of the New York Civil Practice Act, provides that no court shall issue an injunction in a "labor dispute" except after a

[16] Fleming v. Stone & Sons, 3 C.C.H. Lab. Law Serv. ¶ 60,697 (D.C. Ill. 1941); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (Tex. 1940); Gurtov v. Volk, 170 Misc. 322, 11 N.Y.S. (2d) 604 (N.Y. Munic. Ct. 1939) (employers paying above minimum wages said to appear "to be exempt from the operation of the statute").

[17] The back pay and damages were figured as follows: what each employee actually received was subtracted from the sum of 60 cents times the number of regular hours worked plus 90 cents times the number of hours worked overtime; to this figure was added an equal amount as "liquidated damages."

[18] Williams v. General Mills, Inc., 39 F. Supp. 849 (Ohio 1941). Senator, now Associate Justice, Black, co-sponsor of the bill, stated that it was not intended to freeze wages above the minimum. 81 Cong. Rec. 7808 (1938).

[1] Opera on Tour, Inc. v. Weber, 170 Misc. 272, 10 N.Y.S. (2d) 83 (S. Ct. 1939).

[2] Opera on Tour, Inc. v. Weber, 258 App. Div. 516, 17 N.Y.S. (2d) 144 (1940), noted in 39 Mich. L. Rev. 665 (1941), 53 Harv. L. Rev. 1054 (1940), and 11 Air L. Rev. 172 (1940).

[3] 285 N.Y. 348, 34 N.E. (2d) 349 (1941).

hearing and the finding of certain facts, and that such a decree cannot enjoin certain specified conduct in the absence of fraud or violence.[4] A "labor dispute," as defined in the act, ". . . . includes any controversy concerning terms or conditions of employment . . . . or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."[5]

In previous decisions determining the applicability of the statute the New York courts, by means of a narrow construction of the statutory definition, have restricted the legislative intent in limiting the meaning of "labor dispute."[6] Thus the courts have consistently held that where an enterpriser conducts a business alone or with the aid of family members, picketing by a union is enjoinable, since there is no employment dispute and hence no labor dispute within the meaning of Section 876-a.[7] Likewise, although the majority New York view is to the contrary,[8] a few lower courts have enjoined picketing to induce an employer to sign a closed-shop agreement where none of the union members were in his employ,[9] and one court has enjoined picketing by an outside union for the same purpose where the employer had an agreement with another union[10]—the rationale in both situations being that no labor dispute existed within the statutory definition. In the instant case, however, the New York Court of Appeals has gone much further and qualified the plain meaning of the term "labor dispute" with the proposition (stated in a subsequent case[11] interpreting the present holding) that, "unless the objective of the defendant-union is a lawful one, [the] controversy is not a 'labor dispute' in the sense of Section 876-a of the Civil Practice Act."

This confusion of the terms "labor dispute" and "labor objective" would seem to be a carry-over from labor decisions under the common law, which employed the lawful purpose test. After the passage of the Norris-LaGuardia Act,[12] federal prototype of the New York Anti-Injunction Act, a similar confusion arose in federal labor decisions. A federal circuit court has said in this connection: "Whether or not the strike in this case is illegal because of its purpose . . . . is . . . . beside the point . . . . . The statute . . . . nowhere attempts to define as lawful the acts which it says may not be

[4] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1941) § 876-a, 1.

[5] Ibid., at § 876-a, 10(c).

[6] 2 Teller, Labor Disputes and Collective Bargaining § 445 (1940).

[7] Luft v. Flove, 270 N.Y. 640, 1 N.E. (2d) 369 (1936); Thompson v. Boekhout, 273 N.Y. 390, 7 N.E. (2d) 674 (1937); Wohl v. Local 802, 259 App. Div. 868, 19 N.Y.S. (2d) 811 (1940); Miller v. Local 635, 170 Misc. 713, 11 N.Y.S. (2d) 278 (S. Ct. 1939).

[8] Note 17 infra.

[9] Bond Stores v. Turner, 258 App. Div. 769, 14 N.Y.S. (2d) 705 (1939); Nicholaus v. Doe, 175 Misc. 530, 24 N.Y.S. (2d) 258 (S. Ct. 1940), app. dismissed 261 App. Div. 1020, 25 N.Y.S. (2d) 989 (1941).

