St. John's Law Review

Volume 15, November 1940, Number 1 Article 8

Picketing--Scope of Relief Under the New York Anti-Injunction Act

Harry Lorber

tortious act or "wrong" to the other contracting party, the wrongdoer will be precluded from profiting by an enforcement of his second contract.[54]

ROBERT M. POST.

PICKETING—SCOPE OF RELIEF UNDER THE NEW YORK ANTI-INJUNCTION ACT

I

It is most interesting to note the first judicial dispositions of cases involving organization to secure wage increases and picketing. In 1835 a combination of bootmakers, to raise their wages, was indicted for peaceable co-operation for the purpose of maintaining the rate of wages. The court held that such combinations and confederacies to enhance or reduce the price of labor were injurious to trade, and monopolistic in aspect.[1] Business was upheld as a property right which equity would enjoin from injury.[2] In another action involving the right to picket, the court similarly enjoined the defendant on the ground that it was a public obstruction and a private nuisance in violation of the right to do business freely.[3] Judicial attitude was rapidly changing, and, towards the end of the century, we find the first assertions that combination, appeal, persuasion,[4] and picketing[5] are legal means of obtaining larger wages. Legislative recognition fostered this change, and in 1870 it was enacted that the "orderly and peaceable assembling or co-operation of persons employed in any profession, trade or handicraft, for the purpose of securing an advance in the rate of wages or compensation" is now permitted.[6] Thus the common law actions of conspiracy[7] and enticing away of workmen[8]

---

[54] 11 A. L. R. 698; RESTATEMENT, LAW OF CONTRACTS § 576.

[1] People v. Fisher, 14 Wend. 2, 18 (N. Y. 1835) ("He may say that he will not make coarse boots for less than one dollar but he has no right to say that no other mechanic shall make them for less").

[2] People v. Barondess, 61 Hun 571, 16 N. Y. Supp. 436 (1st Dept. 1891); Davis v. Zimmerman, 91 Hun 481, 36 N. Y. Supp. 303 (1895); Kerbs v. Rosenstien, 56 App. Div. 619, 67 N. Y. Supp. 385 (1st Dept. 1900); Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185 (2d Dept. 1904); Rogers v. Evarts, — Misc. —, 17 N. Y. Supp. 264 (1891).

[3] Gilbert v. Mickle, 4 Sandf. Ch. 357 (N. Y. 1846) (defendant picketed the plaintiff's auction rooms to warn strangers of mock auctions).

[4] People v. Wilzig, 4 N. Y. Cr. Rep. 403 (1886); People v. Kostka, 4 N. Y. Cr. Rep. 429 (1886).

[5] Levy v. Rosenstein, 66 N. Y. Supp. 101 (Sup. Ct. 1900).

[6] N. Y. Laws 1870, c. 19.

[7] Two or more persons who conspire to prevent another from exercising a lawful trade or calling, or by interfering or threatening to interfere with property belonging to or used by another, or with the use or employment thereof, are guilty of a misdemeanor.

[8] Johnston Harvester Co. v. Meinhardt, 9 Abb. (N. C.) 393 (N. Y. 1880)

gave way to the declaration that free competition between employer and labor was worth more to society than it costs.[9] On this ground a consequent infliction of damage to business is privileged, and the doctrine that picketing was *per se* illegal [10] gave way to the suggestion that threats, intimidations, coercion or force must be established by proof before an injunction will issue.[11]

The New York Court of Appeals had attained a well deserved reputation as the outstanding liberal court in the country on labor questions.[12]

II

Prior to Section 876-a of the Civil Practice Act, the Court had evidenced a marked desire to limit the injunction, and avoid judicial interference in labor disputes.[13] The Court had upheld a union's right to refuse to allow its members to work on non-union materials,[14] or to refuse to handle goods loaded and delivered by non-union labor; [15] had condemned decisions prohibiting picketing in the absence of a strike; allowed picketing directed against a product at the place of sale; [16] had refused to curtail picketing because of a terminable yellow dog contract; [17] had upheld the right to picket despite the existence of a closed shop contract with a rival union; [18] and had limited sweeping injunctions to specific unlawful acts.[19] The legislative enactment of

---

(Injunction should not be granted against a confederation of persons whose object is to entice away workmen from their employers in the absence of violence or coercion).

[9] Commonwealth v. Hunt, 4 Metc. 111 (Mass. 1842).

