

# Strikes and Picketing: Right of Labor Union to Induce Breach of Contract

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

### Recommended Citation

St. John's Law Review (1927) "Strikes and Picketing: Right of Labor Union to Induce Breach of Contract," *St. John's Law Review*: Vol. 2 : No. 1 , Article 11.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol2/iss1/11>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

injuries sustained in a railway collision for which the hack driver was largely responsible.<sup>16</sup>

From a consideration of the "carriage cases" (and they are truly representative of all cases where liability is sought to be predicated upon the giving of directions) it might be said that the decisions are but declarative of the fact that the hiring of a conveyance and driver and the indication of destination and route are not tantamount to the assumption of control over, and responsibility for, the acts of the servant.<sup>17</sup>

It might be mentioned that to establish the fact that the servant of one has transferred his services to another *pro hac vice*, it must appear that he has assented to such transfer expressly or impliedly. No one can transfer the services of his servant to another without the servant's consent. It must appear further that the servant has, in fact, entered upon the service and submitted himself to the direction and control of the new master. His assent may be established by direct proof or by circumstances justifying the inference of such assent.<sup>18</sup>

The true solution of the question of liability for the tortious acts of a transferred servant would appear to lie in determining which party had the right to *control* the servant's acts. In its narrower, or rather limited sense, control could be determined by the answer to "Who had the authoritative direction of the servant as to the work to be done, and how and where to do it?" In its broader sense, the sense properly applicable in cases of this nature, control should be determined not only by the answer to the question of authoritative direction but also by appropriately considering, in connection therewith, the answers to the complementary questions, "Who hired the servant; who could properly discharge him; to whom did he look for wages?"

S. E.

---

STRIKES AND PICKETING: RIGHT OF LABOR UNION TO INDUCE BREACH OF CONTRACT—Until the recent decision in the Exchange

---

<sup>16</sup> Little v. Hackett, *supra*, note 13.

<sup>17</sup> The rule of the "carriage cases" is applicable to the hiring of an automobile; Sheppard v. Jacobs, *supra*, note 9; Wallace v. Keystone Auto Co., 239 Pa. St. 110, 86 Atl. 699 (1913); Gerretsin v. Rambler Garage Co., 149 Wisc. 528, 136 N. W. 186 (1912).

<sup>18</sup> Delaware, etc., Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986 (1896); Mo., etc., R. R. Co. v. Ferch, 18 Tex. Civ. App. 46, 44 S. W. 317 (1898).

Bakeries case,<sup>1</sup> the question of the legality of picketing without a strike was attended with great confusion, largely due to varying judicial conceptions on the subject of picketing generally. From some of the decisions of the lower courts it would appear that picketing is always illegal, this view being predicated upon the assumption that "peaceful picketing" is wholly visionary, a dream of credulous optimists, impossible of realization.<sup>2</sup> This attitude of the courts is rather difficult to understand in the face of clear and unequivocal decisions by the Court of Appeals that "peaceful picketing" in connection with a strike is legal.<sup>3</sup> The decisions concerning picketing in the absence of a strike are equally inconsistent. On the one hand, courts claim that picketing is the legal right of labor unions, regardless of whether or not a strike is in progress. If the picketing be

---

<sup>1</sup> Exchange Bakeries *v.* Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

This note has been limited to the New York adjudications on the subject.

The New York Court of Appeals, though it has been liberal in its attitude toward questions involving labor disputes, has quite properly, recognized its limitations, "A Court of Equity should interfere in labor disputes, either against the employer or laborer, sparingly and with caution." Moran *v.* Lassette, N. Y. L. J., July 20, 1927 (App. Div., 1st Dept.).

However, the courts have been quick to recognize that the organization of labor unions for the purpose of collective bargaining performs a useful social function and is not against public policy, and accordingly have granted workers the right to organize for the protection of their interests; National Protective Ass'n *v.* Cummings, 170 N. Y. 315, 63 N. E. 369 (1902); Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297 (1897); Auburn Draying Co. *v.* Wardell, 227 N. Y. 1, 124 N. E. 97 (1919). They have recognized the right to strike for legal objects, i. e., shorter hours, better pay, and to generally improve their conditions, except where the strike is actuated by a malicious intention; Manker *v.* Bakers', Confectioners' & Waiters' Int. Union, 129 Misc. 516, 221 N. Y. Supp. 106 (Sup. Ct., 1927). The courts have also recognized the right to carry on peaceful boycotts; Bossert *v.* Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Reardon, Inc. *v.* Caton, *et al.*, 189 App. Div. 501, 178 N. Y. Supp. 713 (2nd Dept., 1919).