[10] Spinner v. Doe, 13 N.Y.S. (2d) 449 (S. Ct. 1939).

[11] American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 231, 36 N.E. (2d) 123, 125 (1941).

[12] Consult 1 Teller, Labor Disputes and Collective Bargaining cc. 12–15 (1940), for a brief discussion of the history of federal labor legislation and judicial decisions; ibid., at § 84, for a discussion of the use of the lawful purpose test at common law.

enjoined."[13] Some of the lower federal courts, however, are not in complete agreement with this view.[14]

A close examination of the majority opinion in the instant case reveals that a number of features considered significant are in reality quite indecisive. Thus the court pointed to the fact that the stagehands were satisfied with their own conditions of employment, implying thereby that no labor dispute existed between them and the employer. Since both stagehands and musicians are workers in the theater industry,[15] however, a community of interest exists between them, which, assuming the existence of a labor dispute between the musicians and the opera company, would seem to justify, under New York law,[16] the action of the stagehands.

Likewise, the court emphasizes the non-existence of the employer-employee relationship, although the overwhelming weight of authority in New York holds this relationship of no significance in determining the validity of a union's demands.[17] Further-

[13] Wilson & Co. v. Birl, 105 F. (2d) 948, 951 (C.C.A. 3d 1939). The Supreme Court has stated that "the act does not concern itself with the background or the motives of the dispute." New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561 (1938).

[14] 1 Teller, Labor Disputes and Collective Bargaining § 212 (1940).

[15] It is interesting to consider how attenuated the courts will permit the interest between employees to become and still consider the interest sufficient justification of union activity by a satisfied employee group to further the demands of another group. If only members of the same union may strike, the results might depend upon whether the union is craft or industrial. An industrial organization would find both the stagehands and the musicians in the same union, but it would seem undesirable to have the result depend on such accidental distinctions. Section 876-a, 10(b) of the anti-injunction act appears to cover this point, but the courts have never discussed this part of the act and it is possible only to speculate on what meaning it might be given. Although Judge Lehman, in dissenting, was of the opinion that the industrial connection was sufficient to justify the stagehands in striking, the majority might have held otherwise had they found it necessary to consider the point. The fact that the stagehands were abiding by a mutual assistance agreement with the musicians and might have needed reciprocal assistance in the future to enforce their own demands, might not have constituted a sufficient economic advantage to convince the majority that the stagehands' strike was justified. An apparent inconsistency in the opinion becomes less confusing under this assumption. Despite the fact that the injunction prohibited the stagehands from striking, the court says that its decision is "no denial of the right to strike. . . . . Individually and collectively, the members of any union may at any time refuse to work, because machinery is employed or for any other reason, and may strike in so doing," and that only the "inducement by the Musicians' Union of the Stagehands' Union" was being enjoined. Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 353, 34 N.E. (2d) 349, 351 (1941). This does not mean, however, that the court would allow picketing of the opera company by the musicians alone, since the use of legal methods cannot make legal an unlawful objective, which the insistence that labor-saving machinery be discarded is held to constitute.

[16] 8 Univ. Chi. L. Rev. 356 (1941) and cases cited therein; note 15 supra.

[17] An outside union may picket in an attempt to organize workers: a) where employees are non-union and satisfied with their present conditions of employment, May's Furs and Ready to Wear, Inc. v. Bauer, 282 N.Y. 331, 26 N.E. (2d) 279 (1940); Wise Shoe Co., Inc. v. Lowenthal, 266 N.Y. 264, 194 N.E. 749 (1935); Lifschitz v. Straughn, 261 App. Div. 757, 27 N.Y.S. (2d) 193 (1941); Strauss v. Steiner, 259 App. Div. 725, 18 N.Y.S. (2d) 75 (1940); and b) where the employees are members of another union (the jurisdictional dispute), Stillwell Theatre, Inc. v. Kaplan, 259 N.Y. 405, 182 N.E. 63 (1932); J. H. & S. Theatres, Inc. v. Fay, 260 N.Y. 315,

more, the judge who wrote the majority opinion in the instant case had previously stated that "it is indisputably clear that the existence or non-existence of the employer-employee relationship cannot be the factor by which to determine the presence or absence of a labor dispute."[18]

Finally, the court states that the objective was unlawful because there was no labor dispute (not that there was no labor dispute because the objective was unlawful[19]), and that there was no labor dispute because activity directed against the use of a mechanical device bears no reasonable relation to any condition of employment.[20] Yet there is no question that a significant condition of employment is the availability of employment,[21] and it would seem that this controversy arose "out of the respective interests of employer and employee"[22] within the meaning of the New York Anti-Injunction Act.

