THE CHANGING LEGAL STATUS OF THE "HOT CARGO" TYPE OF SECONDARY BOYCOTT

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CHAPTER I

INTRODUCTION

The purpose of this thesis is to investigate the changing legal status of so-called "hot cargo" clauses by examining cases which have arisen under Section 8, Subsection (b), Paragraph (4) (A) of the Labor Management Relations Act of 1947. This Act amended the Wagner Act of 1935 and changed both the form and the spirit of federal labor law in certain specific areas.

The problem with which we are concerned results from the intention of the Taft-Hartley Act to federalize labor law within wide limitations in regard to boycotts. Specifically, we are concerned with Section 8 (b) (4) (A), which is commonly referred to as the boycott provision of the Act; this section is the source of the changing legal status. Further, we shall be concerned with the National Labor Relations Board's construction of this section in regard to "hot cargo" cases arising from complaints by employers of unfair labor practices on the part of unions. All cases to be considered have resulted from charges of unfair labor practices thus excluding from consideration any other section of the Act.

The word boycott is not easily defined. This has been true because the courts have refused to accept a common definition of the term, and further have employed

the term as a repository into which is promiscuously dropped all union activities that are difficult to classify otherwise.[1]

Historically speaking, the boycott was not concerned with the accomplishment of a demand but was an act of vengeance, social punishment. With the passage of time, the boycott became associated with the collective withdrawal of the labor force from an employer. It then became necessary to distinguish the boycott from the strike; the strike being defined as a concerted refusal to work for an employer and the boycott as a deliberate refusal to buy from him.[2] The history of the boycott has been surrounded with confusion, and much of this confusion still remains; however, for the purpose of this paper, the primary boycott will be defined as the act of interferring with the market of an employer with whom a labor dispute is current and then only on the part of his own workers. The secondary boycott, with which this thesis is concerned, may be defined as:

> the act of causing, or attempting to cause, by inducement, pursuasion, or coercion, third persons to the labor dispute, primarily suppliers and customers of an employer, to refrain from business dealing with the adversary employer.[3]

Secondary boycotts as defined above are illegal under Section 8 (b) (4) (A) of the amended Act. With the consent of the employers, however, unions have participated in

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[1]Stephen J. Mueller, Labor Law and Legislation (2d ed., South-Western Publishing Co.), p. 253.

[2]Leo Wolman, The Boycott in American Trade Unions (John Hopkins Press, 1916), Chapter I.

[3]Mueller, pp. 253, 254.

secondary boycotts. This consent written into the contract is known as a "hot cargo" clause. By including a "hot cargo" clause in the contract, an employer allows the union and its members employed by him to refuse to handle goods and equipment of an employer with whom a dispute is current. Since the wording of Section 8 (b) (4) (A) states that it shall be illegal for a union to induce or encourage employers to engage in secondary action, the Board has held in certain instances that consent in advance cannot be construed to mean induced or encouraged. Therefore, this thesis is concerned with the changing legal status of the "hot cargo" clause as a valid defense for participating in secondary action under Section 8 (b) (4) (A) of the amended Act.

This study of the legality of secondary boycotts under the Taft-Hartley Act is limited to those cases in which a "hot cargo" clause was a part of the contract. It should be recognized that this eliminates from consideration cases of a similar nature in which no "hot cargo" clause existed.

The procedure to be employed in this thesis will be as follows:

Chapter II. Taft-Hartley and the Boycott

1. To investigate briefly the legal status of the boycott prior to the Taft-Hartley Act.

2. To discuss the intention of the Congress in relation to Secion 8 (b) (4) (A).

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4. To discuss the position of the NLRB in the Sand Door Case.

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CHAPTER II

TAFT-HARTLEY AND THE BOYCOTT

In this chapter we shall first review the legal status of the boycott before 1947 to provide a better understanding of the intent of the Congress in Section 8 (b) (4) (A). A satisfactory explanation of the intent of the Congress should provide the basis for a sound analysis of the legality of "hot cargo" clauses. Next, since Section 8 (b) (4) (A) outlaws only secondary action and not primary action, it becomes of particular importance to distinguish between the two according to the interpretation of the NLRB. This examination of the cases in which the NLRB distinguishes between primary and secondary activity should establish the necessary background for evaluating "hot cargo" clauses.

The legal status of the boycott (both primary and secondary) prior to the enactment of the Taft-Hartley bill into law in 1947 results principally from decisions of the courts as applied to boycott cases under the antitrust laws and the Norris-LaGuardia Act of 1932.

It is generally conceded that peaceful primary action is legal under the antitrust laws since it involves no pressure on third persons; however, the legality of secondary pressure is questionable. Section 20 of the Clayton Act attempted to remove the action of labor unions from the realm of court

jurisdiction, but the Act was held in the Duplex Printing Case and the Bedford Cut Stone Case to be inapplicable to such labor pressures when used in connection with secondary boycotts.

However, in 1941, after the enactment of the Norris-LaGuardia Act, the court /Supreme Court/ held in the Hutcheson Case that that Act had extended the protection of Section 20 of the Clayton Act to secondary boycotts, so that the ordinary, peacefully conducted secondary boycott was clothed with the same immunity from antitrust proceedings, civil and criminal, as peaceful primary action.[4]

This apparent ineffectiveness of the antitrust laws as a protective bar against secondary boycotts may have been a reason for the enactment of Section 8 (b) (4) (A) and Section 303 of the Taft-Hartley Act. Section 303 authorizes private suits against unions to recover damages resulting from secondary boycotts, jurisdictional strikes, and strikes in derogation of the bargaining rights of unions certified by the NLRB.

The first problem to be considered in relation to Section 8 (b) (4) (A) of the Taft-Hartley Act is: what were the intentions of the Congress? The clearest indication of intent outside the section itself is found in a statement made by the late Senator Robert Taft who sponsored the bill in the United States Senate.

The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. Subsequently, under 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

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[4]Sidney Sherman, "Boycotts, Strikes and Damages," Labor Law Journal (September, 1954), p. 618.

/Section 8 (b) (4)/ does is to reverse the effect of the law as to secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.[5]

It seems clear from this statement by the late Senator Taft that the intent of the Senate Committee was to reverse federal policy regarding secondary boycotts by making them an unfair labor practice under Section 8 (b) (4) (A).

What the Congress intended and what Section 8 (b) (4) (A) of the Taft-Hartley Act states has become a center of controversy since 1947. A clearer understanding of the problem may be gained from examining the language of the section.

> Sec. 8, (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 self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.[6]

Before considering the NLRB's interpretation of what constitutes secondary action under 8 (b) (4) (A), it may be helpful to state as clearly as possible the meaning of this extremely complex section of the Act. According to the former

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[5]United State Congress, Congressional Record (Washington, 1947), XCIII, 4323.

[6]United States Congress, United States Statutes at Large (Washington, 1947), LXI, 140-141.

chairman of the NLRB, Dr. Harry A. Millis, the meaning of Section 8 (b) (4) (A) may be stated in "everyday language" as follows:

> In general, unions were forbidden to engage in or to induce employees to engage in strikes or concerted refusal to work or boycott--refusal to use, process, or handle certain goods or materials--when an object is one of the four prohibited by clauses A through D. The first prohibited object is forcing or requiring an employer or self-employed person to join any organization or, more important, forcing or requiring anyone to cease using the products of, or doing business with, any other person--thus banning 'secondary boycotts,' very broadly defined. The second is to force recognition by any other employer of any union unless certified, thus preventing pressure in behalf of what may be a minority union. The related (C) bans pressure against any employer to recognize a particular union when another has been certified as the representative of the employees in an appropriate unit. And (D), the fourth, bans economic pressure in a jurisdictional dispute . . . Very significant was the substitution by the Conference Committee of the clause 'where an object thereof is' for the words in the Senate bill 'for the purpose of' in Section 8 (b) (4).[7]

In explanation of this, Dr. Millis states that:

> The words 'the purpose' had sometimes been interpreted as indicating 'primary' or main objective. The substitution of 'an object' has the technical effect of saying 'where any one of the objectives' is proscribed. This was expected to 'button up' the proscriptions and leave no loopholes.[8]

In regard to this point, the late Senator Taft said:

> Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful.[9]

Although Section 8 (b) (4) (A) does not mention secondary

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[7]Millis and Brown, From the Wagner Act to Taft-Hartley (University of Chicago Press, 1950), p. 456.

[8]Ibid., p. 457.

