

Labor Law--Inducement of Supervisor Permitted by Amended Section 8(b)(4) (NLRB v. Teamsters Union, 188 F. Supp. 558 (D. Mass. 1960))

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Perhaps the majority felt that such an interpretation would result in a greater divergence from the doctrine of *forum non conveniens* than the wording of the section warrants.²⁷ Nonetheless, at present, if section 1404(a) is to be available, the proposed transferee forum must be one over which the court has jurisdiction and venue, and where the defendant *was originally* amenable to process.²⁸

Any wider extension of the availability of transfers must now depend upon clearer legislative pronouncement.



LABOR LAW — INDUCEMENT OF SUPERVISOR PERMITTED BY AMENDED SECTION 8(b)(4).—A subcontractor without a union contract was employed at two different construction sites. At the first site, the general contractor operated under a union agreement requiring observance of union rules¹ in all subcontracts. A superintendent at the site had full authority over these subcontracts, as well as the authority to hire and fire, to hear grievances, and to handle routine operational problems. The subcontractor employed suspended union members and did not observe union conditions, which facts were brought to the attention of the superintendent by an agent of the union. The superintendent cancelled the subcontract. At the second site, the subcontractor was removing dirt in trucks driven by non-union personnel. Union officers told the contractors that union drivers would not work with non-union drivers, and, as a result, the subcontractor's non-union trucks were barred from the

in situations like the present implies distrust in the ability and character of district judges to hold the balance . . .” *Hoffman v. Blaski*, 363 U.S. 335, 368 (1960) (dissenting opinion to case No. 26, *Sullivan v. Behimer*).

²⁷ In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the Court had stated: “In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . .” *Id.* at 506-07 (dictum). Considering the wording of the section and its admitted formulation “in accord” with the doctrine of *forum non conveniens* in the light of this statement strengthens the majority view.

²⁸ *But see* *Continental Grain Co. v. Federal Barge Lines, Inc.*, 364 U.S. 19 (1960). Here, a barge and its owner were libelled in admiralty. The Court allowed transfer to a forum where the owner was originally amenable to process, but where in *rem* jurisdiction over the barge was originally unavailable. The Court reasoned, however, that this was really a single civil action against the owner, although the barge was considered as a separate party through a fiction of admiralty law. Thus compelling reasons of “convenience” and “interest of justice” were allowed to override the fiction. Mr. Justice Whittaker, who wrote the majority opinion in the instant case, insisted, in his dissenting opinion that the holding of the instant case should control.

¹ The union required employment of union members at the union pay scale.

site. The United States District Court *held* that the statement of the union agent at the first site was not a prohibited threat, but merely a request for compliance with the union contract, nor was it a prohibited inducement in view of the authority of the superintendent. However, the Court declared that the statements at the second site constituted prohibited threats within the meaning of Section 8(b)(4)(ii) of the Labor-Management Reporting and Disclosure Act. *NLRB v. Teamsters Union*, 188 F. Supp. 558 (D. Mass. 1960).

Union unfair labor practices were first defined in 1947 by the Taft-Hartley Act.² Though not specifically mentioning the secondary boycott, Congress nevertheless sought to outlaw it.³ The act made it an unfair labor practice for a union to induce "the employees of any employer" to engage in a strike or a concerted refusal to work, where the object was to cause a neutral employer to cease doing business with another person.⁴ Subsequent decisions, however, exposed weaknesses in three areas of the provision. First, the language apparently permitted a union to induce an individual worker.⁵ Second, the act's definitions of "employer"⁶ and "employee"⁷ specifically excluded certain persons from its coverage. Thus, the secondary boycott provision did not apply to employees of railroads⁸ and political subdivisions,⁹ nor to supervisors¹⁰ as a class. Finally,

² Labor Management Relations Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1958).

³ "This provision [§ 8(b)(4)] makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." 93 CONG. REC. 4198 (1947) (remarks of Senator Taft).

⁴ Specifically, § 8(b)(4) made it an unfair labor practice for a union "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 . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958).

