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## Labor Law -- Applicability of Anti-Racketeering Act to Certain Practices of Labor Unions

Milton Short

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most authorities advocate that the expert witness be permitted to give his opinion without the use of a hypothetical question.<sup>19</sup> It is their contention that cross-examination could be successfully employed to bring out the exact facts upon which the opinion is based, and that therefore there is no need for posing a time-consuming hypothetical question as a preliminary to the opinion.

As for the rule excluding evidence which the court deems as usurping the province of the jury, it seems unreasonable that the admissibility of expert opinion should be dependent on any such meritless and nebulous standard. As pointed out in a previous case comment in this REVIEW:<sup>20</sup> "Evidence of the very point in issue would seem to be of the highest pertinency. Thus a strict application of the rule leads to the absurd result that admissibility varies in inverse proportion to relevancy". This policy is often defended in that it is said to be necessary to prevent the jury from giving unmerited weight to such an opinion instead of giving the question that independent consideration to which a party is entitled in a jury trial. However, this argument is difficult to follow for, by hypothesis, the subject is one with which the jury is incapable of dealing. It is submitted that a more productive approach would be simply to ask whether, under the circumstances of the case, the opinion would aid the jury in arriving at a sound decision.

E. W. COLE, JR.

### Labor Law—Applicability of Anti-Racketeering Act to Certain Practices of Labor Unions

Convicted under the Federal Anti-Racketeering Act,<sup>1</sup> defendant, a truck drivers' union in New York City, appealed to the federal circuit court. Evidence was that the union sought to control all hauling in New York City; that it posted members on the edge of the city, who attempted to commandeer incoming trucks, drive them within the city, and do any necessary loading and unloading; that various breaches of the peace and acts of violence resulted when the truck operators resisted the labor unions; that in most cases the union men exacted up to \$9.42 (a day's wages) from each incoming truck, regardless of the length of time involved in driving or "standing by";<sup>2</sup> and that the union

<sup>19</sup> 2 WIGMORE, EVIDENCE (3d ed. 1940) §686; RESTATEMENT, CODE OF EVIDENCE (Tent. Draft No. 4, 1933) §509; *Tentative Draft of Model Expert Testimony Act*, 11.

<sup>20</sup> Note (1938) 16 N. C. L. REV. 180.

<sup>1</sup> 48 Stat. 979 (1934), 18 U. S. C. A. §420a-e (Supp., 1940).

<sup>2</sup> As the name implies, a stand-by is a local union member who is present at a particular job-site and is paid a full salary, because of pressure exerted on the employer by a labor union, but who does practically no work, due to the

members probably would have done any and all the truck driving if given a chance to. *Held*, that a logical and prudent interpretation of the clause of the Anti-Racketeering Act which reads, "not including, however, the payment of wages by a bona fide employer to a bona fide employee", and also an examination of the legislative history of the statute, lead to the conclusion that Congress intended thereby to exempt labor disputes generally from the purview of the Act; and, this being a labor dispute, defendant is not guilty of the violation charged, even though its conduct is very questionable.<sup>3</sup>

This case is by no means unique. Various contemporary writers have gathered an alarming number of examples of "rackets" being operated by labor unions. In most such cases force and violence are not used, so that these unions are not subject to attack by injunction under the Federal Anti-Injunction Act.<sup>4</sup> Practically every exhibit at the New York World's Fair was forced to pay tribute to the local unions in the form of hiring stand-bys. Stand-bys had to be hired even for extremely technical jobs which none of the local men possibly could have done. Several workers sent as stand-bys for some noted mural painters, turned out to be only house painters when unexpectedly asked to do some work.<sup>5</sup> Painters' unions in various sections of our country forbid the use of spray guns—handbrush painting increases the time involved, and so proportionately the cost.<sup>6</sup> Because the local builders' unions refuse to work with prefabricated materials, FHA records reveal that, instead of more positions being created for carpenters, plumbers, masons, and laborers, the number of homes constructed in Cleveland, Ohio, for example, is greatly reduced.<sup>7</sup> Chicago grocers, wishing to pass on to the public the savings in delivery charges of cash-and-carry milk, were prevented from so doing by the local milk-wagon drivers' union.<sup>8</sup> In various parts of the country, union men will not work under the direct supervision of the person having the work done, but will force the hiring of many unneeded supervisors and "straw bosses".<sup>9</sup>

Such examples could be cited almost *ad infinitum*, but it will suffice to say that because of the very union under indictment in the principal case, it costs \$112.00 more to distribute a load of vegetables in New

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fact that the employer uses his own previously employed workers even though he has to pay double for so doing.

