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# Labor Law - LMRA - "Hot Cargo" Clause as a Defense to Secondary Boycott

Jack G. Armstrong S.Ed.
*University of Michigan Law School*

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# COMMENTS

LABOR LAW—LMRA—"HOT CARGO" CLAUSE AS A DEFENSE TO SECONDARY BOYCOTT—In *McAllister Transfer, Inc.*[1] the National Labor Relations Board decided to reconsider the question of "hot

1 110 N.L.R.B. 1769 (1954).

cargo" clauses. In this case, the Teamsters' union requested McAllister, a non-union cartage company, to recognize it as the bargaining representative of McAllister's employees, and submitted a proposed contract to the employer. When McAllister refused to recognize the Teamsters, the union announced that the company would be "shut off" from interlining freight.[2] Accordingly, the Teamsters induced those of their members who were working for three other carriers not to handle McAllister freight. Each of these other carriers was a party to a cartage agreement with the Teamsters union which contained a "hot cargo" clause. Despite this clause, each of the other carriers posted a notice directing their employees to handle all freight without discrimination.[3] However, the employees were not disciplined when they refused to heed these notices. McAllister was effectively "shut off" from interlining freight until the district court issued an injunction under section 10 (*l*) of the amended National Labor Relations Act.[4] The trial examiner found that the union action was not a violation of section 8 (b) (4) (A) of the amended NLRA,[5] on the grounds that the "hot cargo" clause in the cartage agreement provided a meritorious defense. In making this decision, the trial examiner relied on the *Conway's Express*[6] and the *Pittsburgh Plate Glass Company*[7] decisions. The National Labor Relations Board disagreed with the trial examiner and held that the Teamsters had violated section 8 (b) (4) (A). In the process, the Board wrote three separate opinions, the total effect of which was, and still is, to render the status and validity of any particular "hot cargo" clause in some doubt. It is the purpose of this comment to examine the present state of the law on this subject.

[2] "Interlining" of freight means receiving freight from interstate motor carriers for delivery to its destination, or delivering freight to such carriers for further transportation. McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1772 (1954).

[3] The notice posted by Freightways (one of the secondary carriers) read as follows: "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." The other two secondary carriers published substantially similar notices. McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1773-1774 (1954).

[4] Labor-Management Relations Act, 1947, 61 Stat. L. 149, 29 U.S.C. (1952) §160.

[5] Labor-Management Relations Act, 1947, 61 Stat. L. 141, 29 U.S.C. (1952) §158 (b) (4) (A).

[6] 87 N.L.R.B. 972 (1949), affd. Rabouin v. NLRB, (2d Cir. 1952) 195 F. (2d) 906.

[7] 105 N.L.R.B. 740 (1953).

## I. *Secondary Boycotts and "Hot Cargo" Clauses*

The term "secondary boycott" has a long and confusing history. It was so difficult to define precisely that Congress avoided its use in the final draft of the Taft-Hartley Act, despite the fact that the committee reports and floor debates all indicate that it was the "secondary boycott" which section 8 (b) (4) (A) was intended to control. A simple example will illustrate a typical secondary boycott: union *U* is attempting to organize company *R* (primary employer). In order to put additional economic pressure on *R*, it goes to the employees of company *A* (secondary employer) and induces these employees to force *A* to cease doing business with *R* until it recognizes *U*.[8]

A "hot cargo clause" is a provision in the contract between *U* and *A* (secondary employer) whereby *A* agrees that "it shall not be cause for discharge if any employee . . . refuse to handle unfair goods. . . . 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. . . ."[9] The function of these clauses is to secure permission from an employer to exert secondary pressure upon any person doing business with the employer who has, or may subsequently have, a dispute with the labor organization.

## II. *State of the Law Prior to the McAllister Case*

A. *Period Prior to the Conway Case.* It is not surprising to find that, originally, the courts were generally quite willing to enjoin secondary pressure.[10] Judicial opinion set up various tests

[8] One of the best definitions of a secondary boycott was given by Judge Learned Hand in IBEW, Local 501 v. NLRB, (2d Cir. 1950) 181 F. (2d) 34 at 37, where he said: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands."

