NOTES

HOT CARGO CLAUSES AS DEFENSES TO VIOLATIONS OF SECTION 8(b)(4)(A) OF THE LMRA*

In addition to direct pressure, labor unions often use secondary boycotts to influence employers with whom they have disputes.1 The most significant form of these boycotts is a concerted refusal to work by employees of employers not engaged in a dispute, generally called secondary employers, to force them to stop doing business with an employer involved in a dispute, generally called a primary employer.2 Such refusals, which could usually be enjoined at common law,3 were insulated from injunction in the federal courts by the Norris-LaGuardia Act.4 But section 8(b)(4)(A) of the Labor Management Relations Act of 1947 made it an unfair labor practice for a union or its agents to induce employees of a secondary employer to engage in these work stoppages.5 The National Labor Relations Board has issued numerous cease and desist orders against such union-induced boycotts,6 and these orders have been

---

1. FRANKFURTER & GREENE, THE LABOR INJUNCTION 43 (1930); TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 141 (1940).
2. FRANKFURTER & GREENE, op. cit. supra note 1, at 43. For examples of such boycotts see cases cited note 6 infra. For a discussion of other types of secondary boycotts see FRANKFURTER & GREENE, op. cit. supra note 1, at § 141.
3. FRANKFURTER & GREENE, op. cit. supra note 1, at 43.
Whether § 8(b)(4)(A) of the Labor Management Relations Act of 1947 pre-empts the field of state supervision of secondary boycotts is a debated question. See Cox & Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 236-38 (1950) (pre-emption); Petro, Participation by the States in the Enforcement and Development of National Labor Policy, 28 Notre Dame Law. 1, 66-69 (1952) (no pre-emption). If the field is not pre-empted secondary boycotts will not be enjoined in some states because of local anti-injunction statutes patterned after the Norris-LaGuardia Act. 2 TELLER, op. cit. supra note 1, §§ 433-50.
5. 61 STAT. 141 (1947), 29 U.S.C. § 158(b) (4)(A) (1952):
"(b) It shall be an unfair labor practice for a labor organization or its agents—"
"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:
(A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."
enforced by the courts. Since the 1949 case of Conway's Express, the NLRB and the courts have recognized an exception to this rule where so-called hot cargo clauses are included in the collective bargaining contract between the secondary employer and the union representing his employees. These clauses typically reserve to the employees the right to refuse to handle "unfair goods"—those of any employer engaged in a labor dispute with any union. The Conway doctrine regards hot cargo clauses as promises by secondary employers to boycott hot goods. The conduct of union agents in inducing workers not to handle unfair goods is considered to be merely causing "the employees to exercise their contractual privilege." However, a recent decision has cast doubt on the validity of the Conway doctrine.

In the case of McAllister Transfer, Inc., the NLRB found a violation of section 8(b)(4)(A) on facts similar to those in Conway. McAllister, who was the primary employer and complaining party, had a labor dispute with a union seeking to organize his workers. The employees of three trucking companies with which McAllister did business stopped handling his goods after agents of their union informed them of the dispute. The employees were members of the Teamsters Union, which had hot cargo clauses in its agreements with the secondary employers. The trucking companies posted notices

---

10. For examples of clauses using this terminology, see Conway's Express, 87 N.L.R.B. 972, 1003, 1020 (1949); Pittsburgh Plate Glass Co., 105 N.L.R.B. 740, 741 (1953); note 15 infra.
14. The union seeking recognition was the Teamsters Union. Ibid.
15. The agreements read:

"ARTICLE IX. (a) It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this contract.

(b) The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier,
directing their men to handle all goods, but when these were ignored, the secondary employers took no further action. Moreover, during the period of the boycott, in accordance with an earlier agreement, the clauses were renegotiated to afford the union fuller protection. In a three to two decision, the NLRB held the conduct of the union to be an unfair labor practice and issued a cease and desist order. Two majority Board members, Rodgers and Beeson, determined that in light of the other, contradictory facts, posting of orders by the secondary employers did not amount to requests to work; nevertheless, they found refusals by the employees, because goods which would ordinarily be handled were ignored. And the members reasoned that the hot cargo term could be no defense because 8(b)(4)(A) was adopted to protect primary employers and the public, as well as secondary employers, from secondary boycotts. Rodgers and Beeson argued that upholding hot cargo clauses would allow the secondary employer to waive a right which was not his alone, and they concluded that the Conway doctrine should be overruled. Chairman Farmer, concurring, viewed the notices posted by the secondary employers as requests to work which their employees refused. He considered it irrelevant that the orders were given in repudiation of the employers' agreements, reasoning that the statute makes no exception for such contracts. Farmer recognized Conway as binding authority, but limited to the situation where the secondary

whether party to this agreement or not, at whose terminal or terminals or place or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment should continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.”


