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The "Hot Cargo" Dilemma - Local 1976, Etc. v. National Labor Relations Board (Sand Door Case)

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Comments and Casenotes

The "Hot Cargo" Dilemma

Local 1976, Etc. v. National Labor Relations Board (Sand Door Case)[1]

The above *Sand Door* case, consolidated for hearing with two other cases referred to hereinafter as the *American Iron* cases,[2] resolved conflicting views of N.L.R.B. members extending back over several years, as to the validity and effect of so-called "hot cargo" clauses in collective bargaining agreements. Without condemning such clauses as being illegal *per se*, and without condemning all secondary boycotts, a 6-3 opinion by Mr. Justice Frankfurter holds that labor unions may be guilty of unfair labor practice in violation of Section 8(b)(4)(A) of the National Labor Relations Act as amended by the Taft-Hartley Act,[3] by inducing employees of neutral employers to enforce such clauses.

The original National Labor Relations Act, popularly known as the Wagner Act, having been intended to apply only to employers, at least with respect to unfair labor practices, contained no reference to secondary boycotts by labor unions. This type of boycott had been a traditional weapon of some trade unions, often formalized in labor contracts by a clause in which the employer agreed not to handle, or require his employees to work on, what was colloquially termed "hot goods" or "hot cargo". "Hot cargo" consists of goods considered to be "unfair", or which are produced or distributed by a non-union employer, or by one with whom there is a primary labor dispute. By enlisting the support of other locals or labor unions in boycotting the "unfair" employer's goods, a union directly involved can more easily bring him to terms. Since the boycott is exerted through other employers with whom the employer under attack does business, this type of secondary pressure frequently results in penalizing neutrals who have little or no control over the outcome of the original dispute. In the Taft-Hartley amendments to the Wagner Act, such secondary activities are prohibited where the union induces or encourages the *employees* of a neutral to refuse to handle

[1] 357 U. S. 93, 78 S. Ct. 1011 (1958).

[2] N.L.R.B. v. General Drivers, Etc., Local No. 886, and Local 850, Int. Ass'n. of Machinists v. N..L.R.B., *ibid.*

[3] 29 U. S. C. A. (1956) §158(b)(4)(A).

or work upon goods for the purpose of forcing the neutral employer to cease doing business with another person.[4] It should be noted here that this provision has no application where the secondary employer is not truly a neutral, as for example where he is a subsidiary or is allied with the primary employer.[5]

The prohibition, by its terms applies to activities aimed at the *employees* of the neutral, and so, under recognized rules of statutory construction, does not apply to dealings by a union directly with the neutral employer. Consequently, the "hot cargo" clauses take on a greater significance. These clauses have been the subject of divided and changing interpretations within the N.L.R.B. as to their validity and enforceability. In *Conway's Express,*[6] a majority of the Board decided that neither agreement upon nor enforcement of a hot cargo clause violated Section 8(b)(4)(A). In 1954, however, in *McAllister Transfer,* after a change in the membership of the Board, an opposite result was reached.[7] In this case, two members adhered to the *Conway's Express* doctrine, two members held a hot cargo clause to be a violation *per se* of 8(b)(4)(A), and the fifth member concurred in result, but not in reasoning, with the latter. The holding, therefore, came down to finding a violation where, under a hot cargo clause, the union induced the employees of a neutral to refuse to handle hot goods.

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[4] *Ibid.:*

"It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or 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; . . . ."

[5] National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.), 87 NLRB 54 (1949); National Labor Relations Board v. Somerset Classics, 193 F. 2d 613 (2nd Cir. 1951); National Labor Rel. Bd. v. Business Mach. & Office A., Etc. (Royal Typewriter), 228 F. 2d 553 (2nd Cir. 1955); Die Sinkers Union (General Metals), 120 NLRB No. 160 (CCH ¶ 55,424) (1958).

[6] National Brotherhood of Teamsters, Etc., 87 NLRB 972 (1949); aff'd. Rabouin v. National Labor Relations Board, 195 F. 2d 906 (2nd Cir. 1952).

[7] International Brotherhood of Teamsters (McAllister Transfer, Inc.), 110 NLRB 1769 (1954).

In 1955, when the N.L.R.B. decided the *Sand Door* case,[8] again with a three-way division, the decision conformed to the *McAllister* opinion.[9] While the Court of Appeals for the Ninth Circuit affirmed the *"Sand Door"* doctrine,[10] it was rejected by the District of Columbia Court of Appeals in a similar case.[11] The Supreme Court granted certiorari to resolve the dispute.

