Cleveland State Law Review

Volume 1 | Issue 1 Article 11

1952

# Relief for Vendee from Vendor's Strike

Warren D. Langer

# Relief for Vendee from Vendor's Strike

*by Warren D. Langer**

ONE RESULT of the complexity of our modern civilization is the harming of those with whom we have no contentions or find no fault, while attempting to alleviate difficulties and disagreements with others whose paths we cross and whose interests conflict with ours.

Many situations exemplify the conditions stated above, but one frequently encountered is the harm caused to a vendee when a vendor is on strike. While there may be no intent, reason, or desire to harm the vendee, lack of materials, fuel, services, or some other necessity provided by the vendor forces the vendee to curtail operations, or to let his plant lay idle and risk the loss of skilled workers.

What can the vendee, the innocent party, do? It is true that there is not always a remedy for this situation, and sometimes such remedy as is available may be more costly than warranted. However, there are several rights or actions which may be exercised of which four should be noted: 1. Breach of contract; 2. Action against the striking union; 3. Use of the mails; 4. The writ of replevin.

**Breach of Contract.**

The most apparent remedy is an action against the vendor for breach of contract because of failure to perform within a reasonable time,[1] or within a stipulated time. The use of this remedy, however, has been almost completely circumscribed by the inclusion, in the vast majority of contracts, of strike clauses which attempt to relieve the vendor of liability due to strikes.

Where there is no strike clause in a contract, and the vendor has assumed an unqualified promise to perform, he may not utilize the fact of a strike as a defense in a breach of contract suit. In *Schaefer v. Brunswick Laundry*,[2] the court said: "Generally, impossibility of performance offers no relief from per-

---

* Warren D. Langer is a graduate of Fenn College and a veteran of 3 years of army service in the Pacific during World War II. He is married and the father of two children.

[1] Empire Transp. Co. *et al.* v. Philadelphia & R. Coal & Iron Co., 77 Fed. 919 (1896); (discharge of the cargo of a vessel a week late, delay having been caused by a strike of the employees of the charterer without grievance or warning, was held to be within a reasonable time).

[2] 116 N. J. L. 268, 183 Atl. 175 (1936).

formance of contractual obligation whether impossibility could or could not have been foreseen at time of making the contract, except where impossibility arises by operation of law, where a thing necessary to performance is destroyed, or where the contract calls for personal services and the party to perform or receive performance dies." A strike in this case was held not to fall into any of the three aforementioned exceptions.

In Ohio there is no case directly on point, but two decisions[3] indicate that a similar holding would be adhered to if such question should arise.

Where strike clauses are included in the contract, the extent to which the vendee's actions are limited are determined by the phraseology of the particular clause. In *Consolidated Coal Co. of St. Louis v. Jones and Adams Co.*,[4] the contract stipulated that the vendor should not be required to furnish coal "during any portion of the time when prevented by strikes, unavoidable accidents, or other causes beyond its control from handling the product of the mine at which the coal herein provided for is produced." The court held that this strike clause did not apply to strikes by third parties although the strike affected the possibility of performance by the vendor.[5] In *General Commercial Co. v. Butterworth-Judson Corp.*[6] a clause stating, "This contract is contingent upon strikes, fires, pestilence, riots, war, rebellion, and other causes beyond our control . . ." was, on the other hand, construed by the court to include strikes by third persons.[7]

---

[3] Universal Coal Co. v. Old Ben Coal Corp., 32 Ohio App. 254, 167 N. E. 904 (1929); (under contract for sale of coal, seller was held not excused because of fire, embargo, and labor trouble. Labor trouble here was not a strike, but a refusal to work until paid); Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77 (1907).

[4] 232 Ill. 326, 83 N. E. 851 (1908).

[5] *Ibid.* In this case an extensive strike among the anthracite coal miners of the country during the period covered by a contract of sale of bituminous coal, occasioned in part, a very serious shortage of cars, and prevented appellant from performing his contract to furnish coal to appellee. The court held that this strike was not within the clause of the contract exempting seller from the duty to furnish coal during any portion of the time when prevented by strikes. The strike clause was intended to apply only to strikes affecting the handling of the output of the seller's own mine.

[6] 198 N. Y. App. Div. 799, 191 N. Y. Supp. 64 (1921).

