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The Right-to-Control Test in Secondary Boycotts: NLRB v. Enterprise Association of Steam Pipefitters Local 638

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the policy considerations and reasoning upon which the decision was based; instead, it raises more questions than it answers. The court will undoubtedly be forced to clarify its position in subsequent decisions.

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Hudik-Ross, a subcontractor, entered into a subcontract with Austin, a general contractor, which violated the work preservation clause of Hudik's collective bargaining agreement with Enterprise Association, a plumbing and pipefitting union. The work preservation clause provided that the traditional bargaining-unit work of pipe threading and cutting would be performed on the jobsite. The subcontract, however, included the general contractor's specifications calling for factory-piped climate control units. Under the subcontract, Hudik's employees would be installing the climate control units, but not performing the internal piping. The union pipefitters refused to install the units since the factory piping violated the collective bargaining agreement. Austin, though not a party to the collective bargaining agreement, filed an unfair labor practice charge[1] alleging secondary boycott violations[2] under section 8(b)(4)(B) of the Labor Management Relations Act.[3] The administrative law judge found that Enterprise's actions to en-

1. The process of charging an employer or a union with engaging in an unfair labor practice begins when a formal charge is filed with the appropriate Regional Office of the National Labor Relations Board. The charging party is normally required to submit supporting evidence consisting of affidavits and lists of witnesses. After thorough investigation of the charge, it will either be dismissed, withdrawn, or a complaint and notice of hearing before an administrative law judge will issue. A. COX & D. BOK, CASES AND MATERIALS ON LABOR LAW 162-63 (6th ed. 1965). Almost 98% of the charges filed alleging unfair labor practice violations are dismissed (36.7%), withdrawn (35.8%), or settled before the administrative law judge gives his decision. 41 NLRB ANN. REP. 222-23 (1976).

2. A secondary boycott involves the application of economic pressure upon a party with whom the union has no disputes regarding its own terms and conditions of employment in order to induce that person to cease doing business with an employer with whom the union does have such a dispute. R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 240 (1976). For additional explanation see H. LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE 64 (1913); C. MORRIS, THE DEVELOPING LABOR LAW 604 (1971). A primary boycott is the application of economic pressure only upon the employer with whom the union has a dispute. H. LAIDLER, *supra*, at 64.

3. 29 U.S.C. § 158(b)(4)(B) (1970) states:

> It shall be an unfair labor practice for a labor organization or its agents . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is—(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer. . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Section 8(b)(4)(B) was originally enacted as § 8(b)(4)(A), but was changed to § 8(b)(4)(B) in 1959.

force the collective bargaining agreement amounted to a secondary boycott in violation of section 8(b)(4)(B) since Hudik did not have the "right to control" the specifications;[4] the National Labor Relations Board agreed. The Court of Appeals for the District of Columbia, rejecting the right-to-control test, reversed, setting aside the NLRB's cease and desist order.[5] The United States Supreme Court granted certiorari. *Held*, *reversed*: Union pressure exerted upon a subcontractor who has no right to control specifications is secondary in nature and, therefore, violates section 8(b)(4)(B). *NLRB v. Enterprise Association of Steam Pipefitters Local 638*, 424 U.S. 507 (1977).

I. THE RIGHT-TO-CONTROL TEST

In labor movement history, one of labor's most effective weapons has been the secondary boycott. Initially, the courts employed a variety of means,[6] including the antitrust laws,[7] to enjoin these strikes and boycotts.[8] Members of the labor movement viewed this as a substantial infringement on their rights[9] and after a period of strong protest, section 20 of the Clayton

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Senator Taft, a co-sponsor of the Taft-Hartley Act described the purpose of § 8(b)(4)(B):

> This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. . . . [U]nder the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.

93 CONG. REC. 4198 (1947).

4. Since the factory-piped units were specified in the subcontract, Hudik did not have the right to control the choice of whether to use factory-piped units or have the piping done on the jobsite.

5. Enterprise Ass'n of Steam Pipefitters Local 638 v. NLRB, 521 F.2d 885 (D.C. Cir. 1975) (en banc). The Court of Appeals for the District of Columbia had rejected the right-to-control test in two previous decisions as misconstruing § 8(b)(4)(B) as interpreted by National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967). *See* Local 742, United Bhd. of Carpenters v. NLRB, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); Local 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906 (D.C. Cir. 1970).