Conceding argumentatively that the test for determining the applicability of Section 876-a is the "lawful objective" test, it is not clear that the authority cited by the court establishes the proposition that the prevention of the use of labor-saving devices is an unlawful objective. *Hopkins v. Oxley Stave Co.*,[23] a federal circuit court of appeals case, is the only authority cited, there being no New York decisions in point. In protesting the use of a barrel-hooping machine, the union in that case planned to warn the plaintiff's customers and wholesale and retail dealers everywhere to refrain from using or handling machine-hooped barrels, and to notify unions throughout the United States, Canada, and Europe to boycott products packed in such containers in order to make its warning effective. Though the court recognized that the objective was "to compel a manufacturer to abandon the use of a valuable invention,"[24] its chief criticism was directed at the means employed by the union to attain this objective, and later cases, interpreting the decision, emphasize its boycott aspects.[25] Hence the case is not strong authority for the proposition that striking or picketing against the use of labor-saving devices is illegal.

There is little other authority to support the holding in the instant case. A New

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183 N.E. 509 (1932); Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931); Stalban v. Friedman, 259 App. Div. 520, 19 N.Y.S. (2d) 978 (1940), reversing 171 Misc. 106, 11 N.Y.S. (2d) 343 (S. Ct. 1939); Buy-Wise Markets, Inc. v. Winokur, 167 Misc. 235, 2 N.Y.S. (2d) 854 (S. Ct. 1938); Florsheim Shoe Co., Inc. v. Local 287, 262 App. Div. 769, 27 N.Y.S. (2d) 883 (1941). Contra: Cases cited in notes 9 and 10 supra. The New York Anti-Injunction Act, note 5 supra, expressly provides that the employer-employee relation is not necessary.

[18] May's Furs & Ready to Wear, Inc. v. Bauer, 282 N.Y. 331, 339, 26 N.E. (2d) 279, 282 (1940).

[19] The instant case was so interpreted in a later decision by the same court. Note 11 supra.

[20] 285 N.Y. 348, 357, 34 N.E. (2d) 349, 353 (1941). It is only upon such an assumption that the court could consistently introduce the notion of a malicious conspiracy to ruin plaintiff's business. Ibid., at 354 and 351. As Lehman, in dissenting, pointed out, a strike serving a legitimate labor interest is not outlawed because, if successful, some employers will be forced out of business. Ibid., at 371 and 359.

[21] Note 17 supra.

[22] Note 5 supra.

[23] 83 Fed. 912 (C.C.A. 8th 1897).

[24] Ibid., at 917.

[25] Anderson v. United States, 171 U.S. 604 (1898); Carter v. Fortney, 170 Fed. 463 (C.C. W.Va. 1909).

Jersey case, *Barr v. Essex Trades Council*,[26] which superficially lends support, clearly involved a secondary boycott. The court conceded that the union had the right to call a strike,[27] and later New Jersey courts have interpreted the decision as outlawing the secondary boycott.[28] Finally, dicta in two Massachusetts decisions state that strikes against the use of labor-saving devices are unlawful, but the authority upon which these expressions are based is not reliable.[29]

Even if these cases did render activities against labor-saving devices illegal, however, their authority has now become questionable by reason of anti-injunction legislation. In *United States v. Carrozzo*,[30] a recent federal district court case affirmed in a memorandum opinion by the United States Supreme Court, it was held that under the Norris–LaGuardia Act the efforts of a hod-carriers' union to prevent the introduction of truck-mixers—devices for mixing concrete while en route to a building site—were legitimate, since the union's purpose was to maintain employment and certain working conditions for its members. It would seem that the New York statute, with similar provisions, might well be given a like effect. Likewise, in *Baylor v. Brotherhood of Painters*,[31] the New Jersey court, under anti-injunction legislation postdating the *Barr* case, refused to enjoin union activity designed to prevent the utilization of a labor-saving machine.