[9] This is the language used in the cartage agreement which the trial examiner felt constituted a valid defense to a violation of §8 (b) (4) (A) in the McAllister case. McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1775 (1954). The term "unfair goods" is often used interchangeably with the term "hot cargo."

[10] CCH Lab. L. Rep., 4th ed., ¶239 at 701 (1955).

to determine the legality or illegality of such action, but the result of most of these tests was to limit union action severely.[11]

As federal laws were enacted, the situation began to change. The Sherman Act[12] was generally held to prohibit secondary boycotts when they obstructed interstate commerce.[13] The Clayton Act[14] was held not to have changed this result[15] but the Sherman Act and the Norris-LaGuardia Act,[16] as interpreted in *United States v. Hutcheson*,[17] at last made it clear that secondary action, as such, was no longer subject to federal injunction and was not unlawful under the Sherman Act. The Wagner Act,[18] of course, did not change the law as to secondary action, but the Taft-Hartley Act has had a profound effect upon it.

The legislative history of the Taft-Hartley Act indicates that Congress was aiming specifically at secondary action when it placed section 8 (b) (4) (A) in Title I of the act. The precise language used by Congress is of the utmost importance, for this section does not proscribe *only* secondary action,[19] nor does it prohibit *all* secondary action.[20] However, the exact sweep of section 8 (b) (4) (A) is beyond the scope of this comment;[21] in the subsequent discussion it is assumed that a violation of this section has occurred, but for the existence of a "hot cargo" clause.

B. *The Conway Doctrine and Its Ramifications.* In *Conway's Express* the Board recognized that a "hot cargo" clause could be a defense to a charge of violation of section 8 (b) (4) (A). Its reasoning was to the effect that the Taft-Hartley Act does not prohibit an employer from aiding a union by secondary action and, by the same token, it does not prevent him from contracting to aid, and then honoring his contract. Thus, since a "hot cargo"

11 Id. at 701-703.
12 26 Stat. L. 209 (1890), 15 U.S.C. (1952) §§1-30.
13 Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172 (1921).
14 38 Stat. L. 730 (1914), 29 U.S.C. (1952) §§52-53.
15 Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172 (1921).
16 47 Stat. L. 70 (1932), 29 U.S.C. (1952) §§101-115.
17 312 U.S. 219, 61 S.Ct. 463 (1941).
18 49 Stat. L. 449 (1935), 29 U.S.C. (1946) §§151-168.
19 NLRB v. Washington-Oregon Shingle Weavers' Dist. Council, (9th Cir. 1954) 211 F. (2d) 149.
20 See Administrative Ruling of General Counsel, Case No. 305, 30 L.R.R.M. 1034 (1952), where it was held that an appeal by a union to consumers was not a secondary boycott within the meaning of §8 (b) (4) (A).
21 For a concise discussion of the scope of §8 (b) (4) (A), see Torbert, "Section 8 (b) (4) (A) of the Taft-Hartley Law: A Study in Statutory Interpretation," 8 RUTGERS L. REV. 344 (1954).

clause was present, the Board reasoned that there was no "strike or concerted refusal," an element essential to a finding of a violation of section 8 (b) (4) (A).[22] This decision was affirmed by the court of appeals.[23] However, the language used by the majority of the court[24] in discussing the question of the "hot cargo" clause appears to have been dictum. The contract involved was entered into prior to the effective date of the Taft-Hartley Act,[25] and, in addition, the court held that "the embargo on Rabouin's goods was the product solely of requests addressed to management or to supervisory personnel. . . . The union thus did not 'encourage the employees.' "[26] A key point in both the holding of the Board[27] and the court was that the secondary employers acquiesced in the request of the union not to handle the goods of the primary employer.

While it is submitted that the *Conway* case is not direct authority for the proposition that a "hot cargo" clause constitutes a valid defense to a violation of section 8 (b) (4) (A), this cannot be said as easily of the Board's decision in *Pittsburgh Plate Glass Co.*[28] In holding that the clause was a valid defense, the Board there added another argument to those advanced in the *Conway* case. This argument was to the effect that the collective agreement involved defined the secondary employees' "course of . . . employment" and the "hot cargo" clause simply removed the handling of "unfair goods" from this "course of employment."[29] In addition to this new argument, the Board reiterated that "consent in advance to honor a hot cargo clause is not the product of the

[22] Conway's Express, 87 N.L.R.B. 972 (1949). The precise holding in this case is difficult to ascertain, for there were three partial dissents. However, only Member Reynolds clearly dissented on the ground that a "hot cargo" clause violated the policy of the act.