⁵ *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

⁶ National Labor Relations Act, 49 Stat. 449, 450 (1935), as amended, Labor Management Relations Act, 61 Stat. 136, 137 (1947), 29 U.S.C. § 152(2) (1958).

⁷ National Labor Relations Act, 49 Stat. 449, 450 (1935), as amended, Labor Management Relations Act, 61 Stat. 136, 137-38 (1947), 29 U.S.C. § 152(3) (1958).

⁸ *Seafarers' Union*, 124 N.L.R.B. No. 145 (1959); *Lumber and Sawmill Workers, Local 2409*, 126 N.L.R.B. No. 12 (1959); *Paper Markets Importing Co.*, 116 N.L.R.B. 267 (1956). *Contra*, *W. T. Smith Lumber Co. v. NLRB*, 246 F.2d 129 (5th Cir. 1957), *reversing* 116 N.L.R.B. 1756 (1956).

⁹ *Paper Makers Importing Co.*, 116 N.L.R.B. 267 (1956); *International Bhd. of Elec. Workers*, 104 N.L.R.B. 1128 (1953).

¹⁰ See *L. A. Young Spring & Wire Corp. v. NLRB*, 163 F.2d 905 (D.C.

the neutral employer himself received no protection from direct union pressures.¹¹

The Labor-Management Reporting and Disclosure Act of 1959¹² included amendments to section 8(b)(4) which were designed to correct these weaknesses. The amended provision made it an unfair labor practice for a union

- (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of employment to use, manufacture, 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 . . .¹³

where an object thereof was to effect a secondary boycott.¹⁴

The instant case involves one of the first definitive interpretations of the amended section. In permitting the union conduct at the first site, the Court seemingly based its decision on the broad authority vested in the superintendent. In the words of the Court, he "had authority to hire and fire, to hear grievances, and to handle routine operational problems arising out of subcontracts."¹⁵ In addition, he could "terminate" such contracts. The Court therefore held that the mere mention to the superintendent of the fact that his employer's union contract required observance of union rules in all subcontracts could not be a threat prohibited by section 8(b)(4)(ii). Nor did the Court hold that such conduct was a prohibited inducement under section 8(b)(4)(i), since it interpreted that section as applying to persons performing manual or clerical services, or "minor supervisory functions," and not to persons with authority to sever business relations. Concerning the activity at the second site, the Court stated summarily that the remarks of the union officers amounted to threats and were prohibited by section 8(b)(4)(ii).

It was generally thought that substitution of the term "individual" for the term "employees" would bring supervisors, as a class, within the coverage of section 8(b)(4)(i),¹⁶ since the only apparent basis

Cir.), *cert. denied sub nom.* Foreman's Ass'n v. L. A. Young Spring & Wire Corp., 333 U.S. 837 (1947).

¹¹ Rabouin v. NLRB, 195 F.2d 906, 911, 912 (2d Cir. 1952); *accord*, NLRB v. Associated Musicians, Local 802, 226 F.2d 900, 904 (2d Cir. 1955).

¹² 73 Stat. 519 (1959), 29 U.S.C. § 158 (Supp. 1959).

¹³ Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 542-43 (1959), 29 U.S.C. § 158(b)(4) (Supp. 1959).

¹⁴ Specifically, the prohibited objective 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 . . ." Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 543, 29 U.S.C. § 158(b)(4)(B) (Supp. 1959).

¹⁵ NLRB v. Teamsters Union, 188 F. Supp. 558, 560 (D. Mass. 1960).

¹⁶ Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*,

for the exclusion of supervisors was the act's definition of the term "employee."¹⁷ In 1947 Congress first defined a "supervisor" for the purposes of the National Labor Relations Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*¹⁸

Prior to this definition the NLRB had consistently distinguished persons with genuine management authority from other minor supervisory employees. The former were labeled "supervisors" and excluded from the act's coverage,¹⁹ while the latter were consistently included as "employees."²⁰ Congress recognized and retained this classification when it specifically defined a "supervisor" for the act's purposes,²¹ and subsequent NLRB decisions have fortified this distinction.²² It is true that these classifications were made in connection with the application of sections of the act containing the term "employee." Nevertheless, the practical effect of this Court's limitation of the applicability of section 8(b)(4)(i) to persons with "minor supervisory functions" would seem to be the equation of the terms "individual" and "employee," at least with respect to supervisors.