<sup>3</sup> *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America*, 118 F. (2d) 684 (C. C. A. 2d, 1941). *Contra: Nick et al. v. United States*, 122 F. (2d) 660 (C. C. A. 8th, 1941).

<sup>4</sup> 47 Stat. 70 (1932), 29 U. S. C. A. §101-115 (Supp., 1940).

<sup>5</sup> Stanley High, *Labor in the World of Tomorrow*, Reader's Digest, Nov., 1939.

<sup>6</sup> Thurman Arnold, *Labor's Hidden Holdup Men*, Reader's Digest, June, 1941.

<sup>7</sup> *Ibid.*

<sup>9</sup> William Hard, *Labor and National Unity*, Reader's Digest, Nov., 1939.

York than in other comparable cities. A farmer bringing in his own produce on his own truck must hire one of the stand-bys as the price of unloading the truck.<sup>10</sup>

It is believed that the problem thus seen to exist is not adequately dealt with by any of the existing labor acts, or any other federal statutes, unless it is the Anti-Racketeering Act. A survey of the most important labor legislation shows that in the last decade Congress has without exception been affording increased powers and protection to labor. First, the Norris-LaGuardia, or Federal Anti-Injunction Act outlawed the "yellow dog" contract, thus eliminating the practice followed by many employers of hiring only those workers who would sign a contract not to join a union or engage in union activities; and also prevented the abuse of the strike injunction by prohibiting the enjoining of peaceful picketing, and strike practices not accompanied by force or violence.

Second, the Wagner, or National Labor Relations Act<sup>11</sup> guaranteed the right of workers to organize and bargain collectively, provided machinery for protection against unfair labor practices of employers, and provided that no employer could refuse to bargain collectively with a bargaining unit for labor selected under the provisions of the Act.

Third, the Fair Labor Standards, or Wages and Hours Act<sup>12</sup> provides that wages shall be kept above a certain minimum; that hours shall in the main be kept below a certain maximum, or that "time-and-a-half" shall be paid for overtime; that no employee shall be discriminated against by his employer for seeking his rights under the Act; and that the courts may enforce the Act by injunction.

None of these acts would seem to deal with the conduct of the New York truckers' union, and other racketeering unions, except in the cases where these unions resort to outright violence, which can be enjoined under the Norris-LaGuardia Act.

It seems conceivable that the Sherman Anti-Trust Act,<sup>13</sup> which outlaws combinations in restraint of trade and imposes a penalty of treble damages upon violators of the act, would be an effective weapon for eliminating these insidious union activities. But in the recent *Apex Hosiery* case,<sup>14</sup> the United States Supreme Court held that labor disputes are not violative of the Sherman Act unless their purpose is to affect prices or otherwise to destroy free commercial competition in the open market. This Act is thus obviously emasculated insofar as the problem under discussion is concerned.

<sup>10</sup> Thurman Arnold, *Labor's Hidden Holdup Men*, Reader's Digest, June, 1941.

<sup>11</sup> 49 Stat. 449 (1935), 29 U. S. C. A. §§151-156 (Supp. 1940).

<sup>12</sup> 52 Stat. 1060 (1938), 29 U. S. C. A. §§201-219 (Supp. 1940).

<sup>13</sup> 26 Stat. 209 (1890), 15 U. S. C. A. §§1-7 (1941).

<sup>14</sup> *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 Sup. Ct. 982, 84 L. ed. 1311 (1940).

Obviously the Department of Justice is in need of some weapon capable of controlling those unions, which, though not using violence, nevertheless are victimizing the consumer and the public. But for the present decision, an ideal weapon might be found in the Anti-Racketeering Act, which provides that one who, acting so as to affect trade or commerce, obtains or attempts to obtain money or valuable considerations or property belonging to another with his consent, if such consent is induced by wrongful use of force or fear or threats, is guilty of a felony. It is submitted that labor unions are just as capable of extortion and racketeering as any other group, and that there is no sound reason or doctrine that should exclude them from conviction under the Anti-Racketeering Act when it is proved beyond reasonable doubt in open court that they are engaging in these practices.

In the first place, it could be urged on good authority that the instant situation in New York did not involve simply "the payment of wages by a bona fide employer to a bona fide employee", as was held in the principle case. Unless the hirer has the right to discharge, then the worker cannot be considered an "employee".<sup>15</sup> That term means a person employed to labor for the pleasure or interest of another, or one employed to render service or assistance in some trade or vocation; one whom the employer retains the right to direct not only as to what shall be done, but how it shall be done;<sup>16</sup> and one whom the employer has the right to hire, *and discharge even short of the completion of the work*.<sup>17</sup> (This is of course subject to the provisions of the NLRA, that an employer cannot make union activity on the part of a worker the basis for discharging him, or for refusing to hire him in the first place.)<sup>18</sup> Furthermore, it has been held that workers who are guilty of acts of violence against the interests of their employers cannot be considered as employees either for the purpose of securing reinstatement by the NLRB, or of being considered as members of the union for the purpose of collective bargaining.<sup>19</sup> It is submitted that in the light of these holdings the members of the New York truckers' union cannot be considered as "bona fide employees" of the truck