16. All three companies posted the following notice:

“Our Company is not having a labor dispute with any labor union. As a common carrier holding authorities under Federal and State laws, we are required to transport all commodities properly tendered to us.

“Therefore, we direct all of our employees to handle freight received by us, without discrimination as to shippers or motor carriers who may be interlining freight with us. This includes freight which we originate and is destined beyond our line in which specific routing is furnished to us by the shipper.”


17. Pursuant to a record understanding that the clause would be renegotiated if the Conway appeal were decided in favor of the union, the hot cargo clause, see note 15 supra, was changed by adding:

“The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups where freight lines, strikes, walk-outs or lock-outs exist.”


19. Id. at 18, 35 L.R.R.M. at 1286.

20. Id. at 27-8, 35 L.R.R.M. at 1289.
employer voluntarily complies with his agreement and makes no demand for work. Members Murdock and Peterson, in dissent, disagreed with the Chairman's view of the facts, finding that there was no repudiation of the hot cargo agreements and no request to work. They indicated, moreover, that even where the secondary employer does repudiate, they consider Conway as authority for enforcing compliance with his contract. Regarding 8(b)(4)(A) as designed only for the protection of the secondary employer, they would hold him to his promise. In their view, the presence of a hot cargo agreement is always a complete defense to an 8(b)(4)(A) charge.

The three opinions in McAllister may have far-reaching effects on secondary boycotts, and they put in issue the future utility to unions of hot cargo clauses. Members Rodgers and Beeson, rejecting the Chairman's finding of a request to work, at the same time found a refusal to work within the meaning of 8(b)(4)(A). This they inferred from the existence of hot cargo clauses and from the fact that no work was done on McAllister's goods after they arrived at the secondary employers' terminals. This position would almost always result in a finding of an 8(b)(4)(A) violation when any employer who is a party to a hot cargo agreement is involved in a secondary boycott. Presumably the only boycotts which Rodgers and Beeson would allow are those in which secondary employers take the initiative to prevent the handling of goods from the primary employer. Chairman Farmer's view is that forbidden secondary boycotts are those which are produced over the secondary employer's objection by union-induced refusals to work. He regards boycotts as legal when they can be achieved with employer consent, and would find consent if the secondary employer takes no action to halt work stoppages to which he has previously agreed. Farmer also points out that what the employer can do can agree to do. Should he then breach his agreement to boycott, specific enforcement of the contract or self-help by the union would run against

21. Id. at 38-9, 35 L.R.R.M. at 1291.
22. Subsequent to the McAllister decision, the Teamsters Union renegotiated hot cargo clauses covering 200,000 truck drivers in 22 states. The new terms provide:
   "The insistence on the part of an employer that his employees handle unfair goods, or go through a picket line after they have elected not to do so, shall be sufficient cause for an immediate strike of all such employer's operations without any need to go through the grievance procedure herein."
23. See text at note 19 supra.
24. Consequently, a union would be liable in damages under § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952), to a primary employer when employees ceased handling unfair goods and, pursuant to his agreement, their employer made no objection. See note 28 infra.
26. See text at note 20 supra.
the statutory prohibition, but the question remains what other penalty the employer may be made to pay for his breach. If a hot cargo clause is a valid contract term, the union should be able to sue for damages under section 301.28 This would lead to the anomaly of the secondary employer getting an NLRB cease and desist order against the union, but at the same time being made to answer in damages for his act. However, it is unlikely that damages would be allowed. They would be an indirect way of achieving what may not be done directly;29 furthermore, the uncertain nature of damages30 might render them unavailable.31 None of these problems exists for the dissenters who regard a hot cargo clause as a valid contract provision which is a defense to an 8(b) (4) (A) charge.32 However, a troublesome question resulting from their position is the legality of a strike to obtain such a clause. Producing a boycott by inducing a refusal to work is made legal by their view of the clause, but such conduct is clearly illegal in the absence of a hot cargo term. Thus, a strike to obtain such a contract provision would be banned by the general rule which forbids strikes for unlawful objects33—a result inconsistent with the asserted legality of the clause.34

   “(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.”

Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir.), cert. denied, 340 U.S. 827 (1950); Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806 (2d Cir. 1950); Note, 57 Yale L. J. 630 (1947).


29. See Barrows v. Jackson, 346 U.S. 249, 254 (1953); 6 Corbin, Contracts § 1376 (1951).

30. No direct pecuniary damage to the union would result from the secondary employer’s breach. The harm which is generally asserted to follow from loss of the weapon of secondary pressure is deterioration of wage standards and weakening of the labor movement. See S. Rep. No. 105, pt. 2, 80th Cong., 1st Sess. 20 (1947).

31. See 5 Corbin, Contracts § 1020 (1951); McCormick, Damages § 26 (1935).

32. See text at note 21 supra.


The question of the legality of a strike for a hot cargo term was specifically reserved in Pittsburgh Plate Glass Co., 105 N.L.R.B. 740, 744 n.6 (1952).

34. See 61 Stat. 140 (1947), 29 U.S.C. § 157 (1952): “Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” See also National Maritime Union, CIO v.
Much of the disagreement among the members of the Board stems from the
difference between what Congress said about 8(b)(4)(A) and what 8(b)-(4)(A) says. During the debates preceding enactment both proponents and
foes of the section asserted that its effect would be to ban all secondary boy-
ccotts.3 Congress had decided that secondary boycotts were costly: to the
public in higher prices and the waste of perishables,36 and to primary and
secondary employers in loss of profits, of investment, and of competitive posi-
tion.37 The legislators concluded that in prohibiting all secondary boycotts
they would protect primary employers and the public as well as secondary
employers. The primary employer's interest is also recognized in sections
10(j) and 10(l)38 which allow him to obtain injunctive relief, and in section
303(a) which grants him a damage remedy.39 On the other hand, 8(b)(4)-(A)
does not mention secondary boycotts explicitly; it says only that the
principal means of achieving them is illegal: union inducement of a concerted
refusal to work.40

Proper administration of section 8(b)(4)(A) requires that congressional
policy be implemented, but also that the distinction between goal and means
be observed.41 In concentrating on Congress' intent, Members Rodgers and

Herszog, 78 F. Supp. 146, 155 (D.D.C.), aff'd, 334 U.S. 854 (1948) (dictum that employees have
common law right to strike for any lawful purpose).

35. The late Sen. Taft said: "It is made an unfair labor practice for any union to
engage in a secondary boycott." 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT
RELATIONS ACT, 1947, at 1012 (1948) (hereinafter cited as LEG. HIST.); S. Rep. No. 105,

37. E.g., remarks of Sen. Ellender, 2 LEG. HIST. 1056; remarks of Sen. Taft, 2 id. at

38. 61 STAT. 146-50 (1947), 29 U.S.C. § 160(j), (l); Douds v. Local 294, Teamsters
Union, AFL, 75 F. Supp. 414 (N.D.N.Y. 1947) (not distinguishing between 10(j) and
10(l)). If there is reasonable cause to believe that irreparable injury will result to a boy-
cotted employer, § 10(j) allows the Board to petition for temporary relief after issuance
of a complaint, and § 10(l) directs enforcement officers to seek injunctive relief before a
complaint has been issued.

39. 61 STAT. 158 (1947), 29 U.S.C. § 187(a) (1952); United Brick Workers, AFL
v. Deena Artware, Inc., 198 F.2d 637 (6th Cir.), cert. denied, 344 U.S. 897 (1952); Beth-
lehem Steel Co. v. Industrial Union of Marine Workers, CIO, 115 F. Supp. 231 (E.D.N.Y.
1953); see International Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237
(1952).
40. A possible explanation of Congress' failure to use the term secondary boycott is
suggested by the colloquy between Sen. Taft and Sen. Pepper reported in 2 LEG. HIST.
1105-09 (1948) (difficulty of precise description and categorization of secondary boycotts).

41. In Rabouin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952), Judge Clark said:
"But in a matter of such bitter controversy as the Taft-Hartley Act, the product
of careful legislative drafting and compromise beyond which its protagonists either
way could not force the main body of legislators, the courts should proceed
cautiously."
Beeson override the language of the statute to conclude that almost all secondary boycotts are prohibited. On the other hand, Congress' desire to protect primary employers is too plain to render tenable the dissenters' theory that the secondary employer's agreement to a hot cargo clause is alone sufficient to make the union's conduct lawful. Chairman Farmer's interpretation of 8(b)-(4)(A) adheres closely to the language of the statute and at the same time would seem to serve congressional policy effectively.