[23] Rabouin v. NLRB, (2d Cir. 1952) 195 F. (2d) 906.

[24] Judge Learned Hand dissented in this case, but on a ground that made it unnecessary for him to pass on the effect of the "hot cargo" clause.

[25] Section 102 of Title I of the LMRA was the controlling provision. 61 Stat. L. 152 (1947), 29 U.S.C. (1952) §168.

[26] Rabouin v. NLRB, (2d Cir. 1952) 195 F. (2d) 906 at 911.

[27] While the NLRB did not stress the fact that the secondary employers actually acquiesced, the majority nevertheless stated: "And each of the employers, apparently mindful of its contractual obligation, acquiesced in its employees' refusal to handle the 'hot' cargo." Conway's Express, 87 N.L.R.B. 972 at 981 (1949).

[28] 105 N.L.R.B. 740 (1953). Even in this case the Board pointed out (at 743-744) that "with but one belated exception, the employers herein affirmed the contracts by acquiescing in their enforcement during the period of the Respondent's refusal to handle Pittsburgh's unfair goods."

[29] Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 at 744 (1953).

union's forcing or requiring any employer . . . to cease doing business with any other person."[30]

The impetus that these two decisions gave to the "hot cargo" clauses became manifest both in the redrafting of clauses by unions[31] and by denials of section 10 (*l*) injunctions in cases in which they were involved.[32]

## III. *Effect of the McAllister Decision*

As could be imagined, there was a great deal of dissatisfaction among employers with the *Conway* doctrine. The arguments against it are variously phrased, but the central theme is that "hot cargo" clauses are merely contractual secondary boycotts and violate the policy of section 8 (b) (4) (A). Put in more colorful language, it was said that "the 'hot cargo' arrangement is nothing more than the old secondary boycott clothed in a new raiment of would-be-respectability. But the sheep's clothing should not conceal the wolf from the eyes of the law."[33] It was in this setting that the Board reconsidered the *Conway* doctrine in the *McAllister* case.

A. *Opinion of Members Rodgers and Beeson.* These members felt that Congress declared a public policy against all secondary boycotts, without distinction as to type or kind.[34] They stressed

[30] Id. at 744.

[31] The cartage agreement to which the secondary employers in the McAllister case were parties stated: "There shall be a record understanding that, in the event the decision of the National Labor Relations Board in the Conway 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." 110 N.L.R.B. 1769 at 1775 (1954). As a result of this clause, the agreement was modified. This modification was not effective until after the §10 (*l*) injunction had been issued by the district court and thus had no effect on the decision in this case. 110 N.L.R.B. 1769 at 1775 (1954).

[32] Madden v. Local 442, IBT-AFL, (D.C. Wis. 1953) 114 F. Supp. 932. *Contra,* Humphrey v. Local 294, IBT-AFL, (D.C. N.Y. 1950) 25 L.R.R.M. 2318.

[33] Lloyd and Wessel, "Public Policy and Secondary Boycotts," 23 UNIV. CIN. L. REV. 31 at 53 (1954).

[34] They quoted Senator Taft's statements in the course of legislative debate, where he said: "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 [§8 (b) (4) (A)] of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad 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 provisions dealing with secondary boycotts as to make them an unfair labor practice." 93 CONG. REC. 4198 (1947).

the fact that the pre-enactment material on section 8 (b) (4) (A) emphasizes the aim of the protection of the public welfare and not merely the vindication of private rights.[35] They relied on section 10 (a) of the amended NLRA as meaning that private contracts do not prevent the Board from acting in the public interest.[36] They stated that "Congress deliberately banned the inducement or encouragement in Section 8 (b) (4) (A) outright . . . and did not say that this is proscribed unless there is a contract provision permitting it to occur. . . ."[37] They felt that Congress was well aware of the uniform rule of the Board and the courts that contracts in violation of the policy of the act were void, and thus there was no need to provide so specifically. Finally, they disagreed completely with the "course of . . . employment" argument presented in the *Pittsburgh Plate Glass Co.* case.[38] They argued that these words have a technical and well established meaning in the law (particularly in cases interpreting workmen's compensation laws[39]) and that they were used here merely to point up the fact that a distinction is to be drawn under section 8 (b) (4) (A) between employees in their capacity as employees, and employees in

[35] For example, the Senate Report stated that: "Because of the nature of certain of these practices, especially . . . *secondary boycotts* . . . the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes. . . .* Hence, we have provided that the Board, *acting in the public interest and not in vindication of purely private rights,* may seek injunctive relief. . . ." S. Rep. 105, 80th Cong., 1st sess., p. 8 (1947). Italics added by the Board.