[9]United States Congress, Congressional Record (Washington, 1947), XCIII, 7001.

boycotts, the term is defined in general terms in Paragraph (4). This general wording of the law raises the problem of determining what constitutes secondary action. As an example of secondary action, let us consider three separate companies, A, B, and C who operate competing intercity transportation lines. Suppose that company A's employees are on strike as a result of A's refusal to employ a union representative to supervise deliveries at the local city docks. Further, let us assume that company A's employees establish peaceful picket lines at all city docks to give notice of company A's unfavorable reception of the employees' demand. As a result of these picket lines, suppose that the employees of B and C refuse to handle freight destined for company A. This example illustrates the most common characteristics of secondary action. They are: (1) The union's action inducing the employees of companies B and C to refuse to handle company A's products, which places (2) indirect pressure on company A to look more favorably upon their employees' demands.

Such secondary activity, however, which severs normal freight relations between A and the companies B and C, is not necessarily unlawful even if it is determined that B and C are neutral and not allies of company A. Whether or not such action is unlawful depends upon the rulings of the NLRB and the courts. As the precise meaning of these terms is not apparent from reviewing legislative history, it has been necessary for the NLRB and the courts to develop their meaning

on a case by case basis.[10] An important factor which has aided in "distinguishing between primary and secondary action is the locus of such action with relation to the premises of the primary employer, on the one hand, and the neutral, on the other hand."[11] In consideration of this problem it may be helpful to divide the cases as follows:

1. At the separate premises of the primary employer.
2. At the separate premises of the neutral.
3. At the premises common to both.
4. At the roving premises in transportation.[12]

At the separate primary premises -- where the strike or activity is at a plant devoted solely to the operations of the primary employer, the NLRB has held such action to be primary and beyond the reach of Section 8 (b) (4) (A). In the International Rice Milling Case the Board held that the union did not violate Section 8 (b) (4) (A) of the NLRA by attempting to induce two drivers of a customer's truck not to enter the employer's mill during a strike, as the union's activities arose out of primary picketing at the employer's mill and were carried out in the immediate vicinity of the mill.[13]

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[10]Sidney Sherman, "Primary Strikes and Secondary Boycotts," Labor Law Journal (April, 1954), p. 246.

[11]Ibid.

[12]Ibid.

[13]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington) LXXXIV, 360.

At the separate neutral premises -- where the neutral alone occupies the struck or picketed premises, and the union appeals to the neutral's employees at those premises to engage in a concerted refusal to perform services there, with an object of interrupting the neutral's dealings with the primary employer, the Board and the courts have had little difficulty in finding a violation of 8 (b) (4) (A). However, no violation will be found if any of the foregoing factors is absent.[14]

For example, in the Interborough News Company Case, the Board held that the union did not violate Section 8 (b) (4) (A) of the NLRA by approaching employees of a neutral newspaper publisher while at their employer's place of business and asking them not to make deliveries to the newsstands of the primary employer. The Board pointed out that the union "invited" action only at the premises of the primary employer.[15]

Further, the Board has held in a series of cases involving unfair lists that even though the union's appeal contemplates that it will be acted on at the neutral premises, it is not a violation if it is communicated to the employees elsewhere.

However, this does not mean that the union may go to the premises of a neutral employer who is doing business with the 'unfair' primary employer and there tell the neutral's employees that the primary employer is unfair.[16]

At the common premises -- the problem of distinguishing between primary and secondary action becomes more complex

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[14]Sherman, "Primary Strikes and Secondary Boycotts," pp. 246, 247.

[15]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington) XC, 2135.

[16]Sherman, p. 247.

when the questioned activity occurs at premises shared by the primary and neutral employers. In the Pure Oil Case the Board held that the union did not violate Section 8 (b) (4) (A) of the Act by inducing employees of a neutral oil refinery not to handle oil at the dock of a primary employer which the neutral was licensed to use. Although the union's primary pressure on an employer may also have a secondary effect, this act does not convert lawful primary action into unlawful secondary action.[17]

However, in the building trades industry, the Board has held a similar situation to be a violation of the Act. In the case of NLRB v. Denver Building and Construction Trades the Board and the courts held that where the primary employer is a general contractor or subcontractor on a construction job, pressures exerted through strikes or picketing upon a neutral contractor or subcontractor on the same job to be a violation of Section 8 (b) (4) (A).[18]

With respect to these conflicting common situs decisions, it is not easy to find in the language of the Board's opinions any rational reasons for condemning one and not the other. The Board has since, however, in a series of cases involving a form of common-premise picketing peculiar to the transportation industry, announced a new approach. This approach,

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[17]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington) LXXXIV, 315-318.

[18]Ibid., LXXXVII, 755-764.

which is termed the roving situs doctrine, has since been extended to the construction industry as well as all picketing at a joint situs.

The roving situs in transportation -- the Board first encountered the problem of a roving common situs in the Schultz Case. The facts of the case are as follows:

> A trucking company replaced its drivers, members of the respondent union, with members of another union. While the company had a terminal in New Jersey, it had no physical contracts there with its customers who were dispersed over a large, multistate area, with a strong representation in New York City. The union chose to picket the company's trucks while they loaded at the premises of customers in New York City. The picketing was limited to the immediate vicinity of the trucks and to the duration of their sojourn at the customers' premises.[19]

The petition on behalf of the company charged that the action was unlawful in the presence of neutral customers, the object of such being to disrupt dealings between the company and its customers. The respondent union contended that the action was primary because the trucks themselves were a part of the premises of the primary employer. The Board found no violation of the Act holding that the action was limited in time and area and that the picketing of the trucks was the only effective means of bringing direct pressure on the company.[20]

Since the Schultz Case the Board has refined its roving

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[19]Sherman, "Primary Strikes and Secondary Boycotts," p. 249.

[20]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington) LXXXIV, 315-318.

situs doctrine into a complete set of principles. The first complete statement of these principles appeared in the Moore Dry Dock Case; and since this case they have been referred to as the Moore Dry Dock formula. In the Moore Dry Dock Case a seamen's union was picketing a neutral shipyard which was repairing a ship belonging to the primary employer. The actual picketing was not alongside the ship itself but was at the entrance of the yard; this was because the yard owner had refused to admit the pickets inside the yard. The Board, under these circumstances, found no violation of the Act and held that the action involved was "reasonably close" to the primary situs.

Perfecting its doctrine in this case, the Board held that it would tolerate such action only if the following conditions were met:[21]

(1) The picketing is strictly limited to times when the situs of 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 situs;
(3) the picketing is limited to places reasonably close to the location of the situs; and
(4) the picketing discloses clearly that the dispute is with the primary employer.[22]

In regard to transportation cases it should be noted that all of these conditions presuppose that the picketed vehicle is the situs of the dispute.

In summarizing the Board's position with regard to secondary action, a close look at the situation suggests that,

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[21]Ibid., XCII, 547-557.

[22]Ibid., 549.

although the Board continues to use the Moore Dry Dock formula as basic criteria, such things as the permanence of the neutral's attachment to the premises and the impact of picketing on the neutral have influenced the Board's decision. In cases where the injury to neutrals exceeds that of possible injury to the union, the Board has held the action to be secondary. However, where it was evident that to outlaw such action would render the union impotent with little or no injury to the neutrals involved, the Board found this action to be primary.

If this analysis of the Board's position is correct, it would suggest that the Board's decisions to a great extent represent ad hoc judgments as to the relative importance of the interests at hand. However, unless the Board changes its basic position, the area of permissable primary action as stated in the Moore Dry Dock formula is not likely to be changed.[23]

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[23]Sherman, "Primary Strikes and Secondary Boycotts," pp. 251-253.

CHAPTER III

DECISIONS OF THE NLRB PERTAINING TO "HOT CARGO" CLAUSES

In order to present a clearer picture of the Board's handling of "hot cargo" cases, it may be helpful to describe briefly the procedure employed in handling a charge of an unfair labor practice.

Before the Board can act on an unfair labor practice charge, it is necessary for a private party, such as an employer, employee, or union, to file unfair labor practice charges in the proper regional office of the Board.

> The form of complaint calls for the name and address of the person charged with committing the unfair labor practice and a description of the allegedly wrongful conduct. The written charge must be notarized or include a statement by the person who signs it that the contents are true and correct to the best of his knowledge.[24]

After the charge has been made and docketed in the Board's regional office, notice is given to the party complained of. The parties are then asked to make a written statement of their respective positions, and the facts of the charge are further explored by the office's field staff. In this first stage the case may come to an end through withdrawal, dismissal, or settlement. If, however, the parties fail to compose

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[24]McNaughton and Lazar, Industrial Relations and the Government (McGraw & Hill, 1954), p. 190.

their differences through informal procedures, and if there appears to be substance to the charges, the regional director will take the formal action of issuing a complaint and publishing notice of a hearing. Even after the formal action has begun, the parties are given every opportunity to dispose of the case by adjustment in compliance with the law.