[7] *Ibid.* A contract for shipment of goods "July-August, seller's option," providing that "This contract is contingent upon strikes, fires, pestilence, riots, war, rebellion, and other causes beyond our control," did not require purchaser to accept goods shipped subsequent to August on vendor's failure to ship during July or August because of a strike at the German works of the vendor's supplier; the clause merely excused, in the named contingencies, failure to deliver, and not delay in delivering.

Where the meaning of the strike clause is clear, then a right of action may depend on the facts. In *American Fruit Distributors of California v. Hines, Director General of Railroads, et al.,*[8] wherein the defendant was a carrier and therefore an insurer of the goods, the court held that it was incumbent upon the defendant to prove that every reasonable effort was made to replace striking workmen in order to avail themselves of the strike clause and relieve themselves of liability for failure to deliver.

**Actions Against a Union.**

In 1947 Congress deemed it advisable to amend The National Labor Relations Act (The Wagner Act) by passing The Labor Management Relations Act (The Taft-Hartley Law).[9] This Act did not create a new action for damages for breach of a labor contract. Liability and the right of suit for breach of contract existed prior to these Acts and were predicated on the rules of law applying generally to contracts. For example, it had long been held, that in some cases, damages could be recovered for losses caused by a secondary boycott. These actions, however, did not involve the wide latitude of present laws, but were based on some other point such as a conspiracy to produce a breach of contract.[10]

The present law as enunciated in the Labor-Management Relations Act is much broader and authorizes damage suits which are, to a very considerable extent, a novel species of action newly introduced into our body of law.[11] These actions for damages

---

[8] 55 Calif. App. 377, 203 Pac. 821 (1921).

[9] 49 Stat. 449, 29 U. S. C. App. § 151 (1946) *as amended,* 61 Stat. 158 (1947), 29 U. S. C. App. § 187 (Supp. 1947).

[10] New England Cement Gun Co. v. McGivern *et al.,* 218 Mass. 198, 105 N. E. 885 (1914).

[11] Taft-Hartley Act, *supra,* note 9, at tit. 111, § 303: "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless

caused by a strike in furtherance of a secondary boycott or other unlawful combination[12] may be maintained by *any person*[13] injured thereby in his business or property.[14] However such suits may be brought only against labor organizations (incorporated or unincorporated),[15] since the Act specifically provides that "it shall be unlawful . . . for any *labor organization*[16] . . ." to commit the acts enumerated.[17]

It is stated[18] that subsection 303 (b) of the Taft-Hartley Law is general in its application. Although up to the present time, management has not found it desirable to utilize this cause of action to any great extent, it is believed that suits for libel or slander, for personal or property damage, for injuries resulting from unfair labor practices, and even for violation of state laws, although no Federal Law may be involved, would seem to be permitted.

Unions are attempting to nullify the provisions of this law by agreement with those with whom they have a contract, but

---

such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter; . . ." Rothenberg, Labor Relations 645.

[12] Am. Jur. 1951 Cumulative Supplement—Labor 298.5.

[13] Emphasis supplied.

[14] Taft-Hartley Law, *supra*, note 9, at tit. 111, § 303(b) provides that "whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of Section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and cost of the suit."

[15] *Williams v. United Mine Workers*, 294 Ky. 520, 172 S. W. 2d 202 (1943) and *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922) held an unincorporated union to be subject to suit; Nissen v. International Brotherhood, T. C. S. H., 229 Iowa 1028, 295 N. W. 858 (1941), held an unincorporated union, however, not subject to suit in its name alone.

[16] Emphasis supplied.

[17] Taft-Hartley Law, *supra*, note 11.

[18] 173 Amer. Lab. Rep. 1434, Labor Relations Act—Modifications P. 44.

the possibility of exempting themselves from liability to third persons who are injured by their actions seems to be beyond their power.[19]

Among the few reported cases based on the Taft-Hartley Law is *International Longshoremen's & Warehousemen's Union et al. v. Juneau Spruce Corporation*[20] which held that damages could be recovered against a union other than the union with which the employer has contracted when such union engaged in a secondary boycott and caused injuries to the employer. While there was no vendor-vendee relationship in this case, the right to maintain this action, based on Section 303, subsections (a) and (b), was upheld although no contractual relationship existed.