[36] Section 10 (a) states that "the Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established *by agreement,* law or otherwise. . . ." 61 Stat. L. 146 (1947), 29 U.S.C. (1952) §160. Italics added. This has been interpreted to mean that private contracts do not affect the Board's power. See generally, Amalgamated Utility Workers (CIO) v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561 (1940); National Licorice Co. v. NLRB, 309 U.S. 250, 60 S.Ct. 569 (1940); J. I. Case Co. v. NLRB, 321 U.S. 332, 64 S.Ct. 576 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 64 S.Ct. 830 (1944); NLRB v. General Motors Corp., (7th Cir. 1940) 116 F. (2d) 306.

[37] McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1780 (1954).

[38] 105 N.L.R.B. 740 (1953).

[39] 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT, perm. ed., 19-20 (1948) defines this phrase as follows: "In the course of employment points to the time, place, and circumstances under which an accident takes place, and simply means 'while the employment was in progress.'" For an example of the broad sweep given this language by the Supreme Court, see Voehl v. Indemnity Ins. Co. of North America, 288 U.S. 162, 53 S.Ct. 380, 87 A.L.R. 245 (1933). From these definitions it seems that the employees of the secondary carriers would have been "in the course of employment" if they had been injured handling McAllister freight (some of these employees did handle one shipment of McAllister freight—clothing and medicine for a children's home) and there is no apparent reason to give these words a different meaning in §8 (b) (4) (A). For the view of the dissenting members on this point, see note 52 infra.

their capacity as private consumers. In conclusion, they recommended overruling the *Conway* and *Pittsburgh Plate Glass Co.* decisions to the extent they were inconsistent with their views.[40]

It may be contended that the Rodgers-Beeson analysis proves too much, for Congress did not in fact proscribe all secondary boycotts.[41] But the answer is that the type of secondary activity underlying the "hot cargo" situation is the critical point and that this is a type which Congress *did* intend to prohibit, irrespective of the presence of a "hot cargo" clause. This position has considerable support in the pre-enactment material. Thus, the Senate Labor and Public Welfare Committee, in explaining the kind of activity at which section 8 (b) (4) (A) was particularly directed, stated:

> "This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3 (See testimony of R. S. Edwards, vol. 1, P. 176 et seq.; Allen Bradley Co. v. Local No. 3, IBEW, 325 U. S. 797)."[42]

It is significant that the kind of activity in which Local No. 3 had engaged was a product boycott, sanctioned by a type of "hot cargo" clause. There was also a great deal of material presented at the hearings on secondary boycotts in the trucking industry,[43] and this clearly influenced some members of Congress. Senator Ball, in offering an amendment to the Senate bill which would have given private parties, as well as the General Counsel, authority to apply directly to federal district courts for injunctions in secondary boycott cases,[44] stated:

40 This position is basically the same as that taken by Member Reynolds in Conway's Express, 87 N.L.R.B. 972 at 988 (1949). It has been accepted by only one court prior to the McAllister decision. See Humphrey v. Local 294, IBT-AFL, (D.C. N.Y. 1950) 25 L.R.R.M. 2318 (1954).

41 See 48 N.W. UNIV. L. REV. 735 at 739-740 (1954).

42 S. Rep. 105, 80th Cong., 1st sess., p. 22 (1947).

43 See testimony of M. J. Mulvihill, H. Hearings before the Committee on Education and Labor, 80th Cong., 1st sess., pp. 256-347 (1947); testimony of H. L. Strobel, id. at 702-742; testimony of P. C. Turner, id. at 1840-1859.

44 This amendment was not passed, but much of its language was incorporated into a substitute amendment, §303, which gives private parties a damage remedy for the same action proscribed in §8 (b) (4). 61 Stat. L. 158 (1947), 29 U.S.C. (1952) §187.

