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EVOLUTION OF THE SECONDARY BOYCOTT AND MODIFICATION OF THE "HOT CARGO" CLAUSE DEFENSE†

by

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IT IS now well settled that there is no constitutional right to strike and that the right to strike and engage in concerted activities may be regulated by our legislatures and our courts.¹ However, the right of employees to strike and to engage in concerted activities has been recognized as lawful since 1921² and has been given legislative sanction since 1932.³ This right was affirmatively protected through the Wagner Act of 1935,⁴ and although limited in numerous instances by decisions of the NLRB and the courts in cases such as sit down strikes, strikes in breach of contract, and other circumstances,⁵ the right to strike and engage in concerted activity by the employees and their unions has been recognized and protected by Sections 7 and 13 of the Taft-Hartley Act. Conversely, this right has been regulated by other sections of the Taft-Hartley Act, particularly by Section 8(b)(4), but including Section 8(d), with leeway for further regulation by the states through the passage of "Right-to-Work" laws or similar legislation allowed by Section 14(b).⁶

SECONDARY BOYCOTT

Section 8(b)(4) (the so-called secondary boycott section) in subsections (C) and (D) regulates primary strikes by employees. Since these are relatively simple provisions and space is limited these two subdivisions will be only very briefly discussed. The other two

† From a paper delivered at the Sixth Labor Law Institute of the Southwestern Legal Foundation, Southern Methodist University, on April 25, 1957.

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¹ *International Union, UAW, AFL v. Wisconsin Employment Relation Bd.*, 336 U.S. 245 (1939); *Dorchy v. Kansas*, 264 U.S. 286 (1924); Jennings, *The Right to Strike: Concerted Activities under the Taft-Hartley Act*, 40 CAL. L. REV. 12 (1952).

² *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

³ *Norris-LaGuardia Act*, 47 STAT. 70, 29 U.S.C.A. §§ 101-15 (1932).

⁴ 49 STAT. 449, 29 U.S.C.A. 151 *et seq.*

⁵ *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). Also see *Scullin Steel Co.*, 65 N.L.R.B. 1294 (1946); *Thompson Products*, 70 N.L.R.B. 13 (1946), 72 N.L.R.B. 886 (1947); *American News Co.*, 55 N.L.R.B. 1302 (1944); *McKay Radio*, 96 N.L.R.B. 740, 304 U.S. 333 (1938).

⁶ *Local 10, United Ass'n of Journeymen Plumbers, AFL v. Graham*, 345 U.S. 192 (1953).

subsections, (A) and (B), are the basis for most of the discussion in this article.

Section 8(b) (4) is one of the most difficult sections of a difficult statute to interpret; the interpretations are constantly changing almost in direct ratio to the number of new members appointed to the Board.⁷ Ex-Chairman Farmer expressed it thus:

Section 8(b) (4) is one of the most complex provisions of the statute. It deals with a wide range of union conduct which has been telescoped into the term secondary boycott. A phrase which is convenient for purpose of ready reference and which provides scant guidance in the decision of particular cases. Perhaps more than any other this is a field in which we should tread with cautious feet in our attempts to mark the boundaries between conduct which is permissible and that which is interdicted.⁸

The Section 8(b) (4) provides that:

It shall be an unfair labor practice for a union 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 employed person to join any labor or employer organization or any employer or 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;

(B) forcing or requiring any *other* employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 (Emphasis added.)

Thus Section 8(b) (4) permits the union to engage in activities which are "traditional and permissible in a primary strike," but not activities which are directed at employees of secondary employers for the proscribed objects. The Board and the courts in each case must strike the delicate balance between " . . . the dual congressional objects of preserving the rights of labor organizations

⁷ Since the advent of the Republican administration six appointments have been made to the NLRB: Guy Farmer, Chairman, July 13, 1953-August 27, 1955; Philip Ray Rogers, August 28, 1953; Albert C. Beeson, March 2, 1954-April 4, 1955; Boyd Leedom, April 4, 1955; Steven Bean, December 1, 1955; Joseph Jenkins, February 29, 1957. Ivar H. Peterson, Democratic appointee, served until August 26, 1956, and Abe Murdock, reappointed 1952, continues to serve. None of these new appointees has ever been closely associated with labor organizations. This may account in part for the rather unsympathetic treatment (from the union's view) this section has received recently in the complete reversal of older decisions.

⁸ McAllister Transfer, Inc., 110 N.L.R.B. 1769, 35 L.R.R.M. 1281 (1954).

to bring pressure to bear upon offending employers in primary labor disputes and of shielding unoffending employers and others from pressures and controversies not their own."⁹

Despite the provisions of Section 8(c) of the statute and the First Amendment, inducement of secondary employees by either oral or written communications or by peaceful picketing is prohibited by this section, when done for the objectives forbidden by the section. It is "... the objective of the unions' secondary activities ... and not the quality of the means employed to accompany the objective which was the dominant factor motivating Congress in enacting that provision. ..."¹⁰

Before going into specific cases, let us set out some well settled principles.

Direct appeals to an employer are permitted by Section 8(b)(4), and where an employer, at the request of a union which has refrained from the use of threats or direct appeals to his employees, voluntarily agrees to boycott the goods of another employer, there is no violation of Section 8(b)(4) since there has been neither a strike nor inducement or encouragement of the employees to engage in such conduct.¹¹

Section 8(b)(4) does not prohibit consumer boycotts by appeal to the individual members of a union (or to the public) as long as the appeals are confined to the members as individuals, not as employees, and are intended to induce them simply to withhold their personal patronage;¹² but where the union goes further and takes active steps pursuant to a consumer product boycott and appeals not only to the individuals as consumers but also to employees of neutral employers not to handle, use, work on or buy for their employer the product of the primary employer, they run afoul of this section of the act.¹³ Thus, placing an employer or his product on an unfair list at the union meeting or within the union's

⁹ NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

¹⁰ International Brotherhood of Electrical Workers, AFL v. NLRB, 341 U.S. 694, 704 (1951); United Brotherhood Carpenters and Joiners, 81 N.L.R.B. 802 (1949).

¹¹ Sand Door & Plywood Co., 113 N.L.R.B. 210, 36 L.R.R.M. 1378 (1955), *enforcement granted*, NLRB v. Local 11, Carpenters (General Mill Work Corp.), — F.2d —, 39 L.R.R.M. 2731 (6th Cir. April 10, 1957); McAllister Transfer Co., 110 N.L.R.B. 1769, 35 L.R.R.M. 1281 (1954) (opinion by Farmer); Arkansas Express, 92 N.L.R.B. 255, 27 L.R.R.M. 1077 (1950); Consolidated Frame Co., 91 N.L.R.B. 1295, 27 L.R.R.M. 1008 (1950).

¹² Amalgamated Meat Cutters, AFL v. NLRB, 237 F.2d 20, 38 L.R.R.M. 2289 (D.C. Cir. 1956).

