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The Anti-Union Contracts

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THE ANTI-UNION CONTRACTS

The swinging mill bell changed its rate
To tolling like the count of fate,
And though at that the tardy ran,
One failed to make the closing gate.
There was a law of God or man
That on the one who came too late
The gate for half an hour be locked,
His time be lost, his pittance docked.
He stood rebuked and unemployed.

"A Lone Striker"

ROBERT FROST

IN the struggle between employer and employee no one issue has been more fiercely contested during the past forty years than the so-called "Yellow Dog" contract. Its colorful name suggests, to some extent, the ill feeling it has aroused.[1] The contract embodies an agreement that the employee will not join any labor organization during the term of his employment, or will withdraw from employment in the event that he joins.

This condition in the contract came into use in America about 1875. It was used extensively in the coal mining regions, particularly in West Virginia, Ohio, and Pennsylvania. With the growth of labor organizations, employers seized upon it as a convenient weapon of defense and everywhere it was greatly disliked by the employees. The legal effect of the agreement was not so great as the employers believed, for rights and liabilities of the parties remained substantially unimpaired. If the employee did join a labor organization, his contract being one at will, the employer could discharge him whether there was an anti-union provision in the agreement or not. There would be little satisfaction to the employer in a suit for money damages, and, of course, equity would not require the servant to perform the services. However, non-union conditions did continue to be used, probably in the hope that the employee, knowing his employer's attitude toward labor organizations generally,

[1] "The Yellow Dog Contract"—Joel I. Seidman, Ph.D., Johns Hopkins University Studies in Historical and Political Science—Vol. 50, Ser. L, No. 4 (1932).

would hesitate to join, for fear of discharge, rather than fear of breach. So, at the beginning of the century, employers had not much faith in the covenant, and labor organizations were not limited in securing membership because of it.

In 1907, a very important case came before the court, and although final determination was not had until ten years later, the effect upon the non-union clause was tremendous.[2] Prior to June 12, 1906, the Hitchman Coal and Coke Company, operating a mine in what is known as the Pan Handle district of West Virginia, suffered great financial loss because of labor disputes. The mine had heretofore been operated as a union mine. The operators became convinced of the futility of attempting to carry on as such, and therefore established their mine on a non-union basis. This change was apparently with the unanimous approval of the employees and under a mutual agreement, assented to by every employee, that the Hitchman Mine would continue operating as non-union, and would not recognize the United Mine Workers of America. If any employee wanted to become a member of that union, he was at liberty to do so, but he could not be a member and remain in Hitchman's employ. Under this agreement, the mine ran for a year or more without the slightest disagreement between the operators and its men. It became apparent to the officers of United Mine Workers of America, that union mines situated in other states would be pressed by the competition of the Hitchman organization. The operators of these union mines would be unable to comply with the union's demands, and, therefore, it was of paramount importance to unionize the Hitchman Coal Mine. A representative of the United Mine Workers of America was sent there for the purpose of securing a sufficient number of these employees to agree to join the union and to breach their agreements with the operators. The plan was to call a strike as soon as a sufficient number could be secured, and no settlement then was to be effected without the unqualified assent of the owners to operate thereafter as a union mine. These acts were taken by the union with full notice of the agreements that had been entered into

[2] Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, L. R. A. 1918 C 497 (1917).

between the employees and the operators. The primary purpose of the union was not to enlarge the membership of the union, but to compel the owners through a strike, or threat of one, to recognize the union in dealing with its employees. The Hitchman Company sought an injunction, restraining this union representative from interfering with their contracts with the employees. The United States Supreme Court sustained the injunction issued in this action in 1917, after protracted litigation.[3] The decision was considered, at first, a blow to the union. Injunctions had been issued previously in labor disputes, but this case, it was thought, prohibited acts which had not heretofore been challenged; acts that were at the very foundation of labor's attempt to organize.

From this time on the non-union conditions steadily increased, the employers being confident that they now had a positive check on the growth of labor unionism.[4] As might be expected, the increase was great in West Virginia. Labor disputes there were acute. Operators, recognizing the success of the Hitchman mine, were quick to adopt their practices, and so the "Yellow Dog" contracts multiplied. When, therefore, the Borderland Coal Company sought an injunction in September, 1921, to prevent interference with individual employees' contracts, it requested the same relief for sixty-two other companies operating in the same field. Then came the widespread coal strike in 1922, and again many similar suits came before the court. Finally, in 1927, all of these actions were consolidated, and a sweeping injunction, restraining any interference by labor organizations in respect to the individual agreements, was issued.[5] In so acting, the court believed it was following the rule stated in the *Hitchman* case. The effect of the decision was to prevent members of labor organizations from soliciting membership to the extent of about forty thousand men. If such conditions were to continue, collective bargaining would be extin-

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[3] *Ibid.*

[4] "The Yellow Dog Contract"—Joel I. Seidman, Ph.D., Johns Hopkins University Studies in Historical and Political Science—Vol. 50, Ser. L, No. 4 (1932).