"the secondary boycott is one of the most vicious abuses of economic power now being indulged in by labor unions. It is being used . . . virtually to dictate the terms on which small businessmen, farmers, and other persons may do business with each other. In the Philadelphia, Baltimore, and New York markets, the farmers hauling their produce are compelled to obey 100 percent every rule laid down by the teamsters' union, or they cannot do business. . . . "[45]

These and other statements in the pre-enactment material hardly support the view that Congress intended to exempt contractual secondary boycotts from the sweep of section 8 (b) (4) (A).

B. *Concurring Opinion of Chairman Farmer.* Chairman Farmer agreed that the Teamsters had engaged in secondary activity in violation of section 8 (b) (4) (A), despite the "hot cargo" clause, but he distinguished this case from *Conway*[46] in that here, unlike *Conway,* the employees acted contrary to explicit instructions from their employer. He felt that the refusal to follow the notices published by the secondary carriers was a type of "refusal" covered by section 8 (b) (4) (A).

It is submitted that this analysis is sound. It is supported by the language of the statute as well as by the available evidence of congressional intent. Section 8 (b) (4) (A) makes it an unfair labor practice for a union " . . . to induce or encourage the employees of any employer to engage in . . . a concerted refusal . . . to transport . . . where an object is: (A) forcing or requiring any employer . . . to cease . . . handling, transporting, . . . or to cease doing business with any other person." The "hot cargo" clause goes primarily to the element of "refusal" and the chairman rightly held that there can be a refusal *whether or not* there is a "hot cargo" clause.[47] It is true that this non-acquiescence by the employer might be a violation of the collective agreement but this does not change the character of the employees' conduct.

[45] 93 CONG. REC. 4836 (1947).

[46] The chairman limited his opinion to the factual distinctions between the two cases. He stated: "However, I do not find it necessary, or even appropriate, to overrule the Board's *Conway* decision; nor would I go so far as to characterize the 'hot cargo' provision . . . as being contrary to public policy." McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1788 (1954). Cf. Sand Door & Plywood Co., 113 N.L.R.B. No. 123, 36 L.R.R.M. 1478 (1955).

[47] This is not only in accord with the common meaning of the word "refusal" but it is precisely the word used in the "hot cargo" clause here in question. See note 9 supra and adjacent text.

This line of reasoning leads to the conclusion that a "hot cargo" clause exists at the will of the employer.[48] This is so because it seems clear that a union could not lawfully strike to get a "hot cargo" clause.[49] If a union could do so, the legality of a secondary boycott would turn on whether the union properly planned its strike or organizing campaign. For example, if union *U* wished to organize employer *R* and felt that it would need to put some secondary economic pressure on him, it could first strike employer *A* (a principal customer or supplier of *R*) for a "hot cargo" clause, then strike *R* and rely on the clause as a defense to any proceeding against it resulting from the secondary pressure on *A*.[50]

C. *Dissenting Opinion of Members Murdock and Peterson.* Members Murdock and Peterson would have sustained the trial examiner's intermediate report. They felt that the legislative history of the LMRA did not justify the conclusion that "hot cargo" clauses are against public policy. In their view, the public interest discussed by Members Rodgers and Beeson is a policy of protecting neutral, secondary employers who become involved involuntarily in a labor dispute when they do not have any real conflict with their employees,[51] and employers can waive this statutory protection by entering into contracts containing "hot cargo" clauses. Members Murdock and Peterson also disagreed with Chairman Farmer's analysis. They felt that non-acquiescence by the secondary employers had not been proved merely by show-

[48] There is clearly no provision in the act which prevents an employer from dealing or not dealing with any other employer. This is not quite the situation when a common carrier, subject to the Interstate Commerce Act or similar state law, is involved. See Montgomery Ward & Co. v. Northern Pacific Terminal Co., (D.C. Ore. 1953, 1954) 128 F. Supp. 475, 520.

[49] While this seems to come within the proscription of §8 (b) (4) (A), there is no clear decision on the point. In fact the NLRB in Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 at 744, n. 6 (1953), specifically refused to pass on this question.