Job-titles per se have never been conclusive proof of supervisory status.²³ In applying sections of the National Labor Relations Act

73 HARV. L. REV. 1086, 1113-114 (1959); Ryan, *Secondary Boycotts Under the New Labor-Management Reporting and Disclosure Act of 1959*, 34 ST. JOHN'S L. REV. 42, 44 (1959).

¹⁷ See note 11 *supra*.

¹⁸ Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136, 138 (1947), 29 U.S.C. § 152(11) (1958) (emphasis added).

¹⁹ Matter of Charlottesville Woolen Mills, 59 N.L.R.B. 1160, 1163 (1944) (authority to hire, fire and discipline other employees); Casper Lumber Co., 55 N.L.R.B. 819, 821 (1944) (authority to hire and fire).

²⁰ Endicott Johnson Corp., 67 N.L.R.B. 1342, 1347 (1946) (authority to keep production moving); Pittsburgh Equitable Meter Co., 61 N.L.R.B. 880, 882 (1945) (authority to give instructions and to lay out work).

²¹ S. REP. No. 105, 80th Cong., 1st Sess. 4 (1947). "[T]he committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that Act [NLRA]. It has therefore distinguished between straw bosses, lead men, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such acts. In other words, the committee has adopted the test which the Board itself has made in numerous cases . . ." *Ibid*.

²² United States Gypsum Co., 118 N.L.R.B. 20, 25 (1957); Southern Bleachery & Print Works, Inc., 115 N.L.R.B. 787, 791 (1956).

²³ NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235, 239 (4th Cir. 1958); Red Star Express Lines of Auburn, Inc. v. NLRB, 196 F.2d 78 (2d Cir. 1952).

with the term "employee," the courts and the NLRB have excluded those supervisory personnel whose functions identified them closely with management. It is submitted that section 8(b)(4)(i) was designed primarily to bring those "employees," excluded under the old section, within the ambit of the secondary boycott provisions. However, nowhere does it appear that Congress intended to abolish the distinction between "supervisors" and "employees." Hence, section 8(b)(4)(i) has properly been interpreted as excluding persons with management-like authority, since such authority justifies their treatment as "agents" of the neutral employer, rather than as employees.



SALES—BREACH OF IMPLIED WARRANTY—PRIVITY UNNECESSARY FOR RECOVERY.—Plaintiff husband bought an automobile from defendant dealer which had been manufactured by defendant Chrysler Corporation. The dealer-manufacturer warranty disclaimed all warranties except the replacement of parts.¹ Ten days after purchase, plaintiff wife received injuries in an automobile accident when the car went out of control due to a defective steering mechanism.² Plaintiff wife and plaintiff husband brought a breach of warranty action against both dealer and manufacturer. The Supreme Court of New Jersey held that the wife could recover for personal injuries, and the husband, for loss of services, against both dealer and manufacturer regardless of privity. The Court further stated that the dealer-manufacturer warranty disclaimer was invalid as a matter of public policy. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

In 1890 the New York Court of Appeals emphasized that "a sound public policy . . . demands that the doctrine of *caveat emptor* shall be still further encroached upon, rather than that the public health shall be endangered."³ Some years later, when an eminent

¹ The warranty expressly guaranteed the replacement of parts for 90 days or 4,000 miles, whichever occurred first. It expressly disclaimed all other warranties.

² The car was demolished in the accident, making it impossible to discover where the defect had occurred. The only substantial evidence of a defect, aside from the wife's testimony that the car went completely out of control, was an opinion by the insurance inspector that there must have been some mechanical defect to cause the car to react the way it did. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, —, 161 A.2d 69, 75 (1960).

³ *Fairbank Canning Co. v. Metzger*, 118 N.Y. 260, 267, 23 N.E. 372, 374 (1890).