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Labor Law—Legality of Trade Shop, Struck Work and Chain Shop Clauses— Section 8(e).—NLRB v. Amalgamated Lithographers of America

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held valid the temporary suspension of the Broker-Dealers' exemption to deal in regulation A offerings, even though it deprived the broker-dealer of a going business without prior notice or hearing.

Public interest was a major consideration in *Hannah v. Larche.*[18] That case involved the rules governing investigative procedures of the Commission on Civil Rights against a claim that they violated the due process clause by denying subpoenaed witnesses a fair hearing. The Court distinguished *Joint Anti-Fascist* on the basis that it involved a final adjudication as to the status of the names appearing on the list, whereas *Hannah* involved investigatory proceedings which involved no conclusions about the activities of any individual.

The court in *Kukatush* applied the *Hannah* test to the "Canadian Restricted List" to determine if it was a blacklist and thus a violation of due process since no prior hearing was allowed. However, the court supported its decision, not with *Hannah,* which differed from *Kukatush* in that the harm alleged was merely speculative and lacked a clear showing of personal interest, but with cases in which there was a strong public interest argument.[19]

The court must be seen as affirming the freedom of a government agency to speak and communicate with those whom it has been directed by Congress to regulate and protect without being subject to judicial review, particularly where no charges are made against anyone, where the agency issues no orders, and where no one is directed to do or not to do anything.

The decision in *Joint Anti-Fascist* is to be limited by the public interest argument when applied to the field of administrative law and security transactions. The case by case development of what constitutes blacklisting within "due process" indicates that the Court will not apply *Joint Anti-Fascist* in order to find standing to enjoin official action when there is an overriding public interest behind the governmental action.

PHILIP H. GRANDCHAMP

Labor Law—Legality of Trade Shop, Struck Work and Chain Shop Clauses—Section 8(e).—*NLRB v. Amalgamated Lithographers of* America.[1]—Upon complaint of an employer association the National Labor

ness of action on the part of the Commission may be the measure of its effectiveness in preventing illegal activities. They are also set aside in instances where failure to take ex parte action by the Commission before announcing investigations might lead to market fluctuations and injury to innocent persons holding the suspect stock. See Section 19 of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. § 785(a)(4) (1958), granting the SEC the authority "if in its opinion such action is necessary or appropriate for the protection of investors" and "if in its opinion the public interest so requires" to suspend summarily trading in a registered security for not more than ten days. See also Fahey v. Mallonee, 332 U.S. 245, 253 (1947) where the "delicate nature of the institution [a bank] and the impossibility of preserving credit during an investigation" justified summary action.

[17] Supra note 16.

[18] 363 U.S. 420 (1960).

[19] R. A. Holman & Co. v. SEC, supra note 16; Hoxsey Cancer Clinic v. Folsom, supra note 12; Fay v. Miller, supra note 5; Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D.D.C. 1949).

[1] 309 F.2d 31 (9th Cir. 1962), petition for cert. denied, 31 U.S.L. Week 3296 (U.S.

Relations Board found that the defendant unions sought to have certain "hot cargo" clauses included in the collective bargaining agreement and were therefore engaged in unlawful activity in striking and invoking an overtime ban to obtain such clauses.[2] They were found guilty of a refusal to bargain in good faith by insisting upon the adoption of such clauses,[3] all of which were considered to be prohibited by section 8(e).[4] The clauses were: a "trade shop" clause which entitled the unions to reopen contract negotiations if the employer commenced to do business with a non-union shop; a "struck work" clause which attempted to extend the so-called "ally" doctrine to an agreement barring the employer from assisting another employer whose plant is subjected to a strike by the union; and a "chain shop" clause which stipulated that the employer would not request his employees "to handle any work in any plant if in another plant of any employer or any subsidiary of such employer . . . any Local of the Amalgamated Lithographers of America or the International is on strike or locked out."

The Board petitioned for enforcement of its order entered against respondent union.[5] HELD: The trade shop clause is proscribed by section 8(e) as an implied agreement not to deal with non-union employers because any such dealings would expose the contracting employer to the risk of losing the benefits of his union contract through renegotiation. The struck work clause must be read in conjunction with the implementation clause and in this case constitutes nothing more than the accepted "ally" doctrine. The chain shop clause is legal when the contracting employer merely agrees that he will not request *his* employees to handle *his own* work because section 8(e) extends only to activities in which the employer agrees to cease dealing with *another employer or any other person.*

In order to confine the area of industrial dispute to the immediately interested parties, section 8(b)(4)[6] prohibited union attempts to induce employees either to strike or to refuse in concert to perform services for the purpose of coercing an employer into ceasing to do business with any other person. However, labor organizations sought to circumvent this provision of the Taft-Hartley Act by negotiating collective bargaining agreements containing "hot cargo" clauses whereby the employer agreed to refrain from handling the products of other employers who were non-union or engaged in certain labor disputes. The Supreme Court held that such clauses were not

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Mar. 18, 1963) (No. 794). Of the three clauses discussed in this case note only the "trade shop" clause was questioned in the petition.

