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Labor Law—Secondary Boycotts—Hot Cargo Clauses.—Local 48, Sheet Metal Workers v. Hardy Corp.

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of the principal case would appear to be as follows: (1) The decisions of the Adjustment Board regarding non-money grievances are final and binding on both parties;[33] (2) disputes involving money grievances are final and binding if the union's claim is denied;[34] but (3) if the union is granted a money award, the railroad can expect judicial review in a de novo proceeding, by failing to comply with the order of the Board.[35] The principal case completes the scheme by prohibiting strikes at any stage of the proceedings once the grievance machinery has been invoked.

There is an obvious imbalance in the grievance procedure accruing to the benefit of the railroads. It has been contended that this imbalance raises questions of constitutional magnitude,[36] and as the dissent in the principal case indicates, deprives the union of a valuable weapon—the threat of a strike—in the settlement of minor disputes, without substituting an equitable grievance procedure.

It may be granted that the policy which the Court has pursued under section 153 is a salutary one, since to allow a strike at this stage of the grievance procedure would effectively defeat the value of the section by removing a compelling incentive to the settlement of minor disputes on the property, notwithstanding the Court's reluctance to act in an analogous manner in similar disputes arising under Section 301 of LMRA. Yet, the Court has, in effect, attempted to judicially legislate in the area of railway labor-management relations. This attempt, developing as it must on a case to case basis, has resulted in inconsistencies and imbalances, and has created rights without remedies. This result appears to have been caused by vague and indefinite legislation on the one hand, and a too purposeful endeavor on the part of the Court to promote its scheme of labor-management relations in this limited area. It would appear that the RLA should be reviewed by the Congress and amended in order to effectuate its policy in an orderly and equitable manner.

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Labor Law—Secondary Boycotts—Hot Cargo Clauses—*Local 48, Sheet Metal Workers v. Hardy Corp.*[1]—Plaintiff Union brought an action in the district court for damages and injunctive relief to require defendant construction company to comply with the terms of the hot cargo clause contained in the collective bargaining agreement.[2] In arbitration proceedings

[33] Supra notes 17, 18.

[34] Union Pac. R.R. v. Price, 360 U.S. 601 (1959) (Adjustment Board's denial of a money award was not a money award within the meaning of the statute and was not therefore final and binding).

[35] Supra notes 6, 9.

[36] See Pennsylvania R.R. v. Day, 360 U.S. 548 (1959) (dissenting opinion); Union Pac. R.R. v. Price, supra note 34 (dissenting opinion).

[1] 218 F. Supp. 556 (D.C. Ala. 1963).

[2] Article II, Section 1 of the collective bargaining agreement reads:
No employer shall subcontract or assign any of the work described herein which is to be performed at the job site to any contractor, subcontractor or other

between the parties it was determined only that the company had violated the agreement as to the hot cargo clause. The bringing of this action was the union's only attempt to enforce this clause. In answer to plaintiff's allegations defendant pleaded that the hot cargo provision was unenforceable and that the bringing of this action was coercive and an unfair labor practice under Section 8(b)(4)(ii)(B) of the Labor Management Relations Act.[3] HELD: The mere bringing of judicial proceedings was not a violation of section 8(b)(4)(ii)(B), but the court cannot enforce the hot cargo clause since this would result in coercion or restraint of the free will of the employer in deciding whether to do business with the subcontractor, and thus, would be violative of the purpose of section 8(b)(4)(ii)(B).[4]

Under the Taft-Hartley Act of 1947, a hot cargo agreement was valid if the union did not violate section 8(b)(4)(A)[5] in attempting to enforce it.[6] This section dealt with unfair labor practices by the union where the purpose was to force the employer to cease doing business with another person. Such practices included striking, picketing, work stoppages and other forms of coercion. In 1958, the Supreme Court indicated in *Local 1976, Carpenters v. NLRB*[7] that other means not covered by statute might

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person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project.

Brief for Plaintiff, p. 1.

[3] 61 Stat. 136 (1947), as amended by 73 Stat. 519 (1959), 29 U.S.C. § 158(b)(4) (Supp. IV 1959). Section 8(b)(4)(ii)(B) provides that it is an unfair labor practice for a union:

(ii) to threaten, coerce or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is

. . .

