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Labor Law--Secondary Boycott--Inducement of Neutral Employees and Threats Against Neutral Employer Held Unlawful Under 1959 L.M.R.D.A.

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Union had advised the secondary employer, a general contractor, that the common work situs of a multi-employer project would be picketed unless the non-union employees of the primary employer, an independent subcontractor, were removed from the job or, in the alternative, the subcontractor would sign a union contract. Union had also instructed one of the secondary employer's employees to discontinue working and he complied. Picketing, resulting in a general work stoppage, was commenced, the union advising the general contractor that picketing would stop only if the conditions were met. The NLRB found that the union had induced the secondary employee to cease work because of the primary dispute and secondly, that the union's action had the effect of coercing the secondary employer to cease doing business with the primary employer. Held, Affirmed (modified on other grounds). Although the inducement of individual secondary employees to cease work and the coercion and restraint of secondary employers had been lawful under the original boycott ban of the Taft-Hartley Act, the court agreed that the 1959 amendments were clearly intended to remedy this situation when such activities are used to effect unlawful objectives proscribed by the Act. NLRB v. Hod Carriers, Local 1140, 285 F.2d 397 (8th Cir. 1960).

Dual congressional objectives conflict in this area of the national labor policy—preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and the public in controversies not their own. See NLRB v. Denver Bldg. & Construction Trades Council, 341 U.S. 675 (1951). While the National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1956), provided protections for the former, it was later to be found that the interaction of the Wagner Act and the earlier Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1956), had, by removing the power of the federal courts to grant injunctions against labor organizations, see e.g., Drivers Union v. Lake Valley Co., 311 U.S. 91, 100-101 (1940), denied protection to an unoffending employer who was subjected to secondary boycotts. To remedy this situation the framers of the Taft-Hartley Act of 1947 (hereinafter called: the Act), 61 Stat. 136 (1947), 29 U.S.C. § 141
(1956), sought to eliminate the secondary boycott as a legal pressure-weapon available to labor. See, the remarks of Senator Taft concerning Section 8(b) (4) of the Act to the effect that there are no "good" secondary boycotts and that this section purported to make all secondary boycotts an unfair labor practice, 93 CONG. REC. 4198 (1947); cf.: a contrary view, Previant, Boycotts Under the 1959 Amendments, N.Y.U. 13th ANN. CONF. ON LABOR 141, 143-144 (1960). Thus the means of protecting the neutral employer from secondary activities was thought to have been accomplished. However, the legislative purpose was only generally defined and the language of the statute did not distinguish between lawful primary conduct and the illegal secondary activity. Subsequently, the interpretations of the courts frustrated the ideal of a complete boycott ban, by constructing loopholes to permit some types of secondary activity. Congress, in its passage of the Labor Management Reporting & Disclosure Act (hereinafter called: the 1959 Act), 73 Stat. 519 (1959), 29 U.S.C. § 401 (1960 Cum. Supp.), sought to eliminate the ineffectiveness of the Act by redrafting Section 8(b) (4) to eliminate the former exceptions and to impose additional sanctions against labor in the area. The principal case is noteworthy in that it represents the courts' initial impression of the new boycott provisions. The Hod Carrier's decision, supra, further represents a direct rule upon two questions in the former "loop-hole" area.

Concerning the particular questions of the principal case, Section 8(b) (4) of the Act declared that it was an unfair labor practice for a union or its agent:

"To engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is:

  (A) forcing or requiring any employer . . . to cease doing business with any other person;

  (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9;"
Several Board and court-created exceptions, two of which are herein discussed, were engrafted onto this particular section of the Act. In 1951, the Supreme Court held that the concept of "concerted refusal" did not include the inducement or encouragement of individual employees of a neutral employer from engaging in unlawful objectives proscribed by the Act. *NLRB v. International Rice Milling Company*, 341 U.S. 665 (1951). By substituting the word "individual" for the term "employees," and by deleting the term "concerted," the authors of the 1959 Act purported to abrogate the effect of the *Rice Milling* decision, *supra*. See Section 8(b) (4)(i), 1959 Act. The court in the *Hod Carrier's* decision, *supra*, has now effectively affirmed the congressional intent on this question. Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257, 271 (1959-60), and overrules *Rice Milling* to the extent that that decision holds individual employees were not within the ambit of the boycott ban.

The second loophole was one of much greater significance than the inducement of individual employees mentioned above. This latter exception also arose by judicial interpretation. Although the Act prohibited unions from inducing or encouraging employees of a neutral employer from engaging in a proscribed object, Section 8(b) (4) was construed to permit unions to resort to almost any means in seeking to persuade neutral employers to refrain from doing business with another firm. See *Local 1976, Carpenters & Joiners v. NLRB*, 357 U.S. 93 (1958); *Local 47, International Brotherhood of Teamsters*, 112 N.L.R.B. 923 (1955). So it is of particular interest to employers that the new prohibition against a union's threatening, coercing or restraining "any person engaged in commerce or an industry affecting commerce." Section 8(b) (4) (ii), 1959 Act, was drafted to wholly eliminate actions against the employer directly as a means of effecting a secondary boycott. The court in the principal case encountered no difficulty in finding a violation of this section in that the threats against the employer were uncontroverted, stating further that "comments and statements of the Union agents speak for themselves."