¹³ Amalgamated Meat Cutters, AFL, 113 N.L.R.B. 275, 36 L.R.R.M. 307 (1955); Sand Door & Plywood Co., 113 N.L.R.B. 210, 36 L.R.R.M. 1378 (1955); Sound Shingle Co., 101 N.L.R.B. 1159, 31 L.R.R.M. 202 (1952), *enforcement granted*, 33 L.R.R.M. 2656 (9th Cir. 1954).

own periodical is not unlawful.¹⁴ But the implementation of such a list by telephoning the specific employees of the secondary employer and advising them of the list, or picketing at the scene of the secondary employer's premises, may result in an illegal secondary boycott.¹⁵

Nor is it necessary in product boycott cases that the union should have a direct, active dispute with the primary producer of the product. It is sufficient if the only dispute takes place at the secondary employer's premises.¹⁶

Under precedents set by the Board and approved by the courts, for the Board to find a violation of Section 8(b)(4) it is only necessary that *one* of the objects of the union is proscribed by the act; it need not be the sole object of the conduct under scrutiny.¹⁷

Now turning to specific cases, we see that since these cases turn on the question of the object of the inducement, the entire factual situation in each case should be important, as it was under older Board decisions. Slight differences in the facts which may indicate an unlawful objective make tremendous differences in the results. It is impossible in this article to discuss all of the various factual situations with which the Board has been confronted. The early rule approved by the United States Supreme Court was that where the appeals, whether oral, written or by picketing, affecting the employees of secondary employers were confined to the vicinity of the primary employer's premises, even though they induced concerted activity on the part of the secondary employees approaching these premises, the conduct was traditional and permissible in support of a primary strike.¹⁸ Even picketing at the premises of the secondary employer when the primary employer's truck and equipment were present was permissible if the primary employer could not con-

¹⁴ See *Western, Inc.*, 93 N.L.R.B. 336, 27 L.R.R.M. 1398 (1951); *Grauman Co.*, 87 N.L.R.B. 755 (1949).

¹⁵ *NLRB v. Wine, Liquor & Distillery Workers Union, AFL*, 178 F.2d 584 (2d Cir. 1949); *United Brotherhood of Carpenters & Joiners, AFL v. Sperry*, 170 F.2d 863 (10th Cir. 1948); see *Western, Inc.*, *supra*, note 14; *Printing Specialties & Paper Converters Union*, 82 N.L.R.B. 271 (1949).

¹⁶ *General Mill Work Corp.*, 113 N.L.R.B. 1084, *enforcement granted*, — F.2d —, 39 L.R.R.M. 2731 (6th Cir. April 10, 1957); *Sand Door & Plywood Co.*, 113 N.L.R.B. 210, 36 L.R.R.M. 1378 (1955); *Sound Shingle Co.*, 101 N.L.R.B. 1159, 31 L.R.R.M. 202 (1952).

¹⁷ *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Amalgamated Meat Cutters, AFL v. NLRB*, 237 F.2d 20, 38 L.R.R.M. 2289 (D.C. Cir. 1956); *Sand Door & Plywood Co.*, 113 N.L.R.B. 210, 36 L.R.R.M. 1378 (1955); *Standard Oil Co.*, 105 N.L.R.B. 868, 32 L.R.R.M. 1381 (1953); *Acousti Engraving Co.*, 97 N.L.R.B. 574, 29 L.R.R.M. 1138 (1951).

¹⁸ *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 28 L.R.R.M. 2105 (1951); *NLRB v. Service Trade Chauffeurs*, 191 F.2d 65, 28 L.R.R.M. 2450 (2d Cir. 1951). See also *Ryan, Pure Oil and Crump, Inc.*, *infra*.

veniently be reached at his primary situs of employment.¹⁹

The cases where the premises of the two employers (the primary and the secondary) were separate and distinct with no interchange gave the Board little trouble, since the extension of the picketing or the appeal to the employees of the secondary employer clearly demonstrated the unlawful objective in most instances.

The cases that have given the Board most difficulty are common situs cases where both the primary and secondary employers are operating on the same premises. Originally the Board adopted the doctrine that where the dispute was taking place at the situs occupied by the primary employer, even though there was a secondary employer on the premises, the picketing was primary picketing, and was permissible even though it induced the approaching employees of the secondary employer not to report for work. The Board held in the *Ryan* case:²⁰

As is virtually always the case an object of the picketing is to persuade all persons from entering such premises for business reasons. The picketing which is primary did not lose its character and become secondary because employees of other employers were induced to remain away from work.

Also to this effect are the *Pure Oil*²¹ and *Crumph, Inc.*²² cases. Although in *Pure Oil* the union was picketing a ship while it was at dock in an oil refinery, there was in the area no other place where such a ship could be picketed, and the case may be considered for this purpose as holding that this was the primary employer's (the ship's) situs.

On the other hand a violation was found under the following facts which clearly indicated an unlawful objective: where there were several employers engaged at a common situs and the picket sign did not clearly indicate that the dispute was only with the primary employer, or where other factors indicated that the union had a secondary motive, as for instance where the union picketed only when the union employees of the secondary employer were present;²³ where the picketing was obviously directed at the secondary contractor and not at the contractor with whom the union

¹⁹ *Schultz Refrigerated Service*, 87 N.L.R.B. 502, 25 L.R.R.M. 1122 (1949).

²⁰ 85 N.L.R.B. 417, 24 L.R.R.M. 1424 (1949), cited with approval, *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

²¹ 84 N.L.R.B. 315, 34 L.R.R.M. 1293 (1949).

²² 112 N.L.R.B. 311, 36 L.R.R.M. 1012 (1955).

²³ *International Brotherhood of Electrical Workers, AFL v. NLRB*, 341 U.S. 694 (1951); *Sanuel Langer*, 52 N.L.R.B. 1028 (1949) enforcement granted.

had the dispute;²⁴ and where the picketing continued after the trucks of the primary employer with whom the dispute existed had left the premises of the secondary employer.²⁵

This problem of common situs picketing was carefully analyzed by the Board in the *Moore Dry Dock Co.* case,²⁶ where the union was picketing a foreign vessel at an American shipyard for the purpose of protesting the transfer of this former American vessel to a foreign flag. The crew was aboard the vessel engaged in preparing for the voyage and the employees of the shipyard refused to cross the picket line for the purpose of working on the vessel. There the Board laid down four clear criteria governing common situs picketing. While recognizing that the object of picketing is to influence third persons to withhold their business or services from the struck employer and that in this respect there is no difference between lawful primary picketing and unlawful secondary picketing as proscribed by Section 8(b)(4),²⁷ the Board nevertheless held that, even though secondary employees are directly affected: if (1) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises, (2) at the time of the picketing the primary employer is engaged in its normal business at the site, (3) the picketing is placed as reasonably close to the location of the situs as possible and (4) the picketing discloses clearly that the dispute is with the primary employer, such picketing does not violate Section 8(b)(4) even though it affects secondary employers.²⁸

The Per Se Doctrine

From the time of the *Moore Dry Dock* decision (1949) until the rendition of the Board's decision in *Washington Coca-Cola* (1953)²⁹ those were the tests applied. In *Washington Coca-Cola* the Board used a fifth test, a mechanical test, *viz.*, that where the primary employer has no permanent establishment in the vicinity that may be effectively picketed by the union, picketing at any secondary employer's location visited by the primary employer, either by his trucks or his workers,³⁰ is *per se* violative of the Act if he

²⁴ Gould and Preissner, 82 N.L.R.B. 137 (1949), *enforcement granted*, NLRB v. Denver Bldg. & Contr. Trades Council, 341 U.S. 675 (1951).

