

Labor Law - Secondary Products Picketing Under the Labor Management Relations Act

Robert A. Hawthorne Jr.

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ther it would seem that in most cases it would be to the insurer's benefit to allow the insured to use a substitute automobile when his own car becomes dangerous to drive as long as it is clear that the named insured, by using the other car, is not trying to avoid the payment of two premiums.

Gerald L. Walter, Jr.

LABOR LAW — SECONDARY PRODUCTS PICKETING UNDER THE LABOR MANAGEMENT RELATIONS ACT

In furtherance of its dispute with a manufacturing company, the respondent union picketed retail stores selling the company's products. The signs, which appealed to the consuming public not to buy the disputed products, were carried by one picket at consumer entrances of each retail establishment. Picketing began after employees of the retail stores reported for work and ceased before they normally left for the day. Although some employees used the consumer entrances during the day and could see the picketing from inside the stores and although many deliveries were made through these entrances, no retail employees refused to work or handle products and no deliveries were interfered with. Acting upon charges filed by the retailers, the National Labor Relations Board *held* that this picketing constituted an unfair labor practice in violation of Section 8(b) (4) (B) (i) and (ii) of the Labor Management Relations Act as amended in 1959 because it induced and encouraged secondary employees to strike or refuse to perform services and restrained and coerced owners of the retail stores to cease doing business with another person. *Wholesale and Warehouse Employees, Local 261 (Perfection Mattress & Spring Co.)*, 129 N.L.R.B. No. 125 (Dec. 31, 1960).

A secondary boycott in labor law can generally be defined as the bringing of economic pressure against a person not involved in a labor dispute for the purpose of increasing pressure on a party involved in the dispute.¹ A type of secondary boycott is

situations the policy clearly contemplates such a result. For example, where a family policy is issued to Mr. or Mrs. A, and Mr. A gives his son permission to use the family car while Mr. A uses a car borrowed from X, and Mrs. A uses a car borrowed from Y, the policy covers the use of all three automobiles. Mr. and Mrs. A are both named insureds and are therefore protected under the non-owned provision and the son is protected under the owned automobile provision.

1. See *Alpert v. Local 1066, International Longshoremen's Association*, 166 F. Supp. 22 (D.C. Mass. 1958). See also 105 Cong. Rec. 3926-28 (1959) (remarks of Rep. Lafore).

"products picketing" which generally is picketing by a labor organization of business establishments not directly involved in the labor dispute (secondary employer) with the immediate goal of appealing to its customers not to buy products of the employer directly involved in the dispute (primary employer). "Consumer picketing" is broader than products picketing in that it appeals to customers not to buy any products from the establishment being picketed. Products picketing and consumer picketing were *not* unfair labor practices under the Labor Management Relations Act before the 1959 amendments,² *unless* an effect of the activity was to induce or encourage employees other than those of the primary employer to engage in a concerted refusal to work, perform services or handle products in the course of their employment with an object of causing an employer to cease doing business with any other person.³ Such illegal inducement and encouragement could be found even though no secondary work

2. *NLRB v. Business Machine and Office Appliance Mechanics Conference Board*, 228 F.2d 553 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955) (*Royal Typewriter Co.* case); *NLRB v. Crowley's Milk Co.*, 208 F.2d 444 (3d Cir. 1953); *Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952). See also *United Bhd. of Carpenters, Local 1976 v. NLRB*, 357 U.S. 93 (1958); *International Bhd. of Electrical Workers v. NLRB*, 341 U.S. 694 (1951); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

The pertinent portions of the statute read as follows:

"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 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. . . ." Labor Management Relations Act, ch. 120, tit. I, § 101, 61 Stat. 140 (1947).

