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Labor Law: Enforceability of Hot Cargo Clause

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house for another house of like kind, i.e., held for investment purposes, no gain will be recognized from such transaction. While the property received in the exchange must be held "either for productive use in trade or business or for investment",[17] no authority has been found to indicate that such use must be of any definite duration. Conceivably the length of time needed to evict a tenant may be a sufficient holding period and then the taxpayer would have the new residence and also have avoided recognition of gain on the transaction.

The reader is cautioned to bear in mind the doctrine of *Gregory v. Helvering,*[18] where the Supreme Court stated:

> ". . . the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended."

As Judge Learned Hand pointed out in the Circuit Court decision in the same case:

> ". . . it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition."[19]

The Commissioner, if he attempted to overthrow such a scheme, could also rely on the *Century Electric Co.* case where the Court said:

> "The transaction here involved may not be separated into its component parts for tax purposes. Tax consequences must depend on what actually was intended and accomplished rather than on the separate steps taken to reach the desired ends."[20]

The Commissioner and the courts might well find that this scheme accomplished an end not intended by the section in question.

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Labor Law—Enforceability of Hot Cargo Clause—A shipment of doors, manufactured by the Paine Lumber Company of Oshkosh, Wisconsin and purchased from the Sand Door and Plywood Company, were delivered to a hospital construction site on which Harvsted and Jensen were general contractors. A few days later, on August 17, 1954, Fliesher, a business agent of petitioner, Local 1976, visited the site and informed Harvsted and Jensen's foreman, a member of the local, that the doors were non-union and could not be hung. The foreman then ordered the employees to stop handling the objectionable doors and work on them ceased. The general contractors were then

> No gain or loss shall be recognized if property held for productive use in trade or business or for investment . . . is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

[17] *Ibid.*
[18] Gregory v. Helvering, 293 U.S. 465 (1935), at p. 469.
[19] Helvering v. Gregory, 69 F.2d 809 (2nd Cir. 1934) at p. 819.
[20] Century Electric Co. v. Commissioner, 192 F.2d 155, 159 (8th Cir. 1951).

notified of the cessation of work on these goods. Petitioner's business agent relied upon the collective bargaining agreement between the union and the general contractor which contained a "hot cargo" clause which provided that "workmen shall not be required to handle non-union material." As a result of this work stoppage, Sand Door filed a petition with the National Labor Relations Board charging that Local 1976 had violated §8(b)(4)(A)[1] of the Labor Management Relations Act of 1947 in that it had induced and encouraged Halvsted and Jensen's employees to engage in a strike or concerted refusal to work with the purpose of forcing their employers to cease doing business with Paine. The Court of Appeals for the Ninth Circuit enforced the Board's cease and desist order.[2] On *Certiorari* to the Supreme Court,[3] the Board's finding of an unfair practice was affirmed in a six to three decision and directions were given to enforce the cease and desist order. It was held that the hot cargo clause was a valid agreement in the collective bargaining contract but that it could only be enforced by appeals to the employer. In the absence of employer consent at the time of dispute, a union's order to employees to refuse to handle goods covered by the clause is a violation of the Act.[4] In companion cases decided on the same issue and within the scope of Mr. Justice Frankfurter's opinion, it was held that the "hot cargo" clause was not a defense to an unfair labor practice charge either by a union having such a clause in their collective bargaining agreement[5] or by a union which, though not a party to such an agreement, was under contract with an employer who had such an agreement with another union.[6]

An employer who signs a hot cargo provision in his collective bargaining agreement with a union agrees that the workers covered by such agreement need not handle goods which are objectionable to the union. These goods are labeled "hot" either because they come from a non-union company or a company involved in a labor dispute. In the absence of such a provision, a union which ordered its members to refrain from handling such hot cargo would be guilty of secondary boycott in violation of the Labor Management Relations Act of 1947.[7] In the principal case it was the union's position that the act does not

