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Hot Cargo Clauses as a Defense to Union-Induced Secondary Boycotts

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As a general policy it has always been the traditional practice of American trade unions to render each other mutual aid and protection during strikes.\(^1\) Of the arsenal of means available to implement this general policy, possibly the most effective weapon of support has been the sympathy strike or secondary boycott based upon a refusal to patronize or handle unfair goods.\(^2\)

The classic unfair goods situation, resulting in a secondary boycott, often arose in this manner:

The employees of plant \(X\), having become embroiled in a labor dispute with their employer, would strike the plant. Materials produced by plant \(X\) would subsequently be received at plant \(Y\), a customer of \(X\). Under union inducement, the

\(^{1}\)Mills & Montgomery, Organized Labor 20-21 (1945).
\(^{2}\)Id. at 581.
employees at Y would refuse to handle the goods, and a sympathy strike or secondary boycott against the employer at plant Y would be instituted.³

Even though the immediate dispute does not concern the employees of plant Y, by making common cause with the employees of plant X, not only is the power of each union enlarged, but the pressure exerted on the employer at plant X to settle with his employees is proportionally increased.

Under the original National Labor Relations Act,⁴ this type of union conduct was perfectly legitimate, but as early as 1942 Judge Learned Hand questioned how far the community could safely allow such power to grow.⁵ Judge Hand clearly recognized that the public welfare was economically affected by labor-management disputes, and that society might properly regulate the conflict in order to insure a balance between the legitimate right of labor to appeal for support and the interest of society in limiting the impact of industrial disputes.⁶ In 1947, the enactment of the Taft-Hartley Act expressed society's conviction that some restrictions must be placed on the secondary boycott activities of unions.⁷

The restrictions currently applicable to union secondary boycott activities can be found principally in section 8 (b) (4) (A) of the National Labor Relations Act as amended by the Taft-Hartley Act.⁸ In essence, this section makes it unlawful for a labor organization to induce or encourage employees to engage in a “strike” or a “concerted refusal in the course of their employment” to handle products, for the purpose of forcing one employer to stop doing business with another employer.⁹ In short this section would prohibit a union having a labor dispute at plant X from inducing the employees of plant Y to cease handling X's products so as to force a cessation of business between X and Y.

At first glance then, it would seem that a union-inspired secondary boycott would constitute a violation per se of the act, leaving the union open to an unfair labor charge filed by the injured

³ Address by General Counsel Jerome D. Fenton, briefing conference on regulation of labor relations, Washington, D. C., April 10, 1958.
⁵ NLRB v. Peter Cailier Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942).
⁶ Id. at 506.
⁷ 1 LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT 414 (1948).
⁹ Fenton, supra note 3.
secondary employer. Such a patent conclusion would obviously obtain were it not for the hot cargo clauses which exist in many collective bargaining agreements today.

As so aptly stated by the Board's general counsel, Jerome D. Fenton, a hot cargo clause is nothing more than a "contractual formulization or formalization of a secondary boycott." The typical hot cargo clause incorporated into a present day contract between the employer and the union might read: "Employees may refuse to handle material which the company purchases from any supplier whose employees are on strike because of a labor dispute."

In effect, the union employees at plant Y have agreed in advance with their employer to refuse to handle merchandise or materials from plant X, if and when the employees of plant X become embroiled in a dispute with their employer.

Assuming that a strike at plant X subsequently becomes a reality, and plant Y's employees are urged and induced by their union to implement their hot cargo clause, a basic issue immediately arises. Either the union's inducement of Y employees constitutes a violation of section 8 (b) (4) (A) of the act, or the hot cargo clause agreed to in advance by the employer at Y affords the union a defense to a secondary boycott charge.

Before examining the decisions of the National Labor Relations Board and the courts on this question, it would be well to review the conflicting rationales presented by the proponents of these two positions.

The argument that the union inducement is permissible and nonviolative of section 8 (b) (4) (A) may be summarized in this manner: section 8 (b) (4) (A) is silent on the question of union inducement of employers as distinguished from inducement of employees to boycott a product. Therefore, may not a union legally urge an employer to engage in a secondary boycott? What an employer may lawfully do, he may agree to do in advance; hence, the hot cargo clause is itself not unlawful under the act. If this reasoning be accepted, then urging employees to abide by the clause does not constitute inducement of a "strike" or a "concerted refusal in the course of their employment," the only action explicitly cov-

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10 Ibid.
11 Local 388, Printing Specialities Union (Sealright Pacific), 82 N.L.R.B. 271 (1949).
12 Local 294, Int'l Bhd. of Teamsters (Conway's Express), 87 N.L.R.B. 972 (1949).
For, it is argued, the words "strike" and "concerted refusal in the course of their employment" presuppose that the employees are acting in defiance of or contrary to their employer's wishes, but if the employer has consented, can it be said that there is a "forcing or requiring" of an employer to cease doing business with any other person? On the other hand, those who oppose this line of reasoning base their conclusion on a broader premise, namely, that the intent of Congress in enacting section 8 (b) (4) (A) was not only to protect the particular secondary employer involved, but also to shield the general public who would be adversely affected by the boycott. If, so the argument goes, the legislative purpose is to protect the public, then it follows that contractual waiver of the statutory protection by the secondary employer immediately involved cannot be determinative, for otherwise the public would be deprived of its statutory safeguard without its consent. In essence then, this line of reasoning concludes that any hot cargo clause must be subordinated to the legislative purpose of section 8 (b) (4) (A).

