

The "Yellow Dog" Contract

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employer refuses to hire and gives as his reason, lack of ability of the applicant. Yet that very employer might not be hiring because of race, color or creed but there is no reason other than the employer who is the judge of the ability of the applicant. Nor need the employer give any reason if he did hire and immediately thereafter discharged the employee.⁴⁰ As a result, it would seem that unless the employer expressed discrimination because of the applicant's race, color or creed, there would be little efficacy to the act. That the convictions under such a statute would be few indeed is quite evident.

GEORGE J. SCHAEFER.

THE "YELLOW DOG" CONTRACT.—The campaign waged by organized labor on the so-called "yellow dog"¹ contract gained legislative sanction in 1887, when the New York Legislature passed a statute making it a misdemeanor for "any * * * employer * * * (to) coerce or compel any * * * employee to enter into any agreement * * * nor to join or become a member of any labor organization, as a condition of such person securing employment, or continuing in the employment of any such employer."²

Similar statutes were passed in fourteen states, and Congress not only imposed a similar restriction on interstate carriers but in addition forbade discrimination against employees by reason of their membership in labor unions.³

These attempts to make use of criminal sanction to outlaw the anti-union contract fell under constitutional laws as constituting an unconstitutional interference with liberty of contract.⁴

⁴⁰ *Coppage v. Kansas*, *supra* note 4, 10, "So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the service of such employee." See *Prudential Ins. Co. v. Cheek*, *supra* note 7.

¹ Such a contract usually provides that the employer will run his business non-union and that the employee will not become a member of any labor union during the course of his employment nor molest, nor interfere with the employer's business. See Note (1928) 41 *HARV. L. REV.* 770. A "yellow dog" agreement is set forth in *Hitchman v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

² N. Y. PENAL CODE, §1171a, L. 1887, c. 688. It was held unconstitutional in *People v. Marcus*, 185 N. Y. 257, 77 N. E. at 1073 (1906).

³ Erdman Act, June 1, 1898, c. 370 §10.

⁴ *Adair v. U. S.*, 208 U. S. 161, 28 Sup. Ct. 277 (1908); *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1915). In addition about a dozen state supreme court decisions to the same effect have established that it cannot be made a criminal offense for employers to require their employees to agree that they would not join unions.

Beginning with the *Hitchman*⁵ decision, the "yellow dog" became a powerful ally to anti-union employers in fighting unions. Previously, such agreement, while lawful, had been but little used, and were enforceable only through the employer's right to discharge those of his workers who joined unions. In fact, they seem to have been thought of not as contract, but as a condition of employment which the employer might insist on but could not get the court to aid him in maintaining.⁶ But now, employers could use such agreements to secure injunctions to prohibit unions from organizing the workers or inducing them to join in strikes. With this development, "yellow dog" contracts became valuable to anti-union employers. Since the *Hitchman* case there have been more than 60 cases where such contracts have been before the courts. In none of them did the employers bring suit against those who signed them. Invariably injunctions were sought against unions as interfering third parties.

At the session of the New York Legislature that recently terminated, there was proposed in the Senate a bill declaring void provisions in contracts of employment whereby either party promises not to join or belong to a labor or employer's organization during the continuance of the employment.⁷ The lead was taken by Wisconsin in 1929,⁸ and in 1931 statutes similar to one proposed in the New York Legislature were passed in Ohio, Oregon, Colorado, and Arizona.⁹ Their provisions are embodied in section 4 of the proposed Shipstead Federal Anti-Injunction Bill.¹⁰

The text of the proposed New York statute, which in the main is derived from a bill introduced in the Ohio Legislature in 1925, with the active backing of the State Federation of Labor, reads:

"Every undertaking or promise heretofore or 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) either party to such contract or agreement undertakes or promises not to join, become or remain a member of any labor organization or

⁶ *Supra* note 1.

⁷ See Wis. L. REV. 21, 24 (1930) for list of cases involving "yellow dog" contracts taken from the Nicol reports or from Law and Labor.

⁸ Senate Bill No. 201—proposed June 19, 1932.

⁹ WIS. STAT. (1929) Secs. 103, 46.

¹⁰ See A. B. A. J. (1931) p. 516.

¹¹ S. 2497, 71st Cong., 2nd session. See generally, FRANKFURTER AND GREEN, THE LABOR INJUNCTION (1930). As this is being written, the Norris-LaGuardia Anti-Injunction Bill was signed and became law, March 23, 1932. However, much of organized labor's joy over the statute was erased by the opinion of the Attorney General released by President Hoover at the time of signing the bill. See editorial N. Y. L. J., March 30, 1932. The Bill is H. R. 5315.