3. *E.g.*, *NLRB v. Dallas General Drivers, Local 745*, 264 F.2d 642 (5th Cir.), *cert. denied*, 361 U.S. 814 (1959); *NLRB v. Laundry, Linen Supply & Dry Cleaning Drivers*, 262 F.2d 617 (9th Cir. 1958); *NLRB v. United Brotherhood of Carpenters, Local 11*, 242 F.2d 932 (6th Cir. 1957); *NLRB v. Truck Drivers*, 228 F.2d 791 (5th Cir. 1956); *NLRB v. Associated Musicians*, 226 F.2d 600 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955); *Brewery and Beverage Drivers v. NLRB*, 220 F.2d 380 (D.C. Cir. 1955) (*Washington Coca-Cola case*); *Capital Service v. NLRB*, 204 F.2d 848 (9th Cir.), *cert. granted on another question*, 346 U.S. 936 (1953); *Chauffeurs, Teamsters & Helpers*, 127 N.L.R.B. No. 12 (April 10, 1960) (*Grant-Billingsley Fruit Co.*); *Laundry, Cleaning & Linen Works*, 127 N.L.R.B. No. 5 (April 5, 1960) (*Apex Linen Service of Chattanooga*); *Casket Makers Local 3128*, 114 N.L.R.B. 1329 (1955) (*New Jersey Casket Manufacturers Association*); *International Ladies' Garment Workers' Union*, 111 N.L.R.B. 82 (1955) (*Gemsco*); *International Brotherhood of Boilermakers*, 95 N.L.R.B. 1191 (1951) (*Richfield Oil Corp.*). *Accord*, *United Brotherhood of Carpenters, Local 1976 v. NLRB*, 357 U.S. 93 (1958); *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

stoppages actually occurred.⁴ In determining what constituted proof of illegal inducement and encouragement of secondary employees to refuse to work the NLRB considered picketing an automatic strike signal. Consequently, picketing a secondary employer was held to be an unfair labor practice unless other means of communication were used to dispel any appeal to secondary employees.⁵ The federal district courts and courts of appeals, however, generally required more than the mere fact of consumer of products picketing to uphold a finding that secondary employees were illegally induced or encouraged in situations where no secondary concerted refusals to work actually occurred.⁶

The 1959 amendments to the Labor Management Relations Act would seem to afford more protection to persons not directly concerned with labor disputes from being involuntarily involved by economic pressure.⁷ Direct threats, restraint, or co-

4. *E.g.*, NLRB v. Associated Musicians, 226 F.2d 900 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955); Penello v. United Hatters Union, 174 F. Supp. 887 (D.C. Md. 1959); Douds v. International Brotherhood of Teamsters, 139 F. Supp. 702 (S.D.N.Y. 1956).

5. United Wholesale and Warehouse Employees (Perfection Mattress & Spring Co.), 125 N.L.R.B. 520 (1959), *enforcement denied*, 282 F.2d 824 (D.C. Cir. 1960); Seafarers' International Union, 122 N.L.R.B. 52 (1958) (Superior Derrick Corp.), *modified*, 273 F.2d 891 (5th Cir. 1960); United Brotherhood of Carpenters and Joiners, 121 N.L.R.B. 1117 (1958) (Del-Mar Cabinet Co.), *remanded*, 274 F.2d 564 (D.C. Cir. 1959); Laundry, Linen Supply & Dry Cleaning Drivers, 118 N.L.R.B. 1435 (1957) (Southern Service Co.), *enforced*, 262 F.2d 617 (9th Cir. 1958); Dallas General Drivers, 118 N.L.R.B. 1251 (1957) (Associated Wholesale Grocery of Dallas, Inc.), *modified*, 264 F.2d 642 (5th Cir. 1959), *cert. denied*, 361 U.S. 814 (1959); Business Machine & Office Appliance Mechanics Conference Board, 111 N.L.R.B. 317 (1955) (Royal Typewriter Co.), *enforcement denied*, 228 F.2d 553 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955).