[10] The doctrine that all picketing is illegal was followed in California, Illinois, Michigan and New Jersey. New York held it enjoinable as "injurious to trade". Atchison, T. & S. F. Ry. v. Gee, 139 Fed. 582 (C. C. Iowa 1905); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Barnes v. Typographical Union, 232 Ill. 424, 83 N. E. 940 (1908); Beck v. Ry. Teamsters Union, 118 Mich. 497, 77 N. W. 13 (1898); Baldwin Lumber Co. v. Brotherhood of Teamsters, 91 N. J. Eq. 240, 109 Atl. 147 (1920); Gilbert v. Mickle, 45 Sandf. Ch. 357 (N. Y. 1846).

[11] Sun Printing & Pub. Ass'n v. Delaney, 48 App. Div. 623, 62 N. Y. Supp. 250 (1st Dept. 1900); Davis v. Zimmerman, 91 Hun 481, 36 N. Y. Supp. 303 (1895); Levy v. Rosenstein, 66 N. Y. Supp. 101 (Sup. Ct. 1900).

[12] (1936) 5 INT. JURID. ASS'N BULL. 59.

[13] Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Stillwell Theatres v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932).

[14] Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Wilson and Adams Co. v. Pearce, 264 N. Y. 281, 19 N. E. (2d) 545 (1934).

[15] Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

[16] Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937); (1938) 12 ST. JOHN'S L. REV. 358.

[17] Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 864 (1928).

[18] Stillwell Theatres v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932).

[19] J. H. S. Theatres v. Fay, 260 N. Y. 315, 183 N. E. 509 (1932); Wise Shoe Co. v. Lowenthal, 266 N. Y. 264, 194 N. E. 749 (1935).

Section 876-a obviously intended [20] to affirm these results, and limit judicial discretion still further.[21] The lower courts adopted a restrictive attitude with respect to labor activities,[22] and interpreted the Act as merely regulatory of the procedure of granting injunctions, without making any changes in the substantive law.[23] In confining the right to picket peacefully, the lower courts have evolved a series of exceptions in which an injunction will issue in the absence of a finding that a labor dispute exists.[24] For example, if the union engages in any form of extreme, violent or unlawful conduct,[25] the requirements of the Act may be dispensed with; where an employer avoided the possibility of a dispute by closing his doors; [26] where the lone worker struck and the plaintiff carried on with his wife and son; [27] when the employer took over the job of his sole employee; [28] where the parties were not in "unity of interest"; [29] where employer signed a contract

[20] N. Y. CIV. PRAC. ACT § 876-a: "The policy of this state is declared as follows: Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon adequate notice and hearing of the responding party or parties, or that issues after a hearing based upon written affidavits alone and not upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuses in labor litigations for the reason that among other things,

(1) The status quo cannot be maintained but is necessarily altered by the injunction,

(2) Determination of issues of veracity and of probability of fact from affidavits of opposing parties that are contradicted, and under the circumstances, untrustworthy rather than from oral examination in open court is subject to grave error,

(3) Error in issuing the injunctive relief is usually irreparable to the opposing party, and

(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case."

[21] Feinberg, *Picketing, Free Speech, and "Labor Disputes"* (1940) 17 N. Y. U. L. Q. REV. 385.

[22] Note (1940) 49 YALE L. J. 537.

[23] Remington Rand, Inc. v. Crofoot, 248 App. Div. 356, 289 N. Y. Supp. 1025 (4th Dept.), *aff'd*, 279 N. Y. 636, 18 N. E. (2d) 37 (1938); May's Furs & Ready-To-Wear, Inc. v. Bauer, 255 App. Div. 356, 8 N. Y. S. (2d) 819 (2d Dept. 1939); Greater City Master Plumbers' Union v. Kahme, 6 N. Y. S. (2d) 589 (Sup. Ct. 1938); Everett v. Penna, 169 Misc. 589, 6 N. Y. S. (2d) 630 (1938).

[24] See note 21, *supra*.

[25] May's Furs & Ready-To-Wear, Inc. v. Bauer, 255 App. Div. 643, 8 N. Y. S. (2d) 819 (2d Dept. 1939).

[26] Paul v. Mencher, 169 Misc. 657, 7 N. Y. S. (2d) 821 (1937).

[27] Luft v. Flove, 270 N. Y. 640, 1 N. E. (2d) 369 (1936); Botnick v. Winokur, 7 N. Y. S. (2d) 6 (Sup. Ct. 1938); Pitter v. Kaminsky, 7 N. Y. S. (2d) 10 (Sup. Ct. 1938); Wishny v. Jones, 169 Misc. 459, 8 N. Y. S. (2d) 2 (1938).

[28] Thompson v. Boekhout, 273 N. Y. 390, 7 N. E. (2d) 674 (1937).