(B) forcing or requiring any person . . . to cease doing business with any other person. . . . Provided, That nothing contained in this clause [B] shall be construed to make unlawful, where not otherwise unlawful any primary strike or primary picketing . . . .

[4] In a Supplemental Memorandum defendant analogized the enforcement of hot cargo clauses to enforcement of restrictive racial covenants. Although such covenants are not illegal and the parties may voluntarily adhere to them, the courts will not enforce them. If the covenants were enforced, the covenantor would be coerced to continue to use the property in a discriminatory manner. Since the government views racial discrimination as an undesirable policy, it would not supply the means to enforce restrictive covenants. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). Similarly, since the federal government looks with great disfavor on secondary boycotts, it should not enforce an agreement to engage in such a boycott, although the parties might voluntarily and legally adhere to it. Supplemental Brief for Defendant, pp. 2-8.

[5] In 1959, section 8(b)(4)(A) became section 8(b)(4)(B), but the content remained substantially the same.

[6] Local 1976, Carpenters v. NLRB, 357 U.S. 93 (1958).

[7] The Court stated:

It does not necessarily follow from the fact that unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties.

Id. at 108.

be used by unions to enforce hot cargo agreements, but it did not indicate what they were. The Court also stated federal policy regarding the employer's acquiescence in secondary boycotts: the employer must have freedom of choice in deciding whether to engage in a secondary boycott, and a hot cargo clause should not restrict this freedom.[8] This policy is the result of the disfavor with which Congress looks upon secondary boycotts, which, for the most part, were outlawed by Section 8(b)(4)(A) of the Taft-Hartley Act.[9]

Some courts have held, however, that when an employer voluntarily engages in a boycott of another employer, who is involved in a dispute with a union, such a boycott is in fact primary activity.[10] If, however, the employer participated because of union pressure, then the boycott would be secondary in nature. Since secondary boycotts are illegal, they cannot be legalized by claiming that union coercion is directed at enforcement of a prior agreement. An illegal boycott results whether coercion is directed at enforcement of a hot cargo agreement or whether it is aimed at forcing the employer to engage in the boycott. It is only when the employer voluntarily participates that the boycott is not illegal, and, therefore, he must be free to decide whether to participate.

Shortly after the decision in *Local 1976*, the Teamsters Union sought a mandatory injunction in arbitration to compel the employer to engage in a secondary boycott pursuant to a hot cargo clause in the collective bargaining agreement. The court enjoined the arbitration proceedings holding that it would be violative of federal policy, as expounded in *Local 1976*,[11] for the arbitrator to issue the mandatory injunction.[12]

The 1959 amendments to the Taft-Hartley Act changed the law concerning hot cargo agreements in several ways. The new section 8(b)(4)(A) deals directly with hot cargo clauses and makes it an unfair labor practice for the union to use coercion to force the employer to *enter* an agreement outlawed by section 8(e).[13] Section 8(e) provides that all hot cargo agree-

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[8] The Court said:

> There is nothing in the legislative history to show that Congress directly considered the relation between hot cargo provisions and the prohibitions of § 8(b)-(4)(A). Nevertheless, it seems most probable that the freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation. . . . Such a choice, free from the prohibited pressures . . . must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into by the parties.

Id. at 105.

[9] Iserman, Three Taft-Hartley Issues, 7 Pam. Coll. no. 6 (1955), p. 13. The author suggests the following reasons why secondary boycotts were outlawed:

(1) Economic injury to third persons;
(2) Loss of work and wages by secondary employer and secondary employees;
(3) Restraints of trade which are against the public interest.

[10] Local 1976, Carpenters, 113 N.L.R.B. 1210, 36 L.R.R.M. 1478 (1955); Local 294, Teamsters, 87 N.L.R.B. 972, 25 L.R.R.M. 1202 (1949).

[11] Supra note 8.

[12] Application of Apex Lumber Corp., 179 N.Y.S.2d 503 (1958), aff'd, 183 N.Y.S.2d 697 (1959).

[13] 61 Stat. 136 (1947), as amended by 73 Stat. 519 (1959), 29 U.S.C. § 158(b)(4)

ments shall be an unfair labor practice except those in the construction and garment industries. Such clauses are necessary in the construction industry because employment depends on jobs given by the contractor to many subcontractors, and the clause provides some measure of job protection to union members.[14] In the highly competitive garment industry, manufacturers try to force wages down, and these agreements force the jobber to guarantee that the manufacturer to whom he gives work will use union employees and pay union wages.[15] Unions in the garment industry were exempted in section 8(e) from all the provisions of section 8(b)(4)(B). These groups may *enforce* hot cargo agreements in ways not available to other unions.