[50] The clear language of §8 (b) (4) (A) would seem to prevent a union from striking to enforce a "hot cargo" clause. This section makes it an unfair labor practice for a union ". . . (4) to engage in . . . a strike . . . where an object thereof is: (A) forcing or requiring any employer . . . to cease doing business with any other person. . . ." Despite this seemingly clear language, it is on this point that the Teamsters may seek to avoid the impact of the McAllister decision. It is submitted that this attempt will succeed only in those cases where the general counsel is unable to prove that "an object" of the strike was the secondary boycott. For an example of this attempt see, "New 'Hot Cargo' Clause Negotiated by Teamsters," 35 LAB. REL. REP. 259 (1955).

[51] To support this position the dissent quotes several committee reports and statements made in the course of legislative debate which clearly show that the protection of neutral employers was at least one of the objects behind §8 (b) (4) (A). See McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1792 (1954).

ing the posting of notices ordering their employees not to discriminate, but that even if it had, the contractual obligation of the employer should be binding on him.

These arguments were simply a restatement of the reasoning used in the *Conway* opinion.[52] This reasoning, as Members Rodgers and Beeson pointed out, emphasizes only one of the evils of secondary action.[53] It is the difference in the interpretation of the public policy basis of the act that leads to the divergence of views concerning the application of the waiver-of-protection doctrine, as exemplified by the "hot cargo" clause. Thus if section 8 (b) (4) (A) was intended only for the protection of the secondary employer, he might be able to waive it. However, this argument fails if the general public welfare is also considered.[54] Since the pre-enactment material indicates that Congress was concerned with the effect on the general public as well as the effect on the secondary employer, it can certainly be argued that the waiver-of-protection doctrine is inapplicable when applied to section 8 (b) (4) (A).

The dissenters' attempt to refute the analysis of Chairman Farmer is not convincing. They based their repudiation of his position on the assertion that the secondary employers really did acquiesce in the employees' conduct and thus there was no "refusal" by them. This argument ignores the realities of the situation. A secondary employer might vehemently object to putting pressure on a customer or supplier but he might not (from a purely practical standpoint) be willing to discharge or discipline recalcitrant employees for fear of getting himself involved in a

[52] It is significant to note that the dissent does not place any real reliance on the "course of . . . employment" argument made in the Pittsburgh Plate Glass Co. case. They state, ". . . while we do not say that the interpretation which Members Rodgers and Beeson would give to the phrase is lacking in merit, we cannot agree that their construction is any more an expression of Congressional intent than was the Board's interpretation in the Pittsburgh case." McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1797 (1954). Chairman Farmer and Member Leedom have adopted Member Rodgers' views on this point. See Sand Door & Plywood Co., 113 N.L.R.B. No. 123, 36 L.R.R.M. 1478 at 1481 (1955).

[53] The very purpose of the LMRA, as stated in §1 (b), is "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." 61 Stat. L. 136 (1947), 29 U.S.C. (1952) §141 (b). It would seem that a secondary boycott in the transportation industry is one place where the "rights of the public" are clearly involved, for these boycotts invariably keep the goods of many shippers "tied up" when they would otherwise be promptly delivered.

[54] See 12 AM. JUR., Contracts §166 (1938).

strike.[55] This is surely not acquiesence in any true sense of the word.[56] Thus, while the dissent presented a plausible answer to the opinion of Members Rodgers and Beeson,[57] it did not satisfactorily answer Chairman Farmer.[58]

## IV. *The Law After the McAllister Case*

It is submitted that the opinion expressed by Chairman Farmer in the *McAllister* case, that "hot cargo" clauses are not invalid per se but that they can furnish a valid defense to an action under section 8 (b) (4) (A) only if they are acquiesced in by the employer, is the most plausible application of the law. However, as this case was handed down on the last day Member Beeson sat on the National Labor Relations Board,[59] there was considerable speculation as to just what position Member Leedom[60] would assume.[61] This question was answered in *Sand Door & Plywood Co.*[62] In this case Member Leedom joined with Chairman Farmer in the majority opinion.[63] Despite the fact that there was no notice

[55] It is true that this strike might be a violation of §8 (b) (4) (A), but the employer might not feel that his legal rights were worth getting involved in a lawsuit when, for example, such involvement might do him considerable harm from a public relations standpoint.

