

talities threaten interference with State Department policy, the United States should be impleaded at its request. Any judgment obtained against the foreign instrumentality would then be satisfied against the United States, the latter recouping through diplomatic channels.²² In fact, recovery from the United States also appears to be the just solution wherever immunity is granted; it would seem unfair to make individual plaintiffs suffer in order to further United States foreign policy.²³

²² *The Jurisdictional Immunity of Foreign Sovereigns*, 65 *Yale L.J.* 1148 (1954). This would require not simply the creation of a cause of action in favor of the foreign instrumentality against the United States but also amendment of Rule 14(a) of the Federal Rules of Civil Procedure presently providing for impleader only at the instance of the plaintiff or defendant.

²³ *Sovereign Responsibility and The Doctrine of Sacrifice (Aufopferungsanspruch)*, 24 *U. of Chi. L. Rev.* 513 (1957). This argument might, however, be limited to personal injury claimants, on the grounds that persons contracting with foreign instrumentalities assume the risk of immunity and can pass on the cost of such risk by adjusting the contract price. See *Jurisdictional Immunity of Foreign Sovereigns*, 63 *Yale L. J.* 1148 (1954).

HOT CARGO CLAUSES

A labor union, unable to secure its demands by striking and picketing a primary employer,¹ may seek to intensify its pressure by organizing boycotts on the part of employees of customers, suppliers, and carriers doing business with the primary employer. Although this boycott technique was in general prohibited by Section 8(b)(4)(A) of the Taft-Hartley Act,² perplexing problems result when the basis of the boycott is a hot cargo clause, i.e., an agreement by the secondary employer not to do business with employers stigmatized as "unfair" by the union.³

Section 8(b)(4)(A) makes it an unfair labor practice for a union to "induce or encourage" employees to engage in a "strike or concerted refusal in the course of their employment," the purpose of which is to force or require the employer to cease doing business with another employer. It was early decided by the National Labor Relations Board and by the courts that this section does not invalidate hot cargo clauses.⁴ And, although the Board later manifested increased hostility

¹ In a secondary boycott situation the employer involved in a dispute with the union is referred to as the primary employer. The employer whom the union attempts to induce not to handle the primary employer's goods is called the secondary or neutral employer.

² *Labor-Management Relations Act, 1947*, at § 8(b)(4)(A), 61 *Stat.* 141 (1947), 29 *U.S.C.A.* § 158(b)(4)(A) (1956).

³ The typical clause states that it will not be a violation of the contract or cause for discharge for the employees to refuse to handle non-union or "unfair goods." E.g., *McAllister Transfer, Inc.*, 110 *N.L.R.B.* 1769 (1954); *Pittsburgh Plate Glass Co.*, 105 *N.L.R.B.* 740 (1953). It is the union which designates what goods are "unfair" and consequently which employer is to be boycotted.

⁴ *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 294 v. Rabouin*, 87 *N.L.R.B.* 972 (1949), *aff'd* *Rabouin v. N.L.R.B.*, 195 *F.2d* 906 (C.A. 2d, 1952); *Pittsburgh Plate Glass Co.*, 105 *N.L.R.B.* 740 (1953); *McAllister Transfer*,

toward such clauses,⁵ it was faced with the formidable argument that, since a boycott established by a secondary employer at the union's request is concededly valid,⁶ an agreement to establish a boycott should also be valid. Therefore, in order to diminish the effectiveness of hot cargo clauses, the Board, without challenging their validity,⁷ imposed limitations on the methods by which they could be enforced. In *McAllister Transfer, Inc.*,⁸ Chairman Farmer held⁹ that an employer's affirmative repudiation of a hot cargo clause precluded it from being a defense to an 8(b)(4)(A) charge. In *Sand Door and Plywood Co.*¹⁰ the Board held that a direct appeal by the union to the secondary employees for enforcement of the clause constituted an unfair labor practice. Going a step further in *American Iron*,¹¹ the Board declared: "the Act does . . . preclude enforcement [of hot cargo clauses] by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand. . . ."¹²