The actual hearing of the case is usually held in the region in which the charge arose and is conducted by the trial examiner (comparable to a judge) from the Board's staff in Washington. The prosecutor in the case, whose job it is to show proof of violations of the unfair labor section of the Act, is an attorney from the Board's regional office. The conduct of the hearing resembles closely that of an actual court case, and the rules of evidence which govern are those which apply in Federal District Courts.

At the close of the hearing, the trial examiner drafts his decision in the case which includes findings as to fact, reasons for his determinations, and recommendations. If the parties to the case comply with the recommendations made, "the case is terminated; but if the parties or the prosecuting counsel wish to take issue with the intermediate report, they may appeal to the Board in Washington."[25] Usually the Board grants the parties the right to appear and present oral argument.

If the Board determines that the exceptions filed to the

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[25]Ibid., p. 194.

trial examiner's report have merit, then the Board will reconsider the entire case. This review of the case's record

> includes the report and recommendations of the trial examiner, the exceptions filed, the entire transcript of the hearing, and in addition the written briefs, exhibits, and arguments. In this review . . . each member of the Board has the help of his legal assistants, 'who function in the same manner as law clerks do for judges.' According to the Board it 'does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations.'[26]

After the Board has reached its decision in the case, it will issue an order requiring the offending party to cease and desist from unlawful practices and requiring him to take positive steps to correct these wrongful actions. However, this may not be the final step if the offending party fails to comply with the Board's decision. In this case the Board "is required to petition the proper Federal court for enforcement of its decree; or the court may be asked by the person against whom the order is made to review the order and set it aside."[27]

After reviewing the case, the court may either uphold or reverse the Board's decision "in whole or in part, or return the case to the Board for additional proceedings."[28] After the Federal court has issued its decree:

> either party to the case may seek review of the court's decree from the United States Supreme Court. The regional office of the Board conducts an investigation to determine if the court decree has been complied with; if there has not been compliance, the Board may petition the court to hold the offender

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[26]Ibid., p. 195.

[27]Ibid.

[28]Ibid.

in contempt.[29]

As stated in the introductory chapter, the principal purpose is to review the changing legal status of the "hot cargo" type of secondary boycott under Section 8 (b) (4) (A) of the Taft-Hartley Act on a case by case basis. A "hot cargo" clause is a provision in the contract in which the employer agrees to give the union members employed by him the right to refuse to handle goods or equipment when supplied by another employer whom the union regards as unfair. The reason for including this "hot cargo" provision is that Section 8 (b) (4) (A) of the Taft-Hartley Act outlaws secondary boycotts. The parties by agreeing freely without inducement or coercion beforehand to a "hot cargo" clause, hope to avoid the Board's censure for participating in an illegal secondary boycott as proscribed by the Act. Actually, the parties to the agreement are attempting to make legal through a contract what is illegal under the law.

Conway's Express Case

The first case to come to the attention of the Board in which a "hot cargo" clause was a part of the contract after the passage of the Taft-Hartley Act in 1947 was the Conway's Express Case. The full title of this case was International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America v. Henery V. Rabouin doing business as Conway's

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[29]Ibid.

Express. Hereafter, for reasons of simplicity, cases cited will be referred to by the company name since they may be found in the index of the Decisions and Orders of the National Labor Relations Board in this manner.

The case of Conway's Express resulted from a charge of an unfair labor practice by the employer Conway's against Local 294 of the Teamsters Union. The parties to the Conway's Case were the primary employer (Conway's), the respondent against whom the charge was filed (Local 294), the secondary employers who had signed a "hot cargo" clause with Local 294 (Central Warehouse, Oppenheimer and McEwan, and Palmer Lines), and Middle Atlantic Transportation Inc. to whom Conway's had leased its equipment. After conducting a hearing, the trial examiner on June 9, 1948, issued his report, finding that the respondent (Local 294) had engaged in certain unfair labor practices and recommended that it cease and desist therefrom and take affirmative action. Thereafter, Local 294 and the general counsel filed exceptions to the report and supporting briefs. "On May 17, 1949, the Board at Washington, D. C., heard oral argument in which Local 294, Montgomery Ward & Co., and the general counsel participated; Conway's Express did not appear."[30]

The facts of the Conway's Express Case which are pertinent to this study are as follows:

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[30]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington), LXXXVII, 972.

> The employer /Conway's/ operates a motor truck transportation business. From August, 1946 to September, 1947, and in addition to the operation of its business, the employer leased pieces of its trucking equipment to Middle Atlantic Transportation, Inc. The terms of the lease agreement fully established a joint employer relationship. Drivers operating the employer's equipment were dependent for work upon the lease of this equipment. Their pay, although received from Atlantic, was deducted from the amount paid to the employer by Atlantic. The employer /Conway's/ was an equal party to the rules and regulations governing the operation of the drivers of that equipment.
>
> In January, 1947, a dispute arose over this lease agreement. The union demanded that members of Local 294 in good standing be placed on the leased trucks. The employer /Conway's/ refused. The dispute was submitted to the employer association which had negotiated a closed-shop agreement on behalf of the employer. In settlement of the dispute the employer /Conway's/ agreed that it would discontinue the lease arrangement and dispose of the equipment in 30 days. Despite this agreement, the employer neither discontinued the operation or disposed of the equipment.
>
> In September, 1947, the union called a strike of the employer's drivers.[31]

The trial examiner held and the Board agreed that the union did not violate the secondary boycott provision of the Act since the objective of the strike was to compel the primary employer (Conway's) to remedy what the union thought was a violation of the employer's contractual obligation to hire only union drivers. In so ruling, the Board disregarded the general counsel's contention that:

> although the union made no express demand that Conway's discontinue doing business with Atlantic, that demand was inherent in its request that Conway's cease lending /sic - leasing/ its equipment to Atlantic without union drivers.[32]

The secondary boycott problem in the Conway's Express Case arises from an agreement by three secondary employers,

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[31]The Bureau of National Affairs, Inc., Labor Relations Reference Manual (Washington), XXV, 1205.

[32]Ibid.

Central Warehouse, Oppenheimer and McEwan, and Palmer Lines, with the respondent union (Local 294),

entered into before the effective date of the amended Act, which reserved to the respondent the right to refuse to handle goods or freight of any employer involved in a labor dispute. In reliance on this contractual provision, respondent's shop stewards at each of the three establishments ceased handling Conway's freight upon being advised by the respondent's office that the Conway's strike was 'on,' and each of the employers, apparently mindful of its contractual obligation, acquiesced in its employees' refusal to handle the 'hot cargo.'[33]

In relation to these facts, the Board held that it was evident

that the three secondary employers, in effect, consented in advance to boycott Conway's. As they consented, their employees' failure to deliver freight to or accept freight from Conway's trucks was not in the literal sense a 'strike' or 'refusal' to work, nor was any concerted insubordination contemplated by the respondent [Local 294] when it caused the employees to exercise their contract privilege. In the circumstances, Section 8 (b) (4) (A) cannot apply, unless we accept the general counsel's argument that the 'hot cargo' contracts were repugnant to the policy of the amended Act and therefore invalid after the effective date of the 1947 amendments. But we find no merit in this argument. Section 8 (b) (4) (A) of the Act prohibits labor organizations from 'forcing or requiring' the participation of neutral employers in secondary boycotts by the use of certain forms of employee 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 a union 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 any other reason. And further . . . there is nothing in the express provisions or underlying policy of Section 8 (b) (4) (A) 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.[34]

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[33]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington), LXXXVII, 981.

[34]Ibid., 981-983.

The dissenting opinion of Member Reynolds in the Conway's Case takes issue with the majority opinion on two specific points with regard to the "hot cargo" issue. Member Reynolds first agrees with the majority of the Board by dismissing the "complaint as to Palmer Lines /secondary employer/, as there is no evidence of unlawful inducement in this respect by the respondent."[35] However, with respect to Central Warehouse and Oppenheimer and McEwan (secondary employers), he concludes the evidence to be otherwise. Member Reynolds points out that in both instances

> when a Conway's truck called at either of the employer's premises, the shopsteward phoned the respondent /Local 294/ to ascertain whether the strike at Conway's was still in effect. Upon being informed that it was, the shopsteward and other employees refused to move the freight on or off Conway's trucks.[36]

With regard to the foregoing, Member Reynolds concludes that in each instance the action of the employees was induced by the respondent (Local 294) "with the object of forcing Central Warehouse and Oppenheimer and McEwan /secondary employers/ to cease doing business with Conway's, thereby violating Section 8 (b) (4) (A) of the Act."[37]

The second point of the dissenting opinion deals with the respondent's argument that its conduct was protected as it had reserved the right in its contracts with Central Warehouse and Oppenheimer and McEwan (secondary employers) to

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[35]Ibid., 994.

