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Comment

LABOR LAW: STRIKES FOR UNLAWFUL PURPOSES UNDER THE NLRA.

If a labor union strikes or pickets an employer for the purpose of compelling him to grant bargaining privileges which he is forbidden to confer under the terms of the National Labor Relations Act,¹ is there any way in which the employer may obtain relief through the courts? If there is no way, the employer who finds himself in such an unfortunate position has but two alternatives: (1) he may yield to the demands of the union, in which case he shall have committed an unfair practice forbidden by the NLRA;² or (2) he may stand fast, in which case he may see his business completely destroyed by continued striking or picketing. The employer's right to discharge em-

¹ 49 STAT. (1935) 449, 29 U.S.C. (1940) §§ 151-166.

² Threatened economic loss, no matter how great, will not excuse the employer for committing an unfair practice under the Act. *N.L.R.B. v. John Engelhorn & Sons* (C.C.A. 3d, 1943) 134 F. (2d) 553, 557; *N.L.R.B. v. Star Pub. Co.* (C.C.A. 9th, 1938) 97 F. (2d) 465, 470; *N.L.R.B. v. Gluek Brewing Co.* (C.C.A. 8th, 1944) 144 F. (2d) 847, 853, and cases cited therein.

ployees who strike for the purpose of inducing him to violate the NLRA is not likely to be helpful.³ The National Labor Relations Board has no power to issue orders directed against unions, so it is useless to apply to that agency for relief.⁴ It would seem, therefore, that in fairness and justice there should be some judicial remedy obtainable.⁵

Attempts of the employer to obtain relief through the federal courts have so far resulted in complete failure. Early intimations that relief might be had under the anti-trust laws⁶ proved groundless.⁷ It was thought for a time that since a strike to compel an employer to violate the NLRA was a strike for an unlawful purpose, it might be enjoined as such. The few early cases so holding⁸ appear to have been entirely discredited by the more recent federal decisions, which uniformly hold that the Norris-LaGuardia Act⁹ deprives the federal courts of the power to enjoin striking, even though the purpose of the strike is the unlawful one of inducing a violation of the NLRA.¹⁰ As a result, the federal judges have seldom felt able to do more for an employer than to criticize outstanding instances

³ On the employer's right to discharge employees who strike in violation of the purposes of the NLRA, see *N. L. R. B. v. Draper Corp.* (C. C. A. 4th, 1944) 145 F. (2d) 199; (1945) 13 GEO. WASH. L. REV. 380.

⁴ The power of the Board is confined to the prevention of unfair labor practices by an employer. 49 STAT. (1935) 452-453, 29 U. S. C. (1940) § 158.

⁵ For general treatment of these problems, see GALENSON, *RIVAL UNIONISM IN THE U. S.* (1940); Larson, *The Orders of the NLRB and the Right to Strike* (1942) 16 TEMPLE L. Q. 107; Larson, *The Labor Relations Acts—Their Effect on Industrial Warfare* (1938) 36 MICH. L. REV. 1237; Note (1943) 41 MICH. L. REV. 1143.

⁶ *Apex Hosiery Co. v. Leader* (C. C. A. 3d, 1937) 90 F. (2d) 155.

⁷ *United States v. Hutcheson* (1941) 312 U. S. 219.

⁸ *Oberman & Co. v. United Garment Workers of America* (W. D. Mo. 1937) 21 F. Supp. 20; *Union Premier Food Stores v. Retail Food C. & M. Union* (C. C. A. 3d, 1938) 98 F. (2d) 821.

⁹ 47 STAT. (1932) 70, 29 U. S. C. (1940) §§ 101-115.

