

## Labor--Closed Shop Contract--Monopoly--General Business Law Section 340 (Williams v. Quill, 277 N.Y. 1 (1938))

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with confiscation.<sup>19</sup> Indeed, there is such a stern adherence to this rule that, even on the theory of constructive possession, the requisition, by a state, of property outside its jurisdiction has not been upheld, when that property has not come within its actual possession.<sup>20</sup> However, the New York rule should not be considered as impolitic, for the welfare of the state depends upon it, and New York merely shares the same rule with foreign jurisdictions.<sup>21</sup>

E. S. S.

LABOR—CLOSED SHOP CONTRACT—MONOPOLY—GENERAL BUSINESS LAW SECTION 340.—Defendant Transport Workers Union of America was the duly elected bargaining agent for the employees of I. R. T. shops. After long negotiations and threatened strikes, a contract was entered into between defendant union and defendant company which provided that the latter would not employ any worker who was not, or did not become a member of the union within thirty days. Plaintiffs were employees at the time; they refused to join the union and were consequently discharged. In this action to enjoin defendants from carrying out the "closed shop" contract, plaintiffs concede that a "closed shop" contract is generally valid,<sup>1</sup> but they contend that in this case it is invalid because, as the I. R. T. is the only labor market locally for plaintiffs, the contract caused an unlawful monopoly;<sup>2</sup> they further contend that subdivision 2 of Section 340 of the General Business Law<sup>3</sup> is unconstitutional as violating the

<sup>19</sup> *Nichols v. Coolidge*, 274 U. S. 531, 47 Sup. Ct. 710 (1926); *Blodgett v. Holden*, 275 U. S. 142, 48 Sup. Ct. 105 (1927); *Untermyer v. Anderson*, 276 U. S. 440, 48 Sup. Ct. 353 (1927).

<sup>20</sup> *Baglin v. Cusenier Co.*, 221 U. S. 580, 31 Sup. Ct. 669 (1911); *Petrogradsky M. K. Bank v. Nat. City Bank*, 253 N. Y. 23, 170 N. E. 479 (1930).

<sup>21</sup> *The Jupiter*, 1925-26 ANN. DIG. OF INT. LAW CASES, Case No. 100; *Luther v. Sagor*, L. R. [1921] 3 K. B. 532.

<sup>1</sup> NEW YORK LABOR LAW § 704, subd. 5; *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5 (1905); *Commonwealth v. Hunt*, 4 Metc. 111 (Mass. 1842) is the leading case on the subject in this country. *Contra*: *Mische v. Kaminski*, 127 Pa. Super. 66, 193 Atl. 410 (1937).

<sup>2</sup> If the employees did not join the union, they would not be able to work at all. *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297 (1897); *Grassi Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dept. 1916); *Connors v. Connelly*, 86 Conn. 641, 86 Atl. 600 (1913); *Lehigh Co. v. Atl. Works*, 92 N. J. Eq. 131, 111 Atl. 376 (1920); *Polk v. Cleve. Ry.*, 20 Ohio App. 317, 151 N. E. 808 (1925).

The legal reasoning in many cases upholding a closed shop was that it was not oppressive and did not operate throughout the community to prevent non-union men from earning their livelihood; *Jacobs v. Cohen*, 183 N. Y. 207, 212, 76 N. E. 5, 7 (1905).

<sup>3</sup> This section is known as the Donnelly Anti-trust Act. Subdivision 2 expressly exempts "bona fide labor unions" from its provisions.

Fourteenth Amendment. On appeal from order denying temporary injunction, *held*, order affirmed. Section 340 of the General Business Law is constitutional. It has expressly exempted labor unions from its provisions, and, therefore, if there is an evil in the monopoly of labor it is a matter to be considered by the legislature and not by the courts. *Williams v. Quill*, 277 N. Y. 1, 12 N. E. (2d) 547 (1938).<sup>4</sup>

New York has long upheld the right of workmen to strike to procure the discharge of a non-union fellow worker; in other words, the right to strike for a "closed shop" has been declared legal.<sup>5</sup> And, as a necessary corollary, the courts have upheld the validity of a "closed shop" contract,<sup>6</sup> but with so many qualifications that the decision rested largely with the personal convictions of the judge.<sup>7</sup> It was contingent not only upon the means used,<sup>8</sup> but also upon the purpose which motivated the strike or the contract.<sup>9</sup> If the primary purpose was found to be for the general welfare of the union and its members, it was declared lawful;<sup>10</sup> but if the intention was primarily

<sup>4</sup> *Cert. denied*. — U. S. —, 58 Sup. Ct. 650 (1938).

<sup>5</sup> National Prot. Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902).