[36]Ibid., 994, 995.

[37]Ibid., 995.

refuse to handle freight intended for Conway's trucks. In considering this point, Member Reynolds states that in effect the respondent (Local 294) is contending "that by reserving this right to itself, the contracts contained provisions which amounted to an agreement in advance to engage in a secondary boycott."[38] The Act, however, according to Member Reynolds:

> unequivocally proscribes secondary activity on the part of the unions. To the extent that these contract provisions authorize such activity, they are repugnant to the basic public policies of the Act. As the Board in the public interest is charged with the duty of preventing unfair labor practices, contracts which are repugnant to the Act and which conflict with this duty of the Board must obviously yield. Unions or employers cannot nullify the provisions of the Act which circumscribes their activities by inducing each other, or employees, to agree by contract in advance to waive their respective rights under the Act.[39]

Regarding this last point Member Reynolds cites several cases, the Duffy Silk Company, Rutland Court Owners, Inc., and the J. I. Case Company as examples of instances in which the Board has refused to give effect to contracts, otherwise valid, which were incompatible with provisions of the Act.[40] Member Reynolds seems to be suggesting that the Board is creating a double standard by giving effect to "hot cargo" clauses which according to his interpretation are incompatible with the Act.

The majority opinion in the case of Conway's Express has since become known as the Conway's doctrine. The legal

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[38]Ibid.

[39]Ibid.

[40]Ibid.

status of the "hot cargo" type of secondary boycott under the Conway's doctrine was as follows: (1) In cases where a secondary boycott was clearly evident if the bargaining agreement involved contained a "hot cargo" clause, the secondary boycott was not in violation of the Act, and (2) either party to the contract could enforce the terms of the agreement without such action being proscribed by the Act.

The next step in tracing the changing legal status of the "hot cargo" type of secondary boycott will be to construct the Board's application of the Conway's doctrine to cases in which secondary boycotting was evident and where a "hot cargo" clause was part of the contract.

Pittsburgh Plate Glass Company Case

The first illustration of this appeared in the Pittsburgh Plate Glass Co. Case. The parties to the Pittsburgh Case were the primary employer (Pittsburgh Plate and Glass Co.), the respondent against whom the unfair labor charge was filed (Local 135) and the secondary freight carriers who had signed a "hot cargo" clause with Local 135 (Bowser Truck Lines, Interstate Motor Freight, and I R C & D Motor Freight). On March 24, 1953, the trial examiner issued his report wherein he found that the respondent (Local 135) had not engaged in an unfair labor practice as charged and recommended that the complaint be dismissed. "Thereafter, the general counsel filed exceptions to the report and a supporting brief."[41]

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[41]Ibid., CV, 740.

The Board reviewed the trial examiner's report and found that no prejudicial error was committed and adopted the trial examiner's report with some clarification.

The facts of this case pertinent to this study are as follows:

> Following a strike by Teamster, Local No. 716, sister local of the respondent /Local 135/, against Building Contractors Association of Indianapolis, Inc., of which Pittsburgh /the primary employer/ was a member, a settlement was reached on June 7, 1952. However, a concededly lawful picket line was maintained sporadically at Pittsburgh because it withdrew bargaining authorization from the Association and did not adhere to the settlement until late September 1952. During the period May-September 1952, employees of various trucking carriers /secondary employers/ refused to handle Pittsburgh freight at the terminals. All but one of the carriers whose services Pittsburgh sought to utilize operated under both the 'Central States Area Over-The-Road Freight Agreement' and the 'Indiana State Cartage Agreement' covering distance and local hauls, respectively. . . . Under the heading of the 'Protection of Rights' both the 'Indiana Cartage Agreement' and the 'Over-The-Road Agreement' contain the following clause:
>
> 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.
>
> 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, whether parties of 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; and such goods or equipment shall 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.
>
> The union agrees that, in the event the employer becomes involved in a controversy with any other union, the union will do all in its power to help effect a fair settlement.
>
> It is understood that in the event the decision of the NLRB in the Conway's Case is sustained or prevails on appeal to the higher federal courts, this article will be renegotiated and rewritten to provide the union with the maximum of protection afforded by such decision.[42]

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[42]Ibid., 740, 741, 747.

The explanation to the union members and the action taken by them with respect to the foregoing "hot cargo" clause is of particular importance in this case. (This problem of determining which party to the agreement invoked the "hot cargo" clause becomes of increasing importance in later Board decisions in "hot cargo" cases.)

The testimony in the Pittsburgh Plate Glass Case with respect to this point is as follows:

San Soucie, president of the respondent /Local 135/, testified:

'I told the employers that under the terms and provisions of our agreement, the men as individuals did not have to handle strike bound merchandise or unfair goods and if they refused to handle it, that the company was in no position to do anything about it!'

Ogle, terminal manager of Bowser Truck Lines /secondary employer/, stated that he knew Cook, respondent's steward at Bowser, refused to handle Pittsburgh freight because of the 'unfair goods' provision of the contract . . . Dininger, respondent's business agent, testified that Kewitt, terminal manager of Interstate Motor Freight /secondary employer/, asked him if he could explain what the men's rights were in connection with their refusal to handle Pittsburgh freight. Dininger testified further that 'I read the article off ('protection of rights'), and he (Kewitt) said, 'well of course according to that', it was his (Kewitt's) opinion, 'according to that, the men had a right to refuse it . . .'

Lammert, the respondent's business agent, stated that at union meetings San Soucie referred to the union agreements in answer to questions about Pittsburgh freight at the same time informing the members that 'the men had the right . . . to follow their own feelings . . .!

Lynch, respondent's steward at I R C & D Motor Freight /secondary employer/, at which terminal the employees refused to handle Pittsburgh freight, admitted that he had requested Lammert to inform him 'if there was a chance to start refusing (Pittsburgh) freight again' and that Lammert gave him 'a hint and I knew what I was going to do.' Lynch testified further:

> Q. /General Counsel/ Well, what did you tell (the men) if anything about this Pittsburgh Plate freight, after you talked with Mr. Lammert?
>
> A. 'Well, I go back and tell them that we have the right as individuals, to refuse to handle any unfair goods and all my men in the barn are union men, and they just wouldn't handle it.'

* * * *

> Q. And did you tell them that you hoped they wouldn't have anything to do with that?
> A. I say, 'you guys can do as you dammed please, I'm not going to handle any of it.' I said, 'even if your mother works over there, you can't do anything to benefit her or anything. You got to work on your own or you're going to get in the grease in this kind of trouble.'[43]

In view of this testimony and the record of the case as a whole, the Board found that the respondent (Local 135) had engaged in, and by its instructions "induced and encouraged the employees of the various trucking carriers /secondary employers/ to engage in a concerted refusal to handle Pittsburgh freight."[44]

After reconsidering the Conway's Case and its "protection of rights" clause, the Board held that the "protection of rights" clause in this case is in all material respects similar to the "hot cargo" contracts involved in Conway's Express. With respect to the action of the respondent (Local 135) the Board concluded that:

> it cannot be said, therefore, that by causing the employees to exercise their contractual privilege, the respondent induced a concerted refusal to work in the course of employment with an object of forcing any employer to cease doing business with any other person in violation of Section 8 (b) (4) (A).[45]

In the Pittsburgh Plate Glass Case, the Board has carefully reconsidered the underlying principles of the Conway's doctrine in the light of the arguments of the general counsel

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[43]Ibid., 741, 742.

[44]Ibid., 743.

[45]Ibid., 744.

and finds no reason to depart from them, holding that "hot cargo" clauses are valid and that either party to the agreement may invoke the terms of the contract.

The McAllister Transfer, Inc. Case

The parties to the McAllister Case were the primary employer (McAllister Transfer Inc.), the respondent against whom the charge was filed (Local 554), and the secondary employers who had signed a "hot cargo" clause with Local 554 (Union Freightways, Watson Bros. Transportation Co., and Red Ball Transfer Co.). On July 8, 1953, the trial examiner issued his report "recommending that the complaint be dismissed in its entirety. Thereafter, exceptions and briefs were filed by the general counsel and the charging party."[46] The Board reviewed the trial examiner's report without finding prejudicial error and adopted the trial examiner's report only insofar as it was consistent with the Board's decision.