Before proceeding to the decision in *Sand Door* and its companion cases, another N.L.R.B. ruling should be mentioned. In 1957, in a case involving a hot cargo clause inserted in a contract between the Teamsters and a motor freight company which was engaged in carrying goods of the Genuine Parts Company, against whom a strike had been called, the Board extended its *Sand Door* doctrine with respect to carriers.[12] Here again, as might be expected, the Board was divided, rendering four separate opinions. Three members held that hot cargo clauses were invalid *per se,* two confining this rule to carriers on the basis of the Interstate Commerce Act's requirement that carriers render service without discrimination,[13] and one member contending that any such clauses were against public policy. Therefore, a majority was in agreement that, at least as to common carriers, hot cargo clauses were invalid from their inception. The speculation this decision aroused, however, was settled, at least for the moment, in the *Sand Door* decision.[14]

The *Sand Door* case involved a dispute over the installation of certain doors distributed by Sand Door & Plywood Company, which were allegedly made with non-union labor by the Paine Lumber Company. A general contractor, having purchased doors from Sand Door & Plywood, was prevented by a representative of the Brotherhood of Carpenters & Joiners from installing these doors. The union representatives accomplished this by inducing the contractor's foreman, in his other capacity as a member of the Carpenters Union, to order employees to cease hanging the doors. The labor agreement between the Carpenters &

[8] Local 1976 (Sand Door and Plywood Company), 113 NLRB 1210 (1955). A similar ruling was made in General Drivers Union (American Iron and Machine Works), 115 NLRB 800 (1956).

[9] *Supra,* n. 7.

[10] National Labor Relations Board v. Local 1976, Etc., 241 F. 2d 147 (9th Cir. 1957).

[11] General Drivers, Etc. v. National Labor Rel. Bd., 247 F. 2d 71 (D.C. Cir. 1957).

[12] Teamsters, Local 728 (Genuine Parts Company), 119 NLRB No. 53 (CCH ¶ 54,979) (1957).

[13] 49 U. S. C. A. (1951) §316.

[14] 357 U. S. 93, 78 S. Ct. 1011 (1958).

Joiners and the contractor provided that "workmen shall not be required to handle non-union material". The Sand Door Company charged a violation of 8(b)(4)(A) and was upheld by the Board, in spite of the Union's reliance for its defense upon the quoted contract clause. The Court of Appeals for the Ninth Circuit ordered enforcement of the Board's ruling.

The *American Iron* cases[15] arose from a strike called by the International Association of Machinists against American Iron and Machine Works. The Machinists picketed the premises of carriers who were transporting American Iron's products, without clearly indicating that the dispute was solely with American Iron. The Teamster's local which represented the employees of the carriers specifically instructed these employees to cease handling the cargoes sent by American Iron, in spite of the carriers' express orders to continue carrying American Iron shipments. The contract between the Teamsters and the carriers contained a provision that "members of the [Teamsters] Union shall not be allowed to handle or haul freight to or from an unfair Company, provided this is not a violation of the Labor-Management Relations Act of 1947" and this clause was set up as a defense against a charge of an 8(b)(4)(A) violation made by American Iron. The Board issued an order to cease and desist against both Unions, but, on appeal, the District of Columbia Court of Appeals enforced only the order against the Machinists, finding that the contract clause was a valid defense for the Teamsters' actions.[16]

The Supreme Court, in its analysis of 8(b)(4)(A), pointed out that the term "secondary boycott" is not there used; that the section prohibits only certain specifically described union activity where it is aimed at a specific objective. Therefore, a voluntary boycott by an employer is not covered by the statute and ". . . a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees."[17] The Court found nothing in the legislative history of the Taft-Hartley Act, which it characterized as a compromise between conflicting views on industrial relations, to indicate that Congress had intended to outlaw all activity which could be included under the label of secondary boycott; a term which was noticeably omitted from the statu-

[15] *Supra*, n. 8.
[16] *Supra*, n. 11.
[17] *Supra*, n. 14, 1016.

tory language.[18] The majority opinion pointed out that while courts must construe statutes, due to the limitations of language, the most relevant materials for such construction are the words themselves.