The Board has found "inducement," within the meaning of 8(b)(4)(A), in communication by the union with its steward, since a steward is chargeable with enforcing union rules and can reasonably be expected to transmit instructions to his fellow employees.¹³ Similarly, the Board has found inducement in a union appeal to a union member who was also a representative of management.¹⁴ And the mere mention of a hot cargo clause at a union meeting has been held to violate 8(b)(4)(A).¹⁵

Inc., 110 N.L.R.B. 1769 (1954); *Sand Door & Plywood Co.*, 113 N.L.R.B. 1210 (1955), aff'd N.L.R.B. v. Local 1976, United Brotherhood of Carpenters & Joiners, 241 F.2d 147 (C.A. 9th, 1957).

⁵ *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769 (1954); *Sand Door & Plywood Co.*, 113 N.L.R.B. 1210 (1955), aff'd N.L.R.B. v. Local 1976, United Brotherhood of Carpenters & Joiners, 241 F.2d 147 (C.A. 9th, 1957); *American Iron and Machine Works Co.*, 115 N.L.R.B. 800 (1956), rev'd *General Drivers, Chauffeurs, Warehousemen and Helpers Union*, Local No. 886, 247 F.2d 71 (App. D.C., 1957); *Crowley's Milk Co.*, 116 N.L.R.B. 1408 (1956), rev'd *Milk Drivers & Dairy Emp. v. N.L.R.B.*, 245 F.2d 817 (C.A. 2d, 1957).

⁶ Cases cited in note 5 supra.

⁷ See, however, the dissent by Murdock and Peterson in *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769, 1794 (1954).

⁸ 110 N.L.R.B. 1769 (1954).

⁹ Two members of the Board felt that the clauses were invalid and therefore unenforceable. Two other members felt that not only were the clauses valid but also that they were a defense to an 8(b)(4)(A) charge even where the employer repudiates. Thus Farmer's middle ground position was the decisive vote.

¹⁰ 113 N.L.R.B. 1210 (1955).

¹¹ 115 N.L.R.B. 800 (1956).

¹² *Id.*, at 801 (italics added).

¹³ E.g., *Crowley's Milk Co.*, 116 N.L.R.B. 1408 (1956); *General Millwork Corp.*, 113 N.L.R.B. 1084 (1955).

¹⁴ *Sand Door & Plywood Co.*, 113 N.L.R.B. 1210 (1955), aff'd *NLRB v. Local 1976, United Brotherhood of Carpenters & Joiners*, 241 F.2d 147 (C.A. 9th, 1957); *Sheet Metal Workers International Ass.*, 102 N.L.R.B. 1660 (1953).

¹⁵ *Madden v. Local 442*, 114 F.Supp. 932 (W.D. Wis., 1953); cf. *American Iron & Machine Works Co.*, 115 N.L.R.B. 800, 805 (1956) (dissent).

The Courts of Appeals are, at present, in disagreement regarding the Board's position on the requirements of 8(b)(4)(A). The order in *Sand Door and Plywood Co.* was enforced by the Ninth Circuit Court¹⁶ but the orders in *American Iron* and *Milk Dairy Union* were denied enforcement by the District of Columbia¹⁷ and the Second Circuit¹⁸ Courts, respectively.

If the assumption made by the Board and the Courts—that such clauses are initially valid—is accepted, the decisions of the Board and the Ninth Circuit have created an anomalous situation. The union is in the position of having valid agreements which cannot be enforced against an unwilling employer by appeals to union members to engage in conduct permitted by the contract. The Board's position is that the clauses remain valid as between the contracting parties. However, this would seem to mean that the clauses ought to be specifically enforceable in a Section 301 action, and it may be doubted whether the Board contemplated that unions could achieve by court injunction what they cannot achieve through inducement of their employees. In terms of the purposes of 8(b)(4)(A), there seems to be no difference between either method of enforcement. And yet, if the clause is in no way enforceable, it can hardly be called "valid."