What effect then, if any, is to be given to a validly bargained for hot cargo clause? This question has raised a broad divergence of opinion not only within the National Labor Relations Board itself, but also in the courts.

The Board originally took the position in the Conway's Express case that a hot cargo clause afforded a union a complete defense to a secondary boycott charge. Conway's Express presented a situation in which companies X, Y, and Z entered into agreements with the teamsters' union which reserved to the union the right to refuse to handle goods or freight of any employer involved in a labor dispute. The shop stewards at each of the three establishments induced the employees to cease handling Conway's freight upon being advised by the union office that Conway's employees were on strike. Each of the employers, apparently mindful of its contractual obligations, acquiesced in its employees' refusal to handle the hot cargo. Finding no violation of the act, a Board

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13 Columbia Pictures Corp. and Ass'n of Motion Picture Producers, 82 N.L.R.B. 568 (1949).
17 Conway's Express, supra note 12, at 989 (Member Reynolds dissenting).
18 Conway's Express, supra note 12.
majority ruled that there is nothing in the express provision or underlying policy of section 8 (b) (4) (A) which prohibits an employer and a union from voluntarily including a hot cargo provision in their collective bargaining agreement or from honoring these provisions.\textsuperscript{19}

The *Conway Express* ruling was not a unanimous Board decision. A dissenting opinion by Member Reynolds illustrated the differences of opinion within the Board as to the scope and purpose of section 8 (b) (4) (A). The dissent pointed out that since the act unequivocally forbids secondary boycott activity on the part of unions,\textsuperscript{20} then to the extent that a contract provision authorizes such activity, it is per se repugnant to the basic public policies of the act.\textsuperscript{21}

Nevertheless, the majority ruling in *Conway's Express* was later adopted by the District of Columbia Court of Appeals\textsuperscript{22} and the Second Circuit,\textsuperscript{23} thus apparently establishing hot cargo clauses as a valid defense to a secondary boycott charge.

But labor law, as opposed to the more established fields of the law, is a comparatively new creation, and must of necessity be more flexible in order to meet constantly changing conditions in labor-management relationships.\textsuperscript{24} Certainly, as the complexion of the Board itself changes, the labor philosophy of its members is bound to be reflected in its rulings interpreting the act.

Possibly, changes in conditions and in Board membership may explain the first major trend away from the philosophy of the *Conway* decision which occurred in *McAllister Transfer*.\textsuperscript{25} In a fact situation strikingly similar to *Conway*, a majority of the Board found that the union involved had violated section 8 (b) (4) (A). Two Board members adopted the reasoning of Reynolds' dissent in *Conway* and found that the hot cargo clause was per se violative of the act, while two of the remaining three members found, as in *Conway*, that the hot cargo clause constituted a complete defense to a section

\begin{footnotesize}
\textsuperscript{19} See also Local 294, Int'l Bhd. of Teamsters (Montgomery Ward & Co.) 87 N.L.R.B. 984 (1949).
\textsuperscript{20} Conway's Express, suprana note 12, at 988 (Member Reynolds dissenting).
\textsuperscript{21} United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N. L. R. B. 802 (1949).
\textsuperscript{22} Local 338, Milk Drivers Union v. NLRB, 245 F.2d 817 (D.C. Cir. 1957).
\textsuperscript{23} Raboin v. NLRB, 195 F.2d 908 (2d Cir. 1952).
\textsuperscript{24} See NLRB v. Lion Oil Co., 352 U.S. 282 (1957).
\textsuperscript{25} Local 608, Int'l Bhd. of Teamsters (McAllister Transfer), 110 N.L.R.B. 1769 (1954).
\end{footnotesize}
8 (b) (4) (A) charge. Board Chairman Farmer\(^{26}\) chose to concur with the two members who found the hot cargo clause per se repugnant, but he based his decision on an entirely different and novel view. Apparently, the secondary employers in *McAllister* had posted notices directing their employees to handle all freight without discrimination, and these statements were posted for the express purpose of putting employees on notice that they were expected to handle *McAllister* freight. Chairman Farmer found that this action by the employers constituted a repudiation of their hot cargo clauses, and that the subsequent inducement of the employees by the union to cease handling the disfavored goods was unprotected activity and violative of section 8 (b) (4) (A).

Although Chairman Farmer’s view never came to be adopted by a Board majority, his opinion in *McAllister* may be said to have constituted a basis for the reasoning used by the Board majority six years later in the *Sand Door*\(^{27}\) case.