6. Hopkins v. Oxley Stave Co., 83 F. 912 (8th Cir. 1897) (conspiracy to deprive the employer wrongfully of his right to manage his business as he thought best); Rocky Mountain Bell Tel. Co. v. Montana Fed'n of Labor, 156 F. 809 (D. Mont. 1907) (unfair circulars backed by show of concerted action and force of numbers exhorting people not to patronize employer); Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155 (E.D. Wis. 1906), *modified*, 166 F. 45 (E.D. Wis. 1908) (essence of wrong is mere force of numbers giving coercive character to acts themselves perfectly lawful); Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888) (displaying of banner requesting workers to stay away unlawful because injurious to business of employer); Webb v. Cooks' Union No. 748, 205 S.W. 465 (Tex. Civ. App.—Fort Worth 1918, writ ref'd) (combination to boycott and picket an employer to coerce him to unionize his business is unlawful).

7. Loewe v. Lawlor, 208 U.S. 274 (1908). Following early court decisions that the Sherman Antitrust Act covered combinations of labor, there was an effort in Congress to exempt labor organizations from the scope of the Sherman Act. *See* 51 CONG. REC. 9540-41 (1914); 45 CONG. REC. 8849-52 (1910); 34 CONG. REC. 3438-39 (1901); 33 CONG. REC. 6669-70 (1900).

8. The history of this development under the antitrust laws is traced in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

9. Union adherents wanted freedom from labor injunctions based on the doctrines of "conspiracy" and "restraint of trade." Frankfurter & Greene, *Legislation Affecting Labor Injunctions*, 38 YALE L.J. 879, 881 (1929). *See also* Opinion of the Justices, 211 Mass. 618, 98 N.E. 337 (1912). Samuel Gompers was concerned about the powers given to courts under the Sherman Antitrust Act to dissolve labor organizations. 51 CONG. REC. 9165-66 (1914).

Act was passed in 1914.[10] Although unions thought the section would protect secondary strikes and boycotts from the antitrust laws, the Supreme Court held that it immunized only trade union activities directed against an employer by his own employees.[11] Secondary activity remained illegal until 1932 when Congress passed the Norris-LaGuardia Act [12] to shelter secondary boycotts from injunctions when in the form of peaceful strikes, picketing, and appeals to customers.[13] Labor abuses of this broad immunity resulted in the 1947 Taft-Hartley prohibitions against secondary activities, now section 8(b)(4)(B) of the Labor Management Relations Act.[14]

Early controversy under section 8(b)(4)(B) centered around the validity and enforcement of "hot cargo" agreements.[15] In 1958 the Supreme Court in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*[16] sanctioned such agreements, but declared them to be no defense to a section 8(b)(4)(B) secondary boycott violation. In direct response to *Sand Door*, Congress enacted section 8(e)[17] to outlaw hot cargo provisions, strikes, and

10. Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914). The Act provides:

> [N]o restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees . . . or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right. . . .

It further provides that no injunctions shall be issued to prohibit persons, acting as a union, from picketing, boycotting, striking or from any other lawful act in the absence of such labor dispute, whether alone or in concert.

11. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). For a full discussion of the case see E. BERMAN, LABOR AND THE SHERMAN ACT 103-17 (1930). *See also* Note, *Strikes and Boycotts*, 34 HARV. L. REV. 880, 885-86 (1921).

12. Norris-LaGuardia Act, ch. 90, §§ 1-15, 47 Stat. 73 (1932). The House Committee on the Judiciary stated:

> The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

H.R. REP. NO. 669, 72d Cong., 1st Sess. 3 (1932).

13. United States v. Hutcheson, 312 U.S. 219 (1941). For an excellent discussion of the case see Comment, *Jurisdictional Disputes and the Sherman Act—United States v. Hutcheson*, 10 FORDHAM L. REV. 268 (1941).

14. *See* note 3 *supra*. Section 8(b)(4)(B) is an extremely broad provision. The courts, in interpreting this section, have found little guidance in its text and thus have relied on the legislative purpose of outlawing secondary boycotts. *See generally* R. GORMAN, *supra* note 2, at 240-73 (1976).

15. A "hot cargo" provision in a labor contract provides that union members employed by the contracting employer need not handle nonunion or unfair or struck goods of other employers. C. MORRIS, *supra* note 2, at 645. *See generally* Comment, *"Hot Cargo" Clauses in Construction Industry Labor Contracts*, 37 FORDHAM L. REV. 99 (1968).

16. 357 U.S. 93 (1958). For a discussion of the case see Daykin, *Legality of the Hot Cargo Clauses*, 9 LAB. L.J. 559 (1958); 13 SW. L.J. 379 (1959).

17. 29 U.S.C. § 158(e) (1970). The language of § 8(e) is comparable to the language of § 8(b)(4)(B) in most significant respects:

> 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.