Although the determination of an unfair labor practice through the threats directed to the employer was easily determined in the instant case, this area will probably be a troublesome one in the future. *Cf.*, the remarks of Senator Humphrey, 105 CONG. REC. 6231 (1959). Appealing to the reason of the neutral employer will
probably be considered permissible, Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958), but when such appeal is coupled with even an insinuation of pressure, as in the principal case, the Board will find an unfair labor practice. It is suggested that this section is not only plainly designed to protect neutral employers against threats of strikes and refusals to work by their employees, but also against threats of other kinds including those of bodily assaults. If the Board construes “coerce, or restrain” in Section 8 (b) (4) (ii) of the 1959 Act as it has “restrain or coerce” in Section 8(b) (1) of the Act the prohibitions will be broad. This construction should afford protection not only against plainly coercive tactics, such as physical injury, cf., NLRB v. United Brotherhood of Carpenters & Joiners, Local 55, 205 F.2d 515 (10th Cir. 1953), striking and picketing, cf., Alpert v. Excavating Material Union, 184 F. Supp. 558 (D. Mass. 1960) (where threat of strike was used), but also against more subtle forms of coercion, such as derogatory statements about the secondary employer or his business or labor policies, so long as the object thereof is to force or require him to discontinue dealings with a primary employer. Cf., NLRB v. Drivers Local Union, 362 U.S. 274 (1960). However, the 1959 Act specifically permits truthful union publicity, such as passing out handbills, radio and newspaper advertisements concerning a secondary employer’s dealings with one whom the union has a primary strike. See the “Publicity” proviso appended to Section 8(b) (4), 1959 Act. This publicity alone apparently should not be construed to be evidence of an inducement, coercion or restraint of an employer, even though it may indirectly affect him. Williams, Freedom to Speak—But Only Ineffectively, 38 Tex. L. Rev. 373, 386 (1960).

Another problem in the principal case conjoins with the application of Section 8(b) (4) (i) and (ii)B; this decision also involves “situs” difficulties between the unionized major contractor and non-union subcontractor. In this area the courts have developed certain evidentiary standards to determine whether the facts involve secondary, and thus unlawful, activities or whether they involve primary and lawful disputes. For example, the Supreme Court has held that a strike and picketing at a construction project to force a general contractor to stop doing business with a subcontractor is an unlawful use of economic pressure. NLRB v. Denver Bldg. & Construction Trades Council, supra. This determination
called for complex rules in the area of "common situs" disputes in order to differentiate the character of the activities. But in a given situs dispute the general rule of the Denver case is qualified by the Moore Dry Dock standards. Matter of Sailor's Union of the Pacific and Moore Dry Dock Company, 92 N.L.R.B. 547 (1950). This rule is to the effect that picketing the premises of a secondary employer remains primary if it meets the following conditions: (a) the picketing must clearly indicate the union's dispute is not with the person on whose premises it is taking place; (b) it must be limited to times when the struck employer is working on the neutral's premises; (c) it must be limited to places reasonably close to the struck employer's activities; (d) the struck employer must be engaged in his normal business on the struck premises. This decision was approved by a number of circuit courts. Piezonki v. NLRB, 219 F.2d 879 (4th Cir. 1955); NLRB v. Local Union No. 55, 218 F.2d 226 (10th Cir. 1954); but cf., Note, Common Situs Rules Fade Away as NLRB and Courts Look to Object of Union's Picketing in Taft-Hartley Section 8(b) (A) Cases, 45 Geo. L. J. 614 (1957). The Moore Dry Dock tests are, as mentioned, evidentiary and will not be resorted to where evidence of unlawful secondary activities are clear, as in the Hod Carrier's case, supra.

There are other interpretations in this area of "situs" disputes. Where the primary employer farms out struck work to a secondary employer, the latter by performing this work, is held to have lost his status as a neutral, and hence his immunity from the lawful primary pressures of the union. Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948). It was suggested that a related situation occurs where an employer transfers a portion of his operations for performance by some other employer and refuses to bargain with the union concerning the transfer despite the fact that it means layoff for some of the employees represented by the union. This employer should also lose his status as a neutral. See, Rep. No. 1211, 83d Cong., 2d Sess. 10-11 (1954).

By the language of the 1959 Act, see the second proviso to Section 8(b) (4) which states:

"Provided, that nothing contained in this subsection (b) 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 the representative of such employees whom such employer is required to recognize under this Act;"

and by the congressional policy behind it, see H. R. REP. No. 1147, 86th Cong., 1st Sess. 11 (1959), the revision of the boycott ban provision did not purport to upset these established rules—Moore Dry Dock, the Ally Doctrine, and the Transfer of Work Doctrine, among others. Such rules are necessary developments in determining whether pressure activities engaged in by unions and employees are lawful and protected under Sections 7 and 13 of the Act, or are unlawful as coming within Section 8(b) (4) prohibitions as secondary activities.

As the principal case mainly dealt with "loopholes" of the technical variety, it does not foreshadow any sweeping changes in the doctrines just discussed. These latter doctrines may be considered to be loopholes by some, depending upon one's viewpoint; however, they have been found useful in determining the ticklish situs problems in the construction industry. For this reason, and until a better legislative solution is offered, it is suggested that the courts will not interpret the new boycott bans to sweep away these major evidentiary rules in order to declare all union activity involving multi-employer disputes secondary, ergo unfair labor practices.

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Minerals—Natural Gas—Title Not Lost by Storage Underground

P, as owner of a partial interest in the proceeds from the sale of gas produced by certain wells, sought an accounting and to restrain the artificial cutting-back and restriction of production. Ds alleged that the native reserve of gas in the drainage areas of the wells had previously been exhausted and that the gas now being produced is storage gas which has migrated from an adjoining underground storage pool. Ds contend that production of this gas for P's benefit would amount to a wrongful taking of property belonging to the storage companies. Held, judgment for D. Title to natural gas, once having been reduced to possession, is not lost, under Pennsylvania law, by injection of such gas into natural underground reservoir for storage purposes. White v. New York State Natural Gas Corp., 190 F. Supp. 342 (W.D. Pa. 1960).