²⁵ Sterling Beverages, 90 N.L.R.B. 401 (1950).

²⁶ 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950).

²⁷ Schultz Refrigerated Service, *supra*, note 19.

²⁸ Columbia-Southern, 110 N.L.R.B. 206, 34 L.R.R.M. 1624 (1954). Cf. Richfield Oil, 92 N.L.R.B. 1191, 28 L.R.R.M. 1436 (1950).

²⁹ 107 N.L.R.B. 299, 33 L.R.R.M. 1122 (1953).

³⁰ Otis Massey, 109 N.L.R.B. 275 (1954).

(the primary employer) has a location elsewhere where effective picketing can be done.

At first the Board rather narrowly restricted its *per se* doctrine curtailing an extension of the picket line to premises of the secondary employer where the primary employer had its own situs that could be effectively picketed. Thus in *Pittsburgh Plate Glass*,³¹ rendered October 1954, it rejected the Trial Examiner's *per se* test and restricted the application of *Washington Coca-Cola* and *Otis Massey* (discussed in text, *infra*) since Pittsburgh's primary location was a wholesale and industrial area (where presumably the dispute could be as effectively publicized as in *Washington Coca-Cola*) and the employees of Pittsburgh were at work substantially all day at the secondary situs of the contractors. The Board in *Pittsburgh Plate Glass* said:

Implicit in that decision was our view that the *Washington Coca-Cola* doctrine would not be applied where the *premises of the secondary employer harbor the situs of the dispute* between the Union and the primary employer, as in the instant matter.

Chairman Farmer and Members Peterson, Rogers and Beeson participated in this decision.

The decision is also important in demonstrating the view that where the picket sign at the situs of the contractors clearly carried the name "Pittsburgh," it was not necessary for the union to tell the employees of secondary employers on the job that they were free to cross the picket lines (citing *Stover Steel Service*³²).

Later, in reaffirming its original *per se* doctrine, the Board explained in more detail in *Southwest Motor Transport*:³³

The Board's conclusion rests on the sound premise that a union which can direct its inducement to primary employees at the primary employer's premises does not seek to accomplish any more with respect to the same employees by directing the same inducement to these employees at the premises of some other employer. Consequently the only reasonable inference in such a situation is that inducements which are ostensibly directed at the primary employer's employees are in fact directed at the employees of the secondary employer. In conclusion therefore the picketing under such circumstances violates . . . the Act. The Board is effectuating the Congressional objective of shielding unoffending employers from pressures and controversies

³¹ 110 N.L.R.B. 455, 35 L.R.R.M. 1071 (1954). This case is not to be confused with the earlier case of *Pittsburgh Plate Glass*, 105 N.L.R.B. 740, 32 L.R.R.M. 1350 (1953), *infra* n.59. Where referred to in the text the earlier case will be parenthetically designated "(No. 1)."

³² 108 N.L.R.B. 1575, 34 L.R.R.M. 1258 (1954).

³³ 115 N.L.R.B. 981, 37 L.R.R.M. 1459 (1956).

not their own, while at the same time leaving the union free to assert its pressures upon the primary employer in a manner that will at most have only an incidental effect on the secondary employers.

While the *Washington Coca-Cola* decision was enforced by the Court of Appeals for the District of Columbia³⁴ on the facts found by the Board, this same court refused to enforce *Campbell Coal Co.*, a companion case resting purely on the per se doctrine of the Board.³⁵ The facts were slightly different in that the employees of Campbell Coal Co. spent only 25% of their time at the situs of the primary employer and 50% of their time on the construction sites, and, though the union followed the trucks and picketed them at the construction sites, the signs clearly indicated that the dispute was with Campbell Coal and the secondary employers were so advised.

The court pointed out that its previous affirmance of the *Washington Coca-Cola* case did not constitute approval of the rule that ambulatory picketing was per se a violation of 8(b)(4) where an appropriate picketing site was available, but that it had rested its decision in that case upon additional findings present, and it therefore reversed *Campbell Coal* and remanded.³⁶ The Supreme Court refused certiorari.

In the meantime the Fifth Circuit Court of Appeals in the *Otis-Massey* case³⁷ also rejected the Board's per se doctrine where by picket signs and pamphlets it was made clear to the employees at the site of the secondary employers that the dispute was only with Otis Massey, and where Otis Massey's employees were constantly employed on the construction sites of the secondary employers, the court holding that such picketing did not constitute a violation. Several other courts have rejected and criticized as too mechanical this per se doctrine,³⁸ but the Board continues to follow it (even reaffirming *Campbell Coal* on remand³⁹). In each case now, however, the Board seizes upon some additional facts, however small, and bases its decision, in addition to the per se doctrine, on the record considered as a whole.⁴⁰ Generally there is a finding that

³⁴ 220 F.2d 380 (D.C. Cir. 1955).

³⁵ 110 N.L.R.B. 2192, 35 L.R.R.M. 1369 (1954).

³⁶ *Sales Drivers, Int'l Brotherhood of Teamsters, AFL v. NLRB*, 229 F.2d 514 (D.C. Cir. 1955).

³⁷ *NLRB v. General Drivers, Int'l Brotherhood of Teamsters, AFL*, 225 F.2d 205, 36 L.R.R.M. 2541 (5th Cir. 1955), cert. denied, 350 U.S. 914 (1955).

³⁸ *LeBus v. Truck Drivers*, 141 F. Supp. 673 (E.D. La. 1956); *Douds v. International Brotherhood of Teamsters, AFL*, 139 F. Supp. 702 (So. D.N.Y. 1956). Cf. *NLRB v. Truck Drivers, AFL*, 228 F.2d 791 (5th Cir. 1956) (after *Otis-Massey*).

³⁹ 116 N.L.R.B. 1020 (1956).

⁴⁰ *Clark Bros.*, 116 N.L.R.B. 1891 (1956); *Caradine Co.*, 116 N.L.R.B. 1559 (1956); *Barry Controls*, 116 N.L.R.B. 1470 (1956); *Crowley's Milk Co.*, 116 N.L.R.B. 1408

some evidence indicates that one of the four tests of *Moore Dry Dock* are lacking, or that the union did not affirmatively make it clear to the secondary employees of neutral employers that there was no dispute with their employer. The Board apparently has completely abandoned the doctrine it enunciated in *Pittsburgh Plate Glass*⁴¹ that picketing is permissible if the secondary employer's premises harbors the situs of the dispute.

A New Policy

Although the per se doctrine of the Board is used to find a violation where the picketing is extended to secondary sites, it does not necessarily follow that picketing confined solely to the premises of the primary employer is protected.

