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The Permissibility of Picketing in New York

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CURRENT LEGISLATION

THE PERMISSIBILITY OF PICKETING IN NEW YORK.—The New York Anti-Injunction Act¹ prohibits the issuance of injunctions in labor disputes unless seemingly impassable barriers are surmounted by the claimant.² Despite the existence of other remedies,³ injunctions, because of the comparative ease in obtaining them, were the most frequent means used by employers in stopping strikes and boycotts.⁴ The Sherman Anti-Trust Act⁵ was a cause of this flood of injunctive relief, for under its provisions, trade unions were held to constitute monopolies.⁶ In 1914, however, the Clayton Act, hailed by labor as its *Magna Carta*, in addition to limiting the issuance of injunctions in labor disputes,⁷ specifically exempted trade unions from the provisions of the Sherman Act,⁸ and, as a result, strikes and boycotts enjoined under the latter Act as an interference with interstate commerce, were sustained as “implements in lawfully carrying out a union’s legitimate objects and purposes”.⁹ Thus under the Clayton Act, strikes and boycotts (labor’s means of maintaining a balance of bargaining power between itself and capital) were held to be legal. The victory was nominal, however, for by strict interpretations of the wording of the Clayton Act, injunctions were granted in all cases where a *distinct* employer-employee relationship did not exist.¹⁰ The Federal Government attempted to strengthen labor’s bargaining power by passing the Norris-LaGuardia Act,¹¹ the precursor of New York Civil Practice Act Section 876a, under which a labor dispute is not necessarily a controversy exclusively between employer and employee.¹² Co-existent with this unstable equilibrium has been the right to picket.

Picketing is labor’s “power of speech”, an implement in attaining a union’s legitimate aim. Originally it meant the sending of

¹ N. Y. CIV. PRAC. ACT § 876-a (N. Y. Laws 1935, c. 477).

² Complainant must show compliance with all duties imposed by law, his attempts to arbitrate the controversy, failure or inability of the police to give adequate protection, inadequate remedy at law, threatened damage to property, and other conditions precedent.

³ N. Y. PENAL LAW § 722 (disorderly conduct) and N. Y. PENAL LAW § 580 (conspiracy). Now, under N. Y. PENAL LAW § 582, a trade union is not a conspiracy.

⁴ LIEN, LABOR LAW AND RELATIONS (1938) § 217.

⁵ 26 STAT. 209 (1890), 15 U. S. C. §§ 1-7 (1934).

⁶ *Loewe v. Lawler*, 208 U. S. 274, 28 Sup. Ct. 301 (1908).

⁷ CLAYTON ACT § 20, 38 STAT. 738 (1914), 29 U. S. C. § 52 (1934).

⁸ CLAYTON ACT § 6, 38 STAT. 731 (1914), 15 U. S. C. § 17 (1934).

⁹ *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 58 Sup. Ct. 703 (1938); LIEN, *op. cit. supra* note 4, at § 217; WALSH, CASES ON EQUITY (1930) 254; (1938) 13 ST. JOHN’S L. REV. 171.

¹⁰ *American Steel Foundries v. Tri-City, etc., Council*, 257 U. S. 184, 42 Sup. Ct. 72 (1921); *Central Metal Products Corp. v. O’Brien*, 278 Fed. 827 (D. C. Ohio 1922), *appeal dismissed*, 284 Fed. 850 (C. C. A. 6th, 1922).

¹¹ 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (Supp. 1938).

¹² *Ibid.*

watchers by a warring faction to spy on the opposition,¹³ but by extension, and by what has been done under its name, it now means the attempt to induce others to withhold their services or patronage from another.¹⁴

In commercial centers especially, picketing is labor's most potent weapon, for by it, a controversy between employer and employee is often won. When the gross receipts of a retail shop sink, the employer is usually forced, by this legal form of duress, to accede to the picketers' demands. On the other hand, if picketing, in a particular case, were not permissible, the employee would be forced to work, if work is desired or needed, at the employer's price. Thus arises the necessity for ascertaining the permissibility of picketing in the particular case, for upon this depends, not the rights of the parties, but the outcome of the battle.

I.