¹⁰ In the following cases, injunctive relief was denied where an employer was the plaintiff: *Pauley Jail Bldg. Co. v. International Ass'n* (C. C. A. 8th, 1941) 118 F. (2d) 615, *rev'd* (E. D. Mo. 1939) 29 F. Supp. 15; *Sharp & Dohme v. Storage Whse. Employees Union* (E. D. Pa. 1938) 24 F. Supp. 701; *Houston & North Texas Motor Freight Lines v. Local Union No. 886 Etc.* (W. D. Okla. 1938) 24 F. Supp. 619; *Lund v. Woodenware Workers Union* (D. Minn. 1937) 19 F. Supp. 607; *Cupples Co. v. American Fed. of Labor* (E. D. Mo. 1937) 20 F. Supp. 894; *Grace Co. v. Williams* (W. D. Mo. 1937) 20 F. Supp. 263. Injunctive relief is also denied where plaintiff is an aggrieved majority union. *Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238* (App. D. C. 1939) 105 F. (2d) 1, *aff'd*, (1939) 308 U. S. 522; *Int. Brotherhood v. Int. Union* (C. C. A. 9th, 1939) 106 F. (2d) 871, *rev'd* (S. D. Cal. 1938) 25 F. Supp. 870; *Blankenship v. Kurfman* (C. C. A. 7th, 1938) 96 F. (2d) 450; *Montgomery Ward Employees' Ass'n v. Retail Clerks Int. Protective Ass'n* (N. D. Cal. 1941) 38 F. Supp. 321. It seems to be immaterial whether or not the majority union has been certified. *United Elec. Radio & Machinery Workers of A. v. Int. Brotherhood of Elec. Workers* (S. D. N. Y. 1940) 30 F. Supp. 927, *aff'd*, (C. C. A. 2d, 1940) 115 F. (2d) 488; *Yoerg Brewing Co. v. Brennan* (D. Minn. 1945) 59 F. Supp. 625.

of selfish union action,¹¹ or to announce that the employer really does have a legal right to insist that the union shall not strike for unlawful purposes,¹² although that right is unenforceable in a federal court. Since the decision of the Supreme Court in *United States v. Hutcheson*,¹³ holding that conduct which is nonenjoinable under the Norris-LaGuardia Act is not wrongful as a matter of substantive law, it would seem that the employer has not even so much as an abstract, unenforceable right.¹⁴

Against this background of cases so destitute of hope for an employer who desires nothing more than to perform his obligations under the NLRA and to live at peace with the unions,¹⁵ the suggestion has been made in two recent federal cases that some relief may be furnished through an exercise of the inherent power of the federal courts to punish contempts.¹⁶ The one narrow situation to which this suggestion applies arises in this manner:

To secure enforcement of a Board order directing an employer to bargain collectively with the union certified by the Board as bargaining representative, a federal court may issue a mandatory decree directing the employer to comply.¹⁷ If a minority, noncertified union then strikes for the purpose of inducing the employer to bargain with it rather than with the certified union, it is striking for the purpose of compelling the employer not only to violate the NLRA, but also to violate a lawful order of the court. In these circumstances, the court in *N.L.R.B. v. National Broadcasting Co.* announced by way of dictum that "It would seem that the ordinary contempt procedures

¹¹ See, for example, *N. L. R. B. v. Gluek Brewing Co.*, *supra* note 2, at 858.

¹² See *Cupples Co. v. American Fed. of Labor*; *Grace Co. v. Williams*, both *supra* note 10. *Cf. Magruder, The Development of Collective Bargaining* (1937) 50 HARV. L. REV. 1071, 1107: "The [NLRA] does not make the strike illegal. But the statute imposes a duty upon the employer, and a strike to compel a person to violate his legal duty may be held illegal on common-law principles."

¹³ *Supra* note 7.

¹⁴ The identification of legality with nonenjoinability was carried to its extreme in the *Hutcheson* case. See also *New Negro Alliance v. Sanitary Grocery Co.* (1938) 303 U.S. 552, Note (1943) 146 A.L.R. 1252.

In *Park & Tilford I. Corp. v. International Brother., Etc.* (1944) 25 A.C. 750, 155 P. (2d) 16, the *Hutcheson* case was relied on in holding that a strike to compel violation of the NLRA was lawful and immune from injunction in state courts. This decision was reversed on rehearing, however, in *Park & Tilford I. Corp. v. International Brotherhood*, *infra* note 32.

¹⁵ The employer is being "ground between the nether millstone of the order of the National Labor Relations Board and the upper millstone of the strike activities . . . which are destroying [his] business." *Square Deal Clothing Co. v. Federated Raiment Laborers*, Printed Briefs for Moot Court Trial, Harvard University Law School, January, 1938, quoted in *GALENSON, RIVAL UNIONISM IN THE U.S.* (1940) 183, n. 96.

¹⁶ *N. L. R. B. v. National Broadcasting Co.* (C. C. A. 2d, 1945) 150 F. (2d) 895; *N. L. R. B. v. Gluek Brewing Co.*, *supra* note 2.