*Sand Door* found two members of the Board concluding that the act does not invalidate the hot cargo agreement itself, but any union inducement of employees to effectuate the agreement is contrary to the congressional purpose in enacting section 8 (b) (4) (A).\(^{28}\) Unlike the rationale of Chairman Farmer in the *McAllister* case, as far as actual union inducement of employees is concerned, the acquiescence or nonacquiescence of the employer to a union implementation of an existing hot cargo clause becomes immaterial, since *Sand Door* would interpret the term “strike” and “concerted refusal in the course of employment” used in section 8 (b) (4) (A) as covering any union-induced refusal to work.

In affirming *Sand Door* the Ninth Circuit adopted the Board’s majority view that such an agreement, even assuming that it is not per se unlawful, still affords the union no defense to a secondary boycott charge.\(^{29}\) The same opinion was expressed by the Sixth Circuit in *General Millwork*.\(^{30}\)

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\(^{26}\) Former instructor of law at West Virginia University.

\(^{27}\) *Local 1976, United Bhd. of Carpenters (Sand Door & Plywood Co.)*, 118 N.L.R.B. 1210 (1955).

\(^{28}\) Member Rodgers concurring, but on the basis that hot cargo clauses are per se illegal.

\(^{29}\) *NLRB v. Local 1976, United Bhd. of Carpenters*, 241 F.2d 147 (9th Cir. 1957).

\(^{30}\) *NLRB v. Local 11, United Bhd. of Carpenters*, 242 F.2d 932 (6th Cir. 1957).
However, two other cases in which the Board applied the Sand Door ruling were reversed by the District of Columbia Court of Appeals\textsuperscript{31} and the Second Circuit.\textsuperscript{32} These two circuits reaffirmed the Conway ruling, holding that there was no violation of section 8 (b) (4) (A) unless the union involved encouraged the employees to coerce the secondary employer, but there can be no coercion if the employees are merely encouraged to exercise a valid contractual right to which the employer has agreed.

In order to resolve this conflict among the circuits, the Supreme Court, during 1957, granted certiorari in several cases involving hot cargo clauses.\textsuperscript{33} The single question tendered by the petition for certiorari was whether a hot cargo clause constitutes a defense under section 8 (b) (4) (A) to a union induced secondary boycott. On June 16, 1958, the Court handed down its definitive ruling on this question.\textsuperscript{34} Justice Frankfurter, speaking for the Court's majority, noted that section 8 (b) (4) (A) does not contain a blanket outlawing of secondary boycotts as such, but rather describes and condemns specific union conduct directed to specific objects.\textsuperscript{35} A boycott voluntarily engaged in by a secondary employer for his own business reasons is not forbidden. Likewise, a union is free to approach an employer to persuade him to engage in a boycott as long as the union refrains from the specifically prohibited means of coercion through inducement of employees. Therefore, it cannot be said that the congressional purpose in enacting section 8 (b) (4) (A) was to extend to the primary employer or the general public a complete protection against the adverse effects of a secondary boycott. But the Court went on to nullify the significance of hot cargo clauses by finding that, even though the secondary employer may freely choose to enter into a boycott, it is likely that Congress intended that the employer's freedom of choice contemplated by section 8 (b) (4) (A) is a freedom to choose whether

\textsuperscript{31} Local 886, General Drivers Union (American Iron & Machine Works Co.), 247 F.2d 71 (D.C. Cir. 1957).
\textsuperscript{32} Local 338, Milk Drivers Union, 245 F.2d 817 (2d Cir. 1957).
\textsuperscript{33} Local 1976, United Bhd. of Carpenters v. NLRB; NLRB v. Local 886, General Drivers Union; Local 850, Int'l Assn of Machinists v. NLRB, all 355 U.S. 808 (1957) (consolidated for hearing).
\textsuperscript{34} Local 1976, United Bhd. of Carpenters v. NLRB, 78 Sup. Ct. 1011 (1958).
\textsuperscript{35} Section 8 (b) (4) (A) provides that, "It shall be an unfair labor practice for a labor organization or its agents ... to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment ... where an object thereof is the forcing or requiring of any employer to cease doing business with any other person."
to boycott at the time the question arises. This freedom of choice must, as a matter of federal policy, be available to the secondary employer notwithstanding any private agreement between the parties, since in this manner Congress may rightly be assumed to have hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited.

In finding hot cargo clauses to be no defense to the inducement of employees prohibited in section 8 (b) (4) (A), the Court nevertheless did not question the validity of a hot cargo clause as such.\(^{36}\) This reasoning creates something of an anomaly which may well lead to other labor litigation in no way related to secondary boycotts. For example, might a union now maintain an action for breach of contract if the employer repudiates the hot cargo clause? Would an employer be susceptible to a refusal to bargain charge if he refuses to consider the inclusion of a hot cargo clause in his collective bargaining agreement, and would the union then have the right to strike because of this refusal to bargain?

These and other possible problems, not within the scope of this note, would lead one to believe that the courts have not heard the last of hot cargo clauses.

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\(^{36}\) Note the analogy with the Court's position that restrictive covenants are legal but unenforceable. See Shelley v. Kraemer, 334 U.S. 1 (1948).