



10-1-1948

## Contributors to the Fall Issue/Notes

John F. Bodle

James W. Oberfell

John J. Cauley

John G. Smith

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

### Recommended Citation

John F. Bodle, James W. Oberfell, John J. Cauley & John G. Smith, *Contributors to the Fall Issue/Notes*, 24 Notre Dame L. Rev. 82 (1948).

Available at: <http://scholarship.law.nd.edu/ndlr/vol24/iss1/5>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## CONTRIBUTORS TO THE FALL ISSUE

---

Anton-Hermann Chroust, Associate Professor of Law, University of Notre Dame. J. U. D., University of Erlanger; Ph.D., University of Munich; S. J. D., Harvard Law School. Eminent authority and writer on philosophy, law, and jurisprudence, and frequent contributor to the Notre Dame Lawyer.

John Richard Murphy, Instructor in History, Villanova University. A. B., University of Notre Dame, M. A., *Ibid.*

Warren Freedman, of Brooklyn, N. Y., A. B. Rutgers University, presently studying at Columbia University. Contributor to the Texas Law Review.

Hon. Pat McCarran, United States Senator from Nevada since 1932. Former Chief Justice of the Nevada Supreme Court, 1917-18. Vice President, American Bar Association, 1922-23.

Heinrich Rommen, LL.D., Professor of Political Science, College of St. Thomas, St. Paul, Minn. Author of "The Natural Law" and "The State in Catholic Thought". Internationally known authority on the Natural Law and Jurisprudence.

---

## NOTES

LABOR LAW—MARITIME HIRING HALLS FALL AFOUL OF TAFT-HARTLEY CLOSED SHOP BAN.—Recent labor unrest in the nation's maritime industry reflects the maritime unions' concern for their hard-won, union controlled hiring halls. Established in the middle 'thirties after long years of labor strife, the hiring halls ended employer anti-union discrimination and helped stabilize employment in the industry. Their simplification of hiring procedure caused employers as well as workers to become favorably disposed towards them. Passage of the Taft-Hartley Act,<sup>1</sup> however, has disturbed this amicable situation.

---

<sup>1</sup> Labor Management Relations Act, 1947, 61 STAT. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. I).

Section 8 (b) (2) of the National Labor Relations Act<sup>2</sup> as amended by the Taft-Hartley Act makes it an unfair labor practice for a labor union or its agents to cause or attempt to cause employers to discriminate against non-union workers; Section 8 (a) (3) similarly proscribes such discrimination by employers. Actual administration of the hiring halls, if not the basic provisions of the agreements creating them, has been such as to give both labor and management good reason to expect difficulty in the future from enforcement of these sections. Preferential hiring of union members has been, in practice, a corollary of union control of the hiring halls. Recent difficulties have stemmed primarily from employer belief that provision for such union control in new contracts is illegal, and from union demands that their control be continued unless and until prohibited by specific court decision. The N. L. R. B. has already ruled, in *National Maritime Union of America*<sup>3</sup> that such provisions, where it is contemplated by the parties that their administration will involve discrimination against non-union men, are violative of the Act.

Possible implications of the enforcement of such a ruling by the courts may be seen in the history of the maritime labor movement. Before the unions gained control of hiring, entry into the labor market of the industry—an industry in which employment is at best unsteady—was uncontrolled. Unemployment was therefore widespread and unions found it hard to organize and obtain bargaining power. Employers countered attempts at union organization by forming associations which operated hiring halls that discriminated against union members. The blacklist was in common use, and “kickbacks” to employers in return for jobs were by no means unknown. The “shape-up” system of hiring longshoremen by the half day promoted employer favoritism in that part of the industry even as between non-union applicants.

Only on the Pacific coast did unions succeed in obtaining contracts for hiring through union representatives prior to World War I. Government intervention during the war resulted in widespread union gains, but these were wiped out by employers as the unions lost bargaining power in the post-war shipping decline. The old abusive practices of employers returned. Not until 1934 were any substantial concessions regained from the employers. “The unredressed grievances and unexpressed hatreds of these years go far towards explaining the chaotic outbursts and the hotly contested strikes of the period after 1934.”<sup>4</sup>

---

<sup>2</sup> 49 STAT. 449 (1935), as amended, 61 STAT. 136 (1947), 29 U.S.C. § 151 *et seq.* (Supp. I).

<sup>3</sup> *National Maritime Union of America*, 78 N.L.R.B. No. 137, (August 17, 1948) 17 L.W. 2075, 22 LAB. REL. REF. MAN. 1289 (1948).

<sup>4</sup> Hohman, *Maritime Labor in the United States*, 38 INTERNATIONAL LABOUR REVIEW 381 (1938).

The bitter Pacific coast strike of 1934 ended in union victory and the rebirth of the union-controlled hiring hall. Preferential hiring was obtained on the Atlantic coast by negotiation, employers there having been less antagonistic in their tactics. These gains were cemented and augmented by the unions in later strikes and negotiations throughout the subsequent years, until passage of the Taft-Hartley Act.<sup>5</sup>

Having experienced a loss of power and a subsequent recurrence of employer dictation and discrimination after the first World War, the deep concern of the maritime unions over the prospect of once again losing control of hiring becomes eminently understandable. Employers, too, as indicated above, have become accustomed to the simplicity of obtaining qualified men through the union halls and have evinced no desire to upset the status quo and return to the unpredictable, unstable labor supply situation of the twenties.

This general acceptance of the hiring hall in its present form by both sides did not, however, induce Senator Taft and Representative Hartley to make any provision in their bill for continuation of preferential hiring by mutual consent of employer and employee. Neither is there any question that the union hiring hall was meant to fall by the closed shop prohibition of the Act. Senator Taft, in presenting the bill to the Senate, pointed to the maritime hiring hall as a prime target of the Act:

The bill does abolish the closed shop. Perhaps this is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to him.<sup>6</sup>

The union hiring hall is, of course, not limited to the West coast or to the maritime unions alone. Its use is widespread, notably in the building trades. The N. L. R. B.'s decision in the *National Maritime Union* case referred to above indicates the difficulties ahead for all such systems of union hiring.

In that case National Maritime Union hiring halls, operated under contracts with various Great Lakes shippers, were under consideration. The halls assigned jobs to registered seamen in rotation; to register, the seamen had to be union members in good standing. Non-union seamen were admitted to the halls, but were not assigned to any job unless no union member was available and willing to accept it. Even when a non-union man was hired, he could keep his job only for thirty days, or until he returned to the port from which he started. He then had to report back to the hiring hall, and if any union man was

---

<sup>5</sup> For a more detailed history of maritime labor relations, see LESTER, *ECONOMICS OF LABOR* 776 *et seq.*

<sup>6</sup> 93 CONG. REC. 3836 (1947).

available to replace him, he was "bumped" off the ship. This procedure has been standard throughout the industry.

In negotiating for its 1948 contract with the shipowners, the N. M. U. representatives insisted upon retention of the hiring hall provision <sup>7</sup> as a condition precedent to further bargaining by the union. The shipowners adamantly refused to accept this condition, an impasse was thus reached, and the N. M. U. went on strike.

After hearing the case, the N. L. R. B. determined that, although the hiring hall provision on its face did not call for discrimination against non-union labor, the preferential hiring actually practiced under the controverted provision in the past was illegal under the Taft-Hartley Act. Therefore, the Board declared the union's insistence on inclusion of the provision, and its strike to obtain its inclusion, to be violative of Section 8 (b) (2). The Board noted that, although the union had not actually caused the employers to discriminate against non-union workers by its actions, such actions were attempts to cause discrimination, and so were unfair labor practices within the "attempt" clause of the section. Because discriminatory practices, now illegal, had occurred in past operation of the hiring hall clause, and because the union rejected all company proposals which could have put the hiring halls on a non-discriminatory basis, the Board concluded that discrimination in the future was contemplated by the union under the proposed clause.

Although the union was brought within the scope of Section 8 (b) (2) by the "attempt" clause, the Board did not determine that mere acceptance of the hiring clause would at once make the shipowners guilty of violating Section 8 (a) (3). Apparently no illegality would attach to them until an instance of discriminatory hiring or discharge could be shown.

The union's insistence upon retention of the hiring hall clause as a condition precedent to entering any agreement with the shipowners was held to constitute refusal to bargain within the meaning of Section

---

<sup>7</sup> The provision stated: "The Union agrees to furnish satisfactory men and the Company agrees that during the period that this agreement is in effect all replacements shall be hired through the offices of the Union, as vacancies occur. The Company may reject such replacements, provided:

(a) The rejections are for valid reasons, and

(b) The company states in writing to the officers of the Union the reasons for such rejections, and that the Union shall have the right to take up such rejections under the grievance machinery outlined in subsections 3 and 4 of Section 7 and in Section 8 of Article I of this agreement.

