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Labor Law--Union Coercion of General Contractor Causing Him to Discriminate Against Subcontractor Employees Held Not To Be an Unfair Labor Practice Since the Employees Were Not His Own (Local 447, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Malbaff), N.L.R.B. 1968)

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special rules of evidence for different causes of action. Had the Court abolished the unavailability requirement, then the precedential effect of this case would not have been limited to fidelity bond cases. There is no reason, for example, why the statements of a former officer of a corporation, who is present for cross-examination, which statements admit liability for an act done while in the capacity of an officer, should be excluded as affirmative evidence against the corporation. Similar reasoning would apply to the statements of a former agent, employee, partner, or former joint owner of property, which were made in the course of the relationship. The Court of Appeals, rather than clarifying the clouded state of the law of hearsay, merely added to the confusion created by centuries of judicial evasiveness in establishing "rules" of evidence.

LABOR LAW — UNION COERCION OF GENERAL CONTRACTOR CAUSING HIM TO DISCRIMINATE AGAINST SUBCONTRACTOR EMPLOYEES HELD NOT TO BE AN UNFAIR LABOR PRACTICE SINCE THE EMPLOYEES WERE NOT HIS OWN. — A union local, whose members were employed by a general contractor, picketed a construction site and conducted a work stoppage to protest a subcontractor's use of non-union labor, thereby forcing the general contractor to cancel its contract with the subcontractor. The subcontractor filed an unfair labor practice charge against the union alleging unlawful coercion of the general contractor forcing him to discriminate against the subcontractor's employees. The National Labor Relations Board *held* that no unfair labor practice was committed by the union because the prohibition against the unlawful coercion of an employer which forces him to discriminate against employees applies only where the employees are those of the coerced employer. *Local 447, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Malbaff)*, 172 N.L.R.B. No. 7, 5 CCH LAB. L. REP. (1968-1 CCH NLRB Dec.) ¶22,652 (June 24, 1968).

The original National Labor Relations Act [1] [hereinafter referred to as the NLRA], was passed for the express purpose of eliminating the causes underlying labor disputes which obstructed interstate commerce,[2] but was generally thought to be too labor and

[1] The National Labor Relations Act (Wagner Act) of 1935 was amended by the Labor-Management Relations Act (Taft-Hartley Act) of 1947 and the Labor-Management Reporting & Disclosure Act (Landrum-Griffin Act) of 1959 and is currently found in 29 U.S.C. §§ 151-66 (1964).

[2] Myers, *The National Labor Relations Act in Strike Situations*, 18 B.U.L. REV. 282, 283-84 (1938).

employee oriented.[3] The reaction to this imbalance between labor and management culminated in the Taft-Hartley Act amendment of the NLRA [4] [hereinafter referred to as the Act]. The amendment was thought necessary to "furnish additional protection to the individual worker, to correct what [was] . . . conceived to be an imbalance between labor and management, and to shield neutral employers and the public when outside the indicated pale of a labor dispute." [5]

Generally, section 8(b)(2) of the Act is dispositive of the rights of the individual worker insofar as unfair union labor practices are concerned.[6] This section is inextricably intertwined with section 8(b)(1)(A) which prohibits direct union coercion of employees.[7] Section 8(a)(3) is also pertinent[8] for if an employer be in violation of this section for having succumbed to union pressure, then the union would perforce be guilty of violating sections 8(b)(2) and 8(b)(1)(A).[9] The Supreme Court, speaking of the addition of section 8(b)(1)(A) under the Taft-Hartley Act, said:

> It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to *violations of employee rights.*[10]

But what, exactly, is an employee?

The NLRA states that an employee "shall include *any employee,* and shall *not be limited to the employees of a particular employer,* unless this subchapter explicitly states otherwise . . . ." [11]

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[3] R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW 37 (4th ed. 1968).

[4] *Id.* at 46-48.

[5] Feldesman, *Act, Board and Critics: A Few ABC's,* 36 N.Y.S.B.J. 382, 383 (1964).

[6] "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an *employer* to discriminate against an employee in violation of subsection (a)(3). . . ." 29 U.S.C. § 158(b)(2) (1964) (emphasis added).

[7] "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce *employees* in the exercise of the rights guaranteed [them] . . . ." 29 U.S.C. § 158 (b)(1)(A) (1964) (emphasis added).

