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Labor Relations - Unfair Practices of Labor Organizations -Hot Cargo Clause Not a Defense to Alleged Violation of Secondary Boycott Provisions of Taft-Hartley Act

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exemption from income taxes. His exemption was disallowed but the court in holding that the three-year statute applied stated, "We are of the view that if there are any omissions they were not on the part of the taxpayer but of those who handled the returns after they were filed."[6]

The Supreme Court in the instant case adopted the latter view. The purpose of the five-year statute was to enable the Commissioner to investigate returns where he was working under a disadvantage due to a taxpayer's failure to include an item in his return. When the Commissioner has all the items before him there is no such disadvantage.[7]

Section 6501 (e) (1) (A) of the 1954 Code has "resolved the problem for the future".[8] The Code provision is not new, but is a clarification of section 275 (c) of the 1939 Code. The instant case would make the result under both provisions essentially the same. Thus, under both Codes the Commissioner has only three years to assess a tax deficiency where gross income has been accurately reported and where no fraud is involved.[9]

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LABOR RELATIONS — UNFAIR PRACTICES OF LABOR ORGANIZATIONS — "HOT CARGO" CLAUSE NOT A DEFENSE TO ALLEGED VIOLATION OF SECONDARY BOYCOTT PROVISIONS OF TAFT-HARTLEY ACT. — Labor union and contractor were parties to a collective bargaining agreement which provided: "Workmen shall not be required to handle non-union material." This type of provision is known as a "hot cargo" clause. Sand Door Company filed a complaint with the National Labor Relations Board alleging union violation of the provision of the Labor-Management Relations Act of 1947,[1] which forbids unions to induce employees to refuse to handle goods for their employer

6. Slaff v. Commissioner, 220 F.2d 65 (9th Cir. 1955). "We . . . find no occasion to further torture the meaning of the word 'omit'." The court had previously held *contra*, O'Bryan v. Commissioner, 148 F.2d 456 (9th Cir. 1945).

7. The Court in the instant case stated: ". . . Congress manifested no broader purpose than to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage. And this would seem to be so whether the error be one affecting 'gross income' or one, such as overstated deductions, affecting other parts of the return."

8. Subsection (ii) provides: "In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item." Thus the burden is on the government to show that the error was not ascertainable from the face of the return.

9. Where the Commissioner can prove fraud there is, of course, no time limit. Int. Rev. Code of 1954, § 6501 (c). Int. Rev. Code of 1939, § 275 (a), 53 Stat. 87.

1. Labor-Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 141 (1947), 29 U.S.C. § 158 (b) (4) (A) (1952): "It shall be an unfair labor practice for a labor organization or its agents, *** to engage in or to induce or encourage the employees of any employer to engage in, a strike or 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 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."

when an object is to force him to cease doing business with some third party. The United States Supreme Court *held,* three justices dissenting that the presence of a "hot cargo" clause in the collective bargaining contract was not a defense to the complaint. *Carpenters Local 1976 v. National Labor Relations Board,* 357 U.S. 93 (1958).

The argument for the union position in the principal case was based on the proposition that both the employer and employee have freedom in contracting terms of employment.[2] Thus, where an employer has agreed by contract that his employees shall not be required to handle unfair goods, it cannot be said there is a strike or concerted refusal on the part of the employees as contemplated in section 8 of the Act where they merely enforce their contractual rights. This position was taken by the N.L.R.B. in a series of early cases which considered the issue.[3] In 1954, the Board reversed its decision,[4] holding that the Act was designed to protect not only private employers but the public interest as well; hence, an employer could not waive by contract the provisions of the Act which effectuated that policy.[5] Subsequently the N.L.R.B. took the position that although "hot cargo" clauses were not in conflict with the Act, any direct appeal by the union to employees inducing them to assert their rights under the contract provision violated section 8.[6]

In view of the many changes of opinion by the N.L.R.B., the instant decision should supply certainty to the law and remove secondary boycotts under the guise of "hot cargo" clauses from the collective bargaining process.[7]

A study of the history of the Taft-Hartley Act[8] seems to indicate a concern over the misuse of secondary pressures and a desire to limit the economic effect of strikes prohibiting unions from widening the conflict to neutral employers who are not concerned with the primary labor dispute.[9] Congress apparently recognized this problem created by the "hot cargo" clauses and included section 8 in the Act to eliminate it.[10]

While the present decision limits the usefulness of the "hot cargo" provision in union contracts, it should be noted that the Court was careful to observe that not all forms of the secondary boycott are outlawed by the

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2. See, *e.g.,* Adkins v. Children's Hospital, 261 U.S. 525, 545 (1923).

3. Conway's Express, 87 N.L.R.B.972 (1949), *aff'd sub nom.* Rabouin v. N.L.R.B. 195 F.2d 906 (2nd Cir. 1952); Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953); Madden v. Local 442, Etc., 114 F. Supp. 932 (W.D. Wisc. 1953).