6. United Wholesale and Warehouse Employees v. NLRB, 282 F.2d 824 (D.C. Cir. 1960); Carpenters District Council v. NLRB, 274 F.2d 564 (D.C. Cir. 1959); Sales Drivers v. NLRB, 229 F.2d 514 (D.C. Cir.), *cert. denied*, 351 U.S. 972 (1955); NLRB v. Business Machine and Office Appliance Mechanics, 228 F.2d 553 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955); NLRB v. Associated Musicians, 226 F.2d 900 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955); NLRB v. General Drivers, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952); McLeod v. Teamsters, Local 868, 179 F. Supp. 921 (E.D.N.Y. 1960); Penello v. United Hatters Union, 174 F. Supp. 887 (D.C. Md. 1959).

7. See S. Doc. No. 10, 86th Cong., 1st Sess. (1959); Subcommittee on Labor of the Committee on Labor and Public Welfare, 86th Cong., 1st Sess., *Section-By-Section Analysis of the Labor-Management Reporting and Disclosure Act of 1959* (Comm. Print 1959); Brown v. Amalgamated Lithographers, 180 F. Supp. 294 (N.D. Calif. 1960).

Pertinent portions of the statute as amended in 1959 read as follows:

"8(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture,

ercion against any person engaged in a business affecting commerce is made an unfair labor practice by the new amendments,⁸ and the prohibition against inducing and encouraging secondary work stoppages has been retained with certain modifications to plug up loopholes.⁹ Primary picketing is not affected¹⁰ and a new proviso allows non-picketing publicity as long as no sec-

process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

“
 “(B) forcing or requiring any 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, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

“
 “*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. . . .” 73 Stat. 519, 542-43, § 704(a), 29 U.S.C. § 158(b) (4) (Supp. 1959).

8. See note 7 *supra*. See also S. Doc. No. 10, 86th Cong., 1st Sess. (1959); 105 CONG. REC. 1296 (1959) (remarks by Sen. Curtis); 105 CONG. REC. 3926-28 (1959) (remarks by Rep. Lafore); 105 CONG. REC. 15672-73 (1959) (exchange of conversation between Rep. Griffin and Rep. Brown).

9. See note 7 *supra*. Generally the primary loopholes were considered to be (1) appeals for individual, as distinguished from concerted, refusals to work, and (2) appeals to persons not considered within the definition of “employee” under the act. For discussion of the 1959 secondary boycott amendments in relation to these loopholes, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1112-16 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 270-74 (1959); Comment, 45 CORN. L.Q. 724 (1960).

For discussion of a related problem, see Comment, *The Labor Management Reporting and Disclosure Act of 1959—New Restrictions on “Top-Down” Organizing*, 21 LOUISIANA LAW REVIEW 245, 251-54 (1960).

10. See the first proviso in 8(b) (4) as quoted in note 7 *supra*. It should be pointed out that the scope of primary picketing is not well defined. The line between primary and secondary picketing is the subject of a considerable body of jurisprudence which is apparently retained by the new primary picketing proviso. *E.g.*, NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951); NLRB v. International Rice Milling Co., 341 U.S. 665 (1951); Seafarers International Union v. NLRB, 265 F.2d 585 (D.C. Cir. 1959); Sales Drivers v. NLRB, 229 F.2d 514 (D.C. Cir.), *cert. denied*, 351 U.S. 972 (1955); NLRB v. General Drivers, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); United Brick & Clay Workers v. Deena Artware, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952); NLRB v. Service Trade Chauffeurs, 191 F.2d 65 (2d Cir. 1951); Sailors’ Union of the Pacific, 92 N.L.R.B. 547 (1950) (Moore Dry Dock Co.).

ondary employee refuses to work.¹¹ The act, however, does not define or indicate the scope of such words as coerce, restrain, threaten, or picketing, which are crucial in interpreting the new secondary boycott provisions.