But, as the District of Columbia and Second Circuit Courts have urged, a hot cargo clause is advance consent to certain behavior;¹⁹ accordingly, this behavior can hardly constitute a "strike or concerted refusal" or a "forcing or requiring." Admittedly this interpretation reads into 8(b)(4)(A) the requirement that the "refusal" be a refusal to obey a legitimate order. However, this would appear to be correct since a contracting employer should not be able to avoid performance through repudiation. Such a repudiation not only violates the policy of Taft-Hartley, but also appears to violate the duty to bargain imposed by Section 8(a)(5).²⁰

Although the legislative history of Taft-Hartley is inconclusive and although there is some support for the contention that 8(b)(4)(A) was designed to protect the public and the primary employer,²¹ the legislators' main concern ap-

¹⁶ *NLRB v. Local 1976, United Brotherhood of Carpenters & Joiners*, 241 F.2d 147 (C.A. 9th, 1957). Accord: *Roumell v. Plumbers & Pipefitters*, 32 CCH Lab. Cas. ¶ 70,757 (E.D. Mich., 1957). See *NLRB v. Local 11, Etc.*, 242 F.2d 932 (C.A. 6th, 1957).

¹⁷ *General Drivers, Chauffeurs, Warehouseman & Helpers Union, Local No. 886 v. NLRB*, 247 F.2d 71 (App. D.C., 1957).

¹⁸ *Milk Drivers & Dairy Emp. v. NLRB*, 245 F.2d 817 (C.A. 2d, 1957). The United States Supreme Court has granted certiorari to resolve this conflict. 6 CCH Labor Law Rep. ¶ 90,001 (4th ed., 1957).

¹⁹ *General Drivers, etc. v. NLRB*, 247 F.2d 71, 74 (App. D.C., 1957); *Milk Drivers & Dairy Emp. v. NLRB*, 245 F.2d 817, 820-22 (C.A. 2d, 1957).

²⁰ Labor-Management Relations Act, 1947, at § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C.A. § 158(a)(5) (1956).

²¹ 1 Legislative History of the Labor Management Relations Act 414, 2 Leg. Hist. 1106, 1350, 1380 (80th Cong. 1st Sess., 1947).

pears to have been to protect the neutral secondary employer from labor disputes.²² And since it is conceded that a secondary employer can validly consent to a union request for a boycott,²³ it would seem that a secondary employer is not to be protected against informal union pressures. Thus, the position taken by the District of Columbia and Second Circuit Courts—whereby a secondary employer waives the protection of 8(b)(4)(A) through advance consent embodied in a hot cargo clause—does not defeat the policy of the section.

Since every successful boycott curtails the flow of goods or services into commerce—often interstate commerce—hot cargo clauses also become involved in the area regulated by the federal antitrust laws. In *United States v. Hutcheson*,²⁴ the United States Supreme Court ruled that the Norris-La Guardia and Clayton Acts, read together, had the effect of immunizing peaceful union strikes or boycotts against prosecution under the Sherman Act. However, in *Allen-Bradley v. The Union*,²⁵ the Court held that an antitrust violation occurs when a union joins with a combination of nonunion groups to effect a direct commercial restraint. Since such combinations are part of multi-employer contracts, a hot cargo clause in such a contract could be the basis of a violation. *Allen-Bradley* did not decide that an agreement between one union and one employer was outside the statutory immunity, nor did it outlaw parallel agreements negotiated independently with individual employers. In these situations hot cargo clauses might well be immune. Moreover a federal district court, in *Davis Pleating & B. Co. v. California Sportswear & D. Ass'n*²⁶ held a hot cargo clause was not illegal under *Allen-Bradley* since an economic benefit to the nonunion group was not shown. *Allen-Bradley* did not purport to set out an economic benefit test but the facts did demonstrate such a benefit. Also, such a test follows from the Court's reasoning in *Allen-Bradley*: that union activities should be denied immunity when the result of such activities is to "aid and abet" nonunion groups in frustrating the purpose of the antitrust laws.²⁷ Since a secondary employer's failure to deal with a primary employer will usually result in a financial

²² 1 Leg. Hist. 615, 2 Leg. Hist. 1106 (80th Cong. 1st Sess., 1947).