It has been suggested that Congress in drafting section 8(e) did not thoroughly examine the effect of hot cargo clauses except in the trucking and garment industries.[16] The Senate originally banned hot cargo clauses only in the trucking industry,[17] where employers who had entered into hot cargo agreements with the Teamsters Union would boycott the primary employer out of fear of union coercion. Yet, in the absence of actual coercion, such a boycott would be characterized as voluntary. In the House, section 8(e) was expanded to a general prohibition of all hot cargo clauses[18] on the theory that what is evil in the trucking industry must be evil elsewhere.[19] It is indicated that this general prohibition might have carried over into the final drafting of section 8(e) but for the successful lobbying by unions in the garment and construction industries.[20] The Conference Committee stated that the garment industry proviso would not apply to other industries even though similar problems might exist.[21] Congress apparently intended the proviso to pacify the garment unions rather than to settle general economic problems as to the propriety of hot cargo clauses.

(Supp. IV 1959). Section 8(e) states that it is an unfair labor practice for any union and any employer:

> to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from . . . 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: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . .: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer" . . . shall not include persons . . . in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of an agreement which is within the foregoing exception.

[14] See discussion of building and construction industries, 2 U.S. Code Cong. & Ad. News, 86th Cong., 1st Sess. (1959), pp. 2344, 2441.

[15] Aaron, The Labor-Management Reporting and Disclosures Act of 1959, 73 Harv. L. Rev. 1086, 1120 (1960).

[16] Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 273 (1959).

[17] 2 U.S. Code Cong. & Ad. News, supra note 14, at 2444.

[18] Id. at 2474.

[19] Cox, supra note 16, at 274.

[20] Aaron, supra note 15, at 1120-21.

[21] 2 U.S. Code Cong. & Ad. News, supra note 14, at 2512.

In light of Congress' refusal to either outlaw hot cargo clauses in the construction industry or exempt construction unions from section 8(b)(4)(B),[22] the construction proviso has managed to retain an untenable status quo. It might safely be assumed that Congress enacted legislation concerning hot cargo clauses because it deemed existing law to be inadequate, but the inadaquacies were not in application of the law, but in the law itself. Before enactment of section 8(e) there was inconsistency and uncertainty in the law concerning hot cargo clauses.[23] The resolve that hot cargo clauses were valid but unenforceable[24] was not entirely satisfactory since section 8(e) was intended to clarify the situation. The purpose of section 8(e) should have been to distinguish between those areas of commerce and industry where hot cargo clauses would be illegal and those areas where they would be valid and enforceable. A law accomplishing such a purpose would have required extensive congressional study, which apparently was not undertaken.[25] The result appears to be that many industries which may have deserved exclusion were passed over, while the construction industry has retained the rule established in *Local 1976*, that hot cargo clauses are valid but unenforceable.[26]

Not only have the 1959 amendments failed to clarify hot cargo law, but a new area of confusion has arisen. The dispute centers around whether a construction union violates section 8(b)(4)(A) by obtaining a hot cargo agreement through coercive action. The NLRB has taken the position that the use of coercion to obtain the hot cargo agreement is a violation of section 8(b)(4)(A).[27] These rulings are based on the Board's interpretation of federal policy as expressed in the leading case of *Local 1976*.[28] Court rulings have taken the position that section 8(b)(4)(A) applies only to agreements made illegal by section 8(e), and since the construction industry is exempted from the hot cargo ban, it is also exempted from section 8(b)-(4)(A).[29] However, these courts stress that although such an agreement is legal, it is not enforcible because of the rule in *Local 1976*. Recently, the

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[22] Id. at 2511.

[23] This is especially true in the decisions of the NLRB from 1949 to 1956. The holdings changed as frequently as the Board members. Compare the following cases: Local 1976, Carpenters, 113 N.L.R.B. 1210, 36 L.R.R.M. 1478 (1955); Local 554, Teamsters, 110 N.L.R.B. 1769, 35 L.R.R.M. 1281 (1954); Local 135, Teamsters, 105 N.L.R.B. 740, 32 L.R.R.M. 1350 (1953); Local 294, Teamsters, 87 N.L.R.B. 972, 25 L.R.R.M. 1202 (1949).