In the instant case the Board found prohibited inducement and encouragement of secondary employees although no secondary refusals to work occurred and even though the union did everything reasonable to restrict its appeal to the consuming public. It is submitted that such a finding is not supported by substantial evidence since the union's appeal was consumer oriented by the wording on the signs, by limiting the hours of picketing, by picketing only consumer entrances, and by the lack of any evidence of appeals to employees of the retail stores or that any secondary employees actually refused to work.

The instant case points out that certain types of pressures directed toward business establishments not involved in a labor dispute may be unfair labor practices under the new amendments irrespective of any appeals to second employees. The Board, however, did not analyze the new wording or specify what constituted restraint or coercion of secondary employers in the instant case, except to say that the legislative history supports its conclusion. Apparently, the Board considers consumer or products picketing to be restraint or coercion of secondary employers *per se* since no mention was made of any other types of pressures directed toward the retailers or even that the picketing had any effect upon them or their business activities. The result of this interpretation seems to be that activities appealing to customers at secondary establishments are unfair labor practices unless they can be classified as publicity, rather than picketing. Many future cases in this area will doubtless be concerned with attempting to distinguish between publicity and picketing.¹²

At least one writer has advocated that picketing should not automatically be equated with threats, restraint, or coercion, as the Board apparently did in the instant case, since Congress could have used the word "picketing" had it so desired.¹³ It is

11. See the publicity proviso quoted in note 7 *supra*. See also 105 Cong. Rec. 17898-99 (1959) (remarks by Sen. Kennedy).

12. Many borderline factual situations could be suggested. *E.g.*, passing out handbills on sidewalks in front of secondary business establishments, appealing to consumers through loudspeakers attached to automobiles patrolling in front of stores of secondary employers, or signs attached to automobiles parked or patrolling secondary business establishments.

13. Previant, *The New Hot-Cargo and Secondary-Boycott Sections: A Critical*

submitted that the proper approach should be to analyze each case in terms of the test laid down by the statute — whether the activities in question threaten, coerce, or restrain any person engaged in a business affecting commerce to cease doing business with another person — rather than establish a substitute rule that all secondary consumer or products picketing is prohibited. It is not submitted that the results would be different in the instant case, but the suggested approach would avoid establishment of mechanical rules for applying the new secondary boycott provisions and would require a more careful consideration of the statute as applied to the facts of each case.

Robert A. Hawthorne, Jr.

SECURITY DEVICES — BUILDING CONTRACTS — MATERIAL MAN DISTINGUISHED FROM SUBCONTRACTOR

Plaintiff, general contractor for the construction of a public building, engaged a corporation to furnish structural steel conforming to plaintiff's architectural specifications. The corporation then contracted with defendant who agreed to fabricate in its own shop and deliver to the job site certain of the steel products. Defendant delivered the material but neither defendant nor the corporation did any work on the structure itself. The corporation went bankrupt without paying defendant and defendant filed an affidavit of its claim in accordance with statutes providing for the protection of certain furnishers of material for the construction of public buildings.¹ Plaintiff sued to have the affidavit cancelled and erased from the mortgage records. The district court found that the corporation was a material man and not a subcontractor, and since suppliers of material to material men are not given the benefit of the statutes in question,² ordered the cancellation of the affidavit. On appeal,

Analysis, 48 GEO. L.J. 346, 352-54 (1959). Mr. Previant contends that Congress would have used the word picketing had it intended to prohibit picketing automatically. He also suggests that a blanket prohibition on peaceful picketing raises serious first amendment freedom questions. See also Comment, 45 CORN. L.Q. 724 (1960).

1. LA. R.S. 38:2241 *et seq.* (1950).

2. The instant case is the first case so holding under the present revised statutes. However, the cases of *American Creosote Works v. City of Monroe*, 175 La. 905, 144 So. 612 (1932) and *J. Watts Kearny & Sons v. Perry*, 174 La. 411, 141 So. 13 (1932) had reached this result under La. Acts 1918, No. 224. The critical language of that act, found in Section 1, provided that: "When public buildings . . . or public work of any character are about to be constructed, . . .