

Michigan Law Review

Volume 57 | Issue 2

1958

Labor Law - Hot Cargo Clauses No Defense to Secondary Boycotts

Joel D. Tauber S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Contracts Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Joel D. Tauber S.Ed., *Labor Law - Hot Cargo Clauses No Defense to Secondary Boycotts*, 57 MICH. L. REV. 291 (1958).

Available at: <https://repository.law.umich.edu/mlr/vol57/iss2/10>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LABOR LAW—HOT CARGO CLAUSES NO DEFENSE TO SECONDARY BOYCOTTS—
In August 1954 the Sand Door & Plywood Company sold a general contractor, through a millwork contractor, certain non-union-made Paine Lumber Company doors. The union notified its members at the construc-

tion site that the doors should not be hung because of the "hot cargo" clause in their union contract.¹ After negotiations between Sand Door and the union failed, Sand Door filed charges alleging secondary boycott action by the union in violation of section 8(b)(4)(A) of the amended National Labor Relations Act.² A Board order was issued³ and enforced by the court of appeals.⁴ On certiorari to the United States Supreme Court, *held*, affirmed, three justices dissenting. Petitioners violated section 8(b)(4)(A) by encouraging their employees to refuse to handle the Paine doors in order to force the general contractor, millwork contractor, and Sand Door to cease doing business with Paine. The "hot cargo" clause is no defense to the violation. *Carpenters Union (Sand Door and Plywood Co.) v. NLRB*, 357 U.S. 93 (1958).⁵

"Hot cargo" provisions are inserted in labor contracts to permit employees of a neutral employer to refuse to handle the goods of any other employer who may be engaged in a labor controversy. Prior to this decision at least three views concerning the legality of such provisions as a defense to a charged violation of section 8(b)(4)(A) were expressed. The first view is that a "hot cargo" clause should be a valid defense. This was the view of both the Second Circuit and the District of Columbia Circuit.⁶ The strongest justification for this result is that the union is not "forcing or requiring" the neutral employer to cease doing business with the primary employer within the meaning of section 8 (b) (4) (A) since the employer by contract voluntarily agreed to such union action.⁷ A further, though weaker, argument in support of this view is that the employees are not required to handle hot cargo by contract; thus their acts are not

¹ The clause reads "workmen shall not be required to handle non-union material." Principal case at 95.

² 61 Stat. 141 (1947), 29 U.S.C. (1952) §158(b)(4)(A): "(b) It shall be an unfair labor practice for a labor organization or its agent . . . (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. . . ."

³ *Carpenters Union (Sand Door & Plywood Co.)*, 113 N.L.R.B. 1210 (1955).

⁴ *NLRB v. Local 1976, Carpenters Union*, (9th Cir. 1957) 241 F. (2d) 147.

⁵ *General Drivers Union (American Iron & Machine Works)*, 115 N.L.R.B. 800 (1956), *affd.* in part sub nom. *General Drivers Union v. NLRB*, (D.C. Cir. 1957) 247 F. (2d) 71, was also decided at this time (Nos. 273 & 324).

⁶ This view originated in *Rabouin d.b.a. Conway's Express*, 87 N.L.R.B. 972 (1949), enforced sub nom. *Rabouin v. NLRB*, (2d Cir. 1952) 195 F. (2d) 906. It was recently reaffirmed in *Milk Drivers v. NLRB*, (2d Cir. 1957) 245 F. (2d) 817, *revd.* 357 U.S. 345 (1958); *General Drivers Union v. NLRB*, (D.C. Cir. 1957) 247 F. (2d) 71, *cert. granted* 355 U.S. 808 (1957), and is currently followed by Member Murdock of the NLRB [*dissent* in *McAllister Transfer Co.*, 110 N.L.R.B. 1769 at 1790 (1954)].