[8] "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158 (a)(3) (1964).

[9] UAW Local 291 (Wisconsin Axle), 92 N.L.R.B. 968 (1950).

[10] ILGWU (Bernhard-Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961) (emphasis added). For a study of the legislative intent see S. REP. No. 105, 80th Cong., 1st Sess. 50 (Supp. Views); 1 Leg. Hist. 456 (1947); II Leg. Hist. 1199, 1204, 1207 (1947).

[11] 29 U.S.C. § 152(3) (1964) (emphasis added).

But the extent of the meaning of this term has nevertheless been the subject of much interpretation.[12] The net effect of varying judicial statements of the meaning of "employee" has been that the NLRB now applies what it calls the "right-of-control" test, which will indicate an employer-employee relationship where it is found that "control is retained over the manner and means by which the result is to be accomplished." [13] In one case, the prime contractor was found guilty of a section 8(a)(3) violation because he was able to exercise sufficient control over the subcontractor's employees. Union violations of sections 8(b)(2) and 8(b)(1)(A) were also found since the union had demanded that the prime contractor only grant employment to those workers who were approved by the union hiring hall.[14]

The instant case overruled, in part, the 1959 decision in *Northern California Chapter, Association of General Contractors (St. Maurice, Helmkamp & Musser)*[15] (commonly referred to as *Musser*), which was prosecuted along lines similar to the instant case. In *Musser*, the general contractor had let a subcontract to Musser for field engineering and survey work. Due to the Musser employees' affiliation with a different bargaining group than that used by the general contractor, the general contractor's labor group caused a work stoppage, which eventually culminated in the general contractor being forced to cancel its subcontract with Musser. The National Labor Relations Board [hereinafter referred to as the Board] found, *inter alia*, that the union had been guilty of unfair labor practices, as defined under sections 8(b)(2) and 8(b)(1)(A), by forcing the general contractor to discriminate against the Musser employees by terminating their work through cancellation of the subcontract.

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[12] In Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191-92 (1941), the Court stated: "The broad definition of 'employee,' unless the Act explicitly states otherwise, . . . expressed the conviction of Congress that disputes may arise regardless of whether disputants stand in the proximate relation of employer and employee." *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Minnesota Milk Co. v. NLRB, 314 F.2d 761 (8th Cir. 1963).

[13] 1958 NLRB, TWENTY-THIRD ANN. REP. 40 (1958). If the control retained is only over the results to be accomplished, an independent contractor relationship will be found which is outside the scope of the Act. *Id.* The test was applied recently in NLRB v. United Ins. Co., 36 U.S.L.W. 4218 (U.S. March 6, 1968).

[14] H.E. Stoudt & Son, 114 N.L.R.B. 838 (1955). *Accord*, West Texas Utilities Co., 108 N.L.R.B. 407 (1954), *enforced*, 218 F.2d 824 (5th Cir.), *cert. denied*, 349 U.S. 953 (1955).

[15] 119 N.L.R.B. 1026 (1957), *aff'd sub nom.* Operating Eng'r Local 3 v. NLRB, 266 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 834 (1959).

The court reached its conclusion[16] mainly by construing the terms "an employer" and "an employee" as used in the Act. The majority reasoned that a direct employer-employee relationship need not exist. In other words, union activity would be illegal were it to force *any* employer to discriminate against *any* employee, and not necessarily one of his own employees.[17] To emphasize this point, the Board noted that other portions of the Act expressly limit their coverage to an employer's own employees.[18] Additional reliance was placed upon a prior Board decision which had stated that "Section 8(a)(3) does not limit its prohibitions to acts of an employer vis-à-vis his own employees."[19] The Court of Appeals for the District of Columbia, in affirming and enforcing the Board's decision in *Musser* cautioned: "[w]e must guard against giving this broad language a scope which includes employees whose relationship to the controversy is so attenuated as to cause their inclusion to defeat a sound administration of the Act . . . ."[20] However, the court firmly concluded: "the closeness of Musser to the dispute leads us to defer to the Board's interpretation which brings . . . [Musser's] employees within the questioned protection."[21]

The protection afforded the individual employee against discrimination by section 8(b)(2) of the Act is paralleled by the

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[16] It should be noted that the Board reached its conclusion by a 2-1-2 decision. The concurring opinion joined with the majority result by applying the right-to-control test. Using this same test, the minority found the relationship to be too speculative and felt that section 8(a)(3) applied only to cases where the employees are those of the coerced employer.