<sup>6</sup> Kissam v. U. S. Printing Co., 199 N. Y. 76, 92 N. E. 214 (1910); Exchange Bakery v. Rifkin, 245 N. Y. 260, 151 N. E. 130 (1927); Wunch v. Shankland, 59 App. Div. 482, 69 N. Y. Supp. 349 (4th Dept. 1901).

<sup>7</sup> The judges merely reflect the prevalent economic beliefs of the times. Compare Curran v. Galen, 152 N. Y. 33, 46 N. E. 297 (1897) (threatened strike to obtain discharge of non-union man) with instant case.

<sup>8</sup> Violence, intimidation, false statements, etc., are enjoined. American Steel Found. v. Tri-city, 257 U. S. 184, 42 Sup. Ct. 72 (1921); Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995 (1908); O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843 (1897); Purvis v. United Brotherhood, 214 Pa. 348, 63 Atl. 585 (1906); cf. Stillwell Thea. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932). Exchange Bakery v. Rifkin, 245 N. Y. 260, 151 N. E. 130 (1927), holding that where a few isolated wrongs were committed but strike was orderly after that, injunction will not be granted. N. Y. CIV. PRAC. ACT § 876-a; Diamond Coal Co. v. United Mine Workers, 188 Ky. 477, 222 S. W. 1079 (1920), holding that even if violence and intimidation have been committed, injunction will not be issued against unincorporated union, but only against the guilty members.

<sup>9</sup> National Prot. Ass'n v. Cumming, 170 N. Y. 315, 326, 63 N. E. 369 (1902), attacks the rule as illogical and absurd that every-day acts of the business world may be lawful or unlawful according to the motive. At page 322, Parker, J., says that whenever possible the courts should interpret the motive of a labor union to be lawful. This bit of advice was not followed until about twenty-five years later when economic conditions forced most courts to change their attitude toward labor. The law remains, however, that the purpose of the union determines the legality of the strike. See notes 10, 11, *infra*.

<sup>10</sup> Cases in which the primary purpose was found to be the general welfare of the union and its members and therefore lawful: Kissam v. U. S. Printing Co., 199 N. Y. 76, 92 N. E. 214 (1910) (purpose of closed shop contract was not to injure non-union men); Exchange Bakery v. Rifkin, 245 N. Y. 260, 151 N. E. 130 (1927) (the sixteen waitresses in plaintiff's employ were required to sign a yellow dog pledge when they were employed; four of them signed but then joined defendant union; strike when plaintiff refused defendant's demand for a closed shop); Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185 (2d Dept. 1904) (it was found as fact that the purpose of the closed shop contract was not to injure non-union men); Commonwealth v. Hunt, 4 Metc. 111 (Mass. 1842) (indictment for conspiracy for closed shop; lawful or

to injure non-union men, and deprive them of their livelihood, it was declared unlawful as against public policy.<sup>11</sup>

Another qualification was one against monopoly. If any of these contracts even approached a monopoly, such as where all or most of the employers in a given industry or community combined and agreed to a "closed shop" with the union, it was declared void.<sup>12</sup> In the case of *Exchange Bakery v. Rifkin*,<sup>13</sup> however, it was held a union might strike for a "closed shop", even to the extent of excluding others from the entire industry who are not union men.<sup>14</sup> Since then, due to economic and business exigencies, this view has been followed and extended<sup>15</sup> to its logical consequence in the principal case.<sup>16</sup>

The law of New York in regard to the rights of labor is now fairly well settled in all respects except one, *viz.*, liability of unions in an action for inducing a breach of contract.<sup>17</sup> A union may strike, or

unlawful as the means used are lawful or unlawful; no unlawful purpose or means was shown).

<sup>11</sup> Cases in which the primary purpose was found to be unlawful: *People ex rel. Gill v. Smith*, 5 N. Y. Cr. Rep. 509 (1887) (union struck for the discharge of plaintiff who had fired a union member under suspicion of swindling); *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297 (1897) (closed shop contract; plaintiff refused to join the union and was fired; purpose was to injure plaintiff); *Reed v. Whiteman*, 238 N. Y. 545, 144 N. E. 885 (1924) (purpose was to ruin plaintiff maliciously in business); *Grassi Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dept. 1916) (because workers through their own fault worked overtime, union threatened to put a foreman on all plaintiff's jobs for one year, having complete power to hire and fire); *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995 (1908) (widespread union hounded plaintiff out of every job he got).

<sup>12</sup> *McCord v. Thompson Starrett Co.*, 129 App. Div. 130, 113 N. Y. Supp. 385 (1st Dept. 1908), *aff'd*, 198 N. Y. 587, 92 N. E. 1090 (1910).

<sup>13</sup> *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 151 N. E. 130 (1927).

<sup>14</sup> It is peculiar to note that the statement in *Exchange Bakery v. Rifkin*, *id.* at 263, upon which this rule is based, was unnecessary to the decision of that particular case, and was, therefore, purely *dicta*.

