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misconduct was found insufficient to fasten guilt upon him."[42] This reasoning fails to recognize that the same alleged recklessness is the basis of both prosecutions. The judgment of acquittal would seem to have established conclusively that the defendant was not acting illegally at the time the victims were killed.[43] By failing to apply the doctrine of collateral estoppel, the defendant may be obliged to return again and again to relitigate the same issue. The defendant in a criminal case should have the right to claim finality as to any fact previously determined in his favor. In *People v. Allen*,[44] which follows the majority rule, the dissenting justices, recognizing this fact, said ". . . under the rule announced in this case a citizen may be tried an indefinite number of times for the same criminal act until a jury is finally found which will render a verdict suitable to the prosecution. Under this rule, if a grossly negligent act should result in a large number of deaths, the defendant might be tried as many different times as there were deaths involved. Even though jury after jury might find that he had not been grossly negligent, he could be compelled to return again and again to stand trial on this one point, which is the gist of the case."[45]

The primary object of penal sanctions is to deter crime and to insure the peace and safety of the community. In the typical automobile manslaughter situation the state is not dealing with a confirmed felon. The majority sometimes appear to forget this as they stretch legal precepts, very often applicable only in the civil forum. It is natural that judges, as every citizen, should view the rising death rate on our highways with concern. But it is difficult to believe that the solution rests in fashioning rules of law out of legal fictions. One wonders whether any law which subjects a defendant to what may amount to life imprisonment for one careless act, however regrettable its toll, is compatible with our concept of justice.

THE LABOR MANAGEMENT RELATIONS ACT AND THE CONTROVERSIAL HOT CARGO CLAUSE

INTRODUCTION

May coercion be brought by the employees of an employer not involved in a labor dispute to restrain him from doing business with another employer involved in a labor controversy? Such coercion usually takes the form of a strike or a concerted refusal to work on the part of the employees of the neutral or secondary employer. If the economic pressure is effective, the secondary employer is forced to discontinue business with the disputant or primary employer.[1]

42. 200 Minn. at 50, 273 N.W. at 356.

43. See note 41 supra.

44. 368 Ill. 368, 14 N.E.2d 397 (1937), cert. denied, 308 U.S. 511 (1939).

45. Id. at 388, 14 N.E.2d at 407 (dissenting opinion). See Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L.J. 513, 526-27 (1949).

1. At common law such work stoppages could be enjoined. See Frankfurter & Greene, The Labor Injunction 43 (1930).

With the passage of the Norris-La Guardia Act[2] in 1932 these concerted refusals were immunized from injunction, but section 8(b)(4)(A) of the Labor Management Relations Act of 1947[3] now declares the inducement by a union or its agents of employees of a secondary employer to participate in concerted refusals to work to be an unfair labor practice. The limited scope of the section has caused some doubt as to its efficacy. The difficulty arises when the secondary employer has agreed, as a part of the collective bargaining contract with the union, to the insertion of a clause giving his employees the right to refuse to handle the goods of an "unfair employer," that is, one engaged in a dispute with a labor union. This agreement is known as a "hot cargo" clause. The courts and the National Labor Relations Board are generally in agreement that a hot cargo clause is not illegal per se,[4] but legality of the enforcement of the clause has stirred doubts.

Position of the NLRB

The National Labor Relations Board first encountered the problem in the case of *Conway's Express*.[5] There the union made an agreement with a group of employers whereby it reserved the right to refuse to handle the goods of any employer involved in a labor dispute. When the dispute arose, the union advised the employees of the secondary employer not to handle the goods. The Board held that the union inducement was not a violation of section 8(b)(4)(A) since they were only encouraging the employees to exercise their rights under the hot cargo clause in their employment contract,[6] and the employers acquiesced in the concerted refusal of the employees in accord with their advance agreement. This decision was upheld by the Court of Appeals for the Second Circuit[7] which stated: "Consent in advance to honor a hot cargo clause is not the product of the unions' forcing or requiring any employer . . . to cease doing business with any other person."[8]

2. 29 U.S.C.A. §§ 101-15 (1952).

3. 29 U.S.C.A. § 158(b)(4)(A) (1952). The section provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents. . . .

". . . .

"(4) 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: (A) forcing or requiring 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. . . ."

4. General Drivers Union v. NLRB, 247 F.2d 71 (D.C. Cir.), cert. granted, 26 U.S.L. Week 3116 (U.S. Oct. 14, 1957) (No. 273); Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952); McCallister Transfer, Inc., 110 N.L.R.B. 1769 (1954).

5. 87 N.L.R.B. 972 (1949), enforcement granted sub nom. Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

6. 87 N.L.R.B. at 983.

7. Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

8. Id. at 912. The Conway doctrine was followed in Pittsburgh Plate Glass Co., 105

The Board at present takes the position that hot cargo clauses as such are not contrary to public policy.[9] Nevertheless, it has abandoned its original decision in *Conway's Express* and holds that it is an unfair labor practice to encourage union men to exercise rights under the clause. The retreat from *Conway's Express* was first indicated by Chairman Farmer in his concurring opinion in *McCallister Transfer, Inc.*[10] There the employees, under the terms of a hot cargo contract, refused to handle goods, although the secondary employers vainly posted notices directing them to do so. The Chairman recognized the legality of a boycott obtained with employer consent, but he found coercion present since the employers did not immediately acquiesce. His decision, therefore, was based on the reaction of the secondary employer to the invocation of the hot cargo clause by the union.[11]

In *Sand Door and Plywood Co.*,[12] the Board overruled its earlier decision in *Conway's Express.* Its holding was not based on the theory of the acquiescence of the employer in the conduct of the union, since the employer remained silent, but rather on the ground that the union had no right to instruct employees to cease handling goods, and that any refusal on the part of the employees to handle the goods without the employer's instruction constituted an unfair labor practice.[13] Invocation of the hot cargo clause was, therefore, no defense and the refusal was violative of section 8(b)(4)(A) if the secondary employer did not express his acquiescence.

In *American Iron and Mach. Works Co.*,[14] under similar facts, the doctrine of the *Sand Door* case was extended by the Board so that the mere in-

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N.L.R.B. 740 (1953) There the Board further pointed out that in order to have a violation of section 8(b)(4)(A) the employees must be found to have been within the "course of employment" requirement of the act, and since the goods of an unfair employer are excluded under the clause, those goods are not within the "course of employment" requirement.

9. Sand Door and Plywood Co., 113 N.L.R.B. 1210, 1215 (1955) states: "Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy."

10. 110 N.L.R.B. 1769, 1788 (1954).

11. Two of the majority Board members argued that upholding hot cargo clauses would permit the secondary employer to waive a right which was not his alone, and concluded that the Conway doctrine should be overruled. The two dissenting members of the Board, considered Conway's Express as authority for enforcing compliance with the contract. They regarded section 8(b)(4)(A) as designed only for the protection of the secondary employer.

12. 113 N.L.R.B. 1210 (1955), enforcement granted sub.nom. NLRB v. Local 1976, United Brotherhood of Carpenters, AFL, 241 F.2d 147 (9th Cir. 1956).

13. 113 N.L.R.B. at 1216. The "course of employment" argument propounded in Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953), was denounced. The Board pointed out that by the phrase Congress merely intended to distinguish between individuals in their capacity as employees and in their capacity as consumers. Id. at 1211.

14. 115 N.L.R.B. 800, enforcement denied sub. nom. General Drivers Union v. NLRB 247 F.2d 71 (D.C. Cir. 1957), cert. granted, 26 U.S.L. Week 3116 (U.S. Oct. 14, 1957) (No. 273).

ducement or encouragement by the union through appeals to employees to refuse to handle hot cargo precluded enforcement of the clause, regardless of employer acquiescence in the demands of the labor organization.[15] This decision in effect makes hot cargo clauses null and void, for even if the secondary employer unilaterally decides to honor his agreement, the union may not under penalty of violating section 8(b)(4)(A) notify its members that the contract is in force.[16]

Conflict Among the Circuit Courts

The position taken by the Board in the *Sand Door* case has been approved by the Court of Appeals for the Ninth Circuit,[17] and more recently by the Court of Appeals for the Sixth Circuit.[18] These federal courts of appeal have based their reasoning upon the fact that the primary intent of Congress in enacting the section was the protection of the public ". . . from strikes or concerted refusals interrupting the flow of commerce at points removed from the primary labor-management disputes."[19] They further stress that the allowance of the otherwise invalid conduct through contractual assent would be contrary to the express language of the statute and would frustrate the intent of the legislature.[20]

On the other hand, in the most recent decisions[21] handed down by the courts of appeal, the view of the Board in relation to the enforcement of hot cargo clauses has not been upheld. For example, in *General Drivers Union v. NLRB*[22] the Court of Appeals for the District of Columbia reversed the Board's holding in *American Iron and Mach. Works Co.*[23] holding that the ruling of the

15. Id. at 801.

16. See dissenting opinion in American Iron and Mach. Works Co., 115 N.L.R.B. at 806.

17. NLRB v. Local 1976, United Brotherhood of Carpenters, AFL, 241 F.2d 147 (9th Cir. 1957).

18. NLRB v. Local 11, United Brotherhood of Carpenters, AFL, 242 F.2d 932 (6th Cir. 1957).

19. Id. at 936. In H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947) Representative Hartley observed that ". . the committee was impressed by the absolute necessity of steering a course which would recognize the rights of all interested parties in labor relations and which would be scrupulously fair to each—the employer, the employees and the public. While the rights of the public must, in the last analysis, be treated as paramount, it was the belief of the committee, that, except in extraordinary circumstances, the right of the public will be adequately protected if in turn adequate protection is afforded to employers and employees in the exercise of their legitimate rights."

20. 242 F.2d at 936.

21. The significance of the judicial conflict is pointed up by the contrary decision in April 1957 in NLRB v. Local 11, United Brotherhood of Carpenters, AFL, 242 F.2d 932 (6th Cir. 1957).