[17] 119 N.L.R.B. 1026, 1029 (1958).

[18] *Id.* at 1030. *E.g.*, 29 U.S.C. § 158(a)(5) (1964).

[19] The Austin Co., 101 N.L.R.B. 1257, 1258-59 (1952). *See* Local 24, Teamsters (A.C.E. Transp. Co.), 120 N.L.R.B. 1103 (1958).

[20] 266 F.2d 905, 909 (D.C. Cir. 1959).

[21] *Id.* The Supreme Court had concluded previously that the task of defining "an employee" was the NLRB's since it was best equipped to do so. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 126-30 (1944).

The rationale of the *Musser* case, which the majority in the instant case has overruled, was followed in Local 911, Teamsters (Wand Corporation), 122 N.L.R.B. 499 (1959). The dissent in *Wand* is of special interest, because it is the forerunner of the instant case's majority. Both were written by Member Fanning, who was not on the Board at the time of *Musser*. In *Wand*, Member Fanning took as his main theme the proposition that a union could lawfully "approach an employer to persuade him to engage in a boycott" as had been enunciated in Local 1976, Carpenters (Sand Door) v. NLRB, 357 U.S. 93, 99 (1955), Member Fanning felt that the authority of *Musser* was seriously impaired by *Sand Door*. It was apparent, he said, that here was refutation of one of the basic approaches in *Musser*, viz., that a union could not coerce employers legally without impinging upon the individual rights of employees. *Musser's* rationale was, however, followed again in the United Bhd. of Carpenters, 125 N.L.R.B. 853, 859, *modified on other grounds*, 286 F.2d 533 (D.C. Cir. 1960), where a section 8(b)(2) violation was found.

protection afforded the employer under section 8(b)(4) of the Act.[22] Unions have traditionally resorted to both primary and secondary pressures to achieve their aims, and this latter section was intended to protect the neutral employer in a labor dispute from secondary pressures by the unions.[23] These pressures are frequently referred to as secondary boycotts, but the Act does not define the pressures as such; instead, it prohibits specific activities and objectives.[24] Judge Learned Hand's oft-quoted definition of the secondary boycott is:

> that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.[25]

A more concise definition would be "any activity which brings about third party coercion, either of third parties or by third parties or both." [26] The net effect is that coercion of the primary employer is not a violation of the Act, whereas, in most cases, coercion of the neutral (secondary) employer is a violation.[27] The problem exists in distinguishing between activity directed at the primary employer and that directed at the neutral, secondary employer. One suggested test is to determine "the direction of the threat or force exerted." [28]

An important element in determining the direction of the activity is the *situs* of the labor dispute, *i.e.*, wherever the primary employer is working. This proposition was enunciated in the *Sailors Union (Moore Dry Dock)*[29] case. There, a union picketed

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[22] In pertinent part section 8(b)(4) reads as follows: "It shall be an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person . . . ." 29 U.S.C. § 158(b)(4) (1964).

[23] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1112 (1960).

[24] *Id.* at 1112-13. *See generally* Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

[25] International Bhd. Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).

[26] Lloyd & Wessel, *Public Policy & Secondary Boycotts*, 23 U. CIN. L. REV. 31, 42 (1954).

[27] Aaron, *supra* note 23, at 1116.

[28] Richardson, *The Taft-Hartley Act—Punishment or Progress*, 42 KY. L.J. 27, 45 (1953).

[29] 92 N.L.R.B. 547 (1950). The test has been applied to non-ambulatory *situs* situations. *See, e.g.*, Retail Fruit & Vegetable Clerks, Local 1017 (Crystal Palace Market), 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957); Carpenters' Local 55 (PBM), 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954).

a shipyard entrance to protest working conditions aboard a ship in the yards. Although the case is primarily demonstrative of the proposition that a *situs* can be mobile (in this case the ship), the court established four conditions, the fulfillment of which would mean that picketing a secondary employer is not a violation of section 8(b)(4). First, the picketing must occur only when the *situs* is on the secondary employers' property; second, the primary employer, at whom the activity is aimed, must be at work in a normal fashion at the *situs*; third, the picketing is limited to places reasonably close to the actual *situs*; and fourth, the picketing clearly demonstrates that the dispute is with the primary employer only.[30]