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 and shall not afford any basis for the granting of legal or equitable relief by any court against or 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.*" (Italics ours.)

From a brief survey of the cases arising under the "yellow dog" contract it becomes very evident that the statute will not have a great effect on the contractual relationship between employer and employee. Under the wording of the bill, it is apparent that if a condition of the hiring is a non-union promise, it will be disregarded, and this will give rise to an action against the employer if he were to discharge his employees for breaching such condition.

The main importance of the proposed bill and the real reason for its being introduced is to prevent the employer from obtaining injunctions against labor unions.¹¹

Senator Wagner of New York during the debate on the nomination of Judge Parker to the Supreme Court stated "the use of this instrument ("yellow dog" contract) is a unique one. No employer ever sued any employee for violating it. No employer ever expects to do so. That is not its purpose. Its utility lies solely in the fact that it affords a basis upon which to apply for an injunction restraining anyone from attempting to persuade the employees to unionize."¹²

As regards the constitutionality of the proposed statute the Supreme Judicial Court of Massachusetts in two advisory opinions to the Legislature has declared, that a statute akin to the New York one, if passed, would violate the due process clause of the Fourteenth Amendment.¹³ The argument that the proposed legislation is unconstitutional is based to a great extent upon the *Hitchman* case,¹⁴ and upon the other cases in which statutes penalizing employers for discharging or refusing to employ workmen because of union membership have been declared unconstitutional.

¹¹ DASKOW, STATUTES OUTLAWING "YELLOW DOG" CONTRACTS (1930) Vol. XVII, A. B. A. J., p. 516. See also the "Yellow Dog" Devised as a Bar to the Union Organizer (1928) 41 HARV. L. REV. 770; FRANKFURTER, CONGRESSIONAL POWER OVER THE LABOR INJUNCTION (1931) 31 COL. L. REV. 385.

¹² CONGRESSIONAL RECORD, April 30, 1930, pp. 8336, 8340.

¹³ Opinion of the Justices, 271 Mass. 598, 171 N. E. 234 (1930); opinion of the Justices, — Mass. —, 176 N. E. 649 (1931).

¹⁴ *Supra* note 1.

The New York courts are looked to as affording an avenue for upholding the proposed statute. There are decisions in New York to the effect that the "yellow dog" contract is only a condition of employment—a mere understanding as distinguished from an enforceable contract.¹⁵

However, in these cases the court found that the contract was one at will, or that it was so full of loopholes in the Interborough cases, that the I. R. T. could terminate the employment almost at will, thus leaving the contract wholly without mutuality. The New York decisions still leave open the possibility that contracts may be drawn which will meet the requirements of mutuality and consideration. Where there was a *bona fide* agreement for a definite term, no New York case went so far as to refuse an injunction.¹⁶

Hence, the legislation will have to hurdle formidable barriers.

Professor Walsh is of the opinion that the true solution of the whole vexing question would be a holding by the courts that inducing a breach of such contracts to extend the organization of labor in an industry is privileged as fair competition.¹⁷

It is pointed out that nowhere in the *Hitchman*¹⁸ case were the social implications and consequences of the enforcement of "yellow dog" contracts through injunctions so much as mentioned. Even so, three judges dissented, and perhaps in the next case, with the purposes and results appearing so clearly, the Supreme Court might depart from its prior decisions.¹⁹

JULIUS NOVEMBER.

SECTION 52-A. VEHICLE AND TRAFFIC LAWS.—The Legislature of the State of New York during the 1931 session extended the right to obtain personal service on defendants in motor vehicle

¹⁵ Exchange Bakery and Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863 (1928); cf. Interborough Rapid Transit v. Greene, 131 Misc. 682, 227 N. Y. S. 258 (1928). The defendant's brief in this suit published by the Workers' Education Bureau Press is deemed about the best presentation of the legal and economic arguments against the "yellow dog" ever compiled.

¹⁶ In Vail Ballan Press v. Casey, 125 Misc. 689, 212 N. Y. S. 115 (1925), the court said: "it is illegal for any person to induce an employee to breach his contract of employment and to discontinue the same where the contract is still in force and has a definite time to run. The reason is that such a contract is a property right of value to an employer. The rule is different where there is no employment for an expressed definite term because it is not the duty of one man to work for another, unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses." cf. A. L. Reed Co. v. Whiteman, 238 N. Y. 545, 144 N. E. 885 (1924).

¹⁷ WALSH ON EQUITY (1930) p. 258.

¹⁸ *Supra* note 1.

¹⁹ Witte, "Yellow Dog" Contracts (1930) 6 WIS. L. REV. 21, 30.