[5] International Organization U. M. W. v. Red Jacket Consolidated Coal and Coke Co., 18 F. (2d) 839 (C. C. A. 4th, 1927) *cert. denied,* 275 U. S. 536, 48 Sup. Ct. 31 (1927).

guished. If labor organizations could not obtain members, they could not carry on. But the country did approve of their existence and believed in collective bargaining.[6] Something had to be done to alleviate this situation.

There were two possible means open to the unions. First, legislation, and secondly, the aid of the courts. Long before the *Hitchman* case was decided, the legislators were enacting laws respecting the non-union agreement. As early as 1887 the legislature of New York added to its Penal Code, Section 171A, making it a misdemeanor for an employer to require, as condition of employment, that the employee should not join or become a member of a labor organization. The statute was declared unconstitutional as an unauthorized restraint upon the freedom of contract in relation to the purchase and sale of labor.[7] About a decade later, Congress attempted to make criminal such clauses in contracts pertaining to interstate commerce, but in *Adair* v. *United States*[8] the statute was again declared void by the Court. The Court recognized that the right to hire labor, free from restraint, was protected under the Constitution and an interference with this liberty, as serious as that provided in the statute, must be deemed arbitrary, and a deprivation both of liberty and property.[9] Although in the *Adair* case the decision was confined to that part of the statute dealing with the right of the employer to discharge, it was not long before the question was presented in respect to the non-union condition contained in a statute of Kansas and again the United States Supreme Court, in the *Coppage* case, declared the law unconstitutional.[10] Finally, the Ohio Federation of Labor proposed the following measure as one most likely to satisfy the previous constitutional objections.[11] It provided:

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[6] The refusal of the United States Senate to confirm the appointment of Circuit Judge Parker to the United States Supreme Court was due in great measure to the injunctions issued in these cases.

[7] People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282 (1906).

[8] 208 U. S. 161, 28 Sup. Ct. 277, 13 Ann. Cas. 764 (1908).

[9] *Ibid.*

[10] Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, L. R. A. 1915 C 960 (1915).

[11] "The Yellow Dog Contract"—Joel I. Seidman, Ph.D., Johns Hopkins University Studies in Historical and Political Science—Vol. 50, Ser. L, No. 4 (1932).

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained, in any contract or an agreement of hiring or employment between any individual firm, organization, association or corporation, and any employee or prospective employee of the same, whereby (a) either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes, or remains a member of any labor organization, or of any organization of employers, is hereby declared to be contrary to public policy and wholly void."

In view of the limited extent to which the constitutionality of this bill has been discussed by the courts, it is not possible to say that it will or will not be sustained. However, to a question submitted to the justices of the Supreme Judicial Court of Massachusetts, in April, 1930, in regard to the constitutionality of a proposed bill incorporating this section, the court declared the statute to be in conflict with the Constitution of the United States and of the Commonwealth.[12] In so deciding, the court was guided by the earlier cases sustaining the non-union provisions and held that they were decisive of the question propounded.[13] The court pointed out in its conclusion that "there is a wide field for the valid regulation of freedom of contract in the exercise of the police power in the interests of the public health, the public safety or the public morals and in a certain restricted sense of the public welfare." [14] To the same effect, the court in the case of *Coffeyville Vitrified Brick and Tile Co.* v. *Perry,*[15] said: "Before approaching a discussion of the question, let us exclude any notion that the act in question is a

[12] *Re* Opinion of the Justices, 271 Mass. 598, 171 N. E. 234, 68 A. L. R. 1265 (1930).

[13] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 13 Ann. Cas. 764 (1908); Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, L. R. A. 1915 C 960 (1915).

[14] *Re* Opinion of the Justices, 271 Mass. 598, 171 N. E. 234, 68 A. L. R. 1265 (1930).

[15] Coffeyville Vitrified Brick and Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185, 1 Ann. Cas. 936 (1904).

police regulation. It will be observed that it does not affect the public welfare, health, safety, or morals of the community, or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police regulation. Besides, the legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the Constitution, under the guise of a police regulation."

The provisions in the bill were also included in the act passed by Congress in 1932 and known as the Norris-LaGuardia Anti-Injunction Act,[16] and since then legislation in many states has been enacted along similar lines. Without elaborating further on the possible constitutional objections, let us turn to the redress afforded by the courts.