<sup>15</sup> *Lillibridge v. Industrial Accident Com.*, 4 Cal. App. (2d) 237, 40 P. (2d) 856 (1935); *Bernal v. Star Chronicle Pub. Co.*, 84 S. W. (2d) 429 (Mo. 1935); *Mitchell v. Maytag-Pacific-Intermountain Co.*, 184 Wash. 342, 51 P. (2d) 393 (1935); *RESTATEMENT, AGENCY* (1933) §221.

<sup>16</sup> *Simmons v. Kansas City Jockey Club*, 334 Mo. 99, 66 S. W. (2d) 119 (1933).

<sup>17</sup> *Liberty Mutual Ins. Co. v. Boggs*, 66 S. W. (2d) 787 (Tex. 1933).

<sup>18</sup> *Phelps Dodge Corp. v. National Labor Relations Board*, 61 Sup. Ct. 845, 85 L. ed. (Adv. Ops.) 753 (1941); *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893 (1937); *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 57 Sup. Ct. 650, 81 L. ed. 953 (1936).

<sup>19</sup> *Standard Lime & Stone Co. v. National Labor Relations Board*, 97 F. (2d) 531 (C. C. A. 4th, 1938).

owners. It is a strange law that would compel a businessman to accept as his employee and the operator of his expensive machinery and equipment those who have used malicious coercion in foisting themselves upon him.

A second point is that there is a growing tendency in modern judicial thought to construe criminal statutes in a manner consistent with the intent of the legislature, and most conducive to social protection, rather than to follow the old hornbook rule that a criminal statute is to be construed strictly and in the light most favorable to the accused.<sup>20</sup> Social protection certainly seems to demand the conviction of the truckers' union here. Channels of transportation would be totally obstructed if truckers' unions in every town took similar liberties, for a trucking concern would be forced to pay a day's union wages every time one of its trucks entered the limits of any city.

Third, Congress believes in the policy that labor and employer should be on a parity for free and gentlemanly bargaining, as shown by section 1 of the NLRA. It is not intended that either group shall crack the tyrannical whip over the other.<sup>21</sup> On this hypothesis, for union operatives to fortify themselves on the public highway and suddenly assault passing truck drivers, and demand wages for driving the trucks thus taken over, is obviously nothing short of racketeering. It is certainly not settlement of labor disputes by parity bargaining.

Still a fourth idea that should be stressed is the quite obvious fact that labor as a whole is not benefited by most of this pernicious racketeering which certain unions are carrying on. For when the electricians at the New York World's Fair demanded that all electrical equipment used be wired and assembled at the Fair grounds rather than in the home state or factory,<sup>22</sup> the New York electricians were simply depriving other electricians throughout the country of work.<sup>23</sup> When certain

<sup>20</sup> *United States v. Classic*, 61 Sup. Ct. 1031, 85 L. ed. (Adv. Ops.) 867 (1941). (For discussion of this case, see case comment, page 93, *supra*); *Braffith v. People*, 26 F. (2d) 646 (C. C. A. 3d, 1928); *Chapman v. Lake*, 112 Fla. 746, 151 So. 399 (1932); *State ex rel. Kurth v. Grinde*, 96 Mont. 608, 32 P. (2d) 15 (1934); *People v. Clark*, 242 N. Y. 313, 151 N. E. 631 (1926); *Thomas v. State*, 40 Okla. Crim. Rep. 204, 267 Pac. 1040 (1928); *Wilson v. State*, 26 Ohio App. 7, 159 N. E. 585 (1927).

<sup>21</sup> In *Swing v. American Federation of Labor*, 372 Ill. 91, 22 N. E. (2d) 857 (1939), *rev'd on other grounds*, 61 Sup. Ct. 568, 85 L. ed. (Adv. Ops.) 513 (1940), involving a place of business being picketed because employees themselves unanimously preferred to remain non-union, Justice Shaw said, "The right of one group to organize for the advancement of its own ends is exactly equal to but no greater than the right of other citizens peaceably to pursue their own lawful occupations."

<sup>22</sup> *Stanley High*, *Labor in the World of Tomorrow*, Reader's Digest, Nov., 1939.