Under the provisions of Civil Practice Act 876a, the courts are restrained from issuing injunctions stopping threatened or continuing unlawful acts in labor disputes unless there is an inadequate remedy at law, the police have failed or refused to protect complainant's property, irreparable and substantial damage is threatened to such property, complainant will suffer more than the defendant by a denial of the injunction, and some other requisites.¹⁵ These facts must not only be alleged, but also *proved*.¹⁶ Furthermore, if all the preceding are found to exist, the injunction may not prohibit any person from " * * * Giving publicity to * * * or communicating information regarding the existence, or the facts involved in any dispute, whether by advertising, speaking, picketing, * * *, or by any other method not involving fraud, violence or breach of the peace."¹⁷ Inasmuch as the language of the statute is clear, and in view of the fact that the courts have already held the Act as being declaratory of the common law of this State,¹⁸ it would seem that the section above referred to *concedes* labor the right to picket peacefully.¹⁹ The courts have al-

¹³ WEBSTER, NEW INTERNATIONAL DICTIONARY.

¹⁴ Beck v. Railway, etc., Union, 118 Mich. 497, 77 N. W. 13 (1898); Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N. Y. Supp. 250 (1934); MARTIN, LAW OF LABOR UNIONS (1910) § 161; cf. People v. Kopezak, 153 Misc. 187, 274 N. Y. Supp. 629 (1934).

¹⁵ The complainant must also show other prerequisites. See note 2, *supra*.

¹⁶ Krip Holding Corp. v. Canavan, 159 Misc. 3, 299 N. Y. Supp. 468 (1936); People *ex rel.* Sandnes v. Sheriff of Kings County, 164 Misc. 355, 299 N. Y. Supp. 9 (1937).

¹⁷ N. Y. CIV. PRAC. ACT § 876-a (1) (f) (5).

¹⁸ May's Furs & Ready-to-Wear, Inc. v. Bauer, 255 App. Div. 643, 8 N. Y. S. (2d) 819 (2d Dept. 1939); Greater City Master Plumbers Ass'n v. Kahme, 6 N. Y. S. (2d) 589 (1937).

¹⁹ Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Jones v. Maher, 62 Misc. 388, 116 N. Y. Supp. 180 (1909); Grand Shoe Co. v. Children's Shoe Workers' Union, 187 N. Y. Supp. 886 (1920);

ready created an exception to this general rule: public policy. The latest case is *Jewish Hospital of Brooklyn v. Doe*,²⁰ wherein peaceful picketing against a charitable hospital was enjoined on the theory that the Legislature did not intend 876a to apply to such organizations. Other cases, decided long before the passage of the Act, have enjoined picketing against the milk supply²¹ and against the manufacture of goods for governmental use during the World War.²² It is submitted that these two latter cases would be decided in the same manner today for 876a does not create substantive rights, but merely changes a form of procedure.

If the picketing in a labor dispute is accompanied by fraud, violence, or breach of the peace, such illegality will be enjoined, even though a criminal prosecution is available,²³ provided the claimant complies with the prerequisites of 876a. Trespass²⁴ and obstruction of ingress and egress by picketers has been enjoined.²⁵ Expressed or implied intimidation,²⁶ abusive and insulting language,²⁷ threats,²⁸ misleading placards,²⁹ false oral statements,³⁰ and violence³¹ have warranted injunctions. Mass picketing has been held to be not illegal *per se*, but if it tends to a breach of the peace, it is not permissible.³² Fraudulent picketing, *i.e.*, having inducement in malice or ill will, is also not permissible.³³ "It is difficult to canalize or classify * * * conduct which is lawful and which is unlawful. There may be isolated acts which cannot be interpreted as unlawful or wrong, but

Grandview Dairy v. O'Leary, 158 Misc. 791, 285 N. Y. Supp. 841 (1936). In *People ex rel. Sandnes v. Sheriff of Kings County*, 164 Misc. 355, 299 N. Y. Supp. 9 (1937), the court, by way of *dictum*, stated that the right is *expressly granted* by N. Y. Civ. Prac. Act § 876-a.

²⁰ 252 App. Div. 581, 300 N. Y. Supp. 1111 (2d Dept. 1937).

²¹ *Gottlieb v. Matchin*, 117 Misc. 128, 191 N. Y. Supp. 777 (1921).

²² *Rosenwasser Bros. v. Pepper*, 104 Misc. 457, 172 N. Y. Supp. 310 (1918).

²³ *Manhattan Steam Bakery v. Schindler*, 250 App. Div. 467, 294 N. Y. Supp. 783 (2d Dept. 1937); *Vegehlahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896); see note 19, *supra*.

²⁴ *Foster v. Retail Clerks', etc. Ass'n*, 39 Misc. 48, 78 N. Y. Supp. 860 (1902).

²⁵ *Ibid.*; *People v. Hipple*, 263 N. Y. 242, 188 N. E. 725 (1934).

²⁶ *Ibid.*; *People v. Lebensart*, 144 Misc. 671, 259 N. Y. Supp. 309 (1932).