For additional discussion see Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L.Q. 724 (1960).

other coercive union activity designed to force employers to agree to such clauses.[18]

With the increased use of prefabricated materials in the building and construction trades, unions bargained work preservation clauses into their collective agreements. These work preservation clauses, intended to protect work formerly the responsibility of the established bargaining units, were declared lawful.[19] In order to enforce these clauses, employees struck over subcontracts which diminished their on-site work. Whether such strikes were primary or secondary depended on which party to the contract possessed the effective power of decision or right to control. For instance, the Board consistently held that a union could not enforce a work preservation clause against an employer who was required by a subsequent contract with a third party to install prefabricated material[20] because the employer lacked the right to control the choice of material used.[21] Thus, any concerted activity to enforce these work preservation clauses was deemed a secondary boycott in violation of section 8(b)(4)(B).[22]

The Supreme Court first encountered work preservation clauses and section 8(e) in *National Woodwork Manufacturers Association v. NLRB*.[23] In that case the employees struck over a subcontractor's violation of a work preservation clause. The subcontractor had the choice of whether to use prefabricated materials. The Board [24] and the Seventh Circuit[25] declared the strike to be primary activity based on the subcontractor's right to control the specifications. On appeal the Supreme Court expressly refrained from considering the right-to-control test, basing its affirmation on an examination of

18. In the course of the debates concerning the Landrum-Griffin Amendments, Representative Griffin stated that "our substitute would ban all hot cargo agreements." 105 CONG. REC. 15532 (1959). *See also* Comment, *supra* note 17, at 742.

19. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). The Supreme Court implicitly recognized the legitimacy of work preservation clauses in *Fibreboard*:

> Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework. Provisions relating to contracting out exist in numerous collective bargaining agreements and '[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.'

Id. at 211-12 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584 (1960)).

20. *See* Bricklayers' Union Local 8, 180 N.L.R.B. 43 (1969), *modified*, 446 F.2d 522 (9th Cir. 1971) (fining of subcontractors and employees pursuant to work preservation clause held to be secondary activity since subcontractor did not have right to control the choice of materials used); Local 742, United Bhd. of Carpenters, 178 N.L.R.B. 351 (1969), *remanded*, 444 F.2d 895 (D.C. Cir. 1971) (subcontractor did not have the right to control since prefabricated doors were specified in contract with hospital association).

21. Local 636, United Ass'n of Journeymen, 177 N.L.R.B. 189 (1969), *enforcement denied*, 430 F.2d 906 (D.C. Cir. 1970) (subcontractor without right to control piping of fan coil units since contract with mechanical contractor specified factory-piped fan coil units); International Longshoremen's Ass'n, 137 N.L.R.B. 1178 (1962), *enforced as modified*, 331 F.2d 712 (3d Cir. 1964) (refusal to unload ship was secondary activity since stevedoring company did not have right to assign disputed work).

22. For an excellent analysis of the right-to-control rule see Note, *Work Preservation and the Secondary Boycott—An Examination of the Decisional Law Since National Woodwork*, 21 SYRACUSE L. REV. 907, 918-25 (1970).

23. 386 U.S. 612 (1967). For discussion of the Board's decisions concerning hot cargo agreements see Comment, *The Hot Cargo Agreement in Labor-Management Contracts—From Conway's Express to National Woodwork*, 21 SW. L.J. 779 (1967); Note, *Labor Law—Secondary Boycotts—Products Boycott for Work Preservation*, 36 TENN. L. REV. 62 (1968).

24. National Woodwork Mfrs. Ass'n, 149 N.L.R.B. 646 (1964).

25. National Woodwork Mfrs. Ass'n v. NLRB, 354 F.2d 594 (7th Cir. 1966).

the "totality of the circumstances."[26] Relying on the Supreme Court's totality-of-the-circumstances test in *National Woodwork*, four courts of appeals repudiated the Board's continued use of the right-to-control test;[27] two other circuits, however, specifically adopted the right-to-control test.[28]

II. NLRB v. Enterprise Association of Steam Pipefitters Local 638

The Supreme Court granted certiorari to settle the dispute between the circuits. In a six-to-three decision the Court approved the right-to-control test, declaring the union's attempted enforcement of the work preservation clause to be secondary activity.[29] Since Hudik did not have the right to control the job specifications under its subcontract with Austin, pressure to enforce the work preservation clause included the secondary object of influencing Austin to stop handling the products of the control unit manufacturer.[30] Although the work preservation clause in the collective bargaining agreement between Enterprise and Austin was lawful, the majority declared that it was not a defense to a section 8(b)(4)(B) unfair labor practice charge.[31] This holding is in direct conflict with *National Woodwork*'s totality-of-the-circumstances test and represents complete deference to the National Labor Relations Board.