**Use of the Mails.**

When the vendee desires only to obtain goods which are in a strike-bound plant of the vendor, parcel post or the writ of replevin may be utilized. The use of parcel post is not a form of legal relief, but a type of remedy which may be recommended with all propriety when the situation warrants it.

The utilization of this form of relief is restricted, however, by at least three other factors: first, the size of the package is limited by postal regulations and this limitation on size varies according to the class of post office serving the area where the goods are mailed; second, the availability of sufficient personnel for packaging and wrapping the articles to be mailed; third, the accessibility of a mail box or post office.

This relief is dependent almost entirely on the cooperation of the vendor. The vendee may suggest or request this method and in some cases may require or force the vendor to use the mails, the writer believes, where, in some rare instance, a decree of specific performance of the contract of sale is appropriate.

**Writ of Replevin.**

The other method of obtaining goods is by a writ of replevin. Although there are no reported cases on point, several have been recorded by the Court of Common Pleas of Cuyahoga

---

[19] *Ibid.*

[20] 189 F. 2d 177 (1951).

County.[21] A check of the records reveals that the petition in replevin, affidavit in replevin, journal entry, motion (immediate delivery of goods), waiver and release by Defendant, summons in action for replevin, appraisement of attachment, writ of replevin and surety bond, are all executed on the same day. Little delay is encountered in obtaining the desired writ. The vendee (who supplies his own transportation facilities) goes to the vendor's plant, escorted by the sheriff, and after exhibiting the writ of replevin, has the goods loaded and removed from the struck plant. The sheriff does no part of the work. He merely supervises the loading so that only those goods shown in the writ of replevin are removed.

The experience with this type of procedure has been that unions respect the court order and little violence is ever encountered.

A vendee is not, of course, always entitled to a writ of replevin. He must allege ownership and wrongful detention, but the writer believes that a proper action for this writ may be maintained in several instances among which are situations where a subcontractor (vendor) is doing work on the vendee's product; a supplier (vendor) is using the vendee's equipment; or material or equipment is being made for the vendee which the vendee has financed by advance payment.

An example of the usefulness of this type of action would be a situation wherein production and assembly lines are held up for some part because a vendee's die is in a struck plant. Removal of the die to some other stamping company or acquisition of a completed die (or one almost completed) from the manufacturer, would enable the vendee to have the required parts (made from the dies) produced by a company not on strike.

All of the recorded cases examined by the writer indicated a spirit of cooperation between the vendor and vendee. Both parties were apparently eager to fulfill their parts of the contract but were prevented from completion of their agreement by an

---

[21] 1950; Ford Motor Co. v. Globe Stamping Co., Division of Hupp Corp.; Docket No. 615578;
1951; Chevrolet Cleveland Div. General Motors Corp. v. Geometric Stamping Co.; Docket No. 627578;
1951; General Electric Co. v. Geometric Stamping Co.; Docket No. 627260;
1950; International Harvester Co. v. Hupp Corp.; Docket No. 615594;
1951; Continental Motors Co. v. Aluminum Co. of America; Docket Nos. 627410 & 627205.

intervening strike. No attempt to thwart the effects of the strike by strike-breaking activities—no attempt of further production by the vendor—no attempt to benefit the vendor at the cost of the striking employees was discovered nor would such activities be advocated. The cases seem to be an attempt solely to prevent excessive loss to the vendee.

When the obtaining of materials or parts by an innocent vendee will preclude the possibility of excessive loss to such vendee and when no harm to the strikers' cause will be effected by such action, it is difficult to find any objection to the use of this form of relief.

**Conclusion.**

While all persons affected by strikes do not have an available remedy, there are many situations where rights and actions have not been exercised and innocent persons have suffered although the necessity of doing so has been precluded by our existing laws.

In the first remedy, breach of contract, an injured vendee may maintain an action either against a vendor who fails to protect himself by an appropriate strike clause or a vendor who willfully breaches a contract and then attempts to utilize the fact of a strike as a defense. The second remedy, an action against the striking union, is aimed at unions which engage in unlawful activities. The third and fourth remedies, use of the mails and writ of replevin, are not actions for damages but methods of precluding damage. Although the use of these two remedies need not be on a "friendly" basis they usually are undertaken in cooperation with, or with consent of, the vendor.