The facts of this case pertinent to this study are as follows:

> McAllister Transfer, Inc. interlines freight with Union Freightways at Omaha, and with Watson Bros. Transportation Company and Red Ball Transfer Company at Lincoln, Nebraska. 'Interlining' of freight means receiving freight from interstate motor carriers for delivery to its destination, or delivering freight to such carriers for further transportation. Freightways, Watson, and Red Ball /secondary employers/ have collective bargaining contracts with local unions of the Teamsters covering groups of dock workers and over-the-road drivers. The 'Iowa-Nebraska Motor Freight Cartage Agreement,' as originally negotiated, provided in relevant part:

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[46]Ibid., CX, 1769.

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, 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 . . .

There shall be a record understanding that, in the event the decision of the National Labor Relations Board in the Conway's Case is sustained or prevails to the higher Federal Courts, this article will be renegotiated and rewritten to provide the Union with the maximum of protection afforded by such decision.

After the court decision in the Conway's Express Case was issued on March 24, 1952, Article IX of this agreement was revised by the deletion of the paragraph in parenthesis, quoted above, and the addition of the following sentence:

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, walkouts or lock-outs exist.

On Feb. 4, 1953, the president of Teamsters Local 554 [the respondent], accompanied by the local's business agent and a representative of Local No. 784, called upon McAllister's general manager. Local No. 554's president requested recognition of the Teamsters and submitted proposed contracts. The contracts were discussed in some detail although the general manager stated that he did not have authority to execute a contract on behalf of McAllister. In the course of this conference, Local No. 554's president told McAllister's general manager that he would give McAllister a week or so and that if McAllister did not sign the contracts it would be 'shut off' from interlining freight.

On Feb. 12, 1953, Local No. 554's president told a McAllister truck driver that on the next day McAllister would be 'shut off' from interlining freight with other local carriers. On the same day, Local No. 554's business agent telephoned Freightways' general manager and told him that McAllister was being 'shut off' from interlined freight.

On Feb. 13, 1953, two employees of Freightways [secondary employer] who were members of Local No. 554 ceased

notifying McAllister that freight had been received for transportation by McAllister. One employee testified that the Teamsters' business agent had called at the office and told several employees including himself that McAllister was having labor trouble and was 'N. G.' When the employee asked what he should do with the freight for McAllister, the general manager told him to make certain that it did not get into the hands of another carrier. A Freightways' freight checker testified that he refused to accept shipments for McAllister because under the terms of the cartage agreement he was not obligated to handle unfair merchandise.

On Feb. 16, 1953, Freightways posted the following notice to its employees:

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.

However, the two employees of Freightways continued to disregard this notice. Freightways neither rescinded the notice nor disciplined these employees. Except for a few shipments which were handled by supervisors, Freightways' business with McAllister was suspended. About the same time, similar situations developed at Watson and Red Ball /secondary employers/.

At a union meeting held prior to February 8, 1953, the secretary-treasurer and business manager of Local No. 608 explained to the members of the desirability of getting non-union members organized. He told the members that the Teamsters had met with McAllister and discussed the signing of a contract, that under the contract it was no violation of the contract if they refused to handle 'unfair goods' and that they would not be discharged if they refused to handle such goods.

A few days later, this representative of Local No. 608 telephoned Watson's dock foreman and told him that McAllister would be 'shut off' from interlined freight. Watson posted a notice like the one posted by Freightways, but the interlining of freight between Watson and McAllister remained suspended.

The same situation prevailed at Red Ball.[47]

A careful reading of the foregoing facts will reveal

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[47]The Bureau of National Affairs, Inc., Labor Relations Reference Manual, XXXV, 1282-1284.

that this case differs somewhat from the Conway's and Pittsburgh Plate Glass cases. In the McAllister Case the union was attempting to enforce a "hot cargo" clause against the will of the secondary employers and for the purpose of placing pressure on McAllister to sign a collective bargaining agreement which contained a "hot cargo" clause.

In considering these points the Board first reviewed the legislative history of Section 8 (b) (4) (A) finding, surprisingly enough in view of the Conway's decision, that "Congress declared a public policy against all secondary boycotts, without distinction as to type or kind."[48] In light of this newly discovered evidence, the Board found it to be

> significant that Congress spoke in unmistakable terms of the protection of 'the public welfare which is inextricably involved' in such disputes, and pointedly characterized the Board as 'acting in the public interest and not in the vindication of private rights.'[49]

After reevaluating the intent of the Congress, the Board reviewed its past policy with respect to its handling of employer unfair labor practices. The Board states:

> It seems plain to us that if we are to administer the Act fairly, we cannot permit an exception to this firmly established policy to persist in the so-called 'hot cargo' cases. The same policy that has prevailed throughout the years with respect to employer unfair labor practices should continue to be in effect with respect to union unfair labor practices. As it is clear that employers cannot by agreements evade the statutory provisions, so it should be clear that unions cannot do likewise. To permit an obvious device such as the 'hot cargo' clause to nullify the provisions

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[48]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington), CX, 1777.

[49]Ibid., 1778.

outlawing secondary activity on the parts of unions, is to be derelict in our duty to enforce the Act as Congress wrote it, and, indeed, to write in a double standard into our administrative policy . . . Our duty, as we see it, requires that we reverse the Conway's doctrine, and hold that contract clauses of the character here in issue do not constitute a valid defense to a complaint alleging a violation of Section 8 (b) (4) (A) and (B) of the Act.[50]

The decision of the Board in the McAllister Case, however, should not be interpreted to mean that all "hot cargo" clauses are hereafter invalid. In order to clarify the position of the Board regarding "hot cargo" clauses in the McAllister Case, we must consider the decisions of the individual Board members.

The decision in the McAllister Case was by a 3-2 vote. The members of the majority were Rodgers, Beeson, and Chairman Farmer, and the dissenting members were Murdock and Peterson. Members Rodgers and Beeson were of the opinion that "hot cargo" clauses did not constitute a valid defense of illegal secondary action as proscribed by the Act. Although voting with members Rodgers and Beeson, Chairman Farmer found the "hot cargo" clause to be a valid defense of secondary action. Chairman Farmer casts his vote with the majority because he believes that the facts of the McAllister Case distinguish it from the Conway's Case and the Pittsburgh Plate Glass Case. Specifically, he states:

My majority colleagues say, as I construe their position, that a 'hot cargo' clause is at war with the secondary boycott provisions of Section 8 (b) (4) (A), and therefore must be struck down as a matter of public policy. This view,

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[50]Ibid., 1781, 1782.

however, glosses over the plain language of the Statute which makes it an essential element of an unlawful boycott that the union 'engage in,' or induce or encourage . . . employees . . . to engage in a strike or a concerted refusal to handle the goods of another employer. I must assume that my majority colleagues agree with the decisions which hold that there is no violation of Section 8 (b) (4) (A) where an employer, at the request of a union unaccompanied by threats or direct appeals to employers, voluntarily agrees to boycott the goods of another employer with whom the union has a primary dispute. In that situation there is admittedly no violation since there has been no strike and no inducement of employees . . . While this may be characterized as a loophole in the Statute, it is for the Congress, not the Board, to close it, if conduct of this character is thought to endanger the public welfare.[51] (Members Rodgers and Beeson do not, however, agree with this; they find no loophole in the Act.)

In other words Chairman Farmer is saying that the respondent union (Local 554) in the McAllister Case violated the Act because it not only induced and encouraged employees of the secondary employers to take part in a secondary boycott but did so against the employers' will. In the Conway's and Pittsburgh Plate Glass decisions, the secondary employers willingly complied with the provisions of the "hot cargo" clauses which, according to Chairman Farmer, is a valid defense of secondary action.

The dissenting Members Murdock and Peterson continue to hold to the Conway's doctrine. Regarding the public interest, they conclude:

that when Congress referred to the public's interest in regulating secondary boycott provisions, it was not speaking in terms of the public interest at large or in a vacuum, but as it was directly related to the specific activities under consideration.[52]

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[51]Ibid., 1788.

[52]Ibid., 1793.

In relation to the rights of secondary employers' employees, Members Murdock and Peterson refer to the Board's decision in the Pittsburgh Plate Glass Case. In the Pittsburgh Case the Board found that the secondary employees' refusal to handle Pittsburgh's freight was not 'in the course of . . . employment' within the meaning of Section 8 (b) (4) (A), for that employment as defined by the contracts excluded from the required job duties work on 'unfair goods.'[53] (The majority feels that this is an unnecessary construction of the Act.)