Despite the meager authority to support the holding in the instant case, it might be suggested that the defendants' activity is contrary to public policy in that it retards progress. But when as here the legislature has clearly set forth the criteria for determining the applicability of a statute the court should apply these criteria and not look to external standards.

It is necessary that some rein upon technological advancement be recognized, even though the value of this form of progress cannot be overestimated. Whatever may be the long-run advantages of technological improvements,[32] in the short run they create

[26] 53 N.J. Eq. 101, 30 Atl. 881 (1894). [27] Ibid., at 114 and 886.

[28] Kitty Kelly Shoe Corp. v. Local 108, 125 N.J. Eq. 250, 5 A. (2d) 682 (1939); Perfect Laundry Co. v. Marsh, 120 N.J. Eq. 508, 186 Atl. 470 (1936).

[29] In Haverhill Strand Theatre, Inc. v. Gillen, 229 Mass. 413, 118 N.E. 671 (1918), the court cites as authority Hopkins v. Oxley Stave Co., 83 Fed. 912 (C.C.A. 8th 1897), and Minasian v. Osborne, 210 Mass. 250, 253, 96 N.E. 1036, 1038 (1911). In the latter case, the court, in justifying its refusal to issue an injunction, said that the labor activity ". . . . is not aimed to prevent the highest efficiency of labor or the use of modern or economical machinery," thus implying that the court considered it unlawful to prevent the use of modern or economical machinery. No authority is cited to support this statement.

[30] 37 F. Supp. 191 (Ill. 1941), aff'd sub. nom. United States v. United Brotherhood of Carpenters and Joiners, 313 U.S. 539 (1941).

[31] 108 N.J. Eq. 257, 154 Atl. 759 (1931). In a suit to enjoin the union from enforcing a rule prohibiting its members from working for, or for one who employed, a contractor who used a paint-spraying machine the court denied relief on the ground that such a rule was in the interest of the employees' welfare, and stated that the union may "arbitrarily fix conditions of labor, and strike to enforce such demands." Ibid., at 261 and 760.

[32] Lester, Economics of Labor 290 (1941) (long-run effects cannot be determined); Slichter, Union Policies and Industrial Management 575 (1941) (in the long run there are greater opportunities for employment); Yoder, Labor Economics and Labor Problems 124 (2d ed. 1939) (". . . . the general long-term tendency . . . . appears to be to create greater rather than less employment").

unemployment.[33] It is toward the elimination of, or amelioration of the effect of, such unemployment that union activity in these instances is directed.[34]

Adoption of the view that union activity directed against the introduction of a labor-saving device involves a labor dispute within the meaning of the New York Anti-Injunction Act would leave the solution of such disputes to the parties involved. A program which a union might impose upon an employer as the price for acquiescing in the use of technological improvements and in order to render less harsh the immediate effects of their introduction could be added as part of the expense of the technological improvement, thus making industry bear some of the social costs it creates.[35]

The surprising dearth of reported cases involving union activity directed at the introduction of labor-saving devices, however, suggests that unions, conceding the long-run desirability of technological improvements,[36] and fearing the results of a public opinion resentful of any check on "progress," have not made a concerted effort to prevent the use of machines.[37] This is illustrated by a propaganda campaign conducted in 1929 by the American Federation of Musicians, the defendant in the instant case, when more than 17 per cent of its 23,000 members lost theater jobs. When striking proved futile, the union attempted to arouse public opinion against the "cultural debasement" which the art of music faced at the hands of mechanical-reproducing devices.[38]

Other considerations suggest that the problem of technological displacement is too large for solution in the hands of private parties. It is a nation-wide problem; one industry and one union alone cannot solve it. Further, since collective bargaining is not universal, effective self-help is not available to all workers. The parties immediately interested in settling differences usually do not consider long-run consequences, and the solution reached, although immediately advantageous, may be ruinous in the end. Legislative regulation of the problem is therefore desirable. Regulatory measures which should be considered are compulsory payment of dismissal wages, federally-subsidized vocational training programs for displaced workers, and other measures de-

[33] Lester, op. cit. supra note 32, at 290; Slichter, op. cit. supra note 32, at 279; Yoder, op. cit. supra note 32, at 120 ("There can be no question . . . . that technological change does create unemployment").