The Court rejected the argument of the Unions with respect to hot cargo clauses, which could be summarized as a denial that the protection of 8(b)(4)(A) over neutral employers had any application to a neutral employer who had in advance, as shown by acquiescence to such a clause in his labor contract, waived such protection. While admitting the force of this contention, the Supreme Court pointed out that to accept this view would be to deprive the neutral employer of a free choice as to whether to handle goods in a concrete situation as a result of a prior abstract agreement made during the give and take of contract negotiations. The policy of this section of the statute was intended to give just such freedom of choice in a specific situation, and to allow enforcement of a hot cargo clause through the inducement of employees would amount to coercion of the neutral employer regardless of the fact that a prior agreement gave rise to the inducement. The Court further observed that the expertise of the Board may well have considered the reality of collective bargaining, in which there may have been little voluntariness on the part of the employer in accepting a hot cargo clause. Moreover, if the Court were to authorize an approach to the employees by the union, under the guise of reminding them of the contract provision, it could result in the neutral employer's reluctant acceptance of a *fait accompli* — a concerted refusal by his employees to handle goods — which would be something less than a voluntary choice by the neutral employer.

After so holding, the Court left the door open for the future when it said:

> "It does not necessarily follow from the fact that the 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

[18] *Supra*, n. 14, 1016:

". . . 8(b)(4)(A), like the entire Taft-Hartley Act was designed to protect the public interest, but not in the sense that the public was to be shielded from secondary boycotts no matter how brought about. Congress' purpose was more narrowly conceived. It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, . . ., dangerous practice of unions to widen that conflict; the coercion of neutral employers, . . ., through the inducement of their employees to engage in strikes or concerted refusals to handle goods."

> not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in §8(b)(4)(A)."[19]

The Court also pointed out that the extension by the Board of the *Sand Door* rule in the *Genuine Parts* case[20] insofar as that ruling could be considered to have invalidated hot cargo clauses in carriers' labor contracts, was beyond the authority of N.L.R.B. It cannot outlaw all hot cargo clauses for common carriers on the theory that they breach the Interstate Commerce Act. The Board must deal with their legality under the National Labor Relations Act. It was pointed out that rulings of the Interstate Commerce Commission[21] are based upon a different statute with different policies and legislative purposes. The fallacy, as the Court saw it, in the application of the Interstate Commerce rule was illustrated by a hypothetical case where the employer-carrier voluntarily decided to boycott certain shippers. Since there would be no inducement of neutral employees, there could be no violation of 8(b)-(4)(A), but there would be discrimination against shippers. In another earlier case,[22] the Court had also held that the rights established under the National Labor Relations Act did not supersede the legislative objective of the federal mutiny statute. The Supreme Court proceeded to uphold the enforcement orders against the Carpenters and Machinists and remanded the Teamsters case for enforcement, but expressly based its decision upon the unions' inducement of neutral employees to refuse concertedly to handle the goods of the primary employer, and negatived any consideration of the effect of the Interstate Commerce Act.

The holding of these cases may be briefly summarized: Hot cargo clauses are not invalid *per se* and an agreement between a union and an employer upon such a clause is not in itself violative of 8(b)(4)(A); agreement upon a hot cargo clause does not however vitiate this section of the statute and, regardless of such an agreement, a union is prohibited from inducing or encouraging employees of a neutral employer to refuse in concert to handle goods of another employer with whom there is a primary dispute; the

[19] *Supra*, n. 14, 1020.
[20] *Supra*, ns. 12 and 14.
[21] Galveston Truck Lines Corporation v. Ada Motor Lines, 73 MCC 617 (1957); Planters Nut & Chocolate Co. v. American Transfer Co., 31 MCC 719 (1942).
[22] Southern S.S. Co. v. Labor Board, 316 U. S. 31 (1942).

clause may not therefore be a valid defense by the union against a charge of a violation of 8(b)(4)(A) under the circumstances.