"When a rejection is made the Union shall immediately supply a replacement. If the Union cannot furnish replacements by one (1) hour before sailing time, the Company shall have the right to obtain replacements wherever possible." 22 LAB. REL. REF. MAN. 1239, 1292 (1948).

8 (b) (3).<sup>8</sup> Although the union would ordinarily be under no duty to compromise a demand, the illegal nature of the demand here involved deprived the union of the right to condition further bargaining on its acceptance. The Board issued a remedial order that the union bargain collectively upon request of the employers<sup>9</sup> and that it stop attempting to force them into discriminatory contracts and practices.<sup>10</sup>

The N. M. U. had argued that the case against it was built completely on the mere possibility that discriminatory practices might occur in the future. This was similar to the position taken by an N. L. R. B. trial examiner in his report on another case:

. . . To hold that the mere signing of a contract by an employer in which he agrees to discriminate against non-members of a union constitutes the act of discrimination would be unduly to distort the plain meaning of the word. . . . Since what the respondents were attempting to cause the employer to do, namely, to sign a closed-shop contract, would not in itself constitute discrimination as prohibited by Section 8 (a) (3), their said conduct should not be found to be in violation of Section 8 (b) (2).<sup>11</sup>

In the instant case, the union's position would seem to be strengthened by the fact that the hiring hall clause did not expressly call for a closed shop. The logic of the union's argument might seem compelling in the abstract. However, in the actual case, the N. L. R. B. position, which interprets the agreement in the light of its past application and implies the discriminatory nature therefrom, is more realistic. Two subsequent reports of a trial examiner, Wallace E. Royster, in other cases have followed the interpretation of the N. L. R. B. in this case.<sup>12</sup>

---

<sup>8</sup> The section states: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9 (a)."

<sup>9</sup> Although the N. M. U. has not complied with the requirements of Section 9 (f), (g) and (h), the latter being the non-Communist affidavit requirement, and so could not be certified as exclusive bargaining agent, the Board ruled that such non-compliance would not be allowed to protect the union from being compelled to bargain.

<sup>10</sup> The order stated: "The union and certain named officers shall cease and desist from refusing to bargain with the employers; from requiring them to execute contracts which make membership in the N. M. U. a condition of employment; from approving or instigating strikes for the purpose of requiring the execution of such contracts; from causing the employers to discriminate unlawfully against employees . . ." 22 LAB. REL. REP. MAN. 1289, 1305 (1948).

<sup>11</sup> Trial examiner Isadore Greenberg's report in case involving Retail Clerks International Association, quoted at 22 LAB. REL. REP. 190 (1948).

<sup>12</sup> Cases No. 2-CB-87, Aug. 10, 1948, and 2-CB-88, Aug. 13, 1948, were commented upon in 22 LAB. REL. REP. 237 (1948).

This dispute was only one of many which threatened a nation-wide tieup of shipping when contracts throughout the industry expired last June. On the recommendation of the President, acting on the report of his board of inquiry, the Attorney General asked for injunctions to restrain the various unions involved from striking. These were granted in a number of federal courts. The N. M. U. strike on the Great Lakes was halted by such an injunction.<sup>13</sup>

Most of the unions succeeded in settling their disputes with management before the dissolution of the injunctions. The Seafarers' International Union led the way by signing contracts with a number of shippers in which it was provided that the hiring halls be retained until their legality is determined in court.<sup>14</sup> Such provisions were widely adopted on the East and Gulf coasts and Great Lakes. However, several Pacific coast unions, notably Harry Bridges' International Longshoremen and Warehousemen's Union, refused to accept this limitation on the hiring hall clause. When the 80 day injunctions which had been issued against these unions expired without the acquiescence of the shipowners to the hiring hall provision, the longshoremen and seamen involved went out on strike. At this writing, the strike has been in progress for six weeks and has effectively shut down West coast shipping. Hearings are in progress on complaints brought against the I. L. W. U. and the Marine Cooks and Stewards by employers' associations. The unions are charged with coercing the employers and their employees by demanding hiring hall provisions in their contracts.

The limitation accepted in the agreements noted above seems of no great importance in itself. Certainly its presence or absence could not be called the reason for stopping operation of the halls should they be declared illegal. Conversely, the limitation would not abolish the halls if the form of the hiring provision should be upheld and only discriminatory practices not authorized on its face be declared illegal. Apparently, then, the West coast unions want to retain the hiring hall clause without reservation so that, should the halls be declared illegal, they may then declare the contracts at an end and thus be in a position to negotiate at once. It would, of course, be possible to negotiate for new hiring provisions without ending the rest of the contract. This course seems to be contemplated by those unions which have accepted the limitation clause.

But whatever the wisdom of the strike or the motives which prompted it, it serves to emphasize the unrest that may be expected until the status of the hiring hall is definitely determined and, should

---

<sup>13</sup> *United States v. National Maritime Union*, ....F. Supp....., 22 LAB. REL. REF. MAN. 2306 (N. D. Ohio 1948).

<sup>14</sup> The N. L. R. B. initiated court action in the N. M. U. case on September 2, 1948, in the United States Circuit Court of Appeals for the Second Circuit.

it be rendered illegal in its present form, until some substitute is developed. It thus becomes important to consider the attempts which have been or might well be made to create systems of hiring which will not fall under the ban of the Taft-Hartley Act.

The temporary solution already noted—that of retaining the hiring halls in their present form unless and until they are declared illegal—can hardly be considered as more than momentarily effective, in view of the clear legislative intent, noted above, to outlaw the hiring halls, and of the N. L. R. B. decision in the N. M. U. case. Certainly the pre-Taft-Hartley preference of union members will be prohibited. Thus the larger part of the maritime industry is very likely to be left without contractual hiring procedures in the foreseeable future.

The N. M. U. and Great Lakes tanker companies seemed for a while to have found a loophole. Their contract provided that "In the absence of notice of termination by either side, the contract shall continue in effect from year to year subject to such notifications as, at close of the contract year, the parties may agree upon . . ." Since the original contract antedated the Act, both parties were to refrain from giving notice of termination and so, as it was thought, retain the hiring hall under force of the original contract. Unfortunately for the success of this plan, the N. L. R. B.'s General Counsel, Robert Denham, ruled that exemption from the Act cannot be extended by such automatic process. After the date for renewal, whether such renewal is automatic or not, the contract must conform to the Act.<sup>15</sup>

Most of the other attempts which have been made to formulate new hiring procedures have fallen into three general classes.<sup>16</sup> The first of these is based upon the fact that the only form of preferential hiring expressly made illegal under the Act is that which discourages or encourages union membership by discriminating against or preferring union members. Preferential hiring is maintained in the agreements entered into under this theory, but on some basis other than union membership, such as seniority, either in the industry or with a particular employer. Thus the Seafarers' International Union and the Pacific Shipowners' Association have signed an agreement that preference in hiring will be in favor of "applicants who have previously been employed on vessels of one or more of the signatory companies." Outside the maritime industry, the Northern California chapter of the Teamsters has agreed with an association of contractors that preference in employment will be given to persons employed during the

---

<sup>15</sup> This view was expressed in an address delivered by Mr. Denham in Chicago on May 11 before the Illinois Manufacturers' Association. See 22 LAB. REL. REP. 28 (1948).

<sup>16</sup> For a classification of the clauses discussed, see B.N.A., *THE TAFT-HARTLEY ACT—AFTER ONE YEAR* 197, 244-248.



previous year on any job covered by the master agreement between the parties for that year. Such provisions cannot be declared violative of the act per se; as a matter of law, they are not within the Act. It is only on particular matters of fact that discrimination against non-union labor can be shown.

The second class of provisions retains the hiring hall, but in various altered forms designed to prevent its being classed as discriminatory. Mere admitting of non-members to the halls is obviously not enough, on the basis of the N. M. U. case. Some procedure must be devised which will not concern itself with union membership. The Seafarers' contract mentioned above combines the hiring hall with its preferential hiring of former employees to produce a result which it is hoped will not be held discriminatory against non-union workers. Of course, in recent years all who would qualify as "former employees" have been union members, except for the few who may have obtained temporary jobs unwanted by members. Looking beneath the surface of the agreement, as the N. L. R. B. did in the N. M. U. case, grounds for terming this agreement discriminatory seem to be evident. Of course, it will be argued that the employers have a right to employ the most experienced men. In addition, it is conceivable that some workers who acquired seniority as union members have since quit the union.