<sup>15</sup> *Stillwell Thea. v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932); *O'Keefe v. Local 463*, 277 N. Y. 300, 14 N. E. (2d) 77 (1938); *Maisel v. Sigman*, 123 Misc. 714, 205 N. Y. Supp. 807 (1924); *American Fur Mfrs. v. American Fur Coat*, 161 Misc. 246, 291 N. Y. Supp. 610 (1936). This liberal trend is based upon the desire to make the employer and the employee equal in the matter of bargaining. See Note (1937) 37 Col. L. Rev. 816.

<sup>16</sup> This is the first time the question has been squarely placed before the Court of Appeals on the merits whether a closed shop contract covering an entire industry or community is illegal as a monopoly. It answered in the negative. Although a statute was involved, the court declared that this was the law even without the statute. It then cited the *dicta* in *Exchange Bakery v. Rifkin*, cited *supra*, note 13.

<sup>17</sup> This point has not been directly decided by the New York courts, although it has been decided that a "yellow dog" contract will not be the basis for such an action. N. Y. CIVIL RTS. LAW § 17; *I. R. T. v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928); *Tapley*, *The Anti-Union Contracts* (1936) 11 St. JOHN'S L. REV. 40. A few cases, however, indicate that if the question were to be presented, the courts would decide in favor of the unions. *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 151 N. E. 130 (1927); *Stillwell Thea. v. Kaplan*, 259 N. Y. 405, 182 N. E. 62 (1932). *Contra*: *R. & H. Hat Co. v. Scully*, 98 Conn. 1, 118 Atl. 55 (1922).

threaten to strike, or enter into contract, for a "closed shop", even to the extent of monopolizing the whole industry or community.<sup>18</sup> It will be noticed that the purpose and the methods still have to be lawful, although the courts have become very liberal in this respect.<sup>19</sup> The anti-injunction acts have made it almost impossible to obtain an injunction in labor disputes;<sup>20</sup> however, the unions are still liable in damages for violence and other unlawful acts.<sup>21</sup> The right of an employer to hire and fire has not as yet been taken from him, though qualified almost to the point of extinction.<sup>22</sup> The language of some cases is dangerously broad,<sup>23</sup> but labor has not been permitted to abuse its power of monopoly too much.<sup>24</sup>

R. B. F. G.

LABOR—NATIONAL LABOR RELATIONS BOARD—EMPLOYER AND EMPLOYEE RELATIONSHIP.—Defendant was charged with unfair labor practices. Defendant lumber company's logging and milling operations are carried on entirely within the State of Washington, nine-tenths of its output, however, being shipped in interstate commerce. In 1933 a company union was formed. In 1934 a group of defendant's employees formed a union affiliated with the American Federation of Labor. In an election under the National Industrial Recovery Act<sup>1</sup> the latter union was selected as the sole bargaining representative of the employees. A strike was called in May, 1935. Prior to the National Labor Relations Act becoming effective,<sup>2</sup> defendant discharged all employees on strike. Company then reemployed those employees who renounced all affiliations with any labor organi-

<sup>18</sup> See note 15, *supra*.

<sup>19</sup> See note 8, *supra*.

<sup>20</sup> NORRIS-LAGUARDIA ACT, 47 STAT. 70 (1932), 29 U. S. C. §§ 101-115 (1932); *New Negro Alliance v. Sanitary Grocery Co.*, — U. S. —, 58 Sup. Ct. 703 (1938); see (1938) 13 ST. JOHN'S L. REV. 171; N. Y. CIV. PRAC. ACT § 876-a (and annotated cases); see (1938) 12 ST. JOHN'S L. REV. 358.

<sup>21</sup> See Ed. N. Y. L. J., May 28, 1938.

<sup>22</sup> *Sherman v. Abeles*, 265 N. Y. 383, 193 N. E. 241 (1934); *O'Keefe v. Local 463*, 277 N. Y. 300, 14 N. E. (2d) 77 (1938).

<sup>23</sup> See *American Fur Mfrs. v. American Fur Coat*, 161 Misc. 246, 252, 291 N. Y. Supp. 610, 617 (1936).

<sup>24</sup> *Brescia Const. Co. v. Stone Masons Ass'n*, 195 App. Div. 647, 187 N. Y. Supp. 77 (1st Dept. 1921); *Falciglia v. Gallagher*, 164 Misc. 838, 299 N. Y. Supp. 890 (1937). In these cases, the union was acting as a tool in the hands of a monopolistic employers' association.

<sup>1</sup> 48 STAT. 195 (1933), 15 U. S. C. § 702 (1934).

<sup>2</sup> 49 STAT. 449, 29 U. S. C. A. §§ 151-166 (Supp. 1935). The constitutionality of the Act was upheld in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615 (1937).