[56] The word "acquiescence" carries no connotation of avowed consent or of opposition. It is defined as "a silent appearance of consent. . . . Failure to make any objections." 1 BOUVIER'S LAW DICTIONARY 114.

[57] The dissent showed that the pre-enactment material does not conclusively indicate a congressional intent to outlaw "hot cargo" clauses.

[58] The dissenters would have disagreed with Chairman Farmer's opinion even if they had felt that non-acquiescence had been proved. They stated that they were not convinced that the Board should countenance such a repudiation of a collective agreement when the result would be that the other party would be guilty of an unfair labor practice. McAllister Transfer, Inc., 110 N.L.R.B. 1769 at 1791 (1954).

[59] The position of the Board members remained substantially unchanged in a similar case decided on the same day as the McAllister case. See Reilly Cartage Co., 110 N.L.R.B. 1742 (1954).

[60] Member Leedom was appointed to the National Labor Relations Board for a five year term effective December 17, 1954, the day after the McAllister decision was handed down.

[61] Meanwhile the district courts properly assumed that Chairman Farmer's opinion represented the present shape of the law. See Douds v. Milk Drivers and Dairy Employees Local No. 680, IBT-AFL, (D.C. N.J. 1955) 36 L.R.R.M. 2410. Cf. Graham v. International Woodworkers of America, Local 7-140, CIO, (D.C. Ore. 1955) 36 L.R.R.M. 2243.

[62] 113 N.L.R.B. No. 123, 36 L.R.R.M. 1478 (1955). In simplified form the facts are as follows: *U* had a contract containing a "hot cargo" clause with Company *X*. *U* found out that *X* was installing some nonunion doors manufactured by Company *Y* and supplied by Sand Door. *U* then told *Z*, a foreman who was also a union member in charge of enforcing union rules relating to the use of nonunion goods, the status of the doors. He in turn passed the word around and no more of these doors were installed.

[63] The position of Members Rodgers, Peterson and Murdock remained substantially unchanged in this case.

posted by the employer to indicate his non-acquiescence, the new majority was apparently willing to say that the "hot cargo" clause did not even give the union the right to go directly to the employees and tell them of their "rights" under the contract.[64] This could be read as completely nullifying all "hot cargo" clauses, but there are indications in the opinion that the majority was not prepared to go this far. They expressly refused to hold these clauses void as against the policy of the act and they also stated that "this is essentially the view expressed by Chairman Farmer in his concurring opinion in the *McAllister* case. . . ."[65] There is still some life left in the non-acquiescence theory of Chairman Farmer. It is true that this non-acquiescence may not require an express employer repudiation, but some expression of disapproval, e.g., a standing rule not to discriminate in receiving or shipping freight, may still be necessary.

It is important to note that the decision in *Sand Door & Plywood Co.* was handed down one day before the term of office of Chairman Farmer expired. Thus the Board is evenly divided on the question as of this writing. If the next member agrees with either Member Rodgers or with Member Leedom, the Board's position will not change. However, if he should agree with Members Murdock and Peterson, the *Conway* doctrine will become reestablished. Another event which might change the present shape of the law would be an appeal. It seems certain that one of the current cases in this area will be taken to a court of appeals for enforcement, for the subject is one of vital concern to many of the nation's largest labor organizations[66] and employer associations.[67] The importance of the problem clearly points to the desirability of congressional clarification. However, in view of the political difficulties attending any attempt to amend the Taft-Hartley Act, it seems likely that labor and management will have to live with the Board and court dispositions of "hot cargo" clauses.

*Jack G. Armstrong, S.Ed.*

[64] Sand Door & Plywood Co., 113 N.L.R.B. No. 123, 36 L.R.R.M. 1478 at 1481 (1955).

[65] Id. at 1481, n. 20.

[66] The CIO has rarely found it advisable to use "hot cargo" clauses. These clauses are found in practically all Teamster contracts, however, and in a great many of the contracts negotiated by unions in the construction and printing industries.

[67] The employer associations in the trucking business have a particularly vital concern in this area, as they see themselves being put into an impossible situation. For example, if they agree to a "hot cargo" clause and acquiesce in its operation, they are subject to damages for violation of their responsibilities as a common carrier under the doctrine of Montgomery Ward & Co. v. Northern Pacific Terminal Co., (D.C. Ore. 1953, 1954) 128 F.