Two important applications of the *Moore Dry Dock* case should be noted. In *Local 761, Electrical Workers v. NLRB*,[31] a section 8(b)(4) violation was charged against a union which struck and picketed all five gates of a company plant, although one of the gates had for some time been set apart for the use of independent, neutral contractors. The Supreme Court held that blocking the gate probably was illegal secondary activity, harming the neutral contractors, but reversed and remanded in order for the Board to determine whether the neutral contractors were doing normal work for the company (in which case the thrust of the picketing would be primary), or doing independent work on the company grounds (in which case the picketing would be secondary). In *NLRB v. Denver Building & Construction Trades Council*,[32] a section 8(b)(4) violation was found where the labor organization engaged in a strike, an object of which was to force the general contractor to terminate its contract with a subcontractor who was using non-union labor. Previously, the Court of Appeals for the District of Columbia had found the actions of the union to be primary, and refused to enforce the Board's order.[33] The Supreme Court reversed, holding that a union in dispute with a primary party may not direct picketing against a neutral party in order to enforce its demands.

In *Local 447, Plumbers & Pipefitters (Malbaff)*,[34] the instant case, Hart, a general contractor, let a subcontract to Malbaff Landscape Construction Company. Malbaff's employees were non-union. A representative of Local 447 of the Plumbers and Pipe-

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[30] 92 N.L.R.B. at 549.

[31] 366 U.S. 667 (1961).

[32] 341 U.S. 675 (1951). *But cf.* Oil Workers Int'l Union, Local 346 (Pure Oil Co.), 84 N.L.R.B. 315 (1949) (causing cessation of business was not an object of the strike).

[33] Denver Bldg. & Constr. Trades Council v. NLRB, 186 F.2d 326 (D.C. Cir. 1951).

[34] 172 N.L.R.B. No. 7, 5 CCH LAB. L. REP. (1968—I CCH NLRB Dec.) ¶ 22,652 (June 24, 1968).

fitters Union informed general contractor Hart that unless the non-union men were taken off the job-site, there would be a picket. Malbaff, when told of the pending situation, withdrew his employees and filed charges against the union with the Regional Office of the NLRB. Thereupon, the union advised Hart that its intention was only to picket Malbaff, and in accordance with this union assurance, Hart built a separate gate for Malbaff, who then returned to work. The next day, the union commenced picketing at the main gate (not the new, separate gate) carrying signs which mentioned Malbaff only.

Up to this point, the union activity had fully conformed to the test set forth in the *Moore Dry Dock* case. The union had made clear in its picketing that its dispute was with Malbaff; Malbaff was at work on its own subcontract work, located on the general contractor's site; and the picketing was reasonably close to Malbaff's work, even disregarding the presence of a separate gate. However, picketing continued for five days, along with a work stoppage, even after Malbaff's employees were forced to leave the site for the second time. The general contractor, in order to complete the job was ultimately forced to cancel the subcontract and complete the work by alternative means. An illegal secondary boycott by the union had apparently occurred.[35] Had picketing continued but a work stoppage not taken place after the departure of Malbaff's employees, secondary activity would have been less obvious, but nevertheless a violation of 8(b)(4) under the *Moore Dry Dock* approach.[36]

Unfortunately, the Board did not rule on whether the instant case presented an illegal secondary boycott situation. The majority states: "Whether Respondent [union] violated Section 8(b)(4)(B) or any other section of the Act is not an issue in the case." [37] The decision rejected the argument that the union had violated sections 8(b)(2) and 8(b)(1)(A) of the Act even though the union objective was to force Hart to release Malbaff. This conclusion was reached by the simple expedient of ignoring the basic concept that employees can be hurt by the release of their employer.[38] The Board specifically rejected what it considered to be the reasoning of the *Musser* majority: that a general contractor has a modicum of "real control" over the employees of a subcontractor.[39]

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[35] This would appear especially clear, had Hart, the injured neutral contractor, been a complainant.

[36] *Accord*, NLRB v. Plumbers Local 457, 299 F.2d 497 (2d Cir. 1962) (threat of walkout communicated to general contractor and other neutral employers to compel discontinuation of business).