Finally, with respect to the actual contract, Members Murdock and Peterson state:

we are not at all convinced that where an employer has in fact, repudiated a 'hot contract' the Board should countenance such conduct. If a 'hot cargo' contract is valid -- and the Board and courts, as we have indicated, have said that it is -- we question whether the Board should approve a breach by one party which subjects the other party to a finding that the latter has violated the Act.[54]

The exact legal status of the "hot cargo" type of secondary boycott at this point seems to be highly questionable. Relying on the Board's decision in the McAllister Case, we find that "hot cargo" clauses are valid defense of secondary action if the secondary employer consents willingly to the provisions of the contract. If the secondary employer remains neutral and if the union succeeds in inducing his employees to engage in a secondary boycott, does this constitute a violation of the Act? The McAllister decision would seem to indicate that it does.

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[53]Ibid., 1791.

[54]Ibid., CX, 1798.

Sand Door and Plywood Co. Case

The first test of the Board's reformulation of the Conway's doctrine according to the McAllister decision was in the Sand Door and Plywood Case of December 13, 1954. The parties to the Sand Door Case were the charging party who supplied Paine doors (Sand Door and Plywood Co.), the respondent against whom the charge was filed (Local 1976), and the secondary employer who had signed a "hot cargo" clause with Local 1976 (Havstad & Jensen). The facts of this case pertinent to this study are:

> As the trial examiner found, on the morning of August 17, 1954 Fleisher, the respondent's /Local 1796/ business agent, approached Steinert, Havstad & Jensen's /secondary employer/ foreman, at the building site, and told Steinert to stop hanging the Paine doors until it could be determined whether they were union or non-union. Steinert told several laborers, who were under his supervision . . . to stop distributing the doors . . . because they were not union made. Steinert was a member of a constituent Local of the Respondents /Local 1796/ District Council. Under its by-laws and trade rules, Steinert was vested with the authority and responsibility to enforce the District Council's by-laws and trade rules. Among the rules was one barring union members from handling non-union materials.
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> It is true that as a foreman as well as a union agent, Steinert's status at first glance appears equivocal. However, it is clear that Fleisher, who, as the trial examiner found, was an agent of both the Respondent District Council and the Respondent Local, approached Steinert not as a representative of management but as an instrumentality of the respondents through whom the by-laws could be enforced. Thus, Fleisher did not ask Steinert to stop the door hanging, but, in Steinert's words, Fleisher 'told me that we'd have to quit hanging the doors.' (Emphasis supplied.) Also, when, shortly thereafter, Superintendent Nicholson asked Fleisher why he stopped the men from hanging the doors, as credibly testified to by Nicholson, Fleisher replied that 'he had orders from the District Council that morning to stop them from hanging the doors,' that he 'could have pulled them off yesterday but . . . waited until today.' Significantly too, after giving his instructions to Steinert, Fleisher stood by to insure that Steinert passed these instructions on to employees. Furthermore Fleisher did not approach Steinert

to gain enforcement of their contract which the respondents claim relieved the carpenters of the duty of installing the Paine doors, for at no time in his conversations with Steinert or Nicholson was the contract mentioned by Fleisher. We note in this connection that Steinert, as a foreman, was at the lowest level of management and not an official who would be approached as to matters of company policy and contract compliance. As there is, in addition, no indication of the extent of Steinert's authority to act for his employer, we conclude that Fleisher approached Steinert in Steinert's capacity as agent of the Respondent District Council and that Steinert acted in such capacity in ordering the laborers and carpenter Agronovich to stop handling the doors, thereby inducing or encouraging them to engage in a concerted refusal to handle the Paine doors.[54]

Relying on these facts the Board found by a 3-2 majority that the union had violated Section 8 (b) (4) (A) of the amended NLRA. Although the composition of the Board's membership had changed since the McAllister decision, the vote split was almost the same as in the McAllister Case. The members of the majority were Rodgers, Leedom and Chairman Farmer with Members Murdock and Peterson dissenting.

Regarding the individual opinions of the majority, Member Rodgers holds to his position in the McAllister Case that "hot cargo" clauses are invalid; while Member Leedom concurs with Chairman Farmer's position in the McAllister Case. Chairman Farmer does not give an individual decision in this case aside from inferring that he retains his position in the McAllister Case that "hot cargo" clauses are valid if the secondary employer willingly accedes to the union's action. This is interpreted to mean that if the union induces the employees to engage in a secondary boycott

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[54]Ibid., CXIII, 1212, 1213.

through someone other than a bonafide representative of management, such action is a violation of the Act.

Member Murdock's dissenting opinion is principally concerned with the position taken by Chairman Farmer and Member Leedom. In reviewing their position he states:

> First they agree that the inducement of employers to cease doing business with other employers is not unlawful under Section 8 (b) (4) (A). They then concede that what an employer may be induced to do he may be induced in advance to do by the execution of a contract freeing his employees from the duty of handling non-union material during the term of the contract. Notwithstanding these findings, they thereupon take the position that the union may not approach the employees it represents and for whose benefit the contract was made to notify them that their contract reserves to them the right not to handle non-union material. Such notification, they find, induces these employees to engage in a strike, despite their employer's advance permission granting them the right to refrain from performing work. These conclusions, in my opinion, cannot logically stand together. A contract does not consist of words on paper. It is a binding agreement between the contracting parties that requires them to behave toward each other in a specific manner under a given set of circumstances, present or future . . . The decision of Chairman Farmer and Member Leedom encourages employers to violate their lawful agreements with labor organizations.[55]

In consideration of Member Murdock's dissenting remarks, it is agreed that the position of Chairman Farmer contradicts itself but not for the reasons cited by Member Murdock. A close reading of Section 8 (b) (4) (A) will reveal that a part of the contradiction results from the wording of that section. In seeking to outlaw secondary boycotts, the Congress did not consider the possibility of contracts which would, by taking advantage of the words induce and encourage in the Act, give validity to what the Congress intended to

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[55]Ibid., 1223, 1224.

invalidate. A "hot cargo" clause which the parties consent to in advance of possible secondary action cannot be said to result from inducement and encouragement by the union. If "hot cargo" clauses are valid, then the rights created by such a clause also should be honored. If, however, the public interest is to be given priority over that of individual or private interests under the law, then "hot cargo" clauses should fall by the wayside. Finally, with respect to Member Murdock's charge that Chairman Farmer's position will cause employers to violate lawful agreements, this would seem to be true only if employers were assured that the Board would vindicate such action as in "hot cargo" cases.

In the remaining "hot cargo" cases, occurring between the Sand Door decision in December of 1954 and July 1, 1957, the Board has held to its position in the Sand Door Case. This position was that "hot cargo" clauses were valid only if the secondary employer, as the result of the union's invitation, agreed to encourage his employees to engage in a secondary boycott. If the union encouraged the employees to honor their contract privileges, "hot cargo" clauses would be found no defense.

In this study we shall consider the remaining cases only insofar as they served to clarify the Board's position.

In the case of Carpenters Union v. General Millwork Corporation (August 26, 1955), the Board held that the union violated the Act by inducing its members working on a prefabricated housing site not to install prehung doors; the

object of such conduct being (1) to force carpentry subcontractors to cease using the doors, (2) to force the general contractor to cease using such doors for inclusion in a prefabricated housing "package," and (3) to force the prefabricating company to cease doing business with the manufacturers of prehung doors.

Regarding the inducement of employees, the Board found that the union business agent's statement to two union stewards on a construction that certain prehung doors are non-union constituted inducement within the meaning of the Act. Specifically, if the statement had been directed to a single steward, it would have constituted inducement of concerted action within the meaning of the Act since several other union members were working with the steward.

With respect to the "hot cargo" clause, the Board held that the union members' refusal to install prehung doors was not justified by an alleged "hot cargo" clause since (1) no contract was in effect during the period involved, (2) the contractors and subcontractors were not bound by the alleged contract, and (3) the alleged "hot cargo" clause merely provided for the installation of conventional doors and did not authorize a refusal to handle prehung doors.[56]

In the case of Woodworkers Union v. Long Bell Lumber Co. (March 7, 1956), the Board held that the union did not violate Section 8 (b) (4) (A) of the amended Act where the

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[56]The Bureau of National Affairs, Inc., XXXVI, 1484.

evidence clearly indicated

> that the thrust of the union's pressure was aimed at persuading the company through its management representatives, rather than through its employees, to assist the union in its quarrel with Firchau /the primary employer/ by discontinuing the handling of Firchau logs at the Bridge Mill.[57]

(There was no dissenting opinion.)