The decision does leave, however, several problems unanswered. While the hot cargo clause may not be a matter of defense, could it be sufficiently enforceable to support a suit for breach of contract under Section 301[23] in a case where, for example, the neutral employer ordered his employees, in the teeth of a contract clause providing otherwise, to handle goods of another employer engaged in a primary dispute and discharged those who refused?[24]

If such a suit could be maintained, the employer would be compelled to engage "voluntarily" in a boycott or pay damages. This would be a far cry from the obvious legislative purpose of shielding the neutral employer from being coerced into being the ally of a union which is engaged in a primary dispute with another employer. It is no answer, in the actual world of labor-management relations, to say that the employer had voluntarily agreed to place himself in such a position. The Court took note of this in one part of the opinion by referring to the abstract nature of a clause such as a hot cargo provision during the negotiation of an involved collective agreement. Since the employer is often forced, by threats or expectations of a work stoppage, to agree on many restrictions on its own activities, it would be unrealistic to call the concession to a hot cargo clause a voluntary act. While it would not be wise to examine the voluntary nature of labor-management agreements, it is not perhaps unreasonable to say, at least, that a clause which ties the hands of management with respect to a type of conduct singled out for condemnation by the Congress should be declared a nullity in all respects. If the hot cargo clause is "valid", it is valid for some purpose. If not of any force as a defense against a charge of an unfair labor practice, it can only be effective as a weapon of offense; nothing else remains. It would approach the realm of make-believe to call voluntary a neutral employer's election to live up to a hot cargo clause rather than pay dam-

[23] 29 U. S. C. A. (1956) §185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[24] The prevalence of arbitration clauses would raise the question of the effect of arbitrating a hot cargo clause. This problem is put aside here for reasons of space and scope.

ages, especially when the damage suit could only be brought by his own employees' representative under the authorization (or inducement) of such a clause.

The carrier is in a particularly difficult position inasmuch as he may face not only the dilemma referred to above but may, in addition, be in danger of a suit by a shipper whose goods he has failed to carry in attempting to live up to a hot cargo clause.[25] This type of employer is in a most unenviable position, and it is no comfort to be told that there are two legislative policies governing his activities.

It would appear that, to avoid this impasse, the only sensible solution would be to declare the hot cargo clause invalid for all purposes on the ground of public policy, or to uphold its validity for all purposes as constituting a waiver by the signing employer. As the dissent in *Sand Door* properly pointed out, the majority opinion is capricious in making the boycott "lawful if the employer agrees to abide by this collective bargaining agreement . . . unlawful if the employer reneges",[26] thus implying judicial approval of a refusal to abide by a labor agreement. The course of upholding the hot cargo clause as valid can be rationalized only by inferring that the legislative purpose was solely to protect neutral employers against outside interference with their employees. Thus, an employer who signs a labor agreement containing such a clause could be considered as having exercised a right to waive the protection of the section and could not complain when it is enforced against him by any means available to the union. On the other hand, the complete invalidation of these clauses would restore the situation which was envisaged by Congress in the enactment of section 8(b)(4)(A): a neutral employer's being genuinely free to make a decision as to whether to continue to do business with another employer engaged in a labor dispute.

There is no question but that the Board and the Court were correct in finding that the unions' activities in the *Sand Door* and *American Iron* cases fell under the ban of 8(b)(4)(A). It does not necessarily follow, however, that the limits established by this section with regard to the nature of activities condemned as *unfair labor practices* must give validity to other methods of enforcing secondary

[25] The shipper recovered from a carrier who obeyed a hot cargo clause in Montgomery Ward & Co. v. Northern Pacific Term. Co., 128 F. Supp. 475 (D. C. Ore., 1953), and this is supported by language in Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co., 215 F. 2d 126 (8th Cir. 1954).

[26] 357 U. S. 93, *dis. op.* ..., 78 S. Ct. 1011, *dis. op.* 1022, 1023 (1958).

boycotts which lie outside those limits. If we assume 8(b)-(4)(A) was intended to disapprove a result as well as proscribe an act, it would be illogical to indorse the result simply because it was accomplished by other methods or the forbidden means were employed at an earlier point in time. From a practical standpoint, if the employer is induced by a threat of, or by an actual, work stoppage to agree to a hot cargo clause, the very intent of 8(b)(4)(A) is violated even though the boycott itself does not occur until later. The particular means used to enforce the clause would be, under this view, irrelevant except to the extent that the direct approach to the employees of a neutral is singled out for special censure as an unfair labor practice. The concentration by the Court in *Sand Door* upon the literal words of section 8(b)(4)(A), which ignores the evil Congress undoubtedly intended to eliminate — the widening of the area of a particular labor dispute — does not advance the cause of industrial peace. While courts, as they often piously declare, should not legislate, they should however (and in fact often do) analyze the legislative purpose behind the language of a statute and construe the words in the light of that purpose.

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