[37] 172 N.L.R.B. No. 7, 5 CCH LAB. L. REP. (1968—1 CCH NLRB Dec.) ¶22,652, at 29,927 n.3 (June 24, 1968).

[38] *Id.* at 29,928.

[39] *Id.*

The Board cited the *Denver* case, to support its contention that "doing business with a subcontractor does not derogate from the independence of either or subject the employees of one to the control of the other as an employee."[40] But the Board majority's choice of *Denver* is indicative of its weak position. *Denver* was rejected as not having any bearing on the question of a section 8(b)(2) violation by both the court of appeals which enforced the *Musser* order, and by the dissent in the instant case.[41] Thus, the essence of the majority opinion is that there can be no discrimination against employees who are not controlled by the alleged discriminatory employer. Having come to the conclusion that Hart had not been discriminatory because he did not control Malbaff, the Board logically concluded that the union could not have been guilty of unfair labor practices by exerting either direct or indirect pressure on Hart.[42]

This conclusion flies in the face of prior decisions interpreting the employer-employee relationship under section 8(a)(3). Chairman McCulloch hammers at this inconsistency and concludes that the *Musser* decision was correct in its finding that a particular employer-employee relationship need not exist, for *an* employer to discriminate against *an* employee, and that a union which incited such discrimination was guilty of violating sections 8(b)(2) and 8(b)(1)(A) of the Act.[43] Thus, the instant case is generally decided by the majority application of section 8(b)(2) of the Act in a limited sense, rather than broadly, which as Chairman McCulloch suggests is its true import, *i.e.*, the statute protects employees generally, and individually, from labor actions from any quarter, which might cause employers to discriminate against employees.[44]

The decision in the instant case exculpates labor at the expense of the individual laborer.[45] In finding no violation of employee rights, the Board has left employee ranks with the perplexing question of what remedy they may individually be left with, when after union action such as the instant case presents, and after loss of a contract, their employers lay them off for lack of other work. This would seem especially problematical where the union activity is conducted so carefully that it cannot be prosecuted as illegal secondary activity. A recent Board decision may be ana-

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[40] *Id.*

[41] *Id.* at 29,929 n.8 (dissenting opinion).

[42] 5 CCH LAB. L. REP. (1968—1 CCH NLRB Dec.) ¶ 22,652, at 29,929 (June 24, 1964).

[43] *Id.* at 29,930 (dissenting opinion).

[44] *Id.* at 29,929 (dissenting opinion).

[45] *See* Local 57, ILGWU v. NLRB (Garwin Corp.), 374 F.2d 295 (D.C. Cir. 1967), *discussed in* Petro, *Expertise, The NLRB and The Constitution: Things Abused and Things Forgotten,* 14 WAYNE L. REV. 1126, 1131 (1968).

logized to demonstrate the problem. The case [46] presents the exact point of view which the Board apparently wishes to foster: that a union violation of section 8(b)(2) will be found only where it causes an employer to discriminate against his own employees. Violations of sections 8(b)(2) and 8(b)(1)(A) were charged when a union threatened to strike, causing the employer to rescind its agreement to employ a non-union man. A finding of union violation was sustained by the Board. But suppose that the employer had agreed to hire a one-man trucking corporation for a small job, instead of merely an individual. Under the decision in the instant case, a violation of section 8(b)(2) would not stand because the employer would only be cancelling a contract with another employer, and union activity designed to bring about such a cancellation would not be illegal. Alternatively, consider whether a violation of section 8(b)(4) could be found. If the union confined its activity to the trucker, the activity could not be considered illegal secondary action. And yet, the employer would have to get another to do the job, and the trucker would have been discriminated against, and out of a job.

While the NLRB has the power to determine the meaning of the NLRA (subject to review), this narrow construction of a broad protective legislative intent will deny the Board the latitude it requires to administer justice equitably. The instant case narrows the Board's ability to find a section 8(b)(2) violation when there is a necessity to protect any individual employee. Protection of the worker should be paramount to protection of unionism, and the Board should at its first opportunity reestablish the principle that an employer can be found guilty of discriminating against an employee, even if he is not his own employee.

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[46] Teamsters Local 439 (Los Angeles-Seattle Motor Express), 5 CCH LAB. L. REP. (1968—2 CCH NLRB Dec.) ¶20,175 (September 13, 1968).