²³ Cases cited at note 5 supra.

²⁴ 312 U.S. 219 (1941).

²⁵ 325 U.S. 797 (1945). In that case, by means of union contracts with local manufacturers whereby they would sell only to contractors employing the union's members and with local contractors whereby they would buy only from manufacturers with closed shops, manufacturers and contractors outside of New York City, the union's jurisdictional area, were excluded from the New York City market. The result was higher wages for union members and increased profits for the New York manufacturers and contractors. Although the union's activities by themselves, were immunized by the Clayton and Norris-La Guardia Acts, the union-nonunion combination was sufficient to remove this immunity.

²⁶ 145 F. Supp. 864 (S.D. Cal., 1956); cf. *Meier & Pohlmann Furniture Co. v. Gibbons*, 113 F.Supp. 409 (E.D. Mo., 1953).

²⁷ *Allen-Bradley v. The Union*, 325 U.S. 797, 810 (1945).

loss to the secondary employer,²⁸ hot cargo clauses will rarely be held to constitute antitrust violations under this test.

While hot cargo clauses appear unaffected by Section 8(b)(4)(A) or the anti-trust laws, uncertainty remains. One further problem is whether a union can strike for the inclusion of a hot cargo clause in a collective bargaining agreement. If the clause is valid it can be argued that such a strike is for a lawful objective and therefore a protected activity under Section 7.²⁹ On the other hand, it would seem logical to regard 8(b)(4)(A) as protecting an employer, not only from strikes to obtain immediate boycotts, but also from strikes to obtain clauses permitting future boycotts.

Another problem arises when the secondary employer is a common carrier under a duty to serve the public without discrimination or deviation from published tariffs.³⁰ Three times state courts have held such clauses invalid as attempts to avoid this duty.³¹ These decisions appear correct; although a carrier can by advance consent waive the protection given secondary employers under 8(b)(4)(A), he cannot waive his duty to the public. However, the question of which tribunal shall deal with this problem remains unsolved. The state courts have attempted to avoid the argument that congressional preemption of the labor law field prevents state courts from dealing with hot cargo cases, by holding that such clauses are neither protected nor prohibited under Taft-Hartley.³² There is, however, serious doubt as to whether the United States Supreme Court will allow the exercise of state jurisdiction if the question comes before it.³³ And, although one examiner for the Interstate Commerce Commission has ruled that a common carrier cannot contract away its statutory duty via a hot

²⁸ A financial benefit will occur if the primary employer is a competitor, but that is seldom the case. In certain other limited situations, however, there may also be a benefit to the non-union group. Such a situation could arise under facts similar to those in *Allen-Bradley* (see note 25 supra) if the contracts negotiated with the contractors constituted hot cargo clauses. And, in the case of non-carriers, the individual members of a multi-employer group might receive a benefit from a hot cargo clause. Since all members of this group would have to buy at union shop prices, effective competition would be greatly limited.

²⁹ Labor-Management Relations Act, 1947, at § 7, 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (1956).

³⁰ Although this duty has been held to be absolute—i.e., excusable only by acts of God or public enemies, *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F.Supp. 475 (D. Ore., 1953)—the majority of jurisdictions find a duty only when the shipper's request is reasonable. E.g., *Gage v. Ark. Cent. R. Co.*, 160 Ark. 402, 254 S.W. 665 (1923). The Interstate Commerce Act requires carriers to provide service on reasonable request. 24 Stat. 382 (1887), as amended 49 U.S.C.A. § 10 (1), (4) (1929) (railroads) and 49 Stat. 558 (1935), as amended, 49 U.S.C.A. § 316 (b) (1951) (motor carriers).