[2] Section 8(b)(4)(A)&(B), 61 Stat. 141 (1947), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(A)&(B) (Supp. III, 1959).

[3] 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

[4] Landrum-Griffin Act, 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. III, 1959): It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . .

[5] 130 N.L.R.B. 985, 47 L.R.R.M. 1374 (1961).

[6] Supra note 2.

illegal.[7] The Court determined that the then existing secondary boycott provisions were directed at inducement of employees and did not extend to a contractual agreement of an employer. It asserted that there would be no violation of 8(b)(4) if the employer *voluntarily* honored the clause.

In 1959 Congress passed the Landrum-Griffin Act[8] which was designed, in part, to close certain "loop holes" in existing secondary boycott legislation. This enactment contains the previously cited section 8(e) which renders void contractual agreements, expressed or implied, between labor organizations and employers which would have the effect of restraining the employer in his dealings with other employers or any other person. The advent of this section introduced the myriad of constructional problems which normally attend the adoption of such broadly worded legislation.[9] The implications involved must be resolved by what the Supreme Court has referred to as "the process of litigating elucidation."[10] The instant case is the most recent case involving the Lithographer's Union[11] which may serve as a bellwether indicating the direction the courts are apt to take in the process of judicial definition.

This decision on the unlawfulness of the trade shop clause would appear to sound the death knell of any hope the unions may have had for receiving circuit court approval of this type of clause. The union contended that the possibility of the employer increasing his profit margin through dealings with non-union shops justified a renegotiation of the contract. This line of argument had been rejected by the Fifth Circuit in *Employing Lithographers of Greater Miami, Fla. v. NLRB*.[12] As will be seen the court in the instant case evidenced a more liberal attitude than the Fifth Circuit in interpreting the scope and application of 8(e), but *this* court was in agreement with *that* court's rejection of the argument of economic hardship and specifically stated that "the prohibition of section 8(e) is a broad one. Agreements of this kind, whether express or implied, are not made lawful by economic necessity."

The Board did not contend that the "ally" doctrine[13] is inapplicable to "struck work" clauses per se, but urged the rejection of that doctrine on the facts of this particular case. The clause in question is composed of a general statement that the employers will not render assistance to any lithographic employer involved in a strike or lockout and a statement of implementation which provided that the employer would not request his employees to handle

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[7] Local 1976, United Bhd. of Carpenters & Joiners of America, AFL v. NLRB, 357 U.S. 93 (1958).

[8] Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) 73 Stat. 519 (1959), 29 U.S.C. § 141 et. seq. (Supp. III, 1959).

[9] See Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257 (1959); Farmer, The Status and Application of the Secondary-Boycott and Hot Cargo Provisions, 48 Geo. L.J. 327 (1959); Miller, Methods of Applying the Boycott, 12 Lab. L.J. 871 (1961); Previant, The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis, 48 Geo. L.J. 346 (1959); Hot Cargo Clauses: The Scope of Section 8(e), 71 Yale L.J. 158 (1961).

[10] International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

[11] See also Employing Lithographers of Greater Miami, Fla. v. NLRB, 301 F.2d 20 (5th Cir. 1962).

[12] Ibid.

[13] See NLRB v. Business Mach. & Office Appliance Mechanics, 228 F.2d 553 (2d Cir. 1955); Douds v. Metropolitan Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948).

such work "customarily produced by such employer."[14] Standing alone the general statement would be beyond the pale of the "ally" doctrine since it would extend to work customarily performed by the contracting employer for the employer involved in the strike or lockout. However, this court disagreed with the Fifth Circuit's decision in the *Miami* case and elected to read the general statement in conjunction with the statement of implementation. Since the language of the latter was found to be within the scope of the "ally" doctrine this court concluded that the entire clause was meant to be binding only to the extent permissible under that doctrine and was therefore lawful. It is submitted that any inconsistency in the two holdings may be attributed to different predilections in dealing with section 8(e) rather than to a genuine constructional dispute. A carefully drafted struck work clause could avoid the objections of the Fifth Circuit.

