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Labor Law - Refusal To Handle Goods under "Hot Cargo" Clause Held No Defense to Charge of Unfair Labor Practice - Local 1976, United Brotherhood of Carpenters v. NLRB, 78 S. Ct. 1011 (1958)

DePaul College of Law

wording of the Federal Tort Claims Act would have resulted in preclusion of the defense of contributory negligence. The court, however, felt that a situation where a municipal corporation would take advantage of the Act to sue the United States and then raise a shield of municipal immunity could not have been within the contemplation of Congress when the Act was passed.

In doing so, it followed the general philosophy of construing the statute as set forth by the United States Supreme Court in *Feres v. United States:*

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.[15]

[15] 340 U.S. 135, 139 (1950).

LABOR LAW—REFUSAL TO HANDLE GOODS UNDER "HOT CARGO" CLAUSE HELD NO DEFENSE TO CHARGE OF UNFAIR LABOR PRACTICE

The Sand Door Company sold doors to a millwork contractor who delivered them to the site of a hospital construction project in Southern California. The general contractor was a party to a master labor agreement, which included its carpenters, and which stated, "workmen shall not be required to handle non-union materials." The carpenters were installing the doors when the business agent of Local 1976, International Brotherhood of Carpenters, notified the foreman that the doors were non-union and could not be hung. The foreman thereupon ordered his men to cease work. Subsequent negotiations failed to produce an agreement that would allow the doors to be installed. The Sand Door Company petitioned the NLRB[1] which ruled that the action of the business agent was a violation of Section 8 (b) (4) (a) of the Taft-Hartley Act.[2] This section provides, in substance, that it is an unfair labor practice to induce employees of a secondary employer to cease handling goods of a primary employer in

[1] Local 1976, United Brotherhood of Carpenters and Joiners of America *and* Sand Door and Plywood Co., 113 NLRB 1210 (1955).

[2] National Labor Relations Act, Section 8(b) (4) (a) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158 (b) (4) (a) (1956).

Section 8 (b) provides that, "It shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (a) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

order to force the secondary employer to cease buying, transporting, or doing business with the primary employer. The Court of Appeals, Ninth Circuit, enforced the cease and desist order. Certiorari was granted by the United States Supreme Court and the judgment of the NLRB was enforced. *Local 1976, United Brotherhood of Carpenters v. NLRB*, 78 S. Ct. 1011 (1958).

Local 1976 contended that their action was proper on the basis of a provision in the collective bargaining agreement, viz.: "workmen shall not be required to handle non-union material." Such provisions are called "hot cargo" clauses and usually provide that an employee cannot be made to handle items that are not manufactured by union employees, or if union-made are not transported, handled or stored by union employees.

The basic issue before the Supreme Court was: can a "hot cargo" provision, such as is found in the collective bargaining agreement in this case, be a defense to a charge of an unfair labor practice under Section 8(b)(4)(a) when in the absence of such a provision, the union conduct would unquestionably be a violation? This question first appeared before the NLRB some nine years ago in *In re International Brotherhood of Teamsters and Rabouin Doing Business as Conway's Express.*[13] In that case, the employer, a common carrier, leased some of his equipment to another firm, which used non-union drivers to move it. The union struck at the employer's principal terminal and further induced employees at three other firms doing business with the employer not to handle his material. The employer claimed that this violated Section 8(b)(4)(a) of the Act. But the NLRB and the United States Court of Appeals, Second Circuit, concurred in the opinion that the acts of the union were not violative of the section because of the "hot cargo" clause in the collective bargaining agreement. In effect the Court held that "hot cargo" clauses in a collective bargaining agreement constituted a defense to charges of violations of Section 8(b)(4)(a) when negotiated prior to the refusals and when acquiesced to by both parties.

In 1953, in the case of *Chauffeurs, Teamsters, Warehousemen, and Helpers Local Union No. 135 and Pittsburgh Plate Glass Co.*,[4] the union told employees not to handle "unfair goods" as provided in the labor contract. The NLRB decided that the union did not violate Section 8(b)(4)(a). Thus, the Board adhered to the ruling in the *Conway* case.

In the case of *International Brotherhood of Teamsters Local No. 554 and McAllister Transfer, Inc.*,[5] decided in 1954, the pendulum swung the

[3] 87 NLRB 972 (1949), affirmed sub nom, Rabouin v. National Labor Relations Board, 195 F.2d 906 (C.A. 2d, 1952).

[4] 105 NLRB 740 (1953).

