The "Secondary Boycott" Provision of the Taft-Hartley Act

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Comments

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The apparent strength at the polls of organized labor in the recent national elections has insured at least a reconsideration of the controversial Taft-Hartley Act by the Eighty-First Congress. A certain target for repeal or modification will be the act's so-called "secondary boycott provision," which presents in essence an attempt to place limits to the legitimate area of economic conflict between labor and management. How has the Taft-Hartley Act affected this perplexing problem, with its broad social, economic and political ramifications?

No area of labor law has been characterized by more confusion than that of the secondary boycott. However, the cases have been rather consistent in declaring illegal definite coercive pressure applied to one person or business as a means ultimately of influencing the action of another person or business. On the whole the courts, applying common law principles, have suc-

1. See Time Magazine, Nov. 15, 1948, p. 25, col. 2: a total of 121 senators and representatives who voted for the Taft-Hartley Act were either beaten in the primaries, retired, died, or were eliminated in the general elections.


3. Section 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; . . . ." (Italics supplied.)

4. The necessity for restricting this area of conflict was stressed in Carpenters and Joiners' Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942). A correlative problem treated there, namely the relation between stranger picketing and free speech, is not within the scope of this comment.

5. For a thorough treatment of this subject, see Gregory, Labor and the Law (1946) 444; Smith. Coercion of Third Parties in Labor Disputes—The Secondary Boycott (1938) 1 Louisiana Law Review 277; Barnard and Graham, Labor and the Secondary Boycott (1940) 15 Wash. L. Rev. 137.

6. Traditional definition of a secondary boycott may be found in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466, 41 S.Ct. 172, 176, 65 L.Ed. 349, 356 (1920).
ceeded very well in distinguishing between conduct primarily defensive but causing incidental injury to third persons and conduct aimed at compelling the assistance of neutrals. For example, the refusal of union men to work on the same job with non-union men, or to handle or work upon non-union made products, or to handle work for customers of their disputing employer has been recognized as defensive conduct despite incidental injury to third persons. A similar view has been taken of the sending of "unfair" lists by a union to its associates in organized labor. On the other hand, a refusal of union labor to work on a union job for a subcontractor because the principal contractor had another job where non-union men were employed, picking the place of business of a person because the contractor engaged by him to construct a building not connected with that business employed non-union labor, general picketing of a retailer who stocked a non-union product, or putting him on an "unfair" list have been found illegal as designed to compel the assistance of neutrals.

There has also been a constriction of the category of neutrals so as to bring within the area of conflict and thus justify direct


9. Iron Molders' Union v. Allis-Chalmers, 166 Fed. 45 (C.C.A. 7th, 1908), where the court concluded that if the complainant had the right to seek the aid of fellow manufacturers in getting the necessary amount of labor put into his product, the union had a correlative right to prevent that end.

10. Smythe Neon Sign Co. v. I.B.E.W., 226 Iowa 191, 284 N.W. 126 (1939); Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127 (1908); State v. Van Pelt, 136 N.C. 633, 49 S.E. 177 (1904).


coercive practices against those having a unity of interest or economic nexus with a disputing employer, such as those to whom the disputing employer shifts his work\textsuperscript{14} or whom he uses as a medium of distribution.\textsuperscript{15} At the moment it is difficult to say how far an "interdependence of economic interest of all engaged in the same industry" may legally justify a focusing of direct attack on others than the immediate employer. Later cases display a tendency on the part of the courts to look more to economic factors and to consider carefully the relations of a third party to the disputing employer.\textsuperscript{16} The pertinent question now is, has this trend been reversed by the secondary boycott provision" of the Taft-Hartley Act?

An examination of the language of Section 8(b) (4) (A) will reveal that the confusion which characterized the common law treatment of secondary boycotts has not been eliminated by this provision. A perusal of congressional debates and reports fails to show just how far that law-making body intended to go in curbing the use of economic pressure by unions by making unlawful a concerted refusal to use, handle or work on goods or products of a disputing employer. The section makes such conduct unlawful "where an object thereof is" forcing or requiring any person to cease his business relationships with another. The ultimate scope of the provision hinges upon the interpretation

\textsuperscript{14} Iron Molders' Union v. Allis-Chalmers, 166 Fed. 45 (C.C.A. 7th, 1908).
\textsuperscript{15} Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63 (1940); Bakery & Pastry Drivers & Helpers v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1941).
\textsuperscript{16} This approach is demonstrated in several recent cases. In Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63 (1940), the union was picketing retail stores that sold milk processed by plaintiff dairies and distributed by a vendor system which threatened defendant union's wage scale. The court, warning against "shutting one's eyes to the everyday elements of industrial strife," refused to issue an injunction. Third parties were also deemed to be within the legitimate area of conflict in Bakery & Pastry Drivers & Helpers v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1941), where the defendant union, seeking to force bread peddlers to maintain a six day week and employ a union man for one of those days, picketed a bakery which supplied the peddlers. Economic ties binding the bakery to the peddlers were found to be so close as to justify the union's bringing the bakery within the scope of its attack upon the peddlers in order to force the latter to terms.