⁷ *Rabouin d.b.a. Conway's Express*, note 6 *supra*.

a "strike or concerted refusal" to work as required by the statute for an unlawful secondary boycott.⁸ At the other extreme is the second view, that "hot cargo" clauses are inherently invalid⁹ and therefore cannot be used as a defense against a charged violation of section 8(b)(4)(A). This position is based on the reasoning that Congress did not intend to allow private contracts to nullify statutory rights created to protect the public and the primary employer.¹⁰ Section 7 rights generally cannot be contracted away¹¹ and when Congress meant section 8 rights to be subject to contractual modification, it specifically declared this as in section 8(a)(3).¹² Moreover, section 10(a) provides that the power of the board to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement or otherwise." The third view regarding the validity of "hot cargo" clauses represents a compromise approach which attempts to reconcile the language of section 8(b)(4)(A) with the legislative intent underlying this provision. This position, which is the holding of the principal case, is that "hot cargo" clauses cannot be used as a defense to a charged violation of section 8(b)(4)(A), although voluntary observance of a "hot cargo" clause

⁸ Rabouin d.b.a. Conway's Express, note 6 supra. Another rationale is that a union-induced refusal of secondary employees to handle the primary employer's goods is not a refusal "in the course of employment," because the "hot cargo" clause removes the handling of such goods from the course of employment. Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953). This was expressly repudiated in Carpenters Union, note 4 supra. It is also possible to argue that there can be no "inducement or encouragement" of the employees of the secondary employer when the union simply informs its members of their rights under the "hot cargo" clause. Truck Drivers Union (Genuine Parts Co.), 119 N.L.R.B. No. 53, 41 L.R.R.M. 1087 (1957); General Drivers Union, note 5 supra.

⁹ This is the view followed in the dissenting opinion of Judge Prettyman, General Drivers Union v. NLRB, note 6 supra, and in a concurring opinion of Judge Lumbard, Doud v. Milk Drivers Union, (2d Cir. 1957) 248 F. (2d) 534 at 538, as well as the concurring opinion by Member Rodgers in General Drivers Union, note 5 supra.

¹⁰ Even though there is no mention of "hot cargo" clauses, it is clear Congress meant to bar *all* secondary boycotts. Senator Taft declared during the legislative debates, ". . . under the provisions of the Norris-La Guardia Act, it became impossible to stop a secondary boycott. . . . All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. . . . We have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 1104-1109 at 1106 (1948). It seems that because of the wording in §8(b)(4)(A) voluntary secondary boycotts are allowed but this is probably due to the importance of the individual's freedom of choice in this area. For explanation of freedom of choice, see note 19 infra.

¹¹ National Licorice Co. v. NLRB, 309 U.S. 350 (1940). However, non-strike clauses are valid as the right to strike has always been limited in this manner. NLRB v. Columbian Enameling and Stamping Co., (7th Cir. 1938) 96 F. (2d) 948. The National Labor Relations Act, 61 Stat. 151 (1947), 29 U.S.C. (1952) §163 shows that §157 was not intended to affect no-strike clauses. See 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 434, 563 (1948).

¹² "Nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment. . . ." 61 Stat. 140 (1947), 29 U.S.C. (1952) §158(a)(3).

would not be a violation of the statute.¹³ This approach results in the recognition of a "hot cargo" contract which the neutral employer can apparently breach at will, although the union is left with no remedy.¹⁴ Moreover, this treatment of the clause might seemingly permit a strike for its inclusion in a collective bargaining agreement but prohibit use of the clause by the union to induce its members not to handle the "hot cargo."¹⁵ Even though this position may be open to question, it would have been difficult for the Court to adopt either of the other views in light of the current statutory language.