[34] Slichter, op. cit. supra note 32, at 206–7 (1941); TNEC Hearings, Technology and Concentration of Economic Power, Part 30, at 16453, 16507 (1940).

[35] Philip Murray of the CIO has proposed the following list of possible measures: workers displaced should be reabsorbed in the regular labor turn-over; workers to be displaced should get at least six months' notice and in the interval between notice and dismissal should be given an opportunity to learn new skills; workers who cannot be reabsorbed upon dismissal should be carried by the company in some capacity until a regular job develops; workers who get new jobs at a considerable wage reduction should be paid job compensation; workers who for any reason cannot be reabsorbed should be paid a substantial dismissal wage. TNEC Hearings, op. cit. supra note 34, at 16506–7.

[36] Slichter, op. cit. supra note 32, at 205–7.

[37] Public opinion does, on the other hand, permit an employer to retard "progress" by buying up patents on new machinery and methods in order to prevent their exploitation by another to the employer's injury. In some circumstances this may be justifiable inasmuch as the immediate obsolescence of capital equipment because of the advent of a new method of doing the old thing is wasteful to the entire economy as well as ruinous to the individual enterpriser.

[38] Slichter, op. cit. supra note 32, at 211.

signed to facilitate immediate reabsorption of the technologically unemployed.[39] In addition, the desirability and nature of a particular improvement—whether it performs a new job or merely does an old one cheaper—might be considered. Such legislation would not replace, but would rather supplement, existing anti-injunction legislation.

Procedure—Illinois Civil Practice Act—Power of Appellate Court to Consider Evidence Not Offered at Trial—[Illinois].—The plaintiff's husband, insured under the provisions of a life insurance policy issued by the defendant insurance company, had obtained a lower premium rate by dating the policy back approximately two months. The insured failed to pay a premium and died a few days after the expiration of the thirty-one day period of grace. Had the policy been dated as of the date of issuance, insured's death would have been prior to the anniversary date of the policy. The non-forfeiture clause gave the insured the right to elect, within a period of three months after default, any of the following three options: a) to receive the cash surrender value less any indebtedness, b) to apply this net amount to purchase paid-up insurance, or c) to continue extended term insurance for a period purchasable by the cash value reduced by any indebtedness. No election had been made by the insured. The plaintiff-beneficiary brought an action in the Circuit Court of Cook County on the theory that the insured had really died before default, because the anniversary date of purchase was the date of issuance rather than the earlier date stated in the policy. The defendant's demurrer to the complaint was sustained. On appeal to the Appellate Court for the First District, it was held that the plaintiff's contention that the policy was in full force because the date of issuance was its real anniversary date was erroneous, but that the plaintiff had a cause of action based upon the non-forfeiture clause in the policy.[1]

Before the trial court on remand the defendant insurance company filed an affidavit of merits which stated that the insured had borrowed on his policy so large a sum that the loan plus interest would reduce the cash surrender value of the policy to $1.48. The affidavit further stated that the term of extended insurance which $1.48 would purchase was only four and a fraction days, and that therefore the policy had lapsed before the date of the insured's death. A motion by the plaintiff to strike the defendant's affidavit for insufficiency on the theory that the sum available for the purchase of any option was the gross surrender value rather than the net cash surrender value was sustained by the circuit court. The defendant chose to stand on its affidavit and judgment was entered against the defendant. On appeal, it was held that the company had the right to reduce the benefits available under any of the options by an amount in proportion to the indebtedness outstanding.[2]

On remand again, judgment was entered for the defendant after trial without a jury. On appeal, plaintiff argued that the policy necessarily remained in force because no option had been exercised during the three month period and no alternative method for filling this period was provided. It was held that the death of the insured before he had made an election did not deprive the beneficiary of rights under the options,[3]

[39] Philip Murray, in TNEC Hearings, op. cit. supra note 34, at 16508.

[1] Schmidt v. Equitable Life Assurance Society, 282 Ill. App. 439 (1935).

[2] Schmidt v. Equitable Life Assurance Society, 290 Ill. App. 378, 8 N.E. (2d) 535 (1937).

[3] Schmidt v. Equitable Life Assurance Society, 304 Ill. App. 261, 26 N.E. (2d) 742 (1939).