In the *Retail Fruit Dealers Ass'n* case⁴² we begin to see the emergence of a new policy. The Crystal Palace Market, owned by Long, contained sixty-four fruit and grocery stands, including some grocery stores operated by Long and some leased by him to others, and fruit stands leased from Long. The union had a contract dispute with Long and other grocers, but not with the fruit stands whose employees were represented by a sister local. Long shut down his stands and ordered his other grocers to do likewise. Long offered to permit the union to enter Crystal Palace to picket the individual stand. The union refused. It then picketed the outside entrances to Crystal Palace, somewhat remote from Long's, with signs showing that its dispute was with Long and other grocers only. Neutral employees of the fruit stands were induced to remain away from work. Chairman Leedom and Member Rogers specifically overruled the *Ryan* case and their earlier decision in *Crumph, Inc.*⁴³ They also inferentially refused to follow the Supreme Court in the *International Rice Milling* case by stating that the Court's citation of *Ryan* was merely "in support of a dictum by the Court" and that in their opinion the Court did not mean to approve the specific holding of *Ryan*. They quoted as "ample precedent" their own decision in *Professional and Business Men's Life Ins. Co.*,⁴⁴ enforced by the

(1956); *Empire State Express*, 116 N.L.R.B. 615 (1956); *Horn & Hardart Baking Co.*, 115 N.L.R.B. 1184 (1956); *W. H. Arthur*, 115 N.L.R.B. 1137 (1956); *Marsh Food Liners*, 114 N.L.R.B. 639 (1955); *Cisco Constr. Co.*, 114 N.L.R.B. 27 (1955); *Diaz Drayage*, 39 L.R.R.M. 1322; *National Cement Products*, 38 L.R.R.M. 1047.

⁴¹ *Pittsburgh Plate Glass*, 110 N.L.R.B. 455, 35 L.R.R.M. 1071 (1954).

⁴² 116 N.L.R.B. 856, 38 L.R.R.M. 1323 (1956).

⁴³ Chairman Leedom and Member Bean were either not on the Board or did not participate when *Crumph* was decided in April, 1955.

⁴⁴ 108 N.L.R.B. 63, 34 L.R.R.M. 1010 (1954).

tenth circuit,⁴⁵ and the court decision in the damages case of *Deena Artware*;⁴⁶ they noted but did not distinguish the companion Board case of *Deena Artware*⁴⁷ where the previous Board had followed the Trial Examiner and found no violation of 8(b)(4) and the same circuit had approved the Trial Examiner's findings.⁴⁸ Holding that the union was under a duty to minimize the impact on neutral employers (citing *Southwest Motor Transport, supra*), the majority, however, relied on other facts indicating an unlawful objective, including (1) the refusal of the offer to enter the Palace to picket the individual stands, (2) the picketing of entrances remote from Long's stands and (3) the action of the business agent of the sister local, representing the fruit stand employees, in inducing neutrals not to cross the picket line at a time when he was temporarily assisting the respondent local. Member Bean, the third member necessary to make up the majority, concurred specially but on the narrow ground that the grocery stands were closed down and had no employees or customers. He distinguished *Moore Drydock*, *Ryan* and *Pittsburgh Plate Glass*,⁴⁹ while approving the doctrines of these cases.

It is interesting to note that although there was no business dealing between the fruit stands (the neutrals) and Long's grocery stands in their normal trade, these members found that the object of the union was to force the fruit stands to stop doing business with Long in his capacity as owner and landlord of the Palace.

In a long dissent Members Murdock and Peterson pointed out that the decision of the Board reversed its long standing decisions in *Ryan* and *Pure Oil*, approved by the Supreme Court in *International Rice Milling*; that the Board misapplied *Moore Drydock*, where the dispute was not taking place, as here, on the primary employer's premises; and that the Board had set up a new vague test that the union must "make a bona fide effort to minimize the impact of its picketing on neutral employers" without specific standards that would require the union to picket "inside" where the

⁴⁵ *NLRB v. Local 55*, 218 F.2d 226 (10th Cir. 1954).

⁴⁶ *United Brick & Clay Workers v. Deena Artware, Inc.*, 109 F.2d 637 (6th Cir. 1952), *cert. denied*, 344 U.S. 897 (1952).

⁴⁷ *NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); original decision reported 86 N.L.R.B. 732, 24 L.R.R.M. 1675 (1949).

⁴⁸ The two *Deena* cases are reconciled by the court's holding that both the jury under Section 303 and the Trial Examiner under Section 8(b)(4) are finders of fact. The jury found a violation and awarded damage. The Board, following *Ryan*, found no violation. Thus these two members are following the jury case and not the Board decision.

⁴⁹ 110 N.L.R.B. 455, 35 L.R.R.M. 1071 (1954). The case involved a common situs harboring the dispute.

signs would be concealed from the general public. Also criticizing the concurring opinion, the dissenting opinion argued:

The concurring opinion presents, if that is possible, an even more radical departure from established Board and Court law in the area of secondary boycotts and primary strikes. It reverts to the literal language of Section 8(b)(4)—“the only issue is whether the evidence shows that the picketing was for a proscribed object.” In so doing it ignores completely the conflict between this Section of the Act and Sections 13 and 7, a conflict that has absorbed the Board and the courts ever since passage of the amended Act. As indicated in the cases cited above, the Board has pointed out over and over again, with the approval of numerous Circuit Courts of Appeal and the Supreme Court of the United States, that there is a dual Congressional objective in this Statute, that of preserving the rights of employees to engage in the ordinary strike and that of neutral employers to be free from controversies not their own. The Supreme Court itself, in *International Rice Milling*, pointed out the problem of reconciling the right to strike with the language of Section 8(b)(4)(A). Early in the history of the Act the Board accepted the difficult task of accommodating these rights fairly and reasonably. It is too late in the day to refuse, as the concurring opinion does, to recognize the existence of a conflict in these rights when Section 8(b)(4) is literally applied. As the Board said in the *Pure Oil* case, such a decision “might well outlaw virtually every effective strike, for a consequence of all strikes is some interference with business relationships between the struck employer and others.” To justify the conclusion that this picketing is unlawful the concurring opinion relies primarily upon the circumstances that Long and Standard Groceries had closed down their grocery operations so that there were no employees in the Market “directly involved in the contract dispute.” The record is perfectly clear, however, that all Long’s business activities, except the grocery department, continued in full operation during the period of the picketing. Moreover, four other tenants of Long were similarly involved in a contract dispute with Local 648. Although ordered by Long to remain closed, it is not clear from the record that these latter stands, in fact, remained closed after the first day of picketing. But even assuming, contrary to the fact, that all employees of the primary employers had been locked out of their jobs, it is indeed a most novel interpretation of Section 8(b)(4)(A) to find that these employees could not lawfully protest their lockout to the public by picketing the premises where they had been, and hoped in the future to be employed. Such a finding is, in our opinion, a direct infringement of the right of employees to publicize a labor dispute and to engage in concerted activity specifically guaranteed by Congress in Sections 13 and 7 of the Act. The concurring opinion suggests that an employer may effectively forestall notice to the public and its other employees that it is engaged in a labor dispute by the simple expedient of closing down its affected operations. No Board or court decision has ever held or even suggested that a union,

picketing the premises of a primary employer, must limit its activity to the single group of the primary employer's employees directly involved in the dispute. The distinction made in the concurring opinion between Long's "primary stands" (those involved in the dispute) and his other stands (which it suggests to be secondary) introduces a wholly new concept. The line drawn by the Board and courts has been between primary and secondary *employers*.