An A. F. of L. local of electrical workers in Chicago entered into a much more elaborate agreement with an association of contractors. Each party supplies five members to serve on a joint arbitration board. The board appoints a neutral administrator, who prepares a list of all participating employees, ranked by seniority. He administers the hiring hall, filling employers' requests from the list of unemployed workers, preferred according to seniority.

The New York Warehousemen's Association and the Retail, Wholesale and Department Stores Union have agreed that the union hall shall be open to non-union personnel, while the same union's contract with Revlon Products, Inc., goes further, stating that "in operating such employment office and making referrals to the company, the union will not discriminate against, restrain or coerce any person because of non-membership in the union." This latter agreement would seem, at first glance, to be equitable if carried out according to its terms. However, at least one source has suggested that even this form of the hiring hall may be illegal under the Act.<sup>17</sup> If so, then *a fortiori* the other, less equitable plans cited would be proscribed. The ground of illegality suggested is based upon the premise that in passing the Act, Congress intended to halt not only discriminatory hiring, but the

---

<sup>17</sup> 1 TELLER, THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING 75 (Supp. 1948).

depriving of employers of any real freedom in hiring as well.<sup>18</sup> A "free" labor market, it is argued, was to be restored to both labor and management. Then any hiring hall to which the employer is compelled to come would be within the prohibited area.

Within this second general class of solutions, however, may be included optional hiring hall agreements, which would seem to satisfy the legislative intent more fully. Such is the hiring provision agreed upon by the A. F. of L. Electrical Workers and the Central Arizona Power and Light Company. That agreement states:

When the company requires new employees of any classification included in this agreement, the company may request the Business Manager of the Union to send qualified men, or the company may fill its own requirements through its own personnel department. In either event, when any new employee is hired, his name, classification and date of hiring will be forwarded to the Financial Secretary of the Union on cards to be furnished by the Union.

The latter provision seems intended to facilitate operation of a union shop, which of course is permissible under the Taft-Hartley Act under certain conditions. In attempting to invalidate this agreement, it might be said that the very granting of a union hiring hall tends to encourage discriminatory hiring, but the objection hardly seems tenable. In the absence of a union shop agreement, however, neither worker nor employer need have any dealings with the hall unless they so choose. Thus the twin horns of the union dilemma: a compulsory hiring hall is illegal, an optional hiring hall is apt to be useless.

A similar proposal was made to the N. M. U. in the negotiations preceding the case discussed, by the Texas Company, one of the shippers involved. The company was to notify the union when it required replacements. If the applicant sent by the union arrived before the vacancy was filled, he was to be hired unless he failed to meet the company's minimum standards or unless the company would be required to discriminate against any other employee or applicant in hiring him. This proposal was obviously carefully drawn in an attempt to meet the requirements of the law, but proved totally unacceptable to the union.

Under the third general heading of attempted solutions may be grouped provisions which are more in the nature of union reprisals. Provision may be made for the union's no-strike pledge to become void if the union hiring provision is declared illegal. Such a contract was signed in California by the Teamsters and the district contractors. The union may express the right of its members to refuse to handle

---

<sup>18</sup> See SEN. REP. NO. 105, 80th Cong., 1st Sess., 6 (1947).

“hot,” i.e., non-union goods, or to work with non-union labor. A clause of this type was held legal under the Act by a trial examiner in one of the International Typographical Union cases,<sup>19</sup> on the ground that a union cannot be held responsible for the individual acts of its members. However, it would be illegal for the union to order its members not to work with non-members. Clauses granting unions the right to request the discharge of “troublesome” or “disharmonious” employees have been written, but would seem certain to lead directly to discrimination.

It becomes apparent, then, that attempts to retain the union hiring hall in altered form are likely to err either in the direction of failing to avoid the Act or of so emasculating the hall as to render it incapable of aiding the union cause. It also appears that such was the legislative intent in passing the Act.

Establishment of the union shop should also be considered as a possible solution. The majority of employees, under the Taft-Hartley Act, must have authorized negotiation of such a clause in an N. L. R. B.-conducted election.<sup>20</sup> This presupposes compliance by the union with the provisions of Section 9 (f), (g) and (h). Whether the members of non-complying maritime unions could influence their leaders to meet these requirements, and whether they desire that the leaders do so, are problematical questions.

If, however, a union shop contract has been negotiated, employees still cannot be forced to join the union until thirty days after their employment begins. Such a limitation would be most deleterious to the stability of employment in the longshore and unlicensed seamen classifications. There the short term nature of employment, if coupled with free entry of large numbers of unskilled, transient workers, would soon reproduce the unstable employment conditions of the 'twenties. Refusal by employers of jobs to non-union newcomers in an effort to maintain a stable labor force could be held to constitute discrimination under Section 8 (a) (3). Similarly, union attempts to obtain preference for its members would fall within the prohibition of Section 8 (b) (2). Whether or not the courts would be impressed by arguments that such discrimination was based on experience and ability, and not on union membership, would be the crucial question.

Unfortunately, no clear-cut solution can yet be stated to the problem of union security in the maritime industry under the Taft-Hartley Act. Judicial determination of the N. L. R. B. cases now reaching the courts must be awaited before the legal status of the various devices considered herein can be established. At present, it can only

---

<sup>19</sup> See B.N.A., *THE TAFT-HARTLEY ACT—AFTER ONE YEAR* 244.

<sup>20</sup> 49 STAT. 453 (1935), as amended, 61 STAT. 140 (1947), 29 U.S.C. § 159 (Supp. I).

be observed that the maritime unions and employers had reached an important area of agreement in their troubled relations, and that future recourse thereto has now been made illegal, whether wisely or unwisely, by the sweeping provisions of the Taft-Hartley Act.\*

*John F. Bodle*

*James W. Oberfell*

---

INSURANCE—JUSTICE OF LIFE INSURANCE CLAUSES DENYING RECOVERY FOR SUICIDE WHILE SANE OR INSANE.—Insurers, except when prohibited by statute, make it a general practice to include the phrase "suicide, sane or insane" in life insurance policies to avoid liability where the insured takes his own life intentionally. since it is settled law that the mere term "suicide" does not include self-destruction by an insane person.<sup>1</sup> Where the phrase "suicide, sane or insane" is inserted, the majority of the courts hold that no degree of insanity will between the terms "suicide", create liability.<sup>2</sup> That there is a difference and "suicide, sane or insane" has been recognized by American and English courts since *Borradaile v. Hunter*.<sup>3</sup>

By the common law and the great weight of authority, "suicide" appearing alone in an insurance policy clause, is defined as an act of self-destruction with full knowledge of the consequences and a conscious intent to accomplish them. It is therefore necessary that a person be sane at the moment he commits the act in order that it be classified as "suicide".

. . . in the eye of the law, the taking of life by an insane person, whether it be his own or that of some other person, is not an act for which he is responsible. In the Century Dictionary a "suicide" is defined to be "one who commits suicide; at common law one who, being of the years of discretion and sound of mind, destroys himself." And the act itself is defined to be: "Designedly destroying one's own life. 'To constitute

---

\*Editor's Note: As the NOTRE DAME LAWYER went to press, an agreement had apparently been reached by West coast shippers and maritime unions whereby hiring halls would be continued in operation as formerly, pending court determination or congressional action.

1 DeGogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232 (1875).

2 Blackstone v. Standard Life and Accident Ins. Co., 74 Mich. 592, 42 N.W. 156 (1889).

3 5 Man. & G. 639, 134 Eng. Rep. 715 (1843).

suicide at common law, the person must be of the years of discretion and of sound mind.’”<sup>4</sup>

In law, the terms “die by one’s own hand” or “by his own act” or “to take his own life” are synonymous with the above definition of “suicide.”<sup>5</sup>

It is obvious that insurance companies include the word “suicide” or one of its synonyms in their policies to protect themselves from fraudulent recovery. The courts have been strong, however, in deciding that self-destruction while insane is not suicide within the meaning of a pure “suicide” clause. The Supreme Court of the United States, in *Accident Insurance Co. of America v. Crandal*,<sup>6</sup> said:

The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured “shall die by suicide,” or “shall die by his own hand,” go far towards determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words “sane or insane,” does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect.

Such an exception seems to present little danger to insurers, however, since one capable of forming a fraudulent plan to take his own life could hardly be called insane.

The insurance companies, in their attempt to protect themselves and limit their liability further, have substituted for the pure “suicide” clause, a clause reading “suicide while sane or insane” or a clause calculated to give the same effect. In the light of the legal definition of “suicide” that we have examined above, this clause is fraught with ambiguity. “Suicide” means self-destruction while sane. Self-destruction while insane is not suicide. This ambiguity has been cleared up in many policies by inserting a clause reading “self-destructon while sane or insane” or words of like meaning.