[1] Labor Management Relations Act (Taft-Hartley Act) 61 STAT. 140, 29 U.S.C. §158(b) (4) (A) (1947).
[2] Sand Door Plywood Company, 113NLRB 1210, 36LRRM 1478; *aff'd sub. nom.* N.L.R.B. v. Local 1976 United Brotherhood of Carpenters and Joiners of America, A F of L, 241 F. 2d 147 (1957).
[3] Certiorari Granted by Supreme Court of the United States, 355 U.S. 808 (1957).
[4] Local 1976 United Brotherhood of Carpenters and Joiners of America et al vs. N.L.R.B., 78 S. Ct. 1011 (1958).
[5] Machinists Union Local 886 vs. N.L.R.B., 78 Ct. 1011 (1958).
[6] General Drivers Union Local 1956 vs. N.L.R.B., 78 S. Ct. 1011 (1958).
[7] 61 STAT. 140, 29 U.S.C. 158 (b) (4) (A) (1957).

prohibit all secondary boycotts but only those in which one employer is forced to stop dealing with another. The element of coercion, the union argued, is not present where the employer voluntarily agrees in his collective bargaining agreement that his employees need not handle certain goods. The union, far from calling a strike at the time the objectionable articles appear, would thus, by this reasoning, be merely informing the employees of their rights as granted by the employer in advance of the dispute. The court rejected this theory and held that the prior acquiescence of an employer did not eliminate the possibility of coercion where a union instructs its members not to handle hot cargo. The Supreme Court stated:

> "A union is free to persuade an employer to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees."[8]

It was the opinion of the majority that the secondary employer who is a party to a hot cargo agreement retains complete freedom of choice as to whether he will abide by the agreement. If the union appeals to the employees rather than the employer it is guilty of an unfair labor practice.

In this decision the Supreme Court has clarified what has been described as the most vexatious problem to arise under the Labor Management Relations Act.[9] In the first administrative and judicial pronouncement on this problem, it was held that the hot cargo contract was a valid agreement which could be enforced by the union with or without the present consent of the employer since the advance consent embodied in the clause eliminated the element of coercion.[10] In the present case the Supreme Court rejected the Conway Doctrine on enforceability but made clear that while the union was guilty of an unfair labor practice for its activities at the time of the strike, the clause itself was not in violation of the Act. The distinction between the validity of the agreement *per se* and its enforceability at the time of dispute is an important one since there has been a tendency on the part of the Board and some of the courts to treat the hot cargo clause as invalid at its inception. Basically three arguments have been set forth by those who argue that the hot cargo clause is invalid. In Sand Door and Plywood Company, the view was expressed by one member of the Board that,

> ". . . no amount of ingenuity can change the simple fact that the 'hot cargo' contract is nothing more than a device to immunize in advance the very conduct which Congress in re-

[8] *Supra* note 4.
[9] *The Supreme Court and the N.L.R.B.*, an address by member Joseph A. Jenkens, July 15, 1957; 40 L.R.R.M. 98, 110.
[10] Conway Express Co., 87 N.L.R.B. 972 (1949), *aff'd sub. nom.* Rabouin v. N.L.R.B., 195 F. 2d 906 (1952).

sponse to dire *public need* sought to eliminate."[11] [Emphasis supplied].

Although it is true that in the debate surrounding the passage of the Act, the secondary boycott was looked upon with disfavor,[12] the Supreme Court warned against any attempts to find a sweeping prohibition of all secondary boycotts in the Act as finally passed by Congress. The court had likewise rejected the contention that

> ". . . if Congress intended to protect . . . *primary employers,* from the effect of secondary boycotts, and I believe it did so intend, other parties can not insulate themselves by contract from such statutory prohibitions."[13]

In refuting both these contentions the Court pointed out that Congress

> ". . . specifically forbids a union to induce employees to refuse to handle goods for their employers when an object is to force him or another to cease doing business with some third party."[14]

Essential to the Court's analysis is the statutory requirement of force, since without coercion of the employer by the union there is no violation of the act. Thus it follows that neither the public at large nor primary employers can be assured of protection by §8(b)(4)(A) against *voluntary* boycotts of secondary employers.