[24] Local 1976, supra note 6.

[25] Cox, supra note 16.

[26] NLRB v. Local 12, Operating Engineers, 293 F.2d 319 (9th Cir. 1961); NLRB v. Bangor Bldg. Trades Council, 278 F.2d 287 (1st Cir. 1960); Lebus ex rel. NLRB v. Local 406, Operating Engineers, 188 F. Supp. 392 (E.D. La. 1960); Local 825, Operating Engineers, 140 N.L.R.B. no. 48, 52 L.R.R.M. 1043 (1963).

[27] Local 60, Plumbers, 138 N.L.R.B. 1282, 51 L.R.R.M. 1182 (1962); Local 383, Laborers, 137 N.L.R.B. 1650, 50 L.R.R.M. 1444 (1962).

[28] Supra note 8.

[29] Cuneo v. Local 825, Operating Eng'rs, 216 F. Supp. 173 (D. N.J. 1963); Cuneo v. Essex County Carpenters, 207 F. Supp. 932 (D. N.J. 1962); Kennedy ex rel. NLRB v. Local 383, Laborers, 199 F. Supp. 775 (D. Ariz. 1961); Lebus ex rel. NLRB v. Local 60, Plumbers, 193 F. Supp. 392 (E.D. La. 1961).

Ninth Circuit of the Court of Appeals, in *Local 383, Laborers v. NLRB*,[30] specifically overruled the NLRB's position. It appears from this decision that it is legal to use coercion to *obtain* a hot cargo clause but illegal to use coercion to *enforce* such an agreement.[31] The Court of Appeals was probably correct in its literal interpretation of the statute, but the question arises whether Congress purposely excluded construction unions from section 8(b)(4)(A) or whether Congress inadvertantly created a loophole in the law.

The argument that even though the agreement is valid it is still unenforcible[32] does not satisfactorily resolve the question. The real inquiry to be considered is whether or not the union has the right to subject an employer to coercion for the purpose of obtaining an unenforcible agreement. Since this right appears to be based only on the wording of the statute—section 8(b)(4)(A)—perhaps the statute should be changed.

Except in the construction industry, the law relating to hot cargo clauses is becoming settled. In the garment industry, unions may legally obtain and enforce hot cargo agreements without being subjected to section 8(b)(4)(B).[33] In other areas of commerce and industry, hot cargo clauses are illegal and a violation of section 8(e).[34] Current law in the construction industry has left hot cargo clauses totally unenforceable even in judicial proceedings.[35] Thus, the clause will only have meaning where the employer voluntarily chooses to comply with it. Perhaps in its next go-around at improving labor legislation, Congress will take a stand on whether hot cargo clauses should be banned in the construction industry or should be given the legality and enforcibility of other contract provisions.

ROBERT M. STEINBACH

Labor Law—State Fair Employment Practices Acts—The Power of the States to Act in the Field of Job Discrimination in the Face of Current and Proposed Federal Activity.—*Colorado Anti-Discrimination Comm'n v. Continental Airlines.*[1]—Petitioner applied for an available position as an airline pilot with respondent. Upon being rejected, he complained to the Colorado Anti-Discrimination Commission, which, acting under the authority

[30] 323 F.2d 422 (9th Cir. 1963). The litigation involving Local 383 extended over several years, and it illustrates the diversity of opinion between the NLRB and the courts. In 1961 the district court granted a temporary injunction against the union for a violation of section 8(b)(4)(B), but the court refused to find a violation of section 8(b)(4)(A). Kennedy ex rel. NLRB v. Local 383, Laborers, supra note 29. In 1962 the NLRB held in Local 383, Laborers, supra note 27, that the union had violated section 8(b)(4)(A) in picketing to obtain a hot cargo agreement. The union appealed from the Board holding and the Court of Appeals reversed.

[31] Local 383, Laborers, v. NLRB, supra note 30.

[32] Ibid.

[33] Section 8(e), LMRA, supra note 13.

[34] NLRB v. Local 17, Lithographers, 309 F.2d 31 (9th Cir. 1962); Local 9, Typographers v. NLRB, 311 F.2d 121 (D.C. Cir. 1962).

[35] Local 48, Sheet Metal Workers, supra note 1.

[1] 372 U.S. 714 (1963).