Denver Law Review

Volume 30 | Issue 8 Article 4

January 1953

Secondary Boycotts under the Taft-Hartley Act

Philip Hornbein Jr.

SECONDARY BOYCOTTS UNDER THE TAFT-HARTLEY ACT

PHILIP HORNBEIN, JR.
of the Denver Bar

The distinctive feature of a secondary boycott is that it is directed against a neutral party rather than against the employer directly involved in the labor dispute. The target of the secondary boycott is a third party who is engaged in business dealings with the employer as a customer, supplier, or otherwise. The object of the secondary boycott is to cause the boycottee to cease doing business with the employer. The secondary boycott may take the form of a withholding of either patronage or labor from the boycottee. The withholding of labor may consist of an all-out strike but is usually confined to a more limited form of work stoppage.

Even before the enactment of recent state and federal legislation restricting labor union activity, the courts were generally agreed that the secondary boycott was not a permissible weapon in labor disputes. The courts held that it was contrary to public policy "to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose." [1] However, "the economic contest between employer and employee has never concerned merely the immediate disputants." [2] In every labor dispute, disinterested persons are affected in one way or another. Almost every strike will necessarily have an effect upon the operations of customers and suppliers of the struck employer.

But such indirect repercussions do not convert a primary strike into illegal secondary activity. It is only where the thrust of the union activity is aimed directly against the neutral party that it becomes an unlawful secondary boycott. It is not always easy to distinguish between the two types of activity. Because of the complex relationships in our industrial and commercial systems, many border line cases arise which present considerable difficulty to the courts.

Neither federal nor state statutes afford any clear-cut test for drawing the line between lawful primary activity and unlawful secondary activity.

The Taft-Hartley law [3] does not restrict secondary boycotts which take the form of a withholding of patronage. It is only

[1] Carpenters and Joiners Union v. Ritter's Cafe, 315 U. S. 722, 728, 62 S. Ct. 807, 810, in which it was held that an injunction against picketing did not invade any constitutional right where the picketing was directed against a restaurant, the owner of which had engaged a contractor employing non-union labor to construct a building a mile and one-half away from the restaurant.

[2] *Ibid*, 315 U. S. 724, 62 S. Ct. 808.

[3] 29 U.S.C.A., sec. 141, *et seq.*

secondary strikes or work stoppages which fall under the ban of the federal law. Sec. 8(b) (4) (A)[4] of the Act makes it an unfair labor practice "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 . . . 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 . . . ". If this section were applied according to its literal meaning, no strike would be lawful since an object of every strike is to shut down the employer's operations which would necessarily force him to "cease doing business" with other persons. However, the federal courts have quite properly given little heed to the literal terms of the statute, and have based their decisions more on the historic concepts of secondary boycotts.

On June 4, 1951, the United States Supreme Court handed down decisions in four cases[5] involving alleged unlawful secondary boycotts under the Taft-Hartley law.

The first of these cases[6] concerned the picketing of a grain mill by a union which did not represent a majority of the employees of the mill. The object of the picketing was to gain recognition of the union as bargaining representative of the employees. The basis of the complaint against the union was an incident which occurred when a customer's truck, manned by two employees of the customer, approached the mill to pick up a load of grain. The pickets sought to dissuade the truckers from carrying out their assignment and to this end they not only employed rhetoric, but also threw stones at the truck, all to no avail.

The Court of Appeals for the Fifth Circuit had held that an unfair labor practice had been committed by the union in "attempting to induce and encourage the employees of the neutral [customer] to refuse to transport . . . the commodities of the rice mill."[7] The Supreme Court reversed, holding that the conduct of the union pickets was not covered by Sec. 8(b) (4) (A) for two reasons: (1) The picketing was confined to the "geographically restricted area near the mill," and (2) its purpose was not to induce *concerted* action by the employees of the neutral employer. In the words of the court, "a union's inducements or encouragements reaching individual employees of neutral employers

[4] 29 U.S.C.A., sec. 158(b) (4) (A).

[5] N.L.R.B. v. International Rice Milling Company, 341 U. S. 665, 71 S. Ct. 961; N.L.R.B. v. Denver Building and Construction Trades Council, 341 U. S. 675, 71 S. Ct. 943; International Brotherhood of Electrical Workers v. N.L.R.B., 341 U. S. 694, 71 S. Ct. 954; Local 74, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B., 341 U. S. 707, 71 S. Ct. 966.

[6] N.L.R.B. v. International Rice Milling Company, *supra*, n. 5.

[7] 183 Fed. 2d 21, 26.

only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees." [8] The court said that the fact that the picketing was restricted to the vicinity of the mill "is significant, although not necessarily conclusive." [9]

Since the *Rice Milling* case, a number of decisions by the National Labor Relations Board and the federal courts have definitely established that picketing at the premises of the primary employer is legal even though it may cause employees of neutral employers to refuse to perform services for their employers.[10] The United States Court of Appeals, Second Circuit, construed the *Rice Milling* decision "to mean that a union may lawfully inflict harm on a neutral employer, without violating Sec. 8(b) (4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business."[11]

But in many cases the employer's operations are mobile, and the question then arises whether the union may extend its picketing to places remote from the employer's premises. In some industries, the very nature of the employer's business makes it impossible or ineffective to picket the premises of the employer. For example, in the construction industry, the employer's principal operations are not conducted in any central location, but are carried on at numerous project sites. To picket the office or shop of the contractor would have little effect on his operations. For this reason, the picketing is usually carried on at the site of the construction work. But in almost every case there are a number of other contractors also working on the same job, and it is this situation which gives rise to some of the most difficult problems under Sec. 8(b) (4) (A).