¹⁷ 49 STAT. (1935) 454, 29 U.S.C. (1940) § 160.

available against a person with knowledge of the decree although not named in it would enable the court to protect its order."¹⁸ In short, the court in this case has suggested that a party, who is in noway associated in interest with the person against whom a mandatory decree is issued, may yet be held in contempt of court for striking to coerce disobedience of the decree although he could never have been expressly enjoined from so doing.

Though there is some language in the cases which would seem to support this proposition,¹⁹ it is believed that no case has yet authorized the exercise of contempt power in such extreme circumstances. It is true that courts generally have power to hold an unnamed person with knowledge of a decree in contempt if he acts in such a way as to "aid or abet" violation of the decree or to set the "known command of the court at defiance by interference with or obstruction of the administration of justice."²⁰ Such conduct is not in violation of the decree, but is in contempt of the power and dignity of the court.²¹ The power to punish such an offense is said to be "inherent and indisputable."²²

As a matter of specific application, however, this "inherent power" is seldom exercised beyond situations in which a defendant who is within the class of persons whose conduct is intended to be restrained, or who is in some way associated with the restrained party, nevertheless aids or abets the doing of the forbidden act.²³ A few cases go so far as to hold a defendant in contempt who acts independently of the enjoined party in accomplishing a forbidden result,²⁴ though there

¹⁸ *Supra* note 16, at 900.

¹⁹ See, e.g., *Garrigan v. U. S.* (C. C. A. 7th, 1908) 163 Fed. 16, 20, *cert. den.*, (1909) 214 U. S. 514.

²⁰ The cases are collected in Note (1921) 15 A. L. R. 386. See generally (1933) 46 HARV. L. REV. 1311; (1933) 17 MINN. L. REV. 447; (1904) 17 HARV. L. REV. 486.

The power of the federal courts to punish contempts is granted by section 268 of the Judicial Code which provides that the power extends to "disobedience or resistance . . . by any party, . . . or *other person* to any lawful writ, process, order . . ." 36 STAT. (1911) 1163, 28 U. S. C. (1940) § 385. (Italics added.) The "other person" means any person who, having knowledge of the order, violates it. *Kelton v. U. S.* (C. C. A. 3d, 1923) 294 Fed. 491, *cert. den.*, (1924) 264 U. S. 590.

²¹ *Garrigan v. U. S.*, *supra* note 19, at 20; *Huttig Sash & Door Co. v. Fuelle* (C. C. E. D. Mo. 1906) 143 Fed. 363; *Seaward v. Paterson* [1897] 1 Ch. 545.

²² *Garrigan v. U. S.*, *supra* note 19.

²³ "[A court of equity] is not vested with sovereign powers to declare conduct unlawful The only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him." *Alemite Mfg. Corp. v. Staff* (C. C. A. 2d, 1930) 42 F. (2d) 833. See also authorities cited *supra* note 20.

²⁴ *Chisholm v. Caines* (C. C. D. S. C. 1903) 121 Fed. 397; *State v. Pittsburg* (1909) 80 Kan. 710, 104 Pac. 847, (1910) 25 L. R. A. (n. s.) 226, 133 Am. St. Rep. 227.

is much authority contra.²⁵ But no case has been found taking the additional step necessary to hold that it may be contempt for a person to exert economic pressure for the purpose of inducing another to disobey a mandatory decree, when such person could not have been enjoined from such conduct in the first instance. This is the additional step which any court following the dictum in the *National Broadcasting Co.* case must take.²⁶

Assuming that such an additional step may be justified under the doctrine of contempt power, and that it will escape condemnation as a mere colorable scheme to evade the policy of the Norris-LaGuardia Act, it is still difficult to see how the employer will be appreciably benefited. Before a court order has been issued, a union may yet strike with impunity to induce an employer to violate the NLRA or an order of the Board. If a court order has been issued to the employer, a disgruntled minority union may still be justified in striking so long as it does not do so for the manifest purpose of compelling the employer to violate the order. This limitation seems tacitly recognized in the *National Broadcasting Co.* case.²⁷

Attempts of the employer to obtain relief through the state courts have met with a somewhat greater degree of success than they have in the federal courts. Being unfettered by the limitations of the Norris-LaGuardia Act, state courts in general have enjoined striking or picketing when it was found to be illegal under an application of the unlawful-purpose test.²⁸ In four states, a strike to compel an employer to violate the NLRA has been found to be enjoinable as a

²⁵ *Dadirrian v. Gullian* (C. C. D. N. J. 1897) 79 Fed. 784; *Berger v. Superior Court* (1917) 175 Cal. 719, 167 Pac. 143; *Rigas v. Livingston* (1904) 178 N. Y. 20, 70 N. E. 107; Note (1921) 15 A. L. R. 393. Cf. Federal Rule 65(d), 28 U. S. C. (1940) following section 723c: "... Every restraining order ... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." *Chase National Bank v. City of Norwalk* (1934) 291 U. S. 431.