[29] Canepa v. Doe, 277 N. Y. 52, 12 N. E. (2d) 790 (1938); People v. Bellows, 281 N. Y. 67, 22 N. E. (2d) 238 (1939) (if no unity of interest, disorderly conduct); American Gas Stations v. Doe, 250 App. Div. 227, 293 N. Y. Supp. 1019 (2d Dept. 1937); Mlle. Reif, Inc. v. Randau, 166 Misc. 247, 1 N. Y. S. (2d) 315 (1937); *cf.* Davega City Radio, Inc. v. Randau, 166 Misc.

on the basis of false representations;[30] where the union had been denied permission to do business in the state[31] or where all of plaintiff's employees were members of a union which was a rival of the picketing organization.[32] These decisions disregard the established law of the state that labor has an inherent right to picket peacefully,[33] and contravene the express statutory provision that no item of relief granted prohibit "giving publicity to and * * * communicating information regarding the * * * dispute, whether by advertising, communicating information, speaking, picketing * * * or by any other method not involving fraud or breach of the peace."[34] In the case of *Busch Jewelry Co.* v. *United Retail Employees Union*,[35] the Court of Appeals enjoined *all* picketing on the grounds of prior unlawful conduct,[36] and confirmed the lower court's conviction that the anti-injunction statute was merely declaratory of the common law, and purely procedural.[37] In a vigorous dissent, Lehman, J., reiterated that "the legislature has in effect now said to the courts that prohibition of lawful picketing shall not be granted as an item of relief where the desired end might be obtained by prohibitions less complete." Two recent decisions[38] by the Court of Appeals[39] mark a recession by the court from the position taken in the *Busch* case.[40] In *May's Furs and Ready-To-Wear, Inc.* v. *Bauer*,[41] the court reconsidered the assertion made by the lower court, that violence removed the defendant "beyond the pale and protection of Section 876-a", and that having become outlaws, they were not entitled to the protection of the statute. It held that, in the absence of unlawful conduct, no injunction can issue even in the absence of Section 876-a; that the need for statutory safeguards can only exist where the defendant has been

246, 1 N. Y. S. (2d) 514 (1937); Weil & Co. v. Doe, 168 Misc. 211, 5 N. Y. S. (2d) 559 (1938).

[30] Bard & Margolies v. Marcus, N. Y. L. J., Dec. 3, 1938, p. 1947, col. 1.

[31] Hoffman's Vegetarian Restaurant v. Lee, 170 Misc. 815, 10 N. Y. S. (2d) 287 (1939).

[32] Stalban v. Friedman, 171 Misc. 106, 11 N. Y. S. (2d) 978 (1939). *Contra:* Stillwell Theatres v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932).

[33] Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931).

[34] N. Y. Laws 1935, c. 477.

[35] 168 Misc. 224, 5 N. Y. S. (2d) 575 (1938), *aff'd*, 255 App. Div. 970, 82 N. Y. S. (2d) 819, *aff'd*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939).

[36] Citing as authority cases decided before § 876-a. Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931); Wise Shoe Co. v. Lowenthal, 266 N. Y. 264, 157 N. E. 249 (1935).

[37] (1939) 52 HARV. L. REV. 1183 (scalding criticism of decision).

[38] May's Furs & Ready-To-Wear, Inc. v. Bauer, 282 N. Y. 331, 26 N. E. (2d) 279, (1940) *mod'g*, 255 App. Div. 643, 8 N. Y. S. (2d) 819 (2d Dept.); Baillis v. Fuchs, 283 N. Y. 133, 27 N. E. (2d) 812 (1940).

[39] It is to be noted, that on Jan. 1, 1940 three new members of the court took their places on the bench. Judge Lehman, who dissented in the *Busch* case, is now Chief Judge.

[40] (June, 1940) 8 INTER. JURID. ASS'N BULL. 130.

[41] See note 38, *supra*.

guilty of some unlawful activity and is liable to restraint.[42] Further, it was stated that there can be no basis for a perpetual injunction insofar as the statutory limitation on injunctions in labor disputes is limited to six months.[43] Thus, the *Busch* case does not outlaw unions that fail to live up to their "legal responsibilities". The *May's* case is not merely representative of a victory for labor, but serves as a "judicial correction of a former erroneous construction of an unambiguous statute." [44] In a later case,[45] the court followed the *May's* case and decreed that a sweeping injunction be modified so "as to permit unionists their unquestioned right to picket peacefully." [46] This right exists despite the fact that none of the employees were affiliated with any union, and were completely satisfied with their wages and working conditions. "It is the settled law of this state that the legitimate interests of a labor union are not confined to acts directed against an employer of its members."