²⁷ *Busch Jewelry Co. v. United Retail Employees' Union*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939).

²⁸ *Ibid.*

²⁹ *People v. Jenkins*, 138 Misc. 498, 246 N. Y. Supp. 444 (1930), *aff'd*, 255 N. Y. 637, 175 N. E. 348 (1931); *People v. Lebensart*, 144 Misc. 671, 259 N. Y. Supp. 309 (1932); *People v. Epstein*, 159 Misc. 330, 287 N. Y. Supp. 429 (1936).

³⁰ *People v. Kaye*, 165 Misc. 663, 1 N. Y. S. (2d) 354 (1937).

³¹ *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *International, etc. Co. v. Wendrich*, 122 N. J. Eq. 222, 193 Atl. 808 (1937) ("the right to strike does not mean to strike with clubs, stones, or other weapons").

³² *People v. Phillips*, 245 N. Y. 401, 157 N. E. 508 (1927); *People v. Nixon*, 248 N. Y. 182, 161 N. E. 463 (1928).

³³ *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); see *Beardsley v. Kilmer*, 236 N. Y. 80, 140 N. E. 203 (1923).

the accumulative effect of many of such acts may together create a situation which passes the bound of patience and tolerance and creates a hugger-mugger situation, the only object of which can be to compel the one upon whom pressure is exerted to 'bend the pregnant hinges of his knee that thrift may follow fawning.'" ³⁴ The border line in this type of case may be very shadowy and elusive. What would appear to be fraud, violence, or breach of the peace, must be resolved upon the basis of reasonableness. As this question is often decided by the judge, and in view of the fact that all judges do not think alike because of the difference in their education and environment, ³⁵ it is rather difficult, in fact almost impossible, to state that some particular act is illegal, as constituting fraud, violence, or breach of the peace unless such act would clearly appear so to everyone.

Courts have gone further than merely restraining *illegal* picketing. If the pickets persist in unlawful acts, after being enjoined, their right to picket even peacefully is forfeited. ³⁶ Usually the courts have enjoined only the fraud, violence, or breach of the peace and have permitted peaceful picketing, ³⁷ at times even limiting the number of pickets ³⁸ or stating what should appear on the placards. ³⁹

II.

In controversies where a labor dispute, as defined by 876a and the interpretations of said section by the courts, is not involved, picketing accompanied by fraud, violence, or breach of the peace is enjoinable. ⁴⁰ There is never any question on this score if the elements of equity procedure are observed, *i.e.*, inadequate remedy at law, or to prevent a multiplicity of suits. The question arises as to the permissibility of *peaceful picketing*.

Justice Hofstadter, in *Julie Baking Co. v. Graymond*, ⁴¹ has stated that "while the courts have dealt extensively with the subject of picketing in labor disputes, the propriety of picketing for purposes

³⁴ *Mlle. Reif v. Randau*, 166 Misc. 247, 249, 1 N. Y. S. (2d) 515, 518 (1937). Personal conversations by the author with various police officers who have been assigned to "picket duty" reveal the fact that they are ordered to see that the pickets keep at least six feet away from the premises picketed and that they move continuously. No particular individual may be approached personally, nor may the pickets indulge in "overloud" shouting. See *People v. Ward*, 159 Misc. 328, 287 N. Y. Supp. 432 (1936), *aff'd*, 272 N. Y. 615, 5 N. E. (2d) 359 (1936).

³⁵ Holmes, *Privilege, Malice and Intent* (1894) 8 HARV. L. REV. 1, 8.

³⁶ *Busch Jewelry Co. v. United Retail Employees' Union*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939); *Long Island Drug Co. v. Devery*, 6 N. Y. S. (2d) 390 (1938).

³⁷ *Remington Rand, Inc. v. Crofoot*, 248 App. Div. 356, 289 N. Y. Supp. 1025 (4th Dept. 1936), *aff'd*, 279 N. Y. 635, 18 N. E. (2d) 37 (1938).

³⁸ *Ibid.*

³⁹ *Edjomac Amusement Corp. v. Empire Union*, 273 N. Y. 647, 8 N. E. (2d) 329 (1937).

⁴⁰ See notes 19, 20, 24, 25, 27, *supra*.