On the same day the Supreme Court handed down the decision in the *Rice Milling* case, decisions were rendered in three cases involving picketing in the building and construction industry. In the *Denver Building Trades Council* case,[12] the union had picketed a building project. The general contractor employed union workers, but one of the sub-contractors employed non-union workers. The court held the picketing unlawful on the ground that its object was to force the general contractor to terminate the contract of the sub-contractor. In the *Electrical Workers* case,[13] the fact situation was similar to that of the *Denver* case, and the court rendered a like decision. However, there is some illuminating language in the opinion of the court which indicates that if

[8] 341 U. S. 671, 71 S. Ct. 964.
[9] 341 U. S. 671, 71 S. Ct. 964.
[10] Pure Oil case, 84 N.L.R.B. No. 38; Ryan Construction Corporation case, 85 N.L.R.B. No. 76; N.L.R.B. v. Service Trade Chauffeurs, Salesmen and Helpers Union. (C.A.-2) 191 Fed. (2d) 65.
[11] 341 U. S. 675, 71 S. Ct. 943.
[12] 341 U. S. 694, 71 S. Ct. 954.
[13] 341 U. S. 699, 700, 71 S. Ct. 957.

the union had proceeded in a slightly different manner, the picketing would have been permissible. The court points out that the union had made no demands upon the sub-contractor in connection with the particular project which was picketed. The court further pointed out:

> There are no findings that the picketing was aimed at Langer [the electrical sub-contractor] to force him to employ union workmen on this job. On the contrary, the findings demonstrate that the picketing was directed at Deltorto's [the carpentry sub-contractor] employees to induce them to strike and thus force Deltorto to force the general contractor to terminate Langer's electrical sub-contract.[14]

Presumably, if the union had made a demand upon the electrical sub-contractor that he employ union workers on his job, and had re-worded its picket sign to show that it was directed against the sub-contractor rather than the general contractor, there would have been no unfair labor practice.

It is very probable that the practical effect of the picketing would have been the same if the union had proceeded as suggested by the court. As it was, the union workers walked off the job when it was picketed and the general contractor thereupon terminated the contract of the electrical sub-contractor. All this no doubt would have happened even though the union had followed the procedure indicated by the court. From this it might seem that the distinction made by the court is without substance. But it must be kept in mind that under the provisions of the statute, picketing is lawful or unlawful depending upon its "object." It is not the effect of the union activity which determines its legality, but its purpose. What purpose motivates any particular conduct is always a matter which must be inferred from the circumstances of the particular case. It may reasonably be expected therefore that a slight difference in the facts of two cases may produce divergent results.

In cases involving "roving" picketing, the problem of distinguishing between primary and secondary activity is even more difficult. The Board has recognized that "in some cases the *situs* of the dispute may not be limited to a fixed location; it may be ambulatory." [15] In the *Schultz Refrigerator Service* case [16] the Board held that the truck upon which a truck driver worked was the *situs* of a labor dispute between him and the owner of the truck. Accordingly, the union to which the driver belonged had the right to picket the employer's trucks on the premises of the employer's customers.

In the *Moore Dry Dock* case [17] the Board formulated a set of

[14] 341 U. S. 699, 700, 71 S. Ct. 957.
[15] Moore Dry Dock case, 92 N.L.R.B. No. 93.
[16] 87 N.L.R.B. No. 82.
[17] *Supra*, n. 15.

tests to determine the legality of picketing away from the premises of the primary employer. Under this decision, picketing at the premises of a neutral employer is permissible if it meets the following conditions:

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer.

These criteria were accepted by the United States Court of Appeals for the Second Circuit in the *Service Trade Chauffeurs* case.[18]

All of the cases cited involved some type of work stoppage. Where the purpose of the picket is to bring about a withholding of patronage rather than a work stoppage, it would not have to meet the standards adopted by the Board, since it is only picketing to induce a concerted work stoppage that is restricted by the Taft-Hartley law. The standards adopted by the Board in the *Moore Dry Dock* case seem to be inconsistent with the position taken by the Board in the building and construction cases.[19]

It is significant that in few of the cases involving alleged secondary boycotts is the neutral employer the complaining party. Most of the cases originate upon the complaint of the primary employer with whom the union is directly engaged in a dispute. It would seem that the identity of the complaining party should be given considerable weight in determining whether the thrust of the union activity is directed against a disinterested bystander or against the primary employer.

It is unlikely that any workable test or rule will ever be formulated to clearly mark the dividing line between primary and secondary union conduct. The most the courts can do is to "reconcile the competing claims of unions to strike and of bystanders to be free of harm from so-called 'secondary boycotts.' " [20]

LITERATE LAWYERS PLEASE NOTE

The editors of *Dicta* attempt to fill forty pages of each issue with material which is of interest to Colorado lawyers. This is frequently a difficult task since we are dependent upon our readers for contributions of the articles or items used and lawyers are prone to be too modest of their literary prowess. One need only be literate to transcribe for his fellow lawyers and posterity in *Dicta* anecdotes, amusing incidents and other items of interest. Many briefs which lawyers prepare on Colorado law would make excellent articles for *Dicta.* Contributions are always solicited.

[18] *Supra,* n. 10.
[19] *Supra,* n. 5.
[20] N.L.R.B. v. Service Trade Chauffeurs, Salesmen and Helpers Union, (C.A.-2) 191 Fed. 2d 65.