III

The United States Supreme Court recently had an opportunity to ascertain the status of labor's right to picket peacefully. In *Thornhill* v. *The State of Alabama,*[47] the Court held unconstitutional and void on its face a statute prohibiting loitering or picketing.[48] "Free

[42] Learned counsel for the defendant very ably argued that "the very statute which contains the prohibition against the issuance of injunctive relief against peaceful picketing itself, contemplates that unlawful acts have been committed by the defendant." Section 876-a (1) (a): "That unlawful acts have * * * been threatened or committed * * *." Thus, even though unlawful acts have been committed, the statute deprives the court from issuing a blanket injunction. (f) "no item of relief" shall prohibit (5) "Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved, in any dispute. * * *"

[43] This reversed the ruling of a perpetual injunction granted in the *Busch* case.

[44] See note 40, *supra.*

[45] Baillis v. Fuchs, 283 N. Y. 133, 27 N. E. (2d) 812 (1940).

[46] See note 45, *supra,* at 138; Lauf v. E. G. Shinner & Co., 303 U. S. 323, 58 Sup. Ct. 578 (1938); *semble* Lisse v. Local Union, c. W. W., 24 P. (2d) 833 (Cal. 1933), *aff'd,* 2 Cal. (2d) 312, 41 P. (2d) 314 (1935) (no statute); International Pocketbook Workers Union v. Orlove, 158 Md. 496, 148 Atl. 826 (1930) (no statute); Driggs Dairy Farms v. Milk Drivers Union, 49 Ohio App. 303, 197 N. E. 250 (1935) (unlawful conduct restrained; reasonable, truthful and peaceable persuasion permitted). *Contra:* Joe Dan Market v. Wentz, 223 Mo. App. 772, 20 S. W. (2d) 567 (1929); Wise Shoe Co. v. Lowenthal, 266 N. Y. 264, 194 N. E. 749 (1935); Bert Amusement Corp. v. Holmden, 243 App. Div. 81, 276 N. Y. Supp. 236 (1st Dept. 1934); (1938) 116 A. L. R. 528. The propriety of restraining all picketing depends upon the danger to be reasonably anticipated.

[47] Thornhill v. State of Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940).

[48] ALA. CODE (1923) § 3448 (The statute provided, that "any person or persons who * * * go near to or loiter about the premises or place of business of any other person, firm or corporation * * * for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, have business dealings with or be employed by such persons * * * shall be guilty of a misdemeanor").

discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society * * * the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest. * * * " [49] Affirmation of these convictions was accorded in the case of *Carlson* v. *California.*[50] An anti-picketing ordinance [51] was there considered, and held similar to that in the case of *Thornhill* v. *Alabama,*[52] and thus governed by its reasoning. "The carrying of signs and banners * * * is a natural and appropriate means of conveying information on matters of public concern * * *, publicizing *the facts of a labor dispute* * * * by pamphlet, by word of mouth or by banner, *must now be regarded as within that liberty of communication, which is secured to every person by the Fourteenth Amendment against abridgment by the state."* [53] (Italics mine.) The further problem now arises as to the extent of permissible interference with such right.[54] Lower court decisions in New York construe these constitutional rights to be afforded only where the controversy falls within the accepted definition of a "labor dispute".[55]

A rationalization of the problem of picketing shows that the right of peaceful picketing cannot be usurped for, if the defendant has committed acts of violence, a restraining decree will specify and prohibit only those acts allowing the defendant to do the acts not restrained, *i.e.,* peaceful picketing. If, however, *all* acts are violent, then an injunction will affect all activity and there will be no remainder of peaceful picketing. Therefore, it is submitted that in no case should a court issue a sweeping injunction, as the same result may be obtained by enumerating the specific unlawful conduct. It would be overstepping the limitations of Section 876-a to include peaceful and lawful activities among the proscriptions.

HARRY LORBER.

---

[49] Thornhill v. State of Alabama, 310 U. S. 88, 103, 60 Sup. Ct. 736 (1940).

[50] 310 U. S. 106, 60 Sup. Ct. 746 (1940).

[51] The ordinance forbade loitering or picketing or displaying any banner, badge or sign in the vicinity of a factory or place of employment for the purpose of influencing any person from entering or from purchasing goods, or to refrain from entering into service there.

[52] Thornhill v. State of Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940).

[53] Carlson v. California, 310 U. S. 106, 112, 60 Sup. Ct. 746 (1940).

[54] (Summer, 1940) 1 BILL OF RIGHTS REV. 59.

[55] People v. De Julis, 174 Misc. 836 (Sup. Ct. 1940); Meltzer v. Siegelman, 174 Misc. 995 (Sup. Ct. 1940).