[5] 110 NLRB 1769 (1954).

other way and the court declared that all secondary boycotts, whether accomplished under a "hot cargo" clause in a contract or not, were unlawful as violative of Section 8(b)(4)(a). In this case an organizer of a teamsters local approached the general manager of McAllister Transfer. The organizer made clear that his union would refuse to handle the company's freight if it remained non-union. Much of McAllister's business was interlined at terminals operated by other trucking firms who were all in the same business and who were parties to a labor agreement which contained a "hot cargo" clause.

A few days after the organizer's visit, employees of the interlining terminals refused to accept shipment for McAllister because they were "not obligated to handle unfair merchandise." Prior to these employee refusals, a union meeting was held in which the desirability of organizing non-union operations was stressed. Members were advised that it was within their rights to refuse to move "unfair goods." As a result of the employee refusals, the interlining firm posted a notice to its employees directing them to handle all freight entering the terminal. But, the employees did not comply and no disciplinary action was taken. Similar incidents occurred at the other interlining terminals and finally an injunction was issued restraining the boycott. The case was brought to the NLRB where the union interposed the defense of the "hot cargo" provision.

The Board, in refusing the contract as a defense, based its decision primarily on public policy saying that the statutory protection of the public interest cannot be waived by the agreement of the parties. The Board also discussed the legislative intent, stating that the policy of the Board at the time the 1947 amendments to the act were adopted was clearly and unmistakably against giving effect to contracts which thwarted the broad effects of the Act.

The Board finally and unequivocally stated:

> No amount of ingenuity, it seems to us, can change the simple fact that a "hot cargo" contract is nothing more than device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act.[6]

The Board in the intant case held that the union's conduct was clearly a violation of Section 8 (b)(4)(a) not in regard to the mere insertion of a "hot cargo" clause, but in so far as there was a direct appeal to the employees not to handle "unfair goods" even though the "hot cargo" clause apparently gives such a right. The Supreme Court in upholding the decision stated conclusively that a "hot cargo" provision in a collec-

[6] Ibid., at 1784.

tive bargaining agreement is *not* a defense to a charge of unfair labor practices, where in the absence of the "hot cargo" provision, the union conduct would unquestionably be a violation. Thus, inducement of employees which is prohibited under Section 8(b)(4)(a) in the absence of a "hot cargo" provision, is likewise prohibited when there is such a provision.[7]

From the foregoing cases, a gradual evolution of the definitive meaning of Section 8 (b) (4) (a) is seen. In the *Conway* case, it was felt that "hot cargo" contracts were fully within the law and were to be honored. The *McAllister* decision represented a complete reversal calling for an overruling of the *Conway* case and a declaration that a "hot cargo" provision is not a defense to a charge under Section 8 (b) (4) (a). In the *Sand Door* case, the Board changed its mind again by declaring the contract to be lawful, and only the appeal to employees unlawful.

Finally, the Supreme Court decided in affirmation of the *Sand Door* case that any appeal to the employees is a violation of Section 8 (b) (4) (a).

In addition, it held that, in spite of a contract, the employer is always free to make his own choice of dealing with, or refusing to deal with another concern at the time the question of boycott arises, thus giving the contract an almost nugatory effect.

[7] Local 1976, United Brotherhood of Carpenters v. NLRB, 78 S.Ct. 1011 (1958).

LEGAL ETHICS–OPERATIONS OF UNION LEGAL AID DEPARTMENT HELD ILLEGAL AND UNPROFESSIONAL

The Brotherhood of Railroad Trainmen and their regional counsel entered into an agreement whereby fees for claims, arising out of injuries to employees sustained in railroad accidents, were set at a fixed percentage, and any investigation costs, expert witness fees, medical examinations, transcript costs, and printing of appellate briefs, and department's operating costs were to be paid by the attorney out of the fixed percentage.[1] The investigation costs included a payment to an agent appointed by the union, whose responsibility it was to complete accident reports on all injuries occurring to employees in the course of employment. It was the agent's duty to contact the injured party, or his family, promulgating the

[1] Motivated by unhealthy conditions arising from economic pressure being exerted by some railroad claim-settlement agents, and the incompetency or exorbitant fees of some lawyers, in 1930 the Brotherhood established the department which, in essence, is the issue in this case. The avowed purpose of the department is to aid the injured railroad employees and their families. The department consisted of sixteen lawyers selected on a basis of their ability to adequately handle the nature of the cases generally involved and their ability to procure large settlements in personal injury cases.