22. 247 F.2d 71 (D.C. Cir. 1957), cert. granted, 26 U.S.L. Week 3116 (U.S. Oct 14, 1957) (No. 273).

23. 115 N.L.R.B. 800 (1956).

Board would in effect render nugatory the hot cargo clause itself, leaving the employees without adequate remedy.

There is no judicial conflict in regard to the decision in the *General Drivers* case, since none of the other decisions have completely disregarded the concept of employer acquiescence. However, the language of the District of Columbia Court of Appeal indicates that it is opposed to the views expressed by the Sixth and Ninth Circuits. The court pointed out that the employees of the secondary employer were urged by the union not to handle the freight of an unfair employer. Under the agreement with the secondary employers, the latter had agreed that their employees would not be required to handle unfair goods. Therefore, when they did what they had a legal right to do under the agreement, it cannot be said that they engaged in a strike or refusal to work. The court further stated: "Nor can it be said that there was a 'forcing' or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening."[24]

The latest case in which the problem was encountered is *Milk Drivers Union v. NLRB*.[25] Presented with facts similar to those in *McCallister Transfer, Inc.*,[26] the Court of Appeals for the Second Circuit reversed the order handed down by the Board in *Crowley's Milk Co., Inc.*[27] The court, basing its decision on the holding in *Rabouin v. NLRB*[28] found no violation of section 8(b)(4)(A). Furthermore, it rejected the Board's position as stated in the *Sand Door* and *McCallister* cases because of its failure ". . . to distinguish between instances of employer coercion and instances of employer consent,"[29] and because of its disregard of the statutory requirement for a strike or concerted refusal in the course of employment.[30]

Intent of Congress

The conflict among the courts and the NLRB seems to be rooted in the actual intent of Congress in the enactment of section 8(b)(4)(A), and the plain meaning of the statutory language. Prior to the passage of the section it was generally agreed that the section was aimed at banning all secondary boycotts.[31] However, when it was actually drafted it made no specific reference to secondary boycotts, but merely outlawed the principal means by which

24. 247 F.2d at 74.

25. 245 F.2d 817 (2d Cir. 1957).

26. 110 N.L.R.B. 1769 (1954).

27. 116 N.L.R.B. 1408 (1956).

28. 195 F.2d 906 (2d Cir. 1952).

29. Milk Drivers Union v. NLRB, 245 F.2d 817, 822 (2d Cir. 1957).

30. Ibid. The court pointed out that since the "normal" work to be performed was set forth in the collective bargaining agreement, there could be no strike or refusal to work within the statute unless the refusal was in relation to the "normal" work. This position is closely allied to that stated in the Board's decision of Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953). See note 8 supra.

31. See 64 Yale L.J. 1201, 1206 (1955).

they could be achieved, that is, union inducement of a concerted refusal to work.[32] The proponents of the theory that Congress' primary intent was the public protection are opposed to the views set forth by the *General Drivers* and *Milk Drivers* cases.[33] They feel that albeit the secondary employer may waive his individual rights under the section, he has no right to waive the rights of others who would be ultimately affected by a work stoppage, namely, the public. On the other hand, these cases are endorsed by those who feel that the paramount purpose of the section is the protection of neutral employers from strikes resulting from their desire for goods produced by a disputant employer. This view is based on the premise that by their becoming parties to hot cargo contracts the employers agree not to use such goods, and, therefore, are not in need of such protection.[34]

CONCLUSION

The conflict over the invocation of hot cargo clauses by labor unions charged with violations of section 8(b)(4)(A) will probably be resolved by the Supreme Court in the near future. Chief Judge Clark, in his opinion in the *Milk Drivers* case, wisely stressed that the problem should be solved without going behind the clear language of section 8(b)(4)(A).[35] The rationale of his decision is more sound than that of the NLRB which disregards the language of the section. However, the Supreme Court may well take a position different from either of the conflicting views by declaring that hot cargo clauses are illegal per se. This position is consonant with the policy of the Labor Management Relations Act which is designed to protect the citizens of the United States in connection with labor disputes.[36] It also adheres to the language of section 8(b)(4)(A), since there is a "requiring" of the secondary employer to cease dealing with another by the very terms of the hot cargo agreement itself. Moreover, if the statute is finally interpreted so as to declare hot cargo clauses illegal per se, the existence of the anomalous situation under the Board's view, whereby the clause is legal of itself but is incapable of enforcement, will be averted.[37]

32. 29 U.S.C.A. § 158(b)(4)(A) (1952).

33. See note 19 supra.

34. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 43 (1947).

35. The court stated in relation to section 8(b)(4)(A): "We do not think such tangential legislative history authorizes us to go behind the clear language." 245 F.2d at 821.

36. Section 1(b) of the Labor Management Relations Act states: "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." 29 U.S.C.A. § 141(b) (1952).

37. See Shelley v. Kraemer, 334 U.S. 1 (1948), where a racially restrictive covenant was unenforceable, although the covenant itself was not held to be illegal.