⁴¹ 152 Misc. 846, 274 N. Y. Supp. 250 (1934).

other than expressing demands of labor has never been decided. * * * The right of an individual to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions. And it is salutary for the states, in that it serves as a safety valve in times of stress and strain."⁴² This theory was approved in *People v. Kopezak*,⁴³ but the court therein sustained a conviction of disorderly conduct, in spite of the fact that the picketing against rent increases was peaceable, since the lawful and orderly manner of tenants was to file complaints with city bureaus. These cases have dealt with the right to picket as tangent to the right of speech and assembly,⁴⁴ but, nevertheless, the law in reference to such picketing is still unsettled.⁴⁵ It is too early to venture a rule as yet.

However, where labor pickets in a dispute not within the definition of a labor dispute, the law is settled. *Peaceful picketing is not permissible*. Thus, in *A. S. Beck Co. v. Johnson*⁴⁶ the court enjoined peaceable picketing by a negro group because of the danger of race riots and reprisals.⁴⁷

In cases where the complainant is not an employer, *i.e.*, runs the business alone, the courts have enjoined all picketing on the theory that the owner of a business may do as he pleases and not be induced to hire employees.⁴⁸ Where a union picketed a closed family corporation, the New York Court of Appeals, refusing to "pierce the corporate veil" in a four to two decision,⁴⁹ denied an injunction. The law is settled, however, that the sole-owner-employee may have all picketing enjoined.⁵⁰ In *Wishny v. Jones*⁵¹ the employer fired all

⁴² *Id.* at 847, N. Y. Supp. at 251.

⁴³ 153 Misc. 187, 274 N. Y. Supp. 629 (1934), *aff'd w. o.*, 266 N. Y. 565, 195 N. E. 202 (1935).

⁴⁴ *People v. Ribinovich*, 171 Misc. 569, 13 N. Y. S. (2d) 135 (1939).

⁴⁵ *Rosman v. United Strictly Kosher Butchers*, 164 Misc. 378, 298 N. Y. Supp. 343 (1937); Note, *Picketing in Non-Labor Disputes* (1934) 3 I. J. A. B. No. 3, p. 1.

⁴⁶ 135 Misc. 363, 274 N. Y. Supp. 946 (1934).

⁴⁷ The United States Supreme Court, in a similar case, sustained the right to picket but on the theory that the controversy *was* a labor dispute. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 58 Sup. Ct. 703 (1938); (1938) 13 Sr. JOHN'S L. REV. 171.

⁴⁸ *Luft v. Flove*, 246 App. Div. 523, 283 N. Y. Supp. 441 (1st Dept. 1935), *aff'd*, 270 N. Y. 640, 1 N. E. (2d) 369 (1936); *Thompson v. Boekout*, 273 N. Y. 390, 7 N. E. (2d) 674 (1937). These cases were followed in innumerable others, one of the latest being *Gips v. Osman*, 170 Misc. 53, 9 N. Y. S. (2d) 828 (1939). See the dissenting opinion by Mr. Justice Hubbs in *Boro Park Sanitary Live Poultry v. Heller*, 280 N. Y. 481, 487, 21 N. E. (2d) 687, 689 (1939).

⁴⁹ *Boro Park Sanitary Live Poultry v. Heller*, 280 N. Y. 481, 21 N. E. (2d) 687 (1939). Compare *Miller v. Fish Workers' Union*, 170 Misc. 713, 11 N. Y. S. (2d) 278 (1939), with *Schwartz v. Fish Workers' Union*, 170 Misc. 566, 11 N. Y. S. (2d) 283 (1939).

⁵⁰ See note 42, *supra*. Cf. *Wishny v. Jones*, 169 Misc. 459, 8 N. Y. S. (2d) 2 (1938); see *Bieber v. Bininbaum*, 168 Misc. 943, 6 N. Y. S. (2d) 63 (1938).

⁵¹ 169 Misc. 459, 8 N. Y. S. (2d) 2 (1938).

his employees and intended to liquidate his business. The court granted an injunction against all picketing with leave to the defendants to move to set aside the injunction if plaintiff re-engaged in his business. To the same effect, picketing was enjoined where an employer rehired only part of his staff because business did not warrant the rehiring of all his ex-employees.⁵² In the preceding cases, the courts have proceeded on the theory that since the facts do not constitute a labor dispute and are therefore not within the protection of 876a, all picketing should be enjoined.