4. McAllister Transfer, Inc., 110 N.L.R.B. 1769 (1954). Two members dissented relying on the reasoning of the *Conway Express* case and *Pittsburgh Plate Glass Co.* as the correct holding regarding "hot cargo" clauses.

5. *Ibid.* See also J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944); National Licorice Co. v. N.L.R.B., 309 U.S. 350 (1940).

6. American Iron & Machine Works Co., 115 N.L.R.B. 800 (1956); Sand Door & Plywood Co., 113 N.L.R.B. 1210 (1955).

7. "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." Lloyd & Wessel, *Public Policy and Secondary Boycotts,* 23 U. Cin. L. Rev. 31, 53 (1954).

8. For an excellent study of the history of the Labor-Management Relations Act, see Michelson, *Secondary Boycott in the Labor-Management Field,* 30 Conn. B.J. 64 (1956).

9. See remarks of Rep. Landis, 93 Cong. Rec. A-1222 and Rep. Hartley *Id.* at 3424. See also N.L.R.B. v. United Brotherhood of Carpenters & Joiners, 242 F.2d 932 (6th Cir. 1957), where it was stated that the primary purpose of Congress in enacting § 8 (b) (4) (A) was to to protect the public interest from strikes or concerted refusals at points removed from primary labor management disputes.

10. See Genuine Parts Co., 119 N.L.R.B. 53 (1957). *But see,* Milk Drivers v. N.L.R.B., 245 F.2d 817 (2nd Cir. 1957).

Taft-Hartley Act.[11] A thought-provoking aspect of the case stems from the inherent vagueness of the concept of the "secondary boycott". The difficulty encountered in defining that term adequately would seem to leave the way open for achievement of substantially the objectives sought to be reached by the "hot cargo" clause through other means. It is arguable that a union could insist on a higher rate of pay for its members when required to handle non-union goods than it exacts when exclusively union-made goods are utilized by the employer.[12] Equally, a stronger wage policy with regard to employers who consistently handled non-union goods might be effective.

It is felt that it would be better to declare "hot cargo" and similar clauses void, as the union when bargaining for the insertion of such clauses, is merely inducing the employer to agree to a secondary boycott in the future which would nullify the intention and effect of section 8(b) (4) (A) of the Taft-Hartley Act.[13]

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LIBEL AND SLANDER — PERSONS LIABLE — TELEVISION STATION WITHOUT POWER TO CENSOR NOT LIABLE FOR DEFAMATION IN POLITICAL BROADCASTS.— Television company broadcasted political speeches by the qualified candidates for the office of United States Senator. Thereafter, a third candidate requested opportunity to use the broadcasting facilities. The television company believed certain statements in the proposed speech relating to a North Dakota corporation to be libelous and notified the candidate that it would broadcast the proposed script only if demand was made under the provisions of Section 315 of the Federal Communications Act. The script was broadcasted upon demand by the candidate, and the corporation brought action against the television company and the candidate to recover damages for defamatory statements made by the candidate. The Supreme Court of North Dakota *held*, one justice dissenting, that Section 315 grants immunity to a broadcaster from liability for defamatory statements made by candidates, if such statements are germane to political issues discussed by candidates. *Farmers Educational & Coop. Union v. WDAY, Inc.*, 89 N.W.2d 102 (N.D. 1958).[1]

The law of North Dakota makes radio and television stations liable for defamatory publications.[2] Similar law exists in many states.[3] Section 315 of

11. In the instant case the court said, "much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited."

12. The argument is that since employers can obtain non-union goods in many instances at a price which is lower than that paid for union-made goods, that employer will ordinarily make a greater profit from handling such goods, thus furnishing an economic justification for a demand for higher wage rates with respect to such goods on the part of his employees. Moreover, the proscription of the statute extends, as the Supreme Court carefully pointed out in the principal case, only to the conduct specified in the statute itself, namely (1) engaging in a srike or (2) engaging in a concerted refusal to handle such goods in the course of employment. Since neither of these types of conduct would occur in a situation where a union obtained a wage-rate differential for its members when required to handle non-union goods, no violation of the statute would appear to be present.

13. For a more detailed discussion of the "hot cargo" clause see Burstein, *The "Hot Cargo" Clause*, in New York University Eleventh Annual Conference on Labor 153 (1958).

1. *Cert. granted*, 79 S. Ct. 56 (1958).

2. N. D. Rev. Code § 14-0201 (1943). North Dakota also imposes criminal liability for publication of slander by means of radio. See N.D. Rev. Code § 12-2815 (1943). It should be noted that the broadcaster in the instant case alleged as a defense that it was absolved of any liability for damages under the provisions of N.D. Rev. Code § 14-0209 (Supp. 1957) which provides: "The owner, licensee or operator of a visual or sound