Nevertheless, the clause does not exclude the liability of the insurer if the act by which the insured is killed is unintentional or accidental even though it is his own act. Thus, when a person accident-

---

<sup>4</sup> *Weber v. Supreme Tent of the Knights of the Maccabees*, 172 N. Y. 490, 65 N.E. 258 (1902).

<sup>5</sup> *Dickerson v. Northwestern Mut. Life Ins. Co.*, 200 Ill. 270, 65 N.E. 694, 696 (1902).

<sup>6</sup> 120 U. S. 527, 7 S.Ct. 685, 30 L.Ed. 740 (1887).

ally shoots and kills himself, it is held not suicide. Where the insured dies from an overdose of morphine, it is held not to be suicide unless it be proved it was taken with the intent to commit suicide.<sup>7</sup>

Thus the courts have stated in later cases that the person must be insane to a degree as to render him unconscious of the act or he must be under the influence of an insane impulse.<sup>8</sup>

Some state legislatures have regulated the inclusion of insanity clauses in policies issued within the state. Although approximately one half of the states have statutes prohibiting incontestability clauses, these can seldom be interpreted so as to defeat a "suicide, sane or insane" clause. Generally, they provide that policies shall be incontestable after a period of two years except for non-payment or military service,<sup>9</sup> while most "sane or insane" clauses are written to take effect only if the suicide is within two years. The clause therefore avoids the ordinary incontestability clause. In New York, by statute, "suicide" may be put into the policy only as grounds for not paying the full value of the policy.<sup>10</sup> An interesting case arose when, with permission of the State Insurance Commission, a clause was put into insurance policies excluding liability for the face value of the policy for "suicide, sane or insane". The plaintiff beneficiary contended that the policy was void because it was contrary to a statute which authorized only the word "suicide". This contention was upheld. In the decision, the statutory construction turned on the intent of the legislature, the court holding that the difference between the two types of clauses must have been known to the legislature when it passed the act.<sup>11</sup>

Missouri has the only statute which specifically attacks the "sane or insane" clause. It states that:<sup>12</sup>

In suits on policies it is not a defense that the insured committed suicide unless it be proved he contemplated the suicide at the time of issuance of the policy. Any clause in the policy to the contrary shall be void.

Outside of Missouri, whose statutes attack the clause directly, and New York, whose courts have by a negative approach interpreted their statutes so as to defeat the clause, there is no statutory protection in the states from the danger which lay hidden in this clause.

<sup>7</sup> *Brown v. Sun Life Ins. Co.*, 57 S.W. 415 (1899).

<sup>8</sup> *Van Zandt v. Mutual Benefit Life Insurance Co.*, 55 N. Y. 169 (1873).

<sup>9</sup> COLO. STAT. ANN., c. 87, § 57 (Michie 1935). See also: ILL. STAT. ANN., § 66.899 (Jones 1935); MICH. STAT. ANN., GEN. INS. LAW, Tit. 24, § 24.263 (Callaghan 1943).

<sup>10</sup> N. Y. INS. LAW, § 155, subd. 2 (B).

<sup>11</sup> *Franklin v. John Hancock Mutual Life Insurance Co.*, 272 App. Div. 1048, 75 N. Y. S. (2d) 289 (1947), motion for leave to appeal and rehearing granted, 297 N. Y. 1034, 78 N.E. (2d) 868 (1948).

<sup>12</sup> MO. REV. STAT. ANN., c. 37, § 5851 (1939).

In examining the effects of this clause it becomes apparent that it raises a real issue of social policy. The question is, "Is it dangerous to allow an insurance company to restrict its own liability in this fashion?" The addition of the words "sane or insane" to the original concept changes its entire purpose and effect. Where it was originally designed to prevent bad faith recoveries by beneficiaries, it now seeks to prevent recoveries arbitrarily. It is not seeking to attack the fraudulent suicide, but is attempting to rule out a certain class of formerly valid beneficiaries for purposes which are questionable.

It is true that an insurance policy is a contract and, since it is a contract, the parties thereto are bound by their mutual assent to the conditions within their agreement. An insurance company, however, is not an ordinary contracting party. It is recognized as a public institution which has definite public responsibilities to the classes of people for whose benefit it is formed. This is evidenced by the fact that most states have rather inclusive regulations in their statutes for the control of insurance companies.

Courts in states which have no statutes similar to those discussed above seem to show a tendency to ameliorate the harshness of the general rule regarding "suicide, sane or insane" clauses. In a Kentucky case involving a "sane or insane" clause, the following instruction was held to be not in error:<sup>13</sup>

. . . that if they believe from the evidence that deceased was insane at the time he committed suicide, that is, if he at said time did not have sufficient reason to know right from wrong, or did not have sufficient will power to govern his actions by reason of some insane impulse, the result of mental unsoundness, which he could not resist or control, then the law is for the plaintiff, . . .

Other courts also have held insurance companies liable under "sane or insane" clauses, but require proof of such a degree of insanity that the insured did not know the act he was committing would result in his death.<sup>14</sup> This is a greater degree of insanity that was required in the case above.

This modification of the general rule receives further support from the medical opinion that insanity is a disease. In an ordinary life policy covering death by sickness or disease, a clause denying the liability of the company where the insured "commits suicide while sane or insane" effectually denies the beneficiary a performance which he could

---

<sup>13</sup> Bankers Fraternal Union v. Donahue, 33 Ky. Law. Rep. 196, 109 S.W. 880 (1908).

<sup>14</sup> Sovereign Camp of Woodmen of World v. Valentine, 173 Ky. 182, 190 S.W. 712 (1917). Cf. Inter-Southern Life Insurance Co. v. Boyd, 124 S.W. 333 (1910).

reasonably expect under such an insurance contract. There is, therefore, a contradiction between the purpose of the policy and the effect of the inserted clause. Insanity is a disease as certainly as cancer in many cases. When an insane person kills himself, the insanity is in these cases the proximate cause of the death. Therefore, the death of the insured is caused by disease, the very condition on which the policy bases a valid recovery. As was stated in a Pennsylvania case: <sup>15</sup>

Self-destruction, under insane impulses so strong as to be beyond the control and restraint of the will, is a result produced by disease, for which the victim of it is no more morally responsible than he would be for any of the other maladies of which men die.

Self-destruction while insane has also been viewed as an accident, as is illustrated by the following excerpt from an early American decision: <sup>16</sup>

Speaking legally also, . . . self-destruction by a fellow being bereft of reason, can with no more propriety be ascribed to the act of his *own hand*, than to the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more *his act*, in the sense of the law, than if he had been impelled by irresistible physical power . . .

If the killing blow was not his own act and not the act of another it qualifies as an accident.

The purpose of a "suicide clause" in a life or accident insurance policy is to protect the company from fraud on the part of the insured. This fraud requires an intention and a conscious knowledge that the action is injuring the insurance company unjustly. Such a state of mind is impossible in an insane man, and he is therefore incapable of this type of fraud. A clause reading "suicide while sane or insane" prevents the recovery of the beneficiaries even though the insane insured is free from any fraud or evil intent. This extension of the clause is not in conformity with the duties an insurance company owes the public. The "sane or insane" clause is not wrong *per se*, but it opens the door to attacks on the general welfare of the people. The insured contracts in most cases to protect his beneficiaries from being left financially weak. It is the insurance company's duty to see that the beneficiaries are supported rather than to increase their own wealth by writing arbitrary limitations on their agreements to pay into their policies and disguising them as protection from fraud. Some states

---

<sup>15</sup> Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 691 (1878).

<sup>16</sup> Breasted v. The Farmer's L. & T. Co., 4 Hill 73, 75, affirmed 8 N. Y. 299 (1843).



have passed statutes which are interpreted so as to prevent an abuse of the beneficiary's rights by inserting a "sane or insane" clause. In states which have no such statute, courts should look to the welfare of the public and construe such clauses in a manner not conflicting with sound public policy.

*John J. Cauley*

*John G. Smith*

---

LABOR LAW—SECONDARY BOYCOTTS AND THE TAFT-HARTLEY ACT—  
On July 24, 1948, the National Labor Relations Board issued its first cease-and-desist order against a labor union.<sup>1</sup> The Board ruled that the union had been guilty of an unfair labor practice by engaging in a secondary boycott<sup>2</sup> in violation of Section 8(b)(4)(A) of the Taft-Hartley Act.<sup>3</sup> The Board's cease-and-desist order (which amounts to an injunction, even though it is up to the courts to enforce the order<sup>4</sup>) served to emphasize that fact that with the advent of the Taft-Hartley Act, the balance of power in labor-management relations shifted once again, this time in favor of the employer.<sup>5</sup>

## I.

Historically, the problem of the use of the secondary boycott—one of labor's most potent economic weapons—and on the employer's side, of the use of the injunction to combat it, has been the center of much controversy in the field of labor law. In the early 1900's, as an outgrowth of the *Debs* case<sup>6</sup> (in which a federal injunction against unions

---

<sup>1</sup> *Wine, Liquor and Distillery Workers Union, Local 1, et al., (AFL)*, 77 N. L. R. B. No. 61, 22 LAB. REL. REF. MAN. 1222 (1948).