As further evidence of this philosophy, in *Incorporated Oil Co.*,⁵⁰ the union had abandoned its picketing at the site of an oil station with which it had a dispute and later again placed the pickets after a contractor was hired to repair the station, then withdrew its pickets *following the closing of the station* and the removal of employees and again placed them after the contractor returned again to work on the closed station. The Board found that the conduct of the union had as its purpose the inducement of the employees of the contractor to cease work with an object to compel the contractor to stop doing business with the oil company.⁵¹ The remark of the majority in *Incorporated Oil* shows that we can expect no clear-cut guide post for the future:

Our decision here is defined and confined by the limitations that are necessarily infused into it by the facts and records of this case Orderly administration of the statutes entrusted to us is best effectuated by adherence to the practice of deciding cases as they arise and not adhering to "the past practice of deciding cases as they arise, and not previously made.

Dissenter Murdock's comment on this is caustically critical:

My colleagues blandly explain their unwillingness to note, discuss, distinguish, overrule or otherwise delineate the applicability and status of pertinent precedents like Ryan Construction case, with the statement that "orderly administration" of the Act is best effectuated by adhering to "the past practice of deciding cases as they arise, and not by extended discussion of the construction to be placed upon decisions previously made." But how can the administrative process function properly if the quasi-judicial body does not decide what its pertinent precedents mean, and then either apply, distinguish or overrule them? In that way a systematic and rational body of law is built up case by case by which parties can govern their conduct. In disagreement with my colleagues "orderly" way for a quasi-judicial agency to administer an Act such as this, but indeed, that such has been the "past practice" of this Board over the years. The alternative in just "deciding cases as they arise," without regard to legal principles laid down in

⁵⁰ 116 N.L.R.B. 1844 (1956).

⁵¹ Chairman Leedom, Rogers and Bean all joined in this decision.

prior decisions, is an ad hoc approach which leaves the parties and the public in the dark as to what the law is. Between the instant majority decision and that in the *Retail Fruit* case, the state of the Board law with respect to secondary boycotts in important areas is well obfuscated. The majority only adds to this confusion when it tells us that its decision "is defined and confined by the limitations that are necessarily infused into it by the facts and the record of this case."

With this decision it becomes obvious that the Board is repudiating the principle of the *Ryan, Pure Oil* line of cases, which was to the effect that picketing in aid of a primary dispute at the primary employer's premises, regardless of what incidental secondary effect it might have, is not thereby converted into secondary picketing. The test now seems to be that where the picketing has a substantial secondary effect on employees of secondary employers, either by its mere location at the secondary employer's site (even if this situs harbors the dispute) and there is a primary site that may be picketed, or by its timing at the primary situs which brings out a refusal to cross the picket line by a "group . . . of [neutral] employees highly sensitive to any further picket line," the Board will infer an unlawful objective. Thus the test seems to be resolving itself to a question of the effectiveness of the picket line: if it is successful in appealing to third party employees it is unlawful.

An Interesting Recent Case

Of more than passing interest is the recent case of *W. T. Smith Lumber Co.*,⁵² where the Board in the face of a contrary decision by the Fifth Circuit Court of Appeals in *NLRB v. International Rice Milling Co.*⁵³ decided that railroads are not employers and that the employees of railroads are not employees within the meaning of the Act, and that employees of a lumber company on strike do not violate the law by inducing or encouraging these secondary legal nonentities from engaging in a secondary boycott. The Board discussed the recent decision of the Supreme Court in *International Brotherhood of Teamsters v. New York, N.H.&H.R.R.*, decided January 9, 1956,⁵⁴ which held that a railroad which the union was picketing and the customers of which the union was inducing not to do business with it, was a person within the meaning of the Act, and could file charges before the NLRB for the secondary boycott

⁵² 116 N.L.R.B. 507, 39 L.R.R.M. 1082 (1956).

⁵³ See 341 U.S. 665, 28 L.R.R.M. 2105 (1951), *affirming*, 183 F.2d 21, 26 L.R.R.M. 2295 (5th Cir. 1950).

⁵⁴ Local 25, Int'l Brotherhood of Teamsters, AFL v. New York, N.H.&H.R.R., 250 U.S. 155, 37 L.R.R.M. 2271 (1956).

activities against its customers, who were employers. The Board in *W. T. Smith Lumber Co.* followed and relied upon another of its recent decisions, *Paper Makers Importing Co.*,⁵⁵ which held that inducement and encouragement of employees of a secondary municipal corporation operating docks and employing dock workers is not a violation of the Act since a municipal corporation is not an employer within the meaning of the Act, and its employees are not employees within the Act.

Although *W. T. Smith Lumber Co.* and *Paper Makers Importing Co.* hold that inducement of employees of a municipal corporation or a railroad is not and cannot be unlawful under the Act, a secondary boycott does exist where the union has a primary dispute with another employer and the railroad or municipality is the secondary employer, if employees of the contractors working for the political subdivision are unlawfully induced to strike to force the political subdivision to stop doing business with a contractor.⁵⁶

Also, while the *New York, New Haven* case holds that an American employer excluded from the Act may nevertheless file charges, a recent Supreme Court case, *Benz v. Compania Naviera Hidalgo*,⁵⁷ holds that a foreign corporation employing foreign seamen may not file charges or utilize the processes of the Board.

THE "HOT CARGO" CLAUSES

No problem in the interpretation of Section 8(b)(4) presents more difficulty than the so-called "hot cargo" cases.

These cases arise where the union or an ally union which is engaged in dispute with a primary employer has entered into a previous contract with a secondary employer, the contract containing various provisions reserving to the union or the employee the right not to handle goods or perform services for another employer with whom the union has a dispute, or providing that it shall not be cause for discharge for an employee to refuse to handle such goods, or reserving to employees the right not to work on non-union made articles, or, even, provisions that the employer will not subcontract work to non-union employers. These clauses are extremely varied and complex. The doctrine covering hot cargoes originated in the *Conway Express* case⁵⁸ where two of the secondary employers had contracts providing in substance that the union reserved the right

⁵⁵ 116 N.L.R.B. 267, 38 L.R.R.M. 1228 (1956).

⁵⁶ 117 N.L.R.B. No. 60, 39 L.R.R.M. 1250 (1957).

⁵⁷ 353 U.S. 138 (April 6, 1957).

⁵⁸ 87 N.L.R.B. 972, 25 L.R.R.M. 1202 (1949).

to refuse to handle unfair goods. The union notified its shop stewards, employees of the secondary employers, of the provisions of this contract, and in reliance thereon the employees of these employers refused to handle the hot goods from the struck employer. The secondary employers apparently acquiesced in their employees' refusal to handle the goods. The Board held:

The Act prohibits labor organizations from "forcing or requiring" participation of neutral employers in secondary boycotts by the use of certain forms of employees pressure, namely, strikes or work stoppages, either actually engaged in or induced or encouraged by the union. This section does not proscribe other means by which unions may induce employers to aid them in effectuating secondary boycotts. Much less does it prohibit employers from refusing to deal with other persons whether because they desire to assist a labor organization in the protection of its working standards or for other reasons. An employer remains free under that section of the amended Act, as always, to deal with other firms, union or non-union, as he chooses. By the same token there is nothing in the expressed provisions or underlying policies of Section 8(b)(4) which prohibits an employer and a union from voluntarily including hot cargo or struck work provisions in their collective bargaining contracts or from honoring these provisions.