Any modification of the strict rule announced in the cases subsequent to the *Hitchman* case would be of greater value to labor organizations generally, than doubtful constitutional legislation. No state has gone farther in protecting the unions in respect to the legal effect upon them, of the non-union contracts, than has New York.[17] During the last ten years the New York Court of Appeals has consistently shown its independence of the *Hitchman* doctrine and of the later cases which follow and enlarge upon it.[18] In fact, this court has little difficulty in distinguishing this decision, for it has held that the case is not an authority for the proposition that inducements for a breach of contract for a definite term of employment are illegal, even in the case of solicitation by groups of laborers. The injunction, it has pointed out, was sustained in the *Hitchman* case because of the unlawful and deceitful means employed to molest the operators, rather than to better the fortunes of the workers.[19] The facts in the *Hitchman* case showed that the union's primary

[16] 29 U. S. C. A. §§ 101–115.

[17] Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863, 63 A. L. R. 188 (1928); Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dept. 1916); Third Ave. R. R. Co. v. Shea, 109 Misc. 18, 179 N. Y. Supp. 43 (1919), *aff'd,* 191 App. Div. 949, 181 N. Y. Supp. 956 (1st Dept. 1920).

[18] Stillwell Theater, Inc. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Exchange Bakery and Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

[19] *Ibid.*

purpose was not to increase membership, but to compel the owners to carry on only as a union mine.[20] Of course, the court recognizes the rule which gives a right of action for unlawful interference with commercial contracts,[21] but when the facts show that the primary purpose of the union is to increase membership and better the conditions of the employees, rather than to interfere with possible contract rights, the rule is not applicable.[22] The result has been that peaceful picketing by members of a labor union may not be enjoined on the ground that the purpose was to induce or cause a breach of contract between the employer and his employees.[23] To declare fairly and truly that the conduct of an employer is socially objectionable to labor unions is no persuasion to a breach of contract, and the fact that such action may result in incidental injury to the employer, does not in itself constitute a justification for the issuance of an injunction. This principle is true whether the contract between employer and employee is one at will or for a definite term.[24] Following these decisions, lower courts refuse to issue injunctions merely because of the presence of non-union clauses in contracts of employment. It is confidently believed that consistent denial of equitable relief would soon result in the extinguishment of the "Yellow Dog" pests. Employers would appreciate that public opinion was adverse to their use, and labor organizations would not be limited in securing memberships because of them.

Unfortunately, this result has been temporarily retarded in New York. Labor insisted upon the enactment of a law immediately invalidating the non-union provisions. Too

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[20] Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, L. R. A. 1918 C 497 (1917).

[21] Lamb v. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920).

[22] DeAgostina v. Holmden, 157 Misc. 819, 285 N. Y. Supp. 909 (1935) ("Whatever the law may be in other jurisdictions, it has been established by the Court of Appeals as the law of New York that interference with employment relations in a *bona fide* controversy over conditions and terms of employment is permissible when restricted to lawful methods, even though such interference involves a breach of contract.").

[23] Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863, 63 A. L. R. 188 (1928); Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dept. 1916); Third Ave. R. R. Co. v. Shea, 109 Misc. 18, 179 N. Y. Supp. 43 (1919), *aff'd,* 191 App. Div. 949, 181 N. Y. Supp. 956 (1st Dept. 1920).

[24] Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N. Y. Supp. 258 (1928).

impatient to await their gradual extinguishment by judicial process, labor required prompt elimination by statute, and, thus choosing, it necessarily accepted the defense of these laws against constitutional attack. The statutes which were finally adopted to carry out the plan are to be found in the Consolidated Laws and the Civil Practice Act of the state. The statutes are similar in many ways to the provisions of the Norris-LaGuardia Act. In 1935, Section 17 was added to the Civil Rights Law and declared certain employment contracts void.[25] This section contains, practically verbatim, the principal provisions of the bill sponsored by the Ohio Federation of Labor. There can be no doubt that serious constitutional problems are involved in this bill, and to the same extent the New York Law will be open to attack. But the section goes much farther in an attempt to provide attractive benefits to labor. Under subdivision (a) it is provided that any contract of hire is void if it contains a promise by the employee that he will join, become, or remain a member of a company union. Can it be said that company unions, resulting from voluntary agreements between employees and their employers, are so objectionable and contrary to public policy that they can be arbitrarily declared void by the legislature? Merely to state the proposition seems sufficient to demonstrate the unconstitutionality of this provision of the section. If in the future, the so-called "regular" labor organizations "fall out", it may be that the only security afforded to employees and their employers will be through the medium of the company unions. In New

[25] Section 17 of Civil Rights Law provides, "Certain employment contracts void. Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained, in any contract or agreement of hiring or employment between any individual, firm, company, association or corporation and any employee or prospective employee of the same, whereby (a) any employee or prospective employee undertakes or promises to join, become or remain a member of a company union; or (b) either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or any organization of employers; or (c) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes or remains a member of any labor organization or of any organization of employers, is hereby declared to be contrary to public policy and wholly void and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise, or against any other persons who may advise, urge or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of such undertaking or promise."