<sup>2</sup> A "secondary boycott" is a combination not merely to refrain from dealing with a person, or to advise or by peaceful means persuade his customers to refrain, but to exercise coercive pressure on such customers, actual or prospective, in order to cause them to withhold or withdraw their patronage, through fear of loss or damage to themselves. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 466, 41 S. Ct. 172, 65 L. Ed. 349 (1921). The provisions of the Taft-Hartley Act dealing with union secondary activities is broad enough to include not only the "refusal to handle" method of coercion, but secondary strikes and secondary picketing as well. It is in this broad sense that the term "secondary boycott" is used in this article.

<sup>3</sup> Labor Management Relations Act, 1947, 61 STAT. 136 (1947), 29 U. S. C. § 141 *et seq.* (Supp. I). The general scope of Titles I, II & III of the Act has been noted previously. See Notes, 23 NOTRE DAME LAWYER 238; 349; 561 (1948).

<sup>4</sup> American Bar Association, *Report of the Special Committee on Administrative Law*, 61 A. B. A. REP. 720, 749 (1936).

<sup>5</sup> B. N. A., THE TAFT-HARTLEY ACT—AFTER ONE YEAR 89 (1948).

<sup>6</sup> *In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895).

was allowed), and the *Danbury Hatters* case <sup>7</sup> (in which a union was prosecuted under the Sherman Act <sup>8</sup>), the repressive injunction became widely used to stem union organizational activities. Congress, in the face of rising sentiment against the indiscriminate use of the injunction, passed the Clayton Act <sup>9</sup> in 1914. Section 20 of this Act, when read by the ordinary layman or lawyer, would be interpreted as outlawing, among other things, the use of the injunction by federal courts to stop secondary boycotts.<sup>10</sup> But the union hopes for a favorable, or even a reasonable interpretation of Section 20 of the Act were short-lived. As if to provide a concrete example of the meaning of the expression of Justice Frankfurter, made in later years, to the effect that words do not always mean what they say they mean, the Supreme Court decided, in the *Duplex* case <sup>11</sup> and the *Bedford Cut Stone* case <sup>12</sup>, that Section 20 of the Clayton Act did not actually enunciate any new principles with respect to secondary boycotts and injunctions, but was merely declaratory of previously existing law; in both cases, consequently, unions were held to have engaged in illegal secondary boycott activities. Finally, with the passage of the Norris-La Guardia Act <sup>13</sup> in 1932, (specifically in Section 4(a) of the Act) organized labor achieved definitive and substantial recognition of its right to engage in secondary boycott activities without fear of injunction. In addition, the Wagner Act <sup>14</sup> in 1935 (by which the National Labor Relations Board came into being) provided government assistance to labor in its organizational efforts. The years following the passage of these two acts were marked by great freedom of union activity. Some expressed the opinion that the pendulum had swung too far on the side of labor, that certain of the Supreme Court decisions from 1935 to 1947 <sup>15</sup> (prior to the passage of the Taft-

<sup>7</sup> *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488 (1908); *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341 (1915).

<sup>8</sup> Sherman Anti-Trust Act, 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. §§ 1-7 (1946).

<sup>9</sup> Clayton Anti-Trust Act, 38 STAT. 738 (1914), 29 U. S. C. § 52 (1946).

<sup>10</sup> GREGORY, LABOR AND THE LAW, 159 *et seq.* (1946).

<sup>11</sup> *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921).

<sup>12</sup> *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927).

<sup>13</sup> Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U. S. C. § 101 *et seq.* (1946).

<sup>14</sup> National Labor Relations Act, 47 STAT. 449 (1935), 29 U. S. C. § 151 *et seq.* (1946).

<sup>15</sup> The liberality of the Supreme Court toward the use of secondary boycotts by unions reached its peak in the "free speech" cases: *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); and in those decisions following in the wake of the *Hutcheson* case in 1941. *United States v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941); *United States v. Int'l. Hod Carriers Council of Chicago*, 313 U. S. 539, 61 S. Ct. 839, 85 L. Ed. 1508 (1941); *United States v. United Brotherhood of Carpenters*, 313 U. S. 539,

Hartley Act) indicated that the right of unions to engage in secondary boycotts was virtually limitless. The best thought of both management and labor groups advocated some form of federal remedial legislation. Congress, going beyond what seemed to be a sensible suggestion, that they merely define and set the limits in general terms of what would constitute a valid use of the secondary boycott, devised Section 8(b)4(A) of the Taft-Hartley Act, and thereby committed the government to the policy of outlawing all secondary boycott activities by unions in those situations otherwise satisfying the "interstate commerce" requirements of the Act.

## II.

The Taft-Hartley Act, while it does not specifically refer to the secondary boycott, adequately describes it in Section 8(b)4(A) of the Act, where it provides:

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 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 . . . 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. . . .

That the language of Section 8(b)4(A) is inclusive enough to outlaw all secondary boycotts within the scope of application of the Act is borne out by the legislative history of the Act. Senator Taft, in Congressional debate <sup>16</sup> on this section, stated:

All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee . . . never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondaries as to make them an unfair labor practice.

---

61 S. Ct. 839, 85 L. Ed. 1508 (1941); *United States v. Building and Construction Trades Council of New Orleans*, 313 U. S. 539, 61 S. Ct. 839, 85 L. Ed. 1508 (1941); *Allen-Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945).

<sup>16</sup> 93 CONG. REC. 4178 (1947).

The penalties available against unions for violations of Section 8(b)4(A) include: 1. The issuance of a temporary injunction from the appropriate district court, upon application by the Regional Director of the National Labor Relations Board, on the condition that the regional director has reasonable grounds for believing that an unfair labor practice exists. It is mandatory under Section 10 (1) of the Act to seek such a temporary restraining order, if the regional director has such "reasonable grounds." It is interesting to note in this connection that in cases of employer violations of the unfair labor practices section, it is *not* mandatory, according to Section 10 (j), for the regional director to seek a temporary restraining order. 2. Under subsections (c) and (e) of Section 10, a cease-and-desist order may issue from the National Labor Relations Board, enforceable by the circuit court of appeals. 3. A suit for damages by the offended employer is provided for under Section 303 (b).

The Taft-Hartley Act does not provide for the securing of injunctions by private persons against unions for the violation of the secondary boycott provisions of the Act, nor was it the purpose of the legislature to provide such a remedy.<sup>17</sup> Apparently, several courts have misconstrued the Act in this respect.<sup>18</sup>

### III.

Significantly, the National Labor Relations Board's first cease-and-desist order against a union, for a violation of the "unfair labor practices" section of the Act<sup>19</sup> involved secondary boycott activity.<sup>20</sup> In this case the union was engaged in a primary strike against a liquor manufacturer's wholly owned subsidiary, for the purpose of forcing a contract renewal. Allegedly in order to lend support to the strike, warehouse employees of independent distributor firms handling the manufacturer's products called a work stoppage, refusing to handle the manufacturer's products. These employees were members of a "sister" local of the same union involved in the manufacturer's dispute. There was some evidence that the work stoppage at the warehouses was due at least partially to grievances between the warehouse employees and their immediate employers, the distributors. On the other hand it is obvious that one of the effects of such a "work stoppage" would be to force the distributor to cease doing business with the manufacturer, and thus bring secondary pressure to bear on the manufacturer to force him to renew the contract with his employees. Both the manufacturer and the

---

<sup>17</sup> 93 CONG. REC. 4838 (1947).

<sup>18</sup> *Dixie Motor Coach Corp. v. Amalgamated Ass'n.*, 74 F. Supp. 952, 21 LAB. REL. REF. MAN. 2193 (W. D. Ark. 1947); *Schmidt Packing Co. v. Local Meat Cutters Union* (Ohio Ct. Com. Pleas), 21 LAB. REL. REF. MAN. 2467 (1947).

<sup>19</sup> Section 8(b)4 *et seq.*, *supra*, note 3.