³¹ *Kerrigan Iron Works, Inc. v. Cook Truck Lines, Inc.*, 296 S.W.2d 379 (Tenn. App., 1956); *Alladin Industries v. Associated Transport, Inc.*, 298 S.W.2d 770 (Tenn. App., 1956); *General Drivers, etc. v. American Tobacco Co.*, 258 S.W.2d 903 (Ky., 1953).

³² E.g., *Kerrigan Iron Works, Inc. v. Cook Truck Lines, Inc.*, 296 S.W.2d 379 (Tenn. App., 1956).

³³ *Teamsters, etc., Local Union 327 v. Kerrigan Iron Works*, 353 U.S. 968 (1957); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

cargo clause,³⁴ another ICC examiner has recommended that that agency lacks the power to outlaw hot cargo clauses in labor contracts and that this controversy should be handled by the National Labor Relations Board or Congress.³⁵ But, while the majority of hot cargo clause cases have involved common carriers, the Board has never discussed the existence of this duty in upholding the validity of these clauses. It may well feel that this problem, involving a carrier's duty, is beyond its limited powers. Yet, hot cargo clauses involving common carriers are directly contrary to what legislatures and the common law have conceived to be the public good. Unless the Commission or the Board assume jurisdiction, it remains for Congress or the courts to see that this problem is resolved.³⁶

³⁴ ICC Rule Bars Teamster Boycott of Hot Cargoes, N.Y. Times, p. 1, col. 6, p. 20, col. 8 (April 10, 1957).

³⁵ Examiner Rules ICC Lacks Power to Ban "Hot Cargo" Clauses, The Wall Street Journal, p. 5, col. 3 (Aug. 12, 1957).

³⁶ As this comment went to press, the Board, in a proceeding charging an 8(b)(4)(A) violation, held invalid a hot cargo clause contained in the union contract of a common carrier. Genuine Parts Co., 119 N.L.R.B. No. 53 (1957). Chairman Leedom and Member Jenkins felt that the Board's prior rationale upholding such clauses—i.e., that since a boycott established by a secondary employer at the union's request is concededly valid, an agreement to establish a boycott should also be valid—did not apply to cases involving common carriers, since "under the express provisions of the [Interstate Commerce Act], common carriers . . . are not free to decide, at will, to withhold the services they hold themselves out as able to perform, from any customer or class of customers." Ibid. Member Rodgers felt that hot cargo clauses are always invalid, since they contravene a section of the Taft-Hartley Act designed to protect the public. Member Bean concurred solely on the ground that the facts brought the case within the doctrine of Sand Door and Plywood Co. Member Murdock dissented, arguing that questions involving a duty under the Interstate Commerce Act should be decided by the ICC.

In terms of the results of cases before the Board, this new decision marks no change; even under the Sand Door and Plywood Co., and American Iron, cases, the existence of a hot cargo clause was irrelevant to the question of whether an 8(b)(4)(A) violation occurred. And there has been no change in the requirement of inducement, unless the dictum of Leedom and Jenkins, to the effect that the existence of a hot cargo clause is of itself prima facie evidence of inducement, is accepted. *Id.*, at n. 30. However, by placing its decision on a ground that eliminates, at least for common carriers, the indefensible "valid but unenforceable" rubric, the Board may have increased chances for ultimate court acceptance of its position.

EXTRASTATE ENFORCEMENT OF PENAL LAWS

Since Chief Justice Marshall's statement that "courts of no country execute the penal laws of another,"¹ many American courts considered the characterization of a law of another jurisdiction as "penal" to be sufficient grounds for refusing to enforce a judgment or cause of action based upon that law.² In

¹ The Antelope, 10 Wheat. (U.S.) 66, 123 (1825). In this case the Court held that a Spanish statute decreeing forfeiture of slaving vessels would not be enforced with respect to a Spanish craft captured off the American coast by a United States revenue-cutter.

² E.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) (denying enforcement to judgment based on statute imposing fine for failure to file statement about the business of a fire insurance