The Board was thus finding that the secondary employers had consented in advance by contract to a boycott of the primary employer's goods. This reasoning was based on the proposition that it is no violation of Section 8(b)(4) for an employer at the request of a union voluntarily to agree to boycott the goods of another employer.⁵⁹ Later in *Pittsburgh Plate Glass* (No. 1),⁶⁰ where the contract provided that it would not be cause for discharge if "the employees" refused to handle unfair goods, the Board followed this theory and added another, that the refusal of the secondary employer's employees to handle freight did not constitute a refusal to perform work "in the course of their employment," as required by Section 8(b)(4), since the employer had consented to this by contract. In both of these cases the appeals actually were directed to the employees but the employers at the time acquiesced in the action of their employees. The *Conway Express* case was enforced by the second circuit which adopted the Board's theory.⁶¹ These

⁵⁹ *Arkansas Express*, 92 N.L.R.B. 255, 27 L.R.R.M. 1070 (1950); *Lewis Karlton, d/b/a Consolidation Frame Co.*, 91 N.L.R.B. 1295, 27 L.R.R.M. 1008 (1950); *Sealright Pacific, Inc.*, 82 N.L.R.B. 271, 23 L.R.R.M. 1572 (1949).

⁶⁰ 105 N.L.R.B. 740, 32 L.R.R.M. 1350 (1953). (Not the same case as in notes 32, 41 and 49, *supra*.)

⁶¹ *Rabouin, d/b/a Conway's Express v. NLRB*, 195 F.2d 906, 29 L.R.R.M. 2617 (2d Cir. 1952).

two decisions were followed by two United States District Courts.⁶²

This apparently was the settled law from 1949 until December 1954, when the Board had before it the *McAllister Transfer* case.⁶³ Chairman Farmer and Members Murdock, Peterson, Rogers and Beeson participated. It was a classic secondary boycott situation where, pursuant to a dispute for recognition with McAllister, the Teamsters Union persuaded the employees of three secondary freight lines to refuse to handle the freight. The article in the agreements originally provided that it would not be cause for discharge for the employees to refuse to handle such freight, but this was subsequently amended after the *Conway Express* decision to provide that the union and its members individually and collectively reserved the right to refuse to handle such freight. Here, however, the *McAllister* case is lightly distinguishable for, despite the contract, the secondary employers posted a notice to the effect that they had no dispute with any labor organization and that their obligations as common carriers required them to handle all freight tendered to them, and directing their employees to handle the freight. The employees continued to refuse and were not disciplined by the lines. The three member majority of the Board split on their reasons for finding a violation despite the so-called hot cargo provisions of the contract. Members Beeson and Rogers' opinion held that such clauses were contrary to the public policy of the Act and that employers could not in advance waive by contract a violation of the public policy implicit in the provisions of Section 8(b)(4).

This opinion did not consider or discuss the settled doctrine that an employer may voluntarily agree to boycott the goods of another employer. These two members specifically overruled both the *Conway* and *Pittsburgh Plate Glass* (No. 1) doctrines. Chairman Farmer, the third member of the majority, took an entirely different view, reaffirming his faith in the theory that such contracts were legal under the accepted interpretation which permits an employer voluntarily to agree to boycott another employer at the time of the appearance of the dispute and reaffirming both the *Conway* and *Pittsburgh Plate Glass* doctrines; he held that such clauses were not against public policy, but found on the facts that the union had affirmatively induced and encouraged its members to refuse

⁶² *Madden v. Local 442, Int'l Brotherhood of Teamsters, AFL*, 114 F. Supp. 932, 32 L.R.R.M. 2722 (W.D. Wis. 1953); *NLRB v. Lodge*, 850, AFL Machinists, — F. Supp. — (E.D. Okla. October 16, 1954).

⁶³ 110 N.L.R.B. 1769, 35 L.R.R.M. 1281 (1954).

to handle McAllister's freight despite the secondary employers' instructions to them. Chairman Farmer said:

Thus we are confronted here with a case in which all of the elements of a violation, inducement, refusal and unlawful objective have been proven. The fact that one or more of these essential elements might have been lacking had the secondary employer adhered to his contract undertaken to boycott hot cargo is not enough to bring this case within the holding of the Conway decision.

To these opinions combined to make the majority decision there were vigorous dissents by Members Murdock and Peterson, citing the legislative history showing that there was nothing that prevented such a waiver if it might be so construed, and again emphasizing that Section 8(b)(4) allows the secondary employer to refrain from dealing with any person he chooses; they also pointed out that the Board was in effect approving a breach by one party of a valid agreement which subjects the other party to a finding that it has violated the Act.

It should be observed that the Board has never said that a union may strike to obtain such a contract, and in their dissent Members Murdock and Peterson argue that such an agreement is not unlawful and against public policy "so long as the employer's consent is won by means short of an actual strike or refusal to work or the unlawful inducement of his employees to strike or refuse to work which are the sole influences from which the employer is protected by Section 8(b)(4)."

On the same day as the *McAllister* decision, the Board rendered its decision in the *Reilly Cartage Co.* case.⁶⁴ The latter involved a question of subcontracting where the union contract contained a provision in which the employer agreed that in subcontracting any work or any part of it, either to individual owners or other subcontractors, that any subcontractor would comply with the articles of the agreement, and further requiring all employees to become and remain members of the union. When the cartage companies subcontracted to a non-union contractor the union notified its members employed by the cartage companies. The members refused to handle the freight for the subcontractor. Although the Trial Examiner had found that the activities of the union were protected by the *Conway* and *Pittsburgh Plate Glass* (No. 1) doctrine, the same majority of the Board, Chairman Farmer and Members Rogers and Beeson, found a secondary boycott to exist. Chairman Farmer so

⁶⁴ 110 N.L.R.B. 1742, 35 L.R.R.M. 1292 (1954).

found because the contract provision was markedly different and neither contained a reservation of any rights to the union nor protected the employee members against discharge for refusal to perform the work, and for the further reason that the carrier's conduct did not *demonstrate consent to the action on the part of the union*. Members Rogers and Beeson agreed for their reasons in *McAllister*. Again Members Murdock and Peterson vigorously dissented, both on their *McAllister* (dissent) theory and on the factual findings.