The divergent positions of the two circuits are clearly more substantial in their treatment of chain shop clauses where the legality of the clause in question cannot be assured via careful draftsmanship. The Fifth Circuit embraced the concept of the "single employer" exception to section 8(e), but elected to restrict the exception to situations where the two employers should be considered as one. The rationale behind such an exception is that there can be no boycott where there is in fact no other person involved. The court in the instant case concluded that the chain shop clause merely bound the contracting employer with respect to his own work and was therefore beyond the purview of 8(e) which is applicable only to agreements affecting the contracting employer's dealings with the work of "any other person." The Ninth Circuit thus obviated the necessity of considering the scope and concomitant evidentiary problems of the single employer exception. The court held that section 8(b)(4) was inapplicable due to the continuing voluntary character of the agreement.[15] Finding no other provisions of the act which would render the chain shop clause unlawful the court decided that the Board erred in declaring such a clause violative of the act.

In setting out its decision on the chain shop clause the Ninth Circuit recognized that an agreement affecting the primary employer's own work could involve work customarily performed for another person, if the subsidiary is to be regarded as such. The court dismissed this observation by noting that "the thrust of the clause is not to bind the employer to cease handling the work of other persons or employers . . . ." In such a situation this court would refer the employer to the remedy prescribed by section 10(a).[16] It seems probable that other courts could reject the emphasis of the Ninth Circuit on the "thrust" of the chain shop clause and find a literal violation of section 8(e) despite the fact that a remedy is prescribed by section 10(a). It is also arguable that an agreement by an employer not to request his employees to handle his own work in the event of a strike involv-

[14] Struck Work: (a) The Employers agree that they will not render assistance to any lithographic employer any of whose plants is struck . . . and accordingly agree that in implementation of this purpose the employees covered by this contract shall not be requested to handle any lithographic work (other than work actually in process in the plant) customarily produced by such employer.

[15] 309 F.2d at 39, citing the *Local 1976* decision, supra note 7.

[16] 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958).

ing a subsidiary has the ultimate effect of closing that employer's doors to every person with whom he has any business and is thus an implied agreement "to cease doing business with any other person." The fact that an agreement is couched in terms restrictive of the contracting employer's own business would seem to be of little import if the practical effect of such a clause is to cause him to cease doing business with every other person for whom he performs or exchanges services or obtains supplies. Thus proponents of this line of argument could contend that neutral employers and employees are drawn into the economic conflict. This result is precisely what 8(e) seeks to prevent.

The argument based on the practical effect of the chain shop clause appears to be the most cogent reason for holding such a clause violative of 8(e). It is submitted that on this basis chain shop clauses should be held unlawful. However, it should be noted that the single employer exception can always save a chain shop clause from illegality. It may be maintained that this exception should be determined by the same criteria applicable to 8(b)(4)(A), which is also directed at secondary boycott activity.[17] This view would restrict the utilization of chain shop clauses to situations where there is substantial indicia of control.

It seems apparent from the respective postures of the Ninth and Fifth Circuits that the courts may come to differ greatly in construing and applying section 8(e). While the two circuits are in accord on the illegality of the trade shop clause and could concur on the legal propriety of a carefully constructed struck work clause, they are poles apart in their treatment of the chain shop clause. This latter impasse in "the process of litigating elucidation" may remain until resolved by the Supreme Court.

JOHN P. KANE

Labor Law—Section 301—The Standing of an Employee to Sue—Contract Breach Amounting to an Unfair Labor Practice.—*Smith v. Evening News Ass'n.*[1]—The petitioner sued in his individual capacity and as assignee of the action of forty others for damages for breach of a collective bargaining contract by his employer, Evening News Association. While the respondent was being struck by a union of which the petitioner is not a member, he and other non-striking union employees were refused entrance to the working premises by the respondent. Non-union workers were allowed to be at their job even though the newspaper was completely inoperative. These employees were given full wages while the petitioner was not. Smith sued for the withheld wages as damages for breach of the non-discrimination clause of the contract in the Michigan state court. The action was dismissed on the rationale that a suit by an individual to enforce a contract involving an unfair labor practice was pre-empted by the National Labor Relations

[17] Truck Driver's, Local 728 v. Empire State Express, 293 F.2d 414 (5th Cir.), cert. denied, 368 U.S. 931 (1961); Bachman Mach. Co. v. NLRB, 266 F.2d 599 (8th Cir. 1959); J. G. Roy & Sons v. NLRB, 251 F.2d 771 (1st Cir. 1958).

[1] 371 U.S. 195 (1962).