A holding that "hot cargo" clauses are a valid defense, as urged by the dissent in the instant case, would have ignored the legislative history of section 8(b)(4)(A)¹⁶ and allowed the secondary employer to waive a right belonging to the public and the primary employer.¹⁷ The main rationale supporting a holding of validity, that the employer had agreed voluntarily to the union action, was attacked by the majority as being unrealistic.¹⁸ This attack was based primarily upon consideration of the nature of the collective bargaining process¹⁹ and the coercive power of a large union,²⁰ despite the dissent's claim that the reasons for inclusion of a "hot cargo" clause in the union contract can only be surmised.²¹ Upholding the clause as a valid defense would also have served to put a common carrier in the unenviable position of being liable for damages²² whenever it would be

¹³ This view originated in a concurring opinion in *McAllister Transfer Co.*, 110 N.L.R.B. 1769 (1954). It was also applied in the *Carpenters Union* cases, notes 3 and 4 *supra*. Cf. *NLRB v. Local 11, United Brotherhood of Carpenters & Joiners*, (6th Cir. 1957) 242 F. (2d) 932.

¹⁴ Damages will probably not be awarded to the union as this would be indirect coercion of the employer. Cf. *Barrows v. Jackson*, 346 U.S. 249 at 254 (1953). A remedy of self-help would violate National Labor Relations Act, note 2 *supra*.

¹⁵ One possible reason for holding the clause valid but unenforceable is the protection afforded employees from being fired for refusing to work. *Douds v. Milk Dairy and Drivers*, (D.C. N.J. 1955) 133 F. Supp. 336.

¹⁶ Note 10 *supra*.

¹⁷ Majority opinion in *McAllister Transfer Co.*, note 13 *supra*. See 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 1056 (1948); Preamble to the LMRA, note 2 *supra*, "to protect the rights of the public in connection with labor disputes affecting commerce." Another interesting attack on this view can be found in Lawless, "Hot Cargo" Clauses: A Problem in Their Application to Secondary Boycotts," 15 FED. B. J. 76 (1955).

¹⁸ Principal case at 106.

¹⁹ The Court felt that the provision may have been gained by strike or threat of strike or merely as an abstract principle which is not the kind of freedom of choice contemplated by §8(b)(4)(A). The section contemplated "a freedom of choice at the time the question whether to boycott or not arises in a concrete situation. . . ." Principal case at 105.

²⁰ 42 MINN. L. REV. 502 (1958).

²¹ Principal case at 113.

²² *Galveston Truck Line v. Ada Motor Lines*, 42 L.R.R.M. 2662 (1958). The court expressly refused to rule on the validity of "hot cargo" clauses but nonetheless found the common carrier liable for breach of its duty to transport goods.

forced to breach its common law²³ and statutory²⁴ duty to provide transportation to the public upon reasonable request. On the other hand, in order to hold the clause totally invalid it would have been necessary for the Court to indulge in some questionable interpretation of the statutory language.²⁵ Of the three available approaches the one holding these clauses totally invalid is nevertheless most consistent with the LMRA as a whole, the legislative policy behind section 8(b)(4)(A), and current legal theory. As indicated, the Court in the principal case was unable to find invalidity in the language of the statute. An amendment to section 8(b)(4)(A) making "hot cargo" clauses invalid would thus definitely settle the status of such clauses in conformity with the true legislative intent.²⁶

Joel D. Tauber, S.Ed.

²³ *Aldrich v. Southern Ry. Co.*, 95 S.C. 427, 79 S.E. 316 (1913).

²⁴ 24 Stat. 380 (1887), 49 U.S.C. (1952) §§1(4), 3(1); 49 Stat. 558 (1935), 49 U.S.C. (1952) §316(b), (d).

²⁵ The statute prohibits secondary boycotts only where the union uses a certain method, "strike or concerted refusal," with a certain objective, "forcing or requiring" the secondary employer to cease doing business with the primary employer and does not, if narrowly interpreted, contemplate the situation created by "hot cargo" clauses.

²⁶ See suggested changes by President Eisenhower in his labor message to the second session of the 85th Congress, 104 CONG. REC. 646 (Jan. 23, 1958); Tower, "Secondary Boycotts, and the Taft-Hartley Act: Some Suggestions for Amendment," 21 GEO. WASH. L. REV. 547 (1953). However, Congress has twice previously refused to prohibit "hot cargo" clauses, S. 3842, 84th Cong., 2d sess., §(a)(4) (1956); S. 2989, 83d Cong., 2d sess. (1954).