In the case of General Drivers Union v. American Iron Co. (March 15, 1956), the Board held that the union violated the Act by inducing employees of common carriers with which the union had a "hot cargo" contract to refuse to handle freight of the primary employer with an object of forcing the carriers to cease doing business with the primary employer. Referring to the "hot cargo" clause the Board stated that:

> while Section 8 (b) (4) (A) does not forbid the execution of a 'hot cargo' clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such a clause 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.[58]

With respect to individual opinions, each Board member held to his position in the Sand Door Case. Chairman Farmer and Member Leedom held that "hot cargo" clauses are valid only if the secondary employer willingly acquiesces in the union's demands while Member Rodgers finds "hot cargo" clauses to be invalid under the Act. Members Murdock and Peterson dissent for the same reasons as previously stated in the Sand Door Case.

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[57]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington) CXV, 713.

[58]Ibid., 801.

In the case of Teamsters Union v. Ready Mixed Concrete Co. (August 8, 1956), the Board held that the union agent's instructions to secondary employees at four different job sites not to handle the primary employer's products because of the union's strike against the primary employer to be a violation of the Act. The Board found that the disclosed purpose of such inducement was to force secondary employers to cease doing business with the primary employer and to force the primary employer to bargain on a "hot cargo" clause.[59]

In the case of Teamsters Union v. Crowley Milk Company, Inc. (October 25, 1956), the Board held the union's action to be in violation of the Act because the union's act of inducement consisted of sending letters to the union stewards at the secondary employer's plants, asking them to see to it that employees of the secondary employers refused to handle the Crowley Dairy's products in accordance with the "hot cargo" provisions in the union's contract with the secondary employers. This action was carried out in the face of an order from the secondary employer directing his employees to handle the dairy's products.[60]

With respect to the individual opinions of the majority, Chairman Leedom and Member Bean hold that "hot cargo" provisions are valid only if the secondary employer willingly acquiesces in the union's demands while Member Rodgers finds

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[59]Ibid., CXVI, 467, 468.

[60]The Bureau of National Affairs, Inc., XXXIX, 1004.

"hot cargo" provisions to be invalid under the Act. (Member Murdock did not take part in the decision.)

In the case of Operating Engineers v. Industrial Painters and Sandblasters (April 19, 1957), the Board held that the union did not violate the Act by inducing one employee of a neutral employer to engage in a work stoppage. Specifically, where only one employee is involved, an appeal to refuse to work does not constitute a strike or concerted refusal by employees to work within the meaning of the Act.[61]

Although the membership of the Board has changed considerably since the Sand Door decision in December of 1954, the position of the Board with respect to the legality of "hot cargo" clauses has not changed. Chairman Leedom and Member Bean have adopted the position of former Chairman Farmer that "hot cargo" clauses are valid if the secondary employer willingly acquiesces in the union's demands while Member Rodgers continues to find "hot cargo" clauses to be invalid. Member Murdock still dissents holding to the original Conway's doctrine that "hot cargo" clauses constitute a valid defense for participating in a secondary boycott. Member Jenkins, who was only recently appointed to the Board, has not had an opportunity to voice his opinion with respect to "hot cargo" clauses. However, even if Member Jenkins agreed with Member Rodgers that "hot cargo" clauses are invalid, the Board would still find "hot cargo" clauses to be valid if the secondary employer willingly acquiesces in

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[61]Ibid., 1410.

the union's demands. This interpretation of the Board's future position with respect to "hot cargo" clauses assumes that Chairman Leedom, Member Bean, and Member Murdock will continue to hold to their position in the Sand Door Case.

CHAPTER IV

SELECTED COURT DECISIONS PERTAINING TO "HOT CARGO" CLAUSES

Court jurisdiction over an unfair labor practice may result from an appeal by one of the parties to a decision of the NLRB or from a petition by the investigating official of the Board for a temporary injunction. All of the cases to be considered in this chapter have resulted from an appeal of a decision by the Board. The Board's decision may be appealed by the parties concerned to the appropriate Federal Circuit Court of Appeals in whose circuit the case originated. The Federal Court of Appeals' decision may then be appealed by the parties concerned to the United States Supreme Court. The cases decided by the Federal Circuit Courts of Appeals which have been selected for review are the Conway's Express Case, Sand Door and Plywood Co. Case, and the American Iron Co. Case. No "hot cargo" case has come before the Supreme Court of the United States.

In both the Conway's and Sand Door cases, which represent the two principal positions of the Board on "hot cargo" clauses, the Federal Court of Appeals concerned has upheld the Board's ruling. In the American Iron Co. Case, however, the Circuit Court of Appeals, District of Columbia reversed the Board's position under the Sand Door formula that "hot

cargo" clauses are invalid if the union induces the employees to engage in a secondary boycott.

In the Conway's Case (May 17, 1949), the Board held that "hot cargo" clauses constituted a valid defense for participating in a secondary boycott. The Board's decision was appealed by the plaintiff Henery V. Rabouin to the Circuit Court of Appeals, Second Circuit (March 24, 1952). The court accepted the petition and reviewed the facts of the case.

Rabouin, in his petition to the court, contended that the union's pressure on neutral employers to stop accepting his shipments was a violation of the secondary boycott provisions of the Taft-Hartley Act. The court in considering this contention held that:

> even if the demands carried with them an implicit threat to strike, we cannot agree that they tended to induce or encourage the employees to engage in a strike or concerted refusal forcing the employer to cease doing business with another. The embargo on Rabouin's goods was the product solely of requests addressed to management or supervisory personnel . . . The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provisions relating to cargo shipped by struck employers. Consent in advance to honor a 'hot cargo' clause is not the product of the union's forcing or requiring any employer . . . to cease doing business with any other person.[62]

In the Conway's Case the Board and the court agree that consent in advance is not the product of the union's forcing or requiring the employer to acquiesce in its demands;

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[62]The National Labor Relations Board, Court Decisions Relating to the NLRA (Washington), VIII, 163, 164.

however, with respect to the inducement of employees, they differ. The Board under the Conway's doctrine held that "hot cargo" clauses constituted a valid defense for participating in a secondary boycott even if the secondary employer refused to submit to the union's demands. The court, however, finds "hot cargo" clauses to be valid only if the employer willingly acquiesces in the union's demands. Since the inducement in the Conway's Case to engage in a secondary boycott was addressed solely to management, the court upheld the Board's decision.

In the Sand Door and Plywood Co. Case (December 13, 1954), the Board reformulated the Conway's doctrine by finding "hot cargo" clauses to be valid only if the employer willingly acquiesces in the union's demands. This decision of the Board was appealed by the defendant Local 1976 of the Carpenters Union to the Circuit Court of Appeals, Ninth Circuit (February 13, 1957). The court accepted the petition and reviewed the facts of the case.

Commenting on the Board's finding that the union had violated the Act by inducing employees of Havstad & Jensen to refuse to install Paine doors, the court stated:

> As we have seen, the evidence shows that there is no serious question that Steinert, following Fleisher's instructions, caused employees of Havstad & Jensen to engage in a concerted work stoppage for the object forbidden in Section 8 (b) (4) (A).[63]

In its petition to the court, the union urged with respect

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[63]The Bureau of National Affairs, Inc., XXXIX, 2432, 2433.

to this inducement that:

If this idleness can be termed a work stoppage, it is clear that the cessation did not originate with the employees but was a direct result of managerial orders. It is also urged that Havstad & Jensen were parties to and bound by a collective bargaining agreement whereby they had previously agreed not to require workmen to handle non-union materials.[64]

Regarding this contention by the union, the court found that:

In our view, there was inducement to a concerted refusal in the statutory sense, not authorized by the contract between Havstad & Jensen and the Union. 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 Section 8 (b) (4) (A) of the Act . . . when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when the object -- clearly present here -- is . . . forcing or requiring any employer . . . to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person.[65]

Finally, in regard to the union's argument that the work stoppage was a direct result of managerial orders, the court held that this contention was based upon the "theory that Steinert, the foreman, acted solely as a representative of management when he instructed employees to cease their work on the doors."[66] As to the facts, the court found that:

Steinert was a member of Local 563 of the Union. The By-Laws and the Trade Rules of the Los Angeles County District Council of Carpenters required that he belong to the union, and that he should hire no non-union members. As foremen, he and the steward (Fleisher) were equally responsible for the enforcement of all By-Laws and Trade Rules, etc.