<sup>20</sup> *Wine, Liquor and Distillery Workers Union, Local 1, et al. (AFL)*, 77 N. L. R. B. No. 61, 22 LAB. REL. REF. MAN. 1222 (1948).

distributors filed charges alleging an unlawful boycott. A short time after the union called the work stoppage, the distributors and the union adjusted their differences. The warehouse employees subsequently went back to work. Then both the manufacturer and the distributors filed a motion to withdraw the charge and recommended that the complaint be dismissed. The motion was denied, and the National Labor Relations Board continued to process the case, issuing, at length, the present order against the union. Clearly, the activity of the union had as one of its effects a secondary boycott against the manufacturer as proscribed in Section 8(b)4(A) of the Taft-Hartley Act. But the union argued that this section was aimed at the union's organizational attempts and jurisdictional claims only, and that it did not apply in a case arising out of a lawful dispute over terms of employment, and, that the so-called secondary boycott section did not apply in this case because of the unity of interest between the distributor and the manufacturer, making them allies in the primary dispute. In refuting these first two theories of the union, the Board pointed out that the legislative history of the Act did not indicate that Section 8(b)4(A) contemplated any such exceptions. The union further contended that the work stoppage at the distributors was not primarily in support of the strike at the manufacturer's subsidiary, but was a lawful strike against the distributors themselves for accumulated local grievances, and that whatever effect their activity had on third parties was coincidental, and the union was not responsible. Despite these contentions of the union, the Board found that an objective appraisal of the union's activity at the warehouses indicated that at least *one* of its purposes, even though not necessarily the principal one, was to engage in a secondary boycott against the manufacturer, and that this was all that was required under Section 8(b)4(A) of the Act.

While one may agree that none of the theories of defense set forth by the union had much force, considering the broad scope of the boycott section of the Act, yet it must be borne in mind that in the period between the passage of the Norris-LaGuardia Act and the Taft-Hartley Act, the courts entertained such a liberal view toward union activity that the purpose or objective of a strike or work stoppage was virtually immaterial.<sup>21</sup> We would not now wish to go that far. But, forgetting for a moment the effect of Section 8(b)4(A), it would seem that the *Distillery Workers Union* case would, under the old law, be a fair example of a proper use of the secondary boycott, and an injunctive proceedings would not have been successful. A workable solution to the problem lies somewhere between the two extremities of union license, which grew out of the excessive liberality of the courts in pre-Taft-Hartley days, and blanket prohibition, as attempted under the Taft-Hartley Act.

---

<sup>21</sup> B. N. A., THE TAFT-HARTLEY ACT—AFTER ONE YEAR 90 (1948).

In addition to the administrative order of the National Labor Relations Board in the *Distillery Workers Union* case, which indicates the Board's close adherence to the letter of the law in Section 8(b)4(A), there have been a number of judicial interpretations of this section arising out of petitions to the district courts for temporary restraining orders for alleged violations of this section.<sup>22</sup> Some of these judicial interpretations indicate an attitude toward the secondary boycott provisions of the Act rather opposite to that taken by the Board.<sup>23</sup> In the *Metropolitan* case the court held that no secondary boycott existed on the following facts: pressure was exerted by the defendant union against a subcontractor of the union's immediate employer, in support of a primary dispute between the union and its immediate employer; the subcontractor had undertaken completion of work which, at the time the primary strike was called, was being done by the union's immediate em-

<sup>22</sup> Slater v. Denver Bldg. and Construction Trades Council, ....F. Supp., 22 LAB. REL. REF. MAN. 2565 (Colo. 1948); Styles v. Local 760, Int'l. Brotherhood of Electrical Workers, ....F. Supp., 22 LAB. REL. REF. MAN. 2446 (E. D. Tenn. 1948); Evans v. United Electrical, Radio and Machine Workers of America, ....F. Supp., 22 LAB. REL. REF. MAN. 2459 (S. D. Ind. 1948); LeBaron v. Kern County Farm Labor Union, Local 218, ....F. Supp., 22 LAB. REL. REF. MAN. 2435 (S.D. Cal. 1948); Cranefield v. Bricklayers Union No. 1, 78 F. Supp. 611, 22 LAB. REL. REF. MAN. 2239 (W. D. Mich. 1948); Sperry v. Denver Bldg. and Construction Trades Council, 77 F. Supp. 321, 21 LAB. REL. REF. MAN. 2712 (Colo. 1948); Barker v. Local 1796, United Brotherhood of Carpenters and Joiners, ....F. Supp., 21 LAB. REL. REF. MAN. 2406 (M. D. Ala. 1948); LeBaron v. Printing Specialties and Paper Converters Union, 75 F. Supp. 678, 21 LAB. REL. REF. MAN. 2268 (S. D. Cal. 1948); Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672, 21 LAB. REL. REF. MAN. 2256 (S. D. N. Y. 1948); Sperry v. United Brotherhood of Carpenters and Joiners, ....F. Supp., 21 LAB. REL. REF. MAN. 2244 (Kan. 1948); Douds v. Local 294, Int'l. Brotherhood of Teamsters, ....F. Supp., 21 LAB. REL. REF. MAN. 215 (N. D. N. Y. 1948); Douds v. Local 294, Int'l. Brotherhood of Teamsters, 75 F. Supp. 414, 21 LAB. REL. REF. MAN. 2150 (N. D. N. Y. 1947); Douds v. Wine, Liquor and Distillery Workers Union, 75 F. Supp. 184, 21 LAB. REL. REF. MAN. 2120 (S. D. N. Y. 1947), rehearing, 21 LAB. REL. REF. MAN. 2204 (S. D. N. Y. 1948), injunction denied, 75 F. Supp. 447, 21 LAB. REL. REF. MAN. 2282 (S. D. N. Y. 1948); Styles v. Local 74, United Brotherhood of Carpenters and Joiners, 74 F. Supp. 499, 21 LAB. REL. REF. MAN. 2010 (E. D. Tenn. 1947); Douds v. Int'l. Longshoremen's Ass'n., ....F. Supp., 20 LAB. REL. REF. MAN. 2642 (N. D. N. Y. 1947). Many of the above cited cases raise the question of whether the enjoining of secondary picketing under Section 8(b)4(A) of the Taft-Hartley Act violates the free speech provisions of the Constitution of the United States. The many ramifications involved in this question demand treatment in a separate note. It is interesting to note that the Supreme Court has recently granted certiorari in a case involving the issue of whether the California Hot Cargo Act prohibiting secondary boycotts, is unconstitutional because it abridges freedom of speech. See 17 L. W. 3060 (1948).

<sup>23</sup> Slater v. Denver Bldg. and Construction Trades Council, ....F. Supp., 22 LAB. REL. REF. MAN. 2565 (Colo. 1948); Sperry v. Denver Bldg. and Construction Trades Council, 77 F. Supp. 321, 21 LAB. REL. REF. MAN. 2712 (Colo. 1948); Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672, 21 LAB. REL. REF. MAN. 2256 (S. D. N. Y. 1948).

ployer. The court, in denying the temporary restraining order, was careful to restrict the decision to the facts involved. However, the decision was undeniably grounded on the theory, however limited its application, that there was such a *unity of interest* between the primary employer and his subcontractor as to justify the pressure applied by the union against the subcontractor. Such pressure, although there was absolutely no common ownership between the two employers, was deemed by the court to be "primary" rather than "secondary," and thus not within the scope of Section 8(b)4(A). In the two *Denver* cases, involving the building trades, the district court denied temporary restraining orders against the union, ostensibly because interstate commerce was not affected. The cases were very similar on their facts. In both cases the union was engaged in secondary boycott activity against the charging party. With respect to the interstate commerce question, it appeared in the second of these two cases that the employer bought sixty-five percent of the raw materials for his manufacturing plant outside the state, and thirty-five percent of his finished products were sold outside the state. The district court's ruling that interstate commerce was not affected has been appealed to the circuit court.<sup>24</sup> Shortly after the district court's decision in this case, a trial examiner of the National Labor Relations Board dismissed a charge of unlawful boycott involving the same parties and the same facts on the grounds that the court's decision as to interstate commerce was *res adjudicata*, and the Board was thus precluded from further processing the case. The general counsel of the Board has appealed the trial examiner's decision to the Board.<sup>25</sup> Oddly enough, with respect to the first of the two *Denver* cases cited, the Board, despite the district court ruling that interstate commerce was not involved, has continued to process a charge of illegal boycott, arising out of the same facts and involving the same parties. This may well pave the way for the incongruity of a Board ruling against the union under the Taft-Hartley Act in the face of a prior, unappealed decision of the district court that interstate commerce was not involved (precluding, consequently, the application of the Act).