²⁶ Plaintiff, in *International Brotherhood, Etc. v. Keystone F. Lines* (C. C. A. 10th, 1941) 123 F. (2d) 326, unsuccessfully attempted to curb striking by defendant's union employees under a mandatory injunction directed to defendant, but it did not appear that any unlawful purpose was involved.

²⁷ *Supra* note 16, at 900.

²⁸ 1 TELLER, LABOR DISPUTES & COLLECTIVE BARGAINING (1940) 270; RESTATEMENT, TORTS (1939) § 794. California has adopted the unlawful-purpose test, by obvious implication beginning with *McKay v. Retail Auto S. L. Union No. 1067* and *Shafer v. Registered Pharmacists Union*, both *infra* note 35, and explicitly in *James v. Marinship Corp.* (1944) 25 Cal. (2d) 721, 728, 155 P. (2d) 329, 334. Cf. *Parkinson v. Bldg. Trades Council* (1908) 154 Cal. 581, 98 Pac. 1027, 16 Ann. Cas. 1165, 21 L. R. A. (N. S.) 550; *Imperial Ice Co. v. Rossier* (1941) 18 Cal. (2d) 33, 112 P. (2d) 631; Note (1942) 30 CALIF. L. REV. 181, 185.

strike for an unlawful purpose;²⁹ and in one state, a similar result was reached where a state labor relations act was involved.³⁰

The troublesome problem in the state cases arises in deciding to what extent a union might be restrained without unduly infringing labor's right to strike or picket.³¹ The problem is neatly illustrated in the recent California case of *Park & Tilford I. Corp. v. International Brotherhood*.³² In that case, defendant union struck and picketed plaintiff in an effort to secure a closed shop. Plaintiff could not have granted a closed shop without violating the NLRA, since the union's membership did not include a majority of plaintiff's employees. The supreme court, applying the unlawful-purpose test, held that defendant union might be enjoined from striking or picketing insofar as its purpose was to compel plaintiff to violate the NLRA. A strike for the immediate purpose of driving reluctant employees into a union, however, to the end that the union may ultimately be in a position to make a lawful demand for a closed shop, is neither a strike for the purpose of inducing a violation of the NLRA nor for a purpose which is illegal under California law. A strike may put a union in such a position by so impairing an employer's business that his workers will be threatened with the destruction of their jobs unless they yield to the pressure, and join the striking union. If the

²⁹ *Park & Tilford I. Corp. v. International Brotherhood*, *infra* note 32; *Markham & Callow v. Int. Woodworkers* (1943) 170 Ore. 517, 135 P. (2d) 727; *Bloedel Donovan Lumber Mills v. Int. Woodworkers* (1940) 4 Wash. (2d) 62, 102 P. (2d) 270; *Eucld Candy Co. of New York v. Summa* (1940) 174 Misc. 19, 19 N. Y. S. (2d) 382, *aff'd*, (1940) 259 App. Div. 1081, 21 N. Y. S. (2d) 614.

New York courts have reached the same result in respect to the state labor relations act. *Florsheim Shoe Store Co. v. Retail Shoe Salesman's Union* (1942) 288 N. Y. 188, 42 N. E. (2d) 480, *rev'g* (1941) 262 App. Div. 769, 27 N. Y. S. (2d) 883; *Gulf Oil Corp. v. Smallman* (1945) 270 App. Div. 129, 58 N. Y. S. (2d) 495, *aff'g* (1945) 185 Misc. 409, 57 N. Y. S. (2d) 24; *Regal Shoe Co. v. Doyle* (1943) 179 Misc. 696, 39 N. Y. S. (2d) 666.