The situation remained in this somewhat confused state with two members (Beeson and Rogers) definitely committed to the theory that hot cargo clauses were contrary to public policy, two members (Murdock and Peterson) feeling just as strongly that they were permissible and valid matters of voluntary contract and with Chairman Farmer casting his vote on a factual basis as to whether or not the employer (despite the contract) had actually acquiesced at the time of the occurrence of the secondary boycott, until the Board's decision in *Sand Door & Plywood Co.*⁶⁵ By this time Board Member Beeson had been replaced by Member Leedom, who is presently the Chairman of the Board. Again the facts are important. The contractors Havestard and Jenson were using non-union doors made by the Paine Company in Wisconsin. The union business agent approached the contractors' foreman, who was also a member of the Carpenters Union and, as the Board says, "told" the foreman to quit hanging the doors. The agent also told the superintendent that he had orders from the district council to stop the men from hanging the doors and that he would have pulled them (the men) off the day before. The contract provided that "working men shall not be required to handle non-union materials."

Chairman Farmer with the concurrence of Member Leedom held that unions which are parties to such a contract may not approach the *employees* of the contracting employer and induce and encourage them to refuse to handle the goods, and that such conduct constitutes inducement or encouragement of employees to engage in concerted refusal to handle goods for an object proscribed by Section 8(b)(4), no less than it does in the absence of such agreements. Specifically this opinion held:

The employer, but not the union may instruct his employees to cease handling goods sought to be boycotted. Until the employer instructs his employees they need not handle the unfair products, a strike or concerted refusal to handle such goods constitutes a strike or concerted

⁶⁵ 113 N.L.R.B. 1210, 36 L.R.R.M. 1478 (1955).

refusal *in the course of employment to handle the goods* within the meaning of Section 8(b) (4) (A). (Emphasis added.)

This opinion specifically overrules *Pittsburgh Plate Glass* (No. 1) on this point but reaffirms the basic holdings of *Conway Express* and *Pittsburgh Plate Glass* (No. 1). Member Rogers, who this time was the third man making up the majority (whereas Chairman Farmer had been the necessary third man in *McAllister and Reilly Cartage*) again concurred in the majority result upon his theory that hot cargo clauses are against public policy. Of particular interest in this case was the handling of the fact that the approach had been made by the business agent to the *foreman*. The Board found that the foreman was a member of the Carpenters Union and further that he was at a low level of management and not normally an official who would be approached for the purpose of enforcing a contract or on matters of company policy; and that this foreman ordered the employees under him to stop handling the doors, thereby inducing and encouraging them to engage in a concerted refusal. The Board found that the foreman was the agent of the union since he had acted on orders of the business agent, and in this connection it emphasized the fact that the foreman as a member of the union was bound by the by-laws and rules of the union (which provided that no member should handle, install or erect any non-union material) and that he was responsible for the enforcement of this trade rule, under penalty of fine and expulsion. This use of constitutions and by-laws of the local organizations, though not specifically referred to in the contract, is a device frequently employed by the Board to sustain findings of inducement and encouragement. The finding that the foreman becomes the agent of the union and not of the employer because of the provisions of the by-laws is a two-edged sword that leaves the unions practically defenseless, particularly in the building and construction trades where a man frequently moves from journeyman to foreman and even up to superintendent, depending upon the size of the job, yet desires to retain his membership in the organization for the purpose of obtaining work in slack times and on other jobs. This can be combatted only by either completely eliminating provisions in constitutions and by-laws which were originally designed to protect the job opportunities of the members or by specific contract provisions that the member upon promotion will become the agent of the employer and inactive in his membership in the organization.

Even such provisions may not satisfactorily pass the present Board's scrutiny.

Members Peterson and Murdock again dissented vigorously, particularly opposing the finding that the foreman was acting solely as the agent of the union rather than at least as a joint agent of the union and the employer, and the conclusion that employees obeying instructions of their foreman were being induced to engage in a strike or concerted activity by the union.

The case has another unique feature since it demonstrates the dual standards of jurisdiction. Although Members Rogers and Beeson in the *McAllister* case made this statement:

It is no slight matter for the Board to write in a double standard in the Act, one for the employers and another for unions as the so-called Conway doctrine has done

Member Rogers does not hesitate to apply a double standard for asserting jurisdiction. In this case (*Sand Door & Plywood*) it was clear that the Board would not assert jurisdiction over the contractors involved in the dispute and consequently would not have entertained charges or petitions filed by the union. Nevertheless, in order to accumulate sufficient commerce to entertain the secondary boycott complaint *against* the union the Board took into consideration the *outflow* from the State of Wisconsin of the Paine Lumber Company, the manufacturer of the doors, although Paine was not actively involved in the dispute and though the inflow of materials into California, where the dispute was active, was not sufficient to enable the Board to assert jurisdiction. Again the two dissenters Murdock and Peterson vigorously contested this double standard.⁶⁶

This series of cases seems to demonstrate clearly that the interpretation of permissible conduct under the statute depends in large measure on the philosophy of the membership of the Board at the time the case comes before it.

The case to complete this cycle is *American Iron & Machine Works Co.*,⁶⁷ decided in March 1956. The Teamsters Union, in aid of a strike by the Machinists at the American Iron Company, in reliance on a typical hot cargo provision in their contracts induced the employees of various carriers not to handle the freight of the American Iron Company. One carrier acquiesced in this refusal but four did not. By the time this case reached the Board, Member

⁶⁶ Also see, *General Mill Work Corp.*, 113 N.L.R.B. 1084, 36 L.R.R.M. 1484 (1955).

⁶⁷ 115 N.L.R.B. 800, 37 L.R.R.M. 1395 (1956).

Bean had replaced Chairman Farmer and Member Leedom had become Chairman. The case demonstrates a further extension of the doctrine first announced by Chairman Farmer in his opinion in *McAllister*, viz., that direct inducement of employees is unlawful despite the contract provisions where the employer has not acquiesced at the time of the secondary boycott. The opinion of Chairman Leedom and Bean holds that any direct appeal by a union to employees, urging them to engage in a strike or concerted refusal to handle a product, is proscribed by the Act when one of the objects set forth in Section 8(b)(4)(A) is present. Thus, while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by an appeal to the employer to honor his contract, the Act does in the opinion of the Board

preclude enforcement of such clauses by appeals to employees and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle the hot goods.

They go on to hold:

We do not find it necessary to reply as (the Trial Examiner) did on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight with an object of forcing the secondary employers to cease dealing with American Iron.

Member Rogers again concurs on his public policy theory, and Murdock and Peterson (dissenting) point out that the Board had then completely reversed the *Conway* and *Pittsburgh Plate Glass* (No. 1) cases. The dissenters are sharply critical of the split majority which holds that such a contract is valid under the Act but on the other hand that such an agreement is not a defense to an appeal by the union to employees not to handle goods. They say:

We can only read this decision as meaning that an agreement is not an agreement whenever the actual facts contemplated by the agreement arise.

and again:

What good is a contract that deprives one of the parties of a benefit derived through collective bargaining unless the other party unilaterally decides to honor his contract rather than to breach it. Indeed the language of this decision is so broad that even if an employer reaffirms its adherence to an existing contract the union may not under penalty of violating Section 8(b)(4)(A) notify its members that the contract applies.

They point out that under the *American Iron* decision, if carried to its logical conclusion, officials of the union could not discuss the hot cargo clause at membership meetings or send copies of the contract to union members on whose behalf it was signed.