The refusal of the district court in these cases to allow the temporary restraining orders as provided for under the Taft-Hartley Act was admittedly a blow to those who favor the abolition of the use of the secondary boycott in the construction industry by subjecting the building trades unions to the oppression of Section 8(b)4(A). The General Counsel of the National Labor Relations Board is of the opinion that interstate commerce under the Taft-Hartley Act should include the building trades and most small businesses, and has commented "It is a rare case in which business does not affect commerce in some degree."<sup>26</sup>

---

<sup>24</sup> 22 LAB. REL. REP. 331 (1948).

<sup>25</sup> *ibid.*

<sup>26</sup> 22 LAB. REL. REP. 87 (1948).

## IV.

The manifest unwillingness of the district courts in the *Metropolitan* and the *Denver* cases to apply the secondary boycott section of the Act in sledge-hammer fashion is indicative of a wide-spread opinion that there should be "an area of economic conflict" within which a union could engage in a secondary boycott without interference by injunction. Gerhard Van Arkel, former General Counsel of the National Labor Relations Board, had this to say in commenting on the secondary boycott provisions of the Taft-Hartley Act: <sup>27</sup>

Substantively, the secondary boycott is often a union's only method of reaching an unfair employer who threatens the wage standards of an industry; to outlaw its use in all cases must substantially weaken the labor movement in its efforts to raise the living standards of its members.

It would be ironical indeed if, after a time, the body of decisions allowing the use of secondary boycotts on one theory or another should grow to formidable proportions. Thus the court interpretation of the Taft-Hartley Act would indicate a judicial activism paralleled only by the attitude of the courts following the Clayton Act, the difference being, of course, that this time the shoe, so to speak, would be on the other foot. Desirable as judicial disregard of the legislative history and the plain meaning of the secondary boycott section of the Act might be from a pragmatic point of view, such an attitude would only serve to antagonize those critics of our courts who abhor their tendency to indulge in judicial law-making by reflecting in their decisions their private opinions of what the law should be in a given situation. A better solution than expedient rationalization by the courts in order to allow some secondary boycotts would seem to be legislative amendment of Section 8(b)4(A). Such an amendment should recognize and provide for, in general terms, an "area of economic conflict" within which unions could engage in secondary boycott activities without fear of almost inevitable injunctive blockades. Unions' rights should be tested on the basis of the degree of interest between the primary employer and the third party, the means used in accomplishing their purpose, and the object or purpose for which they are engaging in the secondary boycott.

It may seem to many at first blush that the *sine qua non* of the secondary boycott—bringing pressure to bear through an "innocent" third party—is essentially unjust. But in the face of the magnitude and the complexity of our industrial economic system, the illusion fades. For unions to demand to be allowed, within limits, to support one another in their just demands, and otherwise to bring secondary pressure to bear is to demand what employers have traditionally done to further their own interests. Mere primary pressure by a labor group against

---

<sup>27</sup> 20 LAB. REL. REF. MAN. 68, 73 (1947).



its immediate employer is not always effective, especially in times of unemployment. Neither is primary pressure always possible. Secondary pressure to force an employer to unionize his business in order to protect the working standards of the unions in a particular industry might, for example, be the only possible means to reach such an employer. The Taft-Hartley Act, as it now stands, with reference to the secondary boycott provisions (whatever may be its merits in other respects) is a serious interference with labor's right to obtain just wages and decent working conditions, and to protect what they have already gained in this regard.<sup>28</sup> The evils of Section 8(b)4(A) are not so evident in these "boom" times, when unions tend to be complacent with their gains of the past fifteen years and the public, in general, apathetic to the problems of unions. But a period of depression and widespread unemployment would very soon demonstrate to all that the anti-boycott Section of the Taft-Hartley Act is an inroad to union destruction.\*

*E. A. Steffen, Jr.*

---

TRUSTS—DUTY OF A LIFE TENANT UNDER A TRUST TO REPAIR.—What is the extent and nature of the equitable life tenant's duty of repair? Who may enforce this duty, when does the problem arise, and what remedies are available to enforce the same? These and similar questions frequently arise when dealing with life tenancies existing under a trust. It will be the purpose of this note to explain these problems and to classify them when possible.

The question of the rights and duties created by the existence of a legal life estate is generally settled, having been dealt with extensively both by the courts and the text writers.<sup>1</sup> While the equitable life estate is in many respects similar to the legal life estate, and valid analogies between the two are frequent, the situation is complicated some-

---

<sup>28</sup> See CHARLES ANROD AND BENJAMIN L. MASSE, S. J., *THE NEW LABOR LAWS* 17 (America Press 1948): "It is questionable also whether the blanket prohibition of boycotts is wise legislation. When a boycott is used to win an immoral jurisdictional strike or for some other immoral purpose, it, too, is immoral. But suppose the purpose of a boycott is the reform of an unjust employer. Can it not be presumed that the customers of such an employer have the obligation at least not to encourage him in his evil ways by buying and using his products? Or suppose that the labor standards in an entire industry are threatened by a few anti-union employers. If the State is going to outlaw the boycott, it would seem that it would be bound to provide some other means to deal with such cases." See also *ibid.*, 80-85.

\*THE NOTRE DAME LAWYER intends to note any further developments in the law of labor relations.

<sup>1</sup> RESTATEMENT, PROPERTY §§ 129-30 (1936), 1 TIFFANY, REAL PROPERTY § 64, (3rd ed. 1939). 33 AM. JUR. 975, § 447.

what by the existence of two distinct classifications of equitable life estates, each with its own variations. In the first of these situations, the trust instrument instructs the trustee to allow the *cestui* to occupy the land for life, while in the second, the trustee is instructed instead to pay the income from the land to the *cestui* for life. In the first case the beneficiary has an equitable life estate in possession. It is this estate that is most comparable to a legal life estate.<sup>2</sup> The trustee has no duties toward repairing and maintaining the property unless such duties are delegated to him by the trust instrument. The primary duty lies on the tenant in possession, but the trustee has the secondary duty to enforce this obligation for the benefit of the remaindermen.<sup>3</sup> In the second case the *cestui* receives an equitable life estate not in possession. Here, the duties that would ordinarily fall upon a life tenant in possession are charged to the trustee<sup>4</sup> who must pay any costs incurred out of income otherwise payable to the life beneficiary. The trustee's responsibility to the remaindermen remains the same; it is merely the method of enforcement that differs in this type of estate. Although in either case the life beneficiary bears the ultimate burden, the trustee is in a much better position to protect the remainderman where the equitable estate is not one of possession since he can, in such a case, appropriate the income from the property to meet the cost of the repairs.<sup>5</sup> Where, however, the beneficiary of the life estate is in possession, the trustee or remainderman must bring an action to force him to pay directly or to have the court appoint a receiver.<sup>6</sup> Thus the crucial issue becomes whether the equitable life estate is one of possession or not.

Where the instrument creating the trust does not delegate the duty to repair to the trustee, or where the trustee is given few duties in regard to the life estate, it is the responsibility of the tenant to make all neces-

---

<sup>2</sup> *In re Edgar's Will*, 157 Misc. 10, 282 N.Y.S. 795 (1935).

<sup>3</sup> *Mahoney v. Kearins et al.*, 282 Mass. 209, 184 N.E. 686 (1933).

<sup>4</sup> *Contra: In re Fowler*, L.R. 16 Ch. Div. 723 (1881), where a trustee brought an action against his co-trustee and the life tenant because the tenant refused to appropriate any of the rent for repairs and the other trustee had failed to require the tenant to do so.

<sup>5</sup> *In re Heroy's Estate*, 102 Misc. 305, 169 N.Y.S. 807 (1918).

<sup>6</sup> But Perry states: ". . . but whatever may be the rights or liabilities of a legal tenant for life, the trustee of an equitable tenant for life cannot interfere with the possession of the equitable tenant for not repairing, unless he is clothed with the special power of managing the life estate." PERRY, TRUSTS AND TRUSTEES § 477 (7th ed. 1929).

Since in England, no duty to repair is placed on the tenant in the absence of a provision to that effect in the instrument creating the same, Perry's rule illustrates the English rather than the American rule. Thus in *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 67 N.W. 657 (1896), a trustee of an equitable life tenant was allowed a direct action against the life tenant who had failed to pay taxes and make repairs. See also *In re Heroy's Estate*, 102 Misc. 305, 169 N.Y.S. 807 (1918); *Mahoney v. Kearins*, 282 Mass. 130, 184 N.E. 686 (1933).

sary, reasonable, and ordinary repairs.<sup>7</sup> The chief conflict in cases of this sort revolves around the problem of what are repairs. In *Prescott v. Grimes*,<sup>8</sup> it was said:

As a general rule a tenant for life must make all ordinary reasonable, and necessary repairs required to preserve the property and prevent its going to decay or waste, and if he fails to do so, the remainderman may, by appropriate proceedings, either require him to make such repairs or have them made and the interest of the life tenant in the property subjected in satisfaction of the costs thereof.