A contrary result was reached in Carpenters & Joiners' Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942), cited supra note 12. Although labor's right to compete with management for public favor was given full recognition, the court was unwilling to condone direct coercion of a third party because the contractor he employed to construct a building wholly unrelated to his cafe business used non-union labor on that building. In other words, as distinguished from the Wohl and Lake Valley Farm Products cases, the third party here was found to be in reality a "neutral."
of the phrase "where an object thereof is." These words were substituted for the words "for the purpose of" which appeared in the original senate version.17 Opponents of the provision contended that this language was so broad that it represented an indiscriminate attack on all forms of peaceful action by labor unions regardless of its objective.18 Senator Taft expressed the opinion that it "merely reversed the effect of the law as to secondary boycotts"19 and seemed to place special emphasis upon the injustice of situations analogous to that in the Allen-Bradley case.20 In his analysis of the changes made in the senate version by the conference report,21 the senator did not mention the change made in Section 8 (b) (4) from "for the purpose of" to "where an object thereof is."22

A question that immediately arises is whether the change was designed to render illegal any cooperative action involving a refusal to use, handle or work upon non-union made goods. It suggests that the drafters had in mind outlawing conduct primarily defensive as long as it might be determined that "an object thereof" was to interfere with the freedom of choice of a third party. Obviously enough, labor knows that a refusal to handle non-union products in the hands of a third party may operate not only as a defensive measure but may have also the affirmative effect of "forcing or requiring" the user to cease his using. Must this knowledge require a holding that "an object" of such refusal is to force or require the foreseen results? If the court had to find that this foreseen result was "the purpose" of such refusal it might be led to conclude that "the purpose" meant "the primary purpose" which was self protection. But, does the changed language require it to find that coercion was "an object" of the refusal? It should be noticed that by so holding, union labor would be "forced and required" to cut its own throat by using, handling and working upon non-union made products, thus giving support to the employer with whom it is in dispute.

17. 93 Cong. Rec. 4197 (1947).
20. Allen-Bradley Co. v. Local No. 3, I.B.E.W., 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), where a local union which controlled all employment in the manufacture and installation of electrical equipment in the New York City area would allow no outside manufactured equipment to be sold in the New York City market. This embargo was placed on union-made and non-union made equipment alike.
22. Id. at 6441, 6443.
A resume of the cases that have dealt with the "secondary boycott provision" will show that its exact extent of operation is still not at all clear. Injunctive relief has been granted under Section 10(1) in several cases where there was refusal to perform services, or action inducing such refusal, and where the tribunal found "an object" was to force the immediate employer to cease doing business with some other person with whom the union had the primary dispute. At the same time, relief has been refused when the struck employer was "firmly allied" to the disputing employer. Language in one of the cases seems to indicate that attention will continue to focus upon the question of whether or not non-disputants are being coerced. However, none of these decisions as yet has dwelt upon the subject of labor's privilege to refrain from doing anything that may be injurious to its cause, even though such "negative" action may interfere with a third party's freedom of choice as an incidental result. One case presented an opportunity to discuss the point, but no mention of it is found in the opinion. There had been a work stoppage by union members at Jardine Liquor Corporation in New York City and the employer charged that one purpose of the strike was to exert pressure on Schenley Distillers Corporation to get it to agree to contract terms at its plant in Kentucky with another local of the same union. Jardine Corporation customarily handled Schenley products, and the union