<sup>2</sup> On one occasion a court said, "In cases of this kind, 'peaceful picketing' or 'mental picketing' or what not, are usually only figures of speech or exist in the imagination, mostly mentioned, seldom met with. That there ever in reality existed or was practised 'peaceful picketing' is a question." Schwartz & Jaffee, Inc. *v.* Hillman, 115 Misc. 61, 189 N. Y. Supp. 21 (Sup. Ct., 1921). Again, on another occasion, a court stated "Why peaceful picketing is a good deal of a dream. It can be done. There are some angels from Heaven who can peacefully picket. It is more than real human beings can stand. Going up and down and not doing something more than they ought to do." Leeds Shoe Case Co. *v.* Lewis, Special Term of the Supreme Court, N. Y. County, June 24, 1925.

<sup>3</sup> National Protective Assn. *v.* Cummings, *supra*, note 1; Bossert *v.* Dhuy, *supra*, note 1.

orderly and without violence, no injunction will issue.<sup>4</sup> On the other hand, courts have held that picketing in the absence of a strike is entirely illegal, even if picketing during the progress of a strike be not prohibited. The absence of an apparent justification is said by such courts to indicate that the picketing is plainly malicious and unlawful.<sup>5</sup>

The Exchange Bakeries case clarifies the law on this subject to a large extent. In that case the plaintiff restaurant hired non-union waitresses upon their promise not to join the union. Subsequently, without its knowledge, four of the waitresses joined the union. Some of the defendant union's agents entered the plaintiff's store as ordinary customers; one of them blew a whistle and called a strike. The four waitresses who had become members of the union immediately stopped work and left the premises. Thereafter, two of the women picketed the place by walking up and down in front of the premises carrying placards announcing the strike. There was no violence, no intimidation, no collection of crowds. This conduct continued for four days until it was stopped by a temporary injunction.

The decision of the Court of Appeals reiterates its attitude toward the subject of picketing generally and gives the workers not merely a theoretical right of "peaceful picketing" (which some judges believe to be a myth) in connection with strikes, but holds that incidental violence in connection with picketing does not bring it within the category of acts which will be restrained by a court of equity but that such acts are to be dealt with by the criminal courts. To entitle the plaintiff to an injunction, it is held the acts must be repeated and characterize the conduct of the strike. The Court, however, goes further and declares that picketing without a strike is no more unlawful than a strike without picketing. This result was reached by applying the principle that collective bargaining can only

---

<sup>4</sup> *W. A. Wood Mowing & Reaping Machine Co. v. Toohey*, 114 Misc. 185, 186 N. Y. Supp. 95 (Sup. Ct., 1921). *Rogers v. Evarts*, 17 N. Y. Supp. 264 (Sup. Ct. 1891). *Public Baking Co. v. Stern*, 127 Misc. 229, 215 N. Y. Supp. 537 (Sup. Ct., 1926); *Foster v. Retail Clerks Protective Association*, 39 Misc. 49, 78 N. Y. Supp. 860 (Sup. Ct., 1902); *N. & R. Theatre, Inc. v. Basson*, 127 Misc. 271, 215 N. Y. Supp. 157 (Sup. Ct., 1925).

<sup>5</sup> *Stuyvesant Lunch & Bakery Corp. v. Reiner*, 110 Misc. 357, 181 N. Y. Supp. 212 (Sup. Ct., 1920); *Yates Hotel v. Meyers*, 195 N. Y. Supp. 558 (Sup. Ct., 1922); *Yablonowitz v. Korn*, 205 App. Div. 440, 199 N. Y. Supp. 769 (1st Dept., 1923); *Traub Amusement Co. v. Macker*, 215 N. Y. Supp. 397 (Sup. Ct., 1925); *Bolivian Panama Hat Co. v. Finklestein*, 215 N. Y. Supp. 399 (Sup. Ct., 1925); *Cushman Sons, Inc. v. Amalgamated Food Workers*, 127 Misc. 152, 215 N. Y. Supp. 401 (Sup. Ct., 1925); *L. Daitch & Co. v. Cohen*, 218 App. Div. 80, 217 N. Y. Supp. 817 (1st Dept., 1926).