A stronger case against the basic validity of the hot cargo clause was stated by two members of the Board in *Genuine Parts Company.*[15] In that case, members Leedom and Jenkins were of the opinion that the hot cargo clause was invalid in all situations concerning carriers subject to the Interstate Commerce Act.[16] To this the Supreme Court answered that the employer's freedom of choice in business dealings, regardless of whether or not he is engaged in common carriage, was left unrestricted by the Labor Management Relatioss Act. In looking to the activity of the Interstate Commerce Commission in this area, the court pointed out that the *Galveston Truck Line* decision[17] did not pass on the validity of the clause as such but clarified a carrier's duties in a given situation. The Supreme Court noted that the National Labor Relations Board should not presume to make a general rule under the statute governing another administrative tribunal, especially where that tribunal, the Interstate Commerce Commission, has not itself felt it necessary to form such rule as a general policy.

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[11] 113 N.L.R.B. 1210, 36 L.R.R.M. 1478.
[12] 93 CONG. REC. A-1222, 4198-4199, 4838 (1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 8, 22 (1947).
[13] Douds vs. Mild Drivers and Dairy Employees, 248 F. 2d 534, 40 L.R.R.M. 2669 (1957).
[14] *Supra* note 4.
[15] C.C.H. LAB. REP. 54, 979; 119 N.L.R.B. No. 53.
[16] 54 STAT. 919 49 U.S.C. §§301-327 (1940).
[17] Galveston Truck Lines Corp. vs. Ada Motor Lines, Inc. et al,—I.C.C.—,No. MC-C1922 (December 6, 1957).

CONCLUSION

In spite of the restrictions placed on the hot cargo clause by the Supreme Court, the clause still has considerable vitality. Union representatives, especially in the trucking and construction fields, will continue to utilize it to preserve their traditional sentiment against working with non-union articles or personnel. Two factors tend to support this conclusion. Primarily, few secondary employers will dishonor their collective bargaining agreement when they must later bargain with the same representatives of what is usually, though not always, a union shop. Another consideration which must be developed more fully by union leadership is the fact that only the freedom to strike is denied the union by §8(b)(4)(A); the union retains its other powers to persuade the employer to abide by his contract. To these employers who seek to negate the affect of an existing hot cargo clause more latitude is given. Since the union must appeal directly to the secondary employer to enforce the provision, his decision in most circumstances will control as to whether there will be a valid secondary boycott. Assuming that the union makes its request properly and the there is acquiescence, the primary employer's only recourse will be found in common carrier situations. In such cases the primary employer may, relying on *Galveston*,[18] claim before the Interstate Commerce Commission that secondary employer is engaging in a discriminatory practice.

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Federal Taxation—Refund Suit—Full Payment Prerequisite— Taxpayer suffered losses on the sale of certain commodities and futures and reported them as ordinary losses. The Commissioner of Internal Revenue characterized the transactions as capital losses, levying a deficiency assessment in the amount of $28,908.60, including interest. After making two payments totaling $5,058.54, taxpayer submitted a claim for refund of that amount which was disallowed by the Commissioner. Petitioner then challenged the correctness of the deficiency by bringing the present suit for refund under 28 U.S.C. §1346 (a) (1). The United States moved to dismiss for want of jurisdiction and for failure to state a claim upon which relief could be granted. The District Court for the District of Wyoming felt that because petitioner had not paid the full amount of the deficiency he should not maintain the action. But because the Court of Appeals had not resolved the question, the case was decided on its merits for the United States. On taxpayer's appeal to the Court of Appeals for the 10th Circuit, the judgment was vacated and the case remained with instructions to dismiss for failure of the complaint to state a claim.

[18] *Ibid.*