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[64]Ibid., 2433.

[65]Ibid.

Violators of that rule were subject to a fine of $100.00 and/or expulsion.[67]

The court reasoned from these facts that when Fleisher ordered Steinert to tell the men to stop work on the Paine doors, it was "logical to assume that he was invoking Steinert's obligations under the union's rule."[68]

Based on this reasoning the court held that although the Act does not preclude the execution of a "hot cargo" clause the union violated the Act by inducing the employees of Havstad & Jensen to refuse to install Paine doors. This position of the court regarding the validity of "hot cargo" clauses seems to be inconsistent. On one hand the court finds it to be the duty of the Board to act in the public interest while on the other hand it finds "hot cargo" clauses to be valid under certain defined conditions. If the Board is supposed to act in the public interest as the court finds that it should, then it would seem that a contract which vindicates purely private rights would be unlawful. But the court finds that the employer may willingly enter into a contract which constitutes consent in advance to engage in a secondary boycott under the Act. If the union and the employer may enter into such a contract without incurring the censure of the court, it would seem reasonable that they also could enjoy the rights granted by said contract. However, the court finds that even after the employer has signed

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[67]Ibid.

[68]Ibid.

a "hot cargo" clause he still retains the right to decide whether he will accede to the union's boycott demands, the reason for this being that the Act holds it to be unlawful to force or require any employer to engage in a secondary boycott.

In order to avoid this apparent dilemma, it seems that the court should have taken one of two possible positions. It should have either disregarded the Board's duty to protect the public interest thereby finding "hot cargo" clauses and rights under such clauses to be valid, or protect the public interest and not private rights according to the intention of the Act therein finding "hot cargo" clauses to be invalid.

In the American Iron Co. Case (March 15, 1957), the Circuit Court of Appeals, District of Columbia reversed the Board's position that "hot cargo" clauses are valid only if the employer willingly acquiesces in the union's demands. The court found that the "hot cargo" provision of the collective bargaining contract between the Teamsters Union and the Freight Carriers was not in violation of the secondary boycott provisions of Section 8 (b) (4) (A) of the amended Act.[69]

In reaching its conclusion in the American Iron Co. Case, the Board previously held that the union violated the Act by inducing employees of common carriers to cease doing business with the primary employer. Regarding the "hot cargo" clause, the Board held that while the Act does not forbid

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[69]Ibid., IL, 2047.

execution of such a clause or union appeals to the employer to honor his contract, it does preclude enforcement of such by appeals to the employees.[70]

The court in its construction of this case first agreed with the four members of the Board who had held that the "hot cargo" clause in itself was not in violation of Section 8 (b) (4) (A) of the Act. But the court disagreed with the Board's opinion "that any direct appeal to employees by a union to engage in a concerted refusal to handle is proscribed by the Act.[71] Such a ruling as this according to the court "would in practical effect render nugatory the clause itself and would leave the employees without adequate remedy."[72]

Finally, regarding the rights and duties of the parties to a "hot cargo" clause, the court held that:

> if an employer may lawfully agree that its employees will not be required to handle freight from a struck company, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a forcing or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening.[73]

This decision by the Circuit Court of Appeals, District of Columbia in the American Iron Co. Case in effect returns the "hot cargo" type of secondary boycott to its first

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[70]National Labor Relations Board, Decisions and Orders of the National Labor Relations Board (Washington), CXV, 801.

[71]The Bureau of National Affairs, Inc., IL, 2049.

[72]Ibid.

[73]Ibid., 2049, 2050.

accepted status under the Conway's doctrine. As a result of this decision, it may be said that as far as the Federal Circuit Courts of Appeals are concerned the legal status of the "hot cargo" type of secondary boycott still remains unsettled.

According to the decision of the Circuit Court of Appeals, Second Circuit in the Sand Door Case, a "hot cargo" clause will be valid only if the employer willingly acquiesces in the union's demands. The Circuit Court of Appeals, District of Columbia, however, finds "hot cargo" clauses to be a valid defense for engaging in a secondary boycott regardless of the position taken by the employer. Of these two decisions, although it disregards the duty of the Board to protect the public interest over and above purely private rights, the latter seems to be the more consistent. For if "hot cargo" clauses are found to constitute a valid defense of secondary action as proscribed by the Act, it would seem reasonable to assume that the rights granted under such clauses could be enjoyed by both parties.

CHAPTER V

SUMMARY OF THE CHANGING LEGAL STATUS

Since 1947 the NLRB and the Federal Circuit Courts of Appeals have taken two positions regarding the validity of "hot cargo" clauses as a defense for engaging in a secondary boycott proscribed by the amended NLRA. In the Conway's Express Case of May 17, 1949, the Board held that the "hot cargo" clause between the union and the secondary employers constituted a valid defense for participating in a secondary boycott. This was interpreted to mean that both parties to the agreement had the right to invoke the terms of the "hot cargo" clause. The Board's decision in the Conway's Case was upheld by the Circuit Court of Appeals, Second Circuit in March of 1952.

The second position of the Board was first developed in the McAllister Transfer Case of July 8, 1953, and later refined in the Sand Door Case of December 13, 1954. The Board's position regarding the validity of "hot cargo" clauses was changed because Farmer, the Chairman of the Board, distinguished between the facts of the Conway's Case and the McAllister Case. The Board held in the McAllister Case (with Chairman Farmer casting the deciding vote) that the Act does not preclude the existence of "hot cargo" clauses; but because of the distinguishing features of this

case, the Board found that the "hot cargo" clause did not constitute a valid defense for participating in a secondary boycott.

Since Chairman Farmer distinguished between the McAllister and Conway's cases on two points, the crucial issue of employee inducement did not come to light until the Sand Door Case. It seems to this writer that Chairman Farmer clearly indicated that he found "hot cargo" clauses to be valid only if the employer willingly acquiesces in the union's demands, but this conclusion is not unanimously held. Member Murdock at least did not think so in his dissent in the Sand Door Case.

In the Sand Door Case the Board found that the union successfully induced the employees to engage in a secondary boycott without consulting the management. In view of these facts, the Board held that although the Act does not preclude the existence of a "hot cargo" clause such a provision does not constitute a valid defense of union action inducing employees to engage in a secondary boycott without the employer's consent.

Since the Sand Door decision in December of 1954, the Board has continued to hold to its position in the Sand Door Case. This interpretation of the legality of "hot cargo" clauses is not likely to be changed by the present Board.

The Board's decision in the Sand Door Case was upheld by the Circuit Court of Appeals, Ninth Circuit in February of 1957. The Board's application of the Sand Door formula in the American Iron Co. Case was, however, reversed by the

Circuit Court of Appeals, District of Columbia in March of 1957. In this case the Board had held that the union's action of inducing and encouraging employees to engage in a secondary boycott against the employer's consent to be in violation of the Act. The court, however, found that if the Taft-Hartley Act does not preclude the existence of "hot cargo" clauses (with which the Board agrees), then the rights granted under such provisions may be validly imposed by both parties to the agreement. This means that if a "hot cargo" clause exists in the contract the union may induce the employees to do what they have the right to do with or without the consent of the employer. This is consistent with the Board's decision in the Conway's Case.

In summarizing the position of the courts with respect to the legal status of "hot cargo" clauses, it may be supposed from the foregoing cases that subsequent court decisions will take one of three possible positions: (1) "hot cargo" clauses are valid, (2) "hot cargo" clauses are valid only if the employer willingly acquiesces in the union's demands to engage in a secondary boycott, or (3) "hot cargo" clauses are invalid. This is the best solution that can be found until the Supreme Court of the United States rules on the validity of "hot cargo" clauses.

Author's Evaluation

Of the three positions suggested above, only the third, that "hot cargo" clauses are invalid, seems to meet the requirements of Section 8 (b) (4) (A) of the Taft-Hartley

Act. This opinion rests on the evidence marshaled in Chapter II to the effect that it was the intention of Congress in this Act to outlaw secondary boycotts very broadly defined, and that it is the duty of the Board to protect the public interest. The Board and the courts agree that such was the intention of Congress. Nonetheless, they have found some "hot cargo" clauses to be a valid defense for engaging in a secondary boycott. Unions and employers have thus been allowed to make valid by private contract what is supposed to be invalid under the Act. Since this is in conflict with the public interest, the author finds that the duty of the Board to protect the public interest over the vindication of private rights is sufficient ground for declaring "hot cargo" clauses invalid. As a matter of policy, we would recommend that the Congress so amend Section 8 (b) (4) (A) of the Act as to outlaw "hot cargo" clauses.

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