be effective if union conditions prevail not only in the single establishment, but generally. The rates of wages and working conditions of any one shop affect not only those employed there but also all others employed in the same industry. Unless the union can reach all, it cannot possibly attain its ends so that it is of as great consequence that the union be permitted to picket non-union places in an endeavor to unionize the workers there as it is that the union be allowed to call a strike to better the conditions of those who are already members of its organization. An interesting feature of labor law discussed in the Exchange Bakeries case involves the question now before the courts in the pending action of the Interborough Rapid Transit System against a transit workers' union. Although in the Exchange Bakeries case the contract between the employees and the plaintiff was of no definite duration, and therefore the question of whether or not a union had a right, when not actuated by malice, to urge the breach of the contract was not involved, nevertheless Judge Andrews has this to say:

"Even had it been a valid and subsisting contract, however, it should be noticed, that whatever rule we may finally adopt, there is yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to increase its influence."<sup>6</sup>

To support this proposition the court cites several cases which admittedly represent the law on the general subject. In each of these cases the defendant persuaded a third party to breach a valid contract of employment with the plaintiff. Here, however, the similarity between these cases and the Exchange Bakeries case ends. In *Lamb v. Cheney*,<sup>7</sup> the relief sought was not an injunction, but damages, and the court found that the conduct of the defendant was "without just cause or excuse." In *Posner v. Jackson*,<sup>8</sup> an employee having made an express contract to perform specific, unique and extraordinary services for a fixed period was induced to break it by the defendant, "a rival manufacturer." The situation is obviously different. In *Reed Co. v. Whiteman*,<sup>9</sup> there was a finding that the purpose of the union was purely malicious. In not one of the cases cited were the facts presented analogous to those of the Exchange Bakeries case nor to those which are expected to be ultimately presented in the pending Interborough Rapid Transit suit.

---

<sup>6</sup> Exchange Bakeries *v.* Rifkin, *supra*, note 1, 266, 267.

<sup>7</sup> *Lamb v. Cheney*, 227 N. Y. 418, 125 N. E. 817 (1920).

<sup>8</sup> *Posner v. Jackson*, 223 N. Y. 325, 119 N. E. 573 (1918).

<sup>9</sup> *Reed Co. v. Whiteman*, 237 N. Y. 545, 144 N. E. 885 (1924).

Properly, no authoritative inference can be drawn from the opinion of Judge Andrews as to the direction in which the decision will go when there is definitely presented to the Court the question of the right of a union, for proper purpose, to induce a breach of a contract of employment. Judicial wisdom will probably not find it difficult to turn the decision one way or another, depending upon judicial views of the proper functions and utilities of labor organizations. While damages are ordinarily awarded to the plaintiff in cases where the defendant intentionally and knowingly induced the third party to break his contract with the plaintiff,<sup>10</sup> the courts without further explanation, qualifyingly add the mystic phrase, "without reasonable justification or excuse,"<sup>11</sup> leaving what may prove a convenient loop-hole.

The application of the I. R. T. for an injunction restraining the union from attempting to unionize its employees on the ground that by so doing it is persuading them to breach contracts of employment, will squarely present to the court the question which we are here discussing. The I. R. T. has a "company union" of which its employees are members and the problem before the court will ultimately become a question of social policy, the advisability of permitting the existence of company unions as against the wisdom of permitting laboring men to organize themselves into unions uninfluenced by the employing organization. In this case, what will be "just cause or excuse" for the labor union's attempted action will probably be but the asking in another form of the question of whether as a matter of general policy the courts will permit a labor organization to attempt to destroy a company union and replace it by a union otherwise organized. The Exchange Bakeries case furnishes ample opportunity for interesting, though speculative, deductions, not only with regard to the precise problem of the I. R. T. suit, but the larger subject of the extension of labor organization activities generally.

E. N. J.                      A. R.

---

THE NEW OHIO CORPORATION ACT.

Early in 1926, a special committee was appointed by the Ohio Bar Association to revise and modernize the corporation laws of

---

<sup>10</sup> *Campbell v. Gates*, 236 N. Y. 459, 141 N. E. 914 (1923); *Goodman Bros., Inc. v. Ashton*, 211 App. Div. 769, 208 N. Y. Supp. 83 (1st Dept., 1925); *Hansen v. Humphrey, et al.*, 218 App. Div. 291, 218 N. Y. Supp. 197 (3rd Dept., 1926); *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401 409 (1st Dept., 1922).

<sup>11</sup> *Altman v. Schlesinger*, 204 App. Div. 513, 198 N. Y. Supp. 128 (1st Dept., 1923); *Lamb v. Cheney, supra*, note 7; *Reed Co. v. Whiteman, supra*, note 8; *Exchange Bakeries v. Rifkin, supra*, note 1, 264.