In an attempt to reconcile these two decisions, the *Pipefitters* Court explained that in deciding *National Woodwork* it had upheld the Board's right-to-control test by not remanding the case and thus preventing the Board from reconsidering it in light of a new legal rationale.[32] In *National Woodwork*, however, the Court had emphasized that the issue of whether the Board's right-to-control doctrine was a direct rule of law was not before the Court.[33] The Court also distinguished the facts of the two cases.[34] The subcontractor in *National Woodwork* was deemed not to be a neutral since he had the right to decide whether to use prefabricated materials.[35] Neither was Hudik a neutral in the sense contemplated by Congress as warranting or requiring protection: Hudik had included a work preservation provision in its agreement with the employees to satisfy their concern for work preserva-

26. 386 U.S. 612 (1967). The Supreme Court noted:
> Not before us, therefore, is the issue argued by the AFL-CIO in its brief *amicus curiae*, namely, whether the Board's 'right-to-control doctrine—that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand'—is an incorrect rule of law inconsistent with the Court's decision in [NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 497-98 (1970).]

Id. at 617 n.3.

27. Local 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906 (D.C. Cir. 1970); Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188 (1st Cir. 1969) (dictum); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556 (8th Cir. 1968); NLRB v. Local 164, Int'l Bhd. of Electrical Workers, 388 F.2d 105 (3d Cir. 1968).

28. Associated Gen. Contractors of Cal., Inc. v. NLRB, 514 F.2d 433 (9th Cir. 1975); George Koch Sons v. NLRB, 490 F.2d 323 (4th Cir. 1973).

29. 429 U.S. at 521-22.

30. *Id.* at 530-31.

31. *Id.* at 516-17.

32. *Id.* at 522.

33. 386 U.S. at 616 n.3; *see* note 26 *supra*.

34. 429 U.S. at 521-22.

35. 386 U.S. at 624.

tion. In defiance of his obligations, Hudik accepted a subcontract which assigned to another party the rights he had guaranteed his own employees.

The majority relied on *Sand Door* for the proposition that a perfectly legal collective bargaining contract may not be enforced by a strike which in the absence of the contract would be a violation of the statute.[36] *Sand Door* merely holds, however, that pressure to enforce a secondary boycott remains secondary, notwithstanding the legality of the clause itself.[37] *Sand Door* is not authority for the proposition that union pressure to enforce a concededly primary work preservation clause is anything but primary pressure.

In a well-reasoned dissent Justice Brennan disagreed on five points.[38] First, Hudik could not be considered a neutral as contemplated by Congress after agreeing to a work preservation clause.[39] Second, since Hudik could have offered the union a compromise solution, it was not powerless to deal with the union's demand.[40] Third, there was no basis for concluding that Austin was the real target of the union's pressure.[41] Fourth, since the work preservation clause was primary activity under *National Woodwork*, union pressure to enforce the clause could not be considered secondary in nature.[42] Fifth, although technological change should proceed at its own pace, Congress, and not the courts, should handle the problems concerning work preservation.[43]

The *Pipefitters* decision shows an apparent disregard for both the language and spirit of section 8(b)(4)(B) and section 8(e). Congress desired to limit the disruptive effects of legitimate employer-employee confrontations and to protect neutrals from being engulfed in the contest for tactical advantage.[44] This decision allows subcontractors to circumvent their collectively bargained obligations, as well as congressional intent, by conspiring with general contractors. By declaring a violation of section 8(b)(4)(B), the *Pipefitters* Court refused to follow a number of well-reasoned opinions by federal courts across the country[45] and further emasculated the collective bargaining process upon which enforcement of the Labor Management Relations Act depends. The subcontractor was neither a neutral, as contemplated by Congress, requiring and warranting protection, nor was he powerless to deal with the union's demands. It could have offered Enterprise a compromise solution such as an agreement to substitute pay to replace the lost work.[46] It could have satisfied the union's demands by abiding by the collective bargaining agreement. In addition to the Court's departure on these points, there was no basis for holding Austin to be the real target.[47]

36. 429 U.S. at 517.
37. *Id.* at 541.
38. Justices Marshall and Stewart joined Justice Brennan's dissent.
39. 429 U.S. at 537-38.
40. *Id.* at 538-39.
41. *Id.* at 539.
42. *Id.* at 542.
43. *Id.* at 543.
44. 105 CONG. REC. 14343 (1959).
45. *See* note 27 *supra* and accompanying text.
46. 429 U.S. at 539 (Brennan, J., dissenting).
47. *Id.*