York, today, such agreements are absolutely void.[26] Then, too, the statute does not contain a saving clause, so that if the courts are compelled to void the statute because of this manifest objection, the other provisions, embodying as they do the anti-union agreements, must likewise fall. The law intended as a boon to labor and a final settlement of the struggle respecting the non-union clause seems to add greater confusion to the controversy. Labor must assume the expense of costly litigation to preserve a law destined to be ultimately declared void by the courts.

To carry out Section 17 of the Civil Rights Law, the Legislature added Section 876A to the Civil Practice Act. This section greatly restricts the issuance of both temporary and permanent injunctions in cases growing out of a labor dispute as defined by the Act. Of course, it denies all injunctive relief for the breach of a contract involving the non-union clause as these are declared void as against public policy. But the limitation on the jurisdiction of the courts does not end there. The section provides that application for a temporary injunction can be made only by a verified complaint and a verified bill of particulars, specifying in detail the acts complained of, and the persons alleged to have committed the same. There must be a hearing in open court with the liberty of cross-examination and the right to submit testimony in opposition, and no affidavit may be received in support of any allegation of the complaint. Further, it must appear that as to each item of relief granted, greater injury would be inflicted upon complainant by the denial than will be inflicted upon the defendant by the granting thereof. If this objection appears as a single item of relief, the court loses jurisdiction over the entire proceeding.

Under Subdivision A, the court has no jurisdiction unless it is established that the public officers charged with the duty to protect complainants' property have failed or are unable to furnish adequate protection. It would seem that if the court is to retain its jurisdiction, it would have to find under this clause that not only have the police failed, but also high executives. No longer can it be said that the

[26] *Ibid.*

allegation amounts to a mere "conventional assertion." [27] As has been pointed out, it would seem to require proof that all public officers have failed right up to the need of calling out troops and might be the equivalent of saying that no injunction shall issue until martial law has been invoked.[28]

Although the section is enacted in the Civil Practice Act under the chapter dealing with provisional remedies, it goes much farther than affording temporary relief. It has been said, by way of dicta, that since the statute was found under provisional remedies, its application, of necessity, was limited to the temporary injunction.[29] Perhaps this may be a charitable way of construing the law, but, unfortunately, it disregards the express language of the statute. Provision is made for both temporary and permanent injunctions in this type of case. The seventh subdivision reads, "Every temporary injunction and restraining order shall by its terms expire within such time after entry of the order as the court or judge may fix, not to exceed ten days, unless the plaintiff is ready by the expiration of that period to proceed to trial." Subdivision eight provides that no permanent injunction shall remain in force for more than six months from the date on which the judgment is signed. Since this injunction is to be issued after judgment there can be no doubt that it was contemplated as the final determination of the proceeding. Nothing temporary was intended. The section also provides that the permanent injunction issued after judgment may be extended for another six months, providing a new proceeding be instituted, conducted in the same manner as the original, and after the court has again heard the same case, it may continue the injunction for six months more. Apparently, after one year has expired, there is no remedy against unlawful acts. The legislature's liberality in conferring this jurisdiction upon the Supreme Court in respect to "permanent" injunctions, is, indeed, commendable. Of course, it is true that the equitable jurisdiction vesting in the Supreme Court is derived from the Constitution of the state, and not

[27] "The Labor Injunction", by Professor Felix Frankfurter and Professor Nathan Green.

[28] Micamold Radio Corp. v. Beedie, 156 Misc. 390, 282 N. Y. Supp. 77 (1935).

[29] *Ibid.*

from the legislature.[30] The problem presented is, therefore, not analogous to the limitation provided in the federal statute over inferior federal courts.[31] The creation and jurisdiction of these courts under the Federal Constitution is vested exclusively in Congress.[32]

The amendment to the Civil Practice Act has definitely limited the court in its endeavor to work out a solution to this critical problem. Free from legislative restraint, the courts had taken the only logical way to strike out and minimize the effect of the non-union clause. Today, they are powerless. Real benefit to labor can come only when the statutes are declared void.

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[30] N. Y. CONST. art. VI, § 11, provides: "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or hereafter may be prescribed by law not inconsistent with this article."

[31] 29 U. S. C. A. §§ 101–115.

[32] U. S. CONST. Art. III.