³⁰ *R. H. White Co. v. Murphy* (1942) 310 Mass. 510, 38 N. E. (2d) 685. The reasoning of the court indicates that the result would have been the same had the NLRA been involved.

³¹ Potential violation of the free speech guarantee may be involved. *American Federation of Labor v. Swing* (1941) 312 U. S. 321; *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U. S. 287; *Bakery Drivers Local 802 v. Wohl* (1942) 315 U. S. 769; *Larson, May Peaceful Picketing be Enjoined?* (1944) 22 TEX. L. REV. 392. If the *Hutcheson* case is to be strictly followed, a state injunction may violate the *Norris-LaGuardia Act*. *United States v. Hutcheson*, *supra* note 7. Possible conflict with the NLRA itself may occur. See *Hill v. Florida* (1945) 325 U. S. 538; *Allen Bradley Local v. Wisconsin Employment Relations Board* (1942) 315 U. S. 740; Note (1944) 149 A. L. R. 466. The danger that state injunctions will violate labor rights protected by the NLRA is well illustrated by *In re Charles Cushman Shoe Co.* (1937) 2 N. L. R. B. 1015, 1 Labor Rel. Rep. 55. On April 20, 1937, a strike by a CIO union was enjoined on the grounds that a strike by a minority union was illegal under the NLRA. In elections held between July 13 and July 17, the enjoined union was discovered to have a majority.

³² (Jan. 31, 1946) 27 A. C. 620, 165 P. (2d) 891, *rev'g* (1943) 59 A. C. A. 526, 139 P. (2d) 963. See (1944) 25 A. C. 750, 155 P. (2d) 16, for the decision rendered after the first supreme court hearing in this case.

court enjoined all concerted action, therefore, it would in effect be restraining defendant union from striking for a perfectly legitimate object. But if it did not restrain defendant from all striking and picketing, it would in reality be denying plaintiff any effective relief. The court chose the latter alternative, holding that defendant might continue to strike or picket for the purpose of organizing plaintiff's employees, so long as it refrained from demanding that plaintiff violate the NLRA.

The supreme court of Washington made the same choice as the California court in a recent case which involved substantially the same sort of situation.³³ Several decisions in other states seem to have made the opposite choice, though they apparently did not consider the fact that lawful objectives might be found intermingled with the unlawful ones.³⁴

In support of the *Park & Tilford* case, it must be said that to have enjoined all concerted action would have been out of harmony with the California law as it has been established by numerous decisions. This state is committed to the view that concerted action is a legitimate weapon of labor in the competitive struggle between union and nonunion workers for jobs and other economic advantages.³⁵ In this struggle, "the employer is in the unhappy position of a neutral suffering its repercussions."³⁶ This view has already been expressed in the holdings that neither the employer nor his employees³⁷ may object when a union pickets or boycotts the employer in order to obtain a closed shop, even though all of the employees prefer to remain outside the union. As a matter of California law, therefore, the court in the *Park & Tilford* case had no choice of alternatives.

³³ *State v. Supreme Court* (1945) Wash. (2d), 164 P. (2d) 662. Defendant union picketed plaintiff, who had recognized another union pursuant to an order of the NLRB. The court refused to enjoin the union, since the union did not wish plaintiff to violate the NLRA, but rather wished to compel plaintiff's employees to adopt a proposed course of action.

³⁴ *Markham & Callow v. Int. Woodworkers*; *Euclid Candy Co. of New York v. Summa*, both *supra* note 29. Cf. RESTATEMENT, TORTS (1939) § 796: "When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

³⁵ *Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal. (2d) 92, 113 P. (2d) 689; *C. S. Smith Met. Market Co. v. Lyons* (1940) 16 Cal. (2d) 389, 106 P. (2d) 414; *Shafer v. Registered Pharmacists Union* (1940) 16 Cal. (2d) 379, 106 P. (2d) 403; *McKay v. Retail Auto S. L. Union No. 1067* (1940) 16 Cal. (2d) 311, 106 P. (2d) 373.

³⁶ *Park & Tilford I. Corp. v. Int. Brotherhood*, *supra* note 32, at 632, 165 P. (2d) at 898.

³⁷ *C. S. Smith Met. Market Co. v. Lyons* (employer as plaintiff); *McKay v. Retail Auto S. L. Union No. 1067* (employees as plaintiffs), both *supra* note 35. Both of these cases were decided exclusively on the basis of California law, without reference to the NLRA.