<sup>23</sup> The state of Nevada, according to the authority cited above, withdrew from the Fair partially because the local electricians' union demanded that its gigantic electrically operated model of Boulder Dam should be rewired by the locals—which would have involved wrecking the costly model almost entirely.

musicians' unions fight against non-local musicians performing in their "territory";<sup>24</sup> musicians in general are the principal sufferers. When certain unions in Belleville, Illinois and in Cleveland, Ohio, prevent the use of prefabricated materials,<sup>25</sup> factory workers in general suffer. The same is true when plumbers in Washington refuse to use pipe threaded at the factory; and when a Chicago buildings trade council prohibits the use of stone polished at the quarry in Indiana.<sup>26</sup> Congress has granted labor some very strong weapons. Section 1 of the NLRA, *supra*, shows that these weapons were intended to be used in removing labor from the inequitable domination of employers to which it had for centuries been subjected. There was never any intention that a few labor groups should turn these weapons upon their fellow workers, and exploit labor in general for their mere individual gain.

Finally, there is nothing in the wording of the Anti-Racketeering Act itself that would preclude its use in cleaning up this problem. At the end of section (d) of the Act is a proviso that "no court of the United States shall construe or apply any of the provisions of sections (a) to (e) of this act in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States." However, this would not prevent using the Act against racketeering unions. The rights of labor unions as expressed in the existing federal statutes have been sketched above, and it was seen that nothing therein makes *illegal* the practices of "labor's hidden hold-up men". But it is equally obvious, that none of the labor legislation makes these practices *legal*. Labor union racketeering has apparently not been considered by Congress, except in the Anti-Racketeering Act. There have been some suggestions that section 7 of the NLRA, which reads, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection," would legalize the actions of the New York truckers' union.<sup>27</sup> It is believed that Congress intended by this section to list certain broad purposes for which labor unions were empowered to strive. It is inherent in this provision that only *legal* means of obtaining these purposes shall be used. It is believed, as pointed out, that the methods of the racketeering unions are not legal means of obtaining the purposes of collective bargaining, mutual aid, and protection.

<sup>24</sup> Stanley High, *Labor in the World of Tomorrow*, Reader's Digest, Nov., 1939.

<sup>25</sup> Thurman Arnold, *Labor's Hidden Holdup Men*, Reader's Digest, June, 1941.

<sup>26</sup> *Ibid.*

<sup>27</sup> Note (1941) 54 HARV. L. REV. 1400.

Therefore it is submitted that section 7 of the NLRA would not preclude the use of the Anti-Racketeering Act against racketeering unions.

For these various reasons it is believed that the appeal of the principal case now pending before the United States Supreme Court<sup>28</sup> may be successful. However, in the event that a reversal of this decision is not obtained, it is submitted that Congress should amend the Anti-Racketeering Act, perhaps by tacking a proviso onto the proviso to section (d), *supra*, which might read, "provided further, that nothing in this proviso, or anywhere else in this act, shall be construed as exempting any labor organization from the terms of this act when such organization is using or attempting to use or threatening to use coercion for the purpose of obtaining anyone's consent to the taking of his valuable considerations or other properties and rights as set out in sections (a) and (b) of this act, or for the purpose of taking such considerations, properties, and rights without the owner's consent."

MILTON SHORT.

#### Public Officials—Liability for Breach of Statutory Duty

In an action by a town against all members of its board of aldermen, with the exception of the mayor, the complaint alleged that the mayor, as tax collector and waterworks superintendent, had been able to embezzle funds of the town because of the negligent breach of statutory duties on the part of the aldermen; *i.e.*, to require a bond of the mayor and periodic accountings by him. However, since neither a corrupt or malicious motive nor any statutory provision for personal liability was alleged, a demurrer to the complaint was sustained and later affirmed on appeal.<sup>1</sup> In a companion case, by the same town against the same aldermen, with the exception of one of their number whom they had elected chief of police during the time he was serving as alderman, the complaint alleged the violation of a statute forbidding a public officer to hold more than one office, and a consequent loss to the town in the amount of the salary paid to the chief of police. Likewise, demurrer to this complaint was sustained and later affirmed because of the failure of the complaint to allege corrupt motive or a statutory provision for liability.<sup>2</sup> Thus in both of these civil actions against public officers for negligent breach of non-discretionary duties, the court takes the view that a corrupt motive or a statutory provision for liability is necessary to the statement of a cause of action.

These cases involve breaches of duty by public officers. The courts of this state have had occasion to consider these basic facts in several

<sup>28</sup> Announcement of the granting of this certiorari was made October 13, 1941.

<sup>1</sup> *Town of Old Fort v. Harmon*, 219 N. C. 241, 13 S. E. (2d) 423 (1941).

<sup>2</sup> *Town of Old Fort v. Harmon*, 219 N. C. 245, 13 S. E. (2d) 426 (1941).