23. This section makes it mandatory on the N.L.R.B. to petition for an injunction when there is reasonable cause to believe that a violation of Section 8(b)(4)(A), (B), or (C) exists.
25. Douds v. Metropolitan Federation of Architects, 14 C.C.H. Lab. Cas. No. 64,271 (D.C. N.Y. 1948). For several years the Project Engineering Company had served as subcontractor for Ebasco Services. After the union started striking against Ebasco, the amount of work subcontracted to Project Company was increased so that it accounted for about 75% of the latter's business. Refusing to enjoin defendant union's strike against Project Company, the Board found that Section 8(b) was intended to protect only "neutrals" and "bystanders" who were wholly unconcerned with the disagreement between employer and employee. Thus, the meaning of "any other person" was restricted so as to exclude those to whom the disputing employer shifted his work.
26. Le Baron v. Printing Specialists Union, 14 C.C.H. Lab. Cas. No. 64,290 (D.C. Cal. 1948), in which the decision was to the effect that "only coercive and compulsive conduct" was proscribed.
allegedly insisted that its members should not move them until the contract controversy was settled. The board found a violation of Section 8(b)(4)(A), ruling that such violation existed if only one of the objects of the work stoppage was the purpose forbidden by law.\textsuperscript{28}

In the absence of any definitive delineation of the scope of this provision, speculation as to its proper application is both permissible and appropriate. Suppose the members of a carpenters' union refuse to work for the subcontractor on a certain building because the principal contractor runs an office where he employs only non-union clerks. The finding that "an object"\textsuperscript{29} of this conduct was to force the subcontractor to cease dealing with the principal contractor until the latter employed union clerks would without doubt seem to be a proper effectuation of the purpose of Section 8(b)(4)(A). On the other hand, suppose the workers in a furniture factory refuse to handle lumber shipped from a mill employing only non-union labor. Must it be concluded that "an object" of this conduct is to force the owner of the furniture factory to cease dealing with the lumber mill proprietor since it would likely have such result? Or, is this conduct so necessary to the protection of union interests that its coercive effect may be treated as a merely incidental result of the one "object"—that is, a refusal to aid actively interests in conflict with its own? There would seem to be a very substantial basis for the contention that the necessity for recognizing a privilege in labor to withhold its services where they would lend assistance to the opposing party is sufficiently great to justify holding that where its conduct is primarily self defensive, and there is no affirmative showing of an attempt to coerce or require any action by a third party, it was not the purpose of Congress to deny such privilege by the use of the ambiguous language found in this section.

Modification of the "secondary boycott provision" to some extent is a foregone conclusion. Those who opposed the present

\textsuperscript{28} The union had argued that the purpose of the stoppage was to speed up settlement of certain grievances by Jardine Corporation. The board declared that this point was irrelevant as long as one purpose was to exert pressure on the manufacturer who supplied the goods which employees refused to handle. One may speculate here as to what position the board would have taken if the union had contended, instead, that this was merely defensive conduct (i.e., a refusal to aid actively an employer who was openly opposing union interests).

\textsuperscript{29} Webster's Dictionary (2d ed., unabridged) defines "object" as "that on which the purposes are fixed as the end of action or effort; that which is sought for; end; aim; motive; final cause."
version seemed to favor a provision which would define certain lawful objectives of unions and permit either defensive or affirmatively coercive conduct against neutrals in support thereof.\textsuperscript{30} Thus, if the object of the particular conduct were found to be legitimate under the terms of the section, labor would be given a virtual \textit{carte blanche} to coerce the aid of neutrals anywhere along the line in its effort to achieve that object.\textsuperscript{31} Would labor be justified in asking for so much? It may have just cause to complain that it should not be forced to give indirect aid to the opposing party even if this causes incidental injury to neutrals, but can it justly ask for direct conscriptive power?\textsuperscript{32} Would the best interests of the people as a whole be served by the conclusion that it is essential to the adequate protection and advancement of legitimate union interests to allow union labor to force a neutral to take its side in the struggle? The future of our system of free enterprise may well hinge upon the answer given to these questions by those who render the ultimate decision.

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\textsuperscript{30} See H. R. Doc. No. 334, 80th Cong., 1st Sess. (1947) 5; Sen. Rep. No. 105, Part 2, 80th Cong., 1st Sess. (1947) 19, 20, which notes the president's observation in his "veto message" to the effect that all secondary boycotts are not unjustified, but must be judged on the basis of their objectives.

\textsuperscript{31} See 1 Teller, Labor Disputes and Collective Bargaining (1940) § 145, for a possible hint as to what "lawful objects" may be.

\textsuperscript{32} The Supreme Court has attempted to deal with this matter by defining the term "neutral" so as to exclude those having an interdependence of economic interest in the same industry. This is basically the difference between cases such as Milk Wagon Drivers' Union v. Lake Valley Products, 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63 (1940), and Bakery & Pastry Drivers & Helpers v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1941), on the one hand and Carpenters & Joiners' Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942). See note 16, supra.