Repairs must be distinguished from improvements, which are the responsibility of both the life tenant and the remainderman. It has been stated that if the costs of the repairs are more than the worth of the buildings or the income from the property, the tenant is under no duty to repair.<sup>9</sup> It has also been held that a tenant is under no duty to make extraordinary repairs occasioned by acts of God or destruction by third persons through no fault of the tenant.<sup>10</sup> The tenant is not bound to repair an unrepairable house, or a house in such a condition of dilapidation that the expense of repair would be beyond its value.<sup>11</sup> Some cases have attempted classification. In *Stephens v. Milnor*,<sup>12</sup> new roofing and plumbing came under the heading of repairs, and in *Hanover Bank & Trust Company v. Nesbit*<sup>13</sup> it was held that ordinary repairs included plumbing repairs, cleaning and conditioning flues, restoring ceilings, repairing stairways, relaying floors, scraping floors, painting and papering rooms, and installing new heating equipment.<sup>14</sup> A recent case illustrating the problem is that of *Zywiczynski v. Zywiczynski*,<sup>15</sup> where the installation of a new furnace was held to constitute a repair and could not be charged to the remainderman.

---

<sup>7</sup> *Beliveau v. Beliveau*, 217 Minn. 235, 14 N.W. (2d) 360 (1944); in *In re Collins' Will*, 987 Misc. 188, 61 N.Y.S. (2d) 488 (1946), it was stated that the question of what are repairs depends upon the facts and circumstances of each case.

<sup>8</sup> 143 Ky. 191, 136 S.W. 206 (1911); *In re Collins' Will*, 187 Misc. 188, 61 N.Y.S. (2d) 488 (1946).

<sup>9</sup> See 101 A.L.R. 681.

<sup>10</sup> *Renddahl v. Hall*, 160 Minn. 502, 200 N.W. 744 (1924); *Shelangowski v. Schrack*, 162 Iowa 176, 143 N.W. 1081 (1913).

<sup>11</sup> *Clemence v. Steere*, 1 R.I. 272, 53 Am. Dec. 621 (1850); *Savings Investment & Trust Co. v. Little*, 135 N.J. Eq. 546, 39 A. (2d) 392 (1945); *RESTATEMENT, TRUSTS* § 233(i) (1935).

<sup>12</sup> 24 N.J.Eq. 358 (1874).

<sup>13</sup> 121 Conn. 682, 186 Atl. 643 (1936).

<sup>14</sup> *But see Abell v. Brady*, 79 Md. 94, 28 Atl. 87, 817 (1894), where it was held that constructing partitions in warehouses, installing boilers, engines, furnaces for heating, elevators, and gas machines, opening and widening streets adjacent to the property, and putting in asphalt pavements, were not to be classed as repairs, but rather improvements, fixtures or betterments.

<sup>15</sup> ....O.App....., 80 N.E. (2d) 807 (1948).

The trustee in his representative capacity, or the remaindermen themselves may enforce the duty. The usual action is in equity for an injunction and an accounting for past damages.<sup>16</sup> Sometimes a mandatory injunction is allowed.<sup>17</sup> In some states actions have been allowed against the administrator or personal representative of the deceased life tenant for damages for permissive waste committed during the life tenancy.<sup>18</sup> In most, if not all of the states, statutory remedies are available to the remaindermen. The problem usually arises on an objection to a trustee's account when the trustee seeks credit for amounts he has expended from the corpus of other trusts to repair property held by the life tenant.<sup>19</sup> Frequently the problem arises on an action to construe a will.<sup>20</sup> If the life tenant persists in his refusal to make repairs, remaindermen may petition the court for a receiver to be appointed to collect rent and apply the proceeds to the cost of repairs.<sup>21</sup> Where the instrument creating the interest reserves either a legal or equitable life estate in the grantor or settlor, and the remainderman as consideration, is obliged to support the life tenant, a different rule applies. Thus in *In re Ringle*,<sup>22</sup> a case illustrating the exception, the court explained that the life tenant is relieved of the usual duty of repairs.

Another type of situation is created where the trust instrument provides that the beneficiary of the life estate is not to bear the cost of repair. In *In re Mills*,<sup>23</sup> a testatrix devised to her husband a life estate in the dwelling with remainder over to her nephews, providing that taxes, insurance and repairs should be charged to her estate. It was held that the costs of repairs were deductible from the corpus of the residuary trusts and not from income, since the testatrix clearly indicated that direction. In such a case the duty of repair is on the trustee and the equitable life tenant may enforce this duty by appropriate proceedings in equity. The situation usually arises, however, upon a proceeding by the trustee to settle accounts and objections thereto by the remaindermen or life tenant.<sup>24</sup> The principle that a life tenant should bear all costs of maintenance and repair is so well defined that the courts, in the absence of a clear direction to the contrary, will enforce the duty on the part of the life tenant.<sup>25</sup>

<sup>16</sup> *Smith v. Mattingly*, 96 Ky. 228, 28 S.W. 503 (1894); *Collins v. Security Trust Co.*, 206 Ky. 30, 266 S.W. 910 (1924).

<sup>17</sup> *Sawyer v. Adams*, 140 App. Div. 756, 126 N.Y.S. 128 (1910).

<sup>18</sup> *Prescott v. Grimes*, 143 Ky. 191, 136 N.W. 206 (1911).

<sup>19</sup> *In re Van Riper*, 90 N.J.Eq. 217, 107 Atl. 55 (1918).

<sup>20</sup> *Tichenor v. Mechanics & Metals Nat. Bank*, 96 N.J.Eq. 560, 125 Atl. 323 (1924).

<sup>21</sup> *Sweeny v. Schonsberger*, 111 Misc. 718, 186 N.Y.S. 707 (1919).

<sup>22</sup> 259 Mich. 262, 242 N.W. 908 (1932).

<sup>23</sup> 148 Misc. 224, 266 N.Y.S. 478 (1933).

<sup>24</sup> *In re Albertson*, 113 N.Y. 434, 21 N.E. 117 (1889).

<sup>25</sup> *Ibid.*

In *In re King*,<sup>26</sup> a testator devised his dwelling to trustees to collect the income from the same and pay over to his widow, or, if the widow desired, she was to be permitted to live therein without payment of rent. After devising various real property to his sons, he created a residuary trust, the income of which was to be used to pay taxes, assessments, charges, and repairs on all the property and a stated annual income to the widow for life. Though the life estate in the dwelling was contended to be separate and apart from the other clauses, the court held that the testator intended that the taxes, charges, and repairs should be paid out of the residuary income, but were not to be deducted from the annual income payable to the widow. The case illustrates one of the means by which a testator may relieve the life tenant of the usual duty of repairs.

In *Larsen v. Hansen*,<sup>27</sup> involving the construction of a will, the testator, after devising certain property to plaintiff, his daughter, set up a residuary trust of all other property and directed that his wife was to be allowed to live on the homestead free from all rent and costs of maintenance. He further provided that the income of the residuary trust should be paid to the widow for life. It was held that the testator did not intend to impose the cost of repairs on the reversionary interest and hence the residuary trust income must bear the expense. In cases of this type it is a question of construction and intent as to whether the cost of repairs is to be paid out of the income or the corpus of the residuary estate. The question is important, for if the latter were true, the burden would rest on the remainderman, while in the former the ultimate burden would rest, as it did in this case, on the life beneficiary of the residuary trust. The problem hinges upon a careful construction of the trust instrument. The term "out of my estate" has been construed in one instance to mean out of the *corpus* of the residuary estate,<sup>28</sup> and in another to mean out of the *income* of the residuary estate.<sup>29</sup>

In the case of equitable life estates not in possession, the question of whether the equitable life tenant is to bear the cost of repairs is again one to be determined by construction of the trust instrument. Where the will creating the trust estate provided for the payment of the net income of the estate to the life beneficiary it is generally held that the cost of repair must be deducted.<sup>30</sup> This had also been held to be

---

<sup>26</sup> 183 N.Y. 440, 76 N.E. 584 (1906); *Amory v. Lowell*, 104 Mass. 265 (1870).

<sup>27</sup> 12 S.W. (2d) 505 (1929).

<sup>28</sup> *Central Hanover Bank & Trust Co. v. Nesbit*, 121 Conn. 682, 186 Atl. 643 (1936).

<sup>29</sup> *In re Albertson*, 113 N.Y. 434, 21 N.E. 117 (1889).

<sup>30</sup> *In re Whitman*, 221 Iowa 1114, 266 N.W. 28 (1936).