Hot Cargo Clauses Before the Courts

It took more than five years after the *Conway* case for another court to consider this doctrine. The Board's decision in *Sand Door & Plywood Co.* was recently enforced by the Ninth Circuit Court of Appeals (on February 12, 1957).⁶⁸ The court's decision does not thoroughly discuss the basic problem and does not consider the argument that since an employer may voluntarily agree to boycott another employer he may do so by contract, nor does it discuss the second circuit's *Conway* case.⁶⁹ The court quotes with approval from the later Board case of *American Iron & Machine Works* and from the Rogers and Beeson opinion in *McAllister* that hot cargo clauses were against public policy as if this was the majority view in that case, without noting that actually the required majority in *McAllister* was made up only by virtue of Farmer's decision on the factual issue. There also appears this curious statement in the court's opinion in *Sand Door & Plywood Co.*:

An employer may well remain free to decide as a matter of business policy whether he will accede to a union's boycott demands or if he has already agreed to do so whether he will fulfill his agreement. An entirely different situation, however, is presented under 8(b)(4)(A) of the Act when it is sought to influence the employer's decision by a work stoppage of his employees.

Thus the court seems to endorse the principle that an employer need not live up to his agreements. However, when treating the question as to whether the foreman was the agent of the union or the employer, the court decided that the foreman was irrevocably bound by his obligation as a member (although this also is a matter of contract) and that no contract between the union and his employer would interfere with this relationship. Since the doctrine of these cases involves a legal theory of the application of the Act, as well as factual consideration, the decision leaves much to be desired in its failure to discuss the *Conway* case or the vigorous dissents in *Conway*, *American Iron & Machine Works* and *McAllister*.

On April 10, 1957, the Sixth Circuit enforced the *General Mill*

⁶⁸ 31 CCH Lab. Cas. par. 70,504.

⁶⁹ 87 N.L.R.B. 972, 25 L.R.R.M. 1202 (1949). Note 59, *supra*.

Works case,⁷⁰ rendered by the Board the same day as *Sand Door & Plywood*. The *General Mill Works* case contains an excellent discussion of the hot cargo theories, the *Conway* case and all the leading cases decided by the Board, and points out the difficulty of the problem, but then decides to adopt the Board's finding that there was no hot cargo clause in the case. The court held that the Board's finding that the subcontractors themselves were members of the union and obliged to observe union working rules did not excuse a direct appeal to the employees not to work on non-union doors. Thus we are still without a clear-cut court decision on this important point. The door is now open for the Supreme Court to take the matter if it so desires.

It seems clear that under present Board decisions, even with clear hot cargo clauses, appeals may not be made to the employees but may still be made to the employer. However, if the employer does not acquiesce; this appeal may later be used as evidence of an unlawful objective if the employees subsequently refuse to handle the hot goods. As a further note of interest, in connection with hot cargo clauses involving licensed ICC carriers, an ICC Examiner has recently found, without passing on the legality of the hot cargo clauses, that a common carrier may not bargain away its obligations and duties to the public by observing such a clause in the absence of an actual picket line or a situation where the operation of the truck is impractical because violent action may cause injury. The opinion, of course, is subject to review by the ICC.⁷¹

SECTIONS 8(b)(4)(C) AND 8(b)(4)(D)

In connection with Sections 8(b)(4)(C) and 8(b)(4)(D), some recent decisions are interesting. In jurisdictional dispute cases coming under Section 8(b)(4)(D), the Board's policy has been, after issuance of the notice of hearing and the taking of evidence, routinely to find that the employer has the right to assign the work in the first instance and that his assignment of work to a particular craft or trade jurisdiction cannot be controverted. Hence any work stoppage by another disputing this is a violation of subsection (D), which, upon failure of the union to comply with the Board's order awarding the work as assigned by the employer, may result in an injunction against the labor organization.⁷²

⁷⁰ NLRB v. Local 11, Carpenters, 39 L.R.R.M. 2731 (April 10, 1957).

⁷¹ Cf. 39 L.R.R.M. 483.

⁷² Juneau Spruce Corp., 82 N.L.R.B. 650 (1949); Moore Drydock Co., 81 N.L.R.B. 1108 (1949).

In a decision rendered on March 27, 1957,⁷³ *NLRB v. Pipefitters Local*, the Third Circuit Court of Appeals severely criticized the Board for abrogating its duty under Section 8(b)(4)(D), as revealed by the legislative history of the Section and by the Board's own rules and regulations, by making so limited a determination and for not actually deciding and determining the dispute itself on its merits as required by the statute. The court accused the Board of disregarding the provisions of Sections 8(b)(4)(D) and 10(k) and denied the enforcement of the Board's order.

Section 8(b)(4)(C)

Section 8(b)(4)(C) prohibits primary picketing of an employer for recognition where another union has been certified. The decisions of the Board on this point follow the subsection literally. However the Board's decisions have not handled the problem where the certified union is defunct. In a recent decision the Fifth Circuit Court of Appeals directly decides this. The court had before it a damage suit brought under Section 303. A union picketed the plant of an employer who at the time had a certified union which was then defunct and no longer functioning as bargaining agent. The court, relying on numerous Board and court cases holding that the certification is valid until revoked, held that the picketing violated Section 303 and the companion section, Section 8(b)(4)(C), since nothing had been done prior to the picketing to disturb the certification of the certified union.⁷⁴

CONCLUSION

The recent cases clearly indicate that the once well established doctrines of *Ryan*, *Pure Oil*, *Moore Drydock* and *Conway Express*, although repeatedly court tested and approved (even in some instances by the Supreme Court of the United States) can no longer be relied on in advising clients of their rights and obligations under the Act.

The present Board seems definitely to tend toward a literal interpretation of Section 8(b)(4) and to give little if any weight to a balancing of the affirmative protections contained in Section 7 and 13.*

*NOTE: After this paper was prepared the Court of Appeals for the District of Columbia on May 9, 1957, rendered its opinion in *General Drivers Union v. NLRB*

⁷³ — F.2d —, 39 L.R.R.M. 2629 (3d Cir. 1957).

⁷⁴ *Parks v. Atlanta Printing Pressmen*, — F.2d —, 39 L.R.R.M. 2669 (5th Cir. April 5, 1957).

(*American Iron & Machine Works Co.* case), *supra*. A divided court followed the *Conway* case in holding that the Teamsters Union which held the contract with the secondary employers had a right to make direct appeal to the employees not to handle the hot goods. It discusses and disagrees with the *Sand Door & Plywood Co.* case, Judges Bastian and Washington forming the majority on this point and Judge Prettyman dissenting. However, Judges Bastian and Prettyman, forming the majority, decided that the Machinists Union which was involved in the dispute with the primary employer and which did not hold such a contract with the secondary employers could not take advantage of the Teamsters' contract and had no right to appeal to the secondary employees not to handle the hot cargo; to this portion of the opinion, Judge Washington dissented.

The way is now clearly set for the Supreme Court to settle the conflicts between the Second Circuit (*Conway*) and its ally the Circuit Court for the District of Columbia (*American Iron & Machine Works*), on the one hand, and the decision of the Ninth Circuit (*Sand Door and Plywood*), on the other.

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