Secondary picketing, even if peaceful, is illegal and therefore enjoined.⁵³ " * * * where there is the attempt to interfere or ruin the business of one who is not concerned in the dispute between labor and its employer the boundary of lawful conduct is transgressed and the secondary boycott is called into being."⁵⁴ Thus attempts to picket the employer's customers,⁵⁵ and advertisers in employer's newspaper,⁵⁶ were enjoined as illegal. If the alleged secondary boycott fits within the scope of the statutory definition of a labor dispute, peaceful picketing is permissible, even though the facts may resemble a secondary boycott. Instances of this are where the picketing is directed against the presence of a non-union contractor,⁵⁷ or non-union materials in the same or related crafts⁵⁸ especially on construction jobs. Another exception occurs where the picketing is directed against a product at the place of sale.⁵⁹ The New York Court of Appeals⁶⁰ has created the "unity of interest" rule. Thus where the claimant handles exclusively, or almost exclusively, the product of the manufacturer against whom the laborer has the grievance, picketing of the third party claimant is sustained on the theory of unity of interest.⁶¹ This is not really a secondary boycott. It is submitted that the court, in its liberality towards labor,⁶² has re-

⁵² Benito Rovira Co. v. Yampolsky, 187 N. Y. Supp. 894 (1921).

⁵³ B. Gertz, Inc. v. Randau, 162 Misc. 786, 295 N. Y. Supp. 871 (1937).

⁵⁴ Mlle. Reif v. Randau, 166 Misc. 247, 1 N. Y. S. (2d) 515 (1937).

⁵⁵ Canepa v. Doe, 277 N. Y. 52, 12 N. E. (2d) 790 (1938); American Gas Stations v. Doe, 250 App. Div. 227, 293 N. Y. Supp. 1019 (2d Dept. 1937); Weil & Co. v. Doe, 168 Misc. 211, 5 N. Y. S. (2d) 559 (1938); cf. Rand Tea & Coffee Stores v. Manganero, N. Y. L. J., Jan. 5, 1938, p. 53, col. 3.

⁵⁶ Mlle. Reif v. Randau, 166 Misc. 247, 1 N. Y. S. (2d) 515 (1937).

⁵⁷ New York Lumber Trade Ass'n v. Lacey, 269 N. Y. 595, 199 N. E. 688 (1935), cert. denied, 298 U. S. 684, 56 Sup. Ct. 955 (1936).

⁵⁸ Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Willson & Adams Co. v. Pearce, 264 N. Y. 521, 191 N. E. 545 (1934).

⁵⁹ Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937); (1938) 12 Sr. JOHN'S L. REV. 358. See Weil & Co. v. Doe, 168 Misc. 211, 5 N. Y. S. (2d) 559 (1938).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Weil & Co. v. Doe, 168 Misc. 211, 5 N. Y. S. (2d) 559 (1938) ("The tendency has been to enlarge rather than to abridge the right to picket"). See the dissenting opinion of Mr. Justice Lehman in Busch Jewelry Co. v. United Retail Employees' Union, 281 N. Y. 150, 157, 22 N. E. (2d) 320, 322 (1939); Trommers v. Brewery Workers, 167 Misc. 197, 3 N. Y. S. (2d) 782 (1938).

garded the claimant as the agent of the manufacturer.⁶³ The general rule still is that secondary boycotts are illegal and all such picketing will be enjoined.

III.

Section 876a of the Civil Practice Act has, however, been responsible for an abuse. This is illustrated by situations wherein one union has a closed shop agreement with the employer and another union pickets to obtain similar benefits for itself. The employer can not breach his contract with the first union nor can he accede to the demands of the second union. Injunctive relief is denied because of the statute holding such a situation to be a labor dispute. Meanwhile the employer's business diminishes because prospective customers may be deterred from passing the picket line, either by sympathy for labor in general, or by embarrassment or fear. The employer in such a case can do nothing but wait for the legislature to remedy the situation. Of course he can retire, as is usually the case, for legislators solicit the support of unions at campaign time.

In summation it may be generally said that

- (1) In all cases: Picketing accompanied by fraud, violence, or other illegality is not permissible;
- (2) In labor disputes: Peaceful picketing is permissible unless contrary to public policy or unless forfeited by *deliberate* excesses;
- (3) In "non-labor disputes" where:
 - (a) Labor is not involved: No settled rule at present but a tendency to regard peaceful picketing as part of the freedom of speech.
 - (b) Labor is involved: Peaceful picketing is not permissible.

ALFRED M. ASCIONE.

ELECTION OF REMEDIES—STATUTORY CHANGES.—When a litigant has the selection of one of two or more inconsistent remedies, which are available at the same time, a choice made of one, with full knowledge of all the facts which would enable him to resort to the other remedy if he so desired, will preclude him from pursuing the

⁶³ See the concurring opinion of Mr. Justice Rippey in *Goldfinger v. Feintuch*, 276 N. Y. 281, 291, 11 N. E. (2d) 910, 915 (1937).