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Niagara Fire Ins. Co., 254 App. Div. 298, 5 N.Y.S.2d 1 (2d Dep't 1938). This case places equal stress on both incidents of fraud in voiding the policy.

There are a number of federal cases similar to the *Werber* case holding the policy void because of fraud and false swearing. *Hyland v. Milles National Assurance Co.*, 58 F.2d 1003 (N.D.Cal 1932), *aff'd.* 91 F.2d 735 (9th Cir. 1937), *cert. denied* 303 U.S. 645 (1938); *Cuetara Hermanes v. Royal Exchange Assurance Co.*, 23 F.2d 270 (1st Cir. 1927), *cert. denied* 277 U.S. 590 (1928); *Atlas Assurance Co. v. Hurst*, 11 F.2d 250 (8th Cir. 1926). In point of time all of these cases follow a Supreme Court case that establishes the rights of the insurance company under such a clause and holds the force of the clause limited to preliminary proof of loss and examination. *Republic Fire Insurance Co. v. Weides, supra.* The decisions in these federal cases, however, may be reconciled with the *Weides* case on their facts since they arose out of situations involving fraud and false swearing before trial as well as at trial.

It would thus appear that the rule in the instant case is the more sound since it provides the insurer with adequate protection in examining preliminary claims but protects the adversary nature of the trial. The cases advocating a contrary result are generally found to be grounded on fact situations containing fraud or false swearing before the trial and at the trial, and so while correct in themselves, are distinguishable from cases under the majority rule.

Thomas Beecher

Labor Law: Validity of "Hot Cargo" Clause in Contract Between Employees and Common Carriers.

Employment contracts between common carriers and their employees included a typical "hot cargo" clause providing that refusal by the employees to handle "unfair goods" should not constitute a violation of the agreement. The goods of a shipper, involved in an economic strike with the union, were handled by the carriers for about two weeks after commencement of the strike, but with union encouragement, the employees refused to handle them thereafter. On hearing of unfair labor practice charges filed by the shipper, *held* (4-1): the union was guilty of an unfair labor practice under the Taft-Hartley Act. *Genuine Parts Co.*, 119 N. L. R. B. No. 53 (1957). The case is particularly significant, since it is the first time a majority of the Board has held that a "hot cargo" clause itself, as distinguished from efforts to enforce such a clause, was invalid.

Section 8(b)(4)(A) of the Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 141 (1947), 29 U. S. C. §158(b)(4)(A) (1952) makes

it an unfair labor practice for a union to "engage in, or . . . induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment" to handle or work on goods when an object of such refusal is "forcing or requiring" the employer to cease doing business with another person. The section, dealing generally with secondary boycotts, seeks to restrict unions from extending ordinary strikes to neutral employers not involved in labor difficulties but who do business with the struck employer. Any kind of pressure or persuasion will amount to inducement or encouragement within the meaning of the Act. *International Brotherhood of Electrical Workers v. NLRB,* 341 U.S. 694, 701-02 (1951). However, such inducement, to be within the Act's proscription, must be directed to employees; action directed to management, short of a strike, is not forbidden. *Schatte v. International Alliance,* 182 F.2d 158, 165 (9th Cir. 1950), *cert. denied* 340 U.S. 827 (1950).

In early decisions under the Taft-Hartley Act, the Board held that action which would ordinarily have been prohibited by §8(b)(4)(A) was not unlawful when taken by parties to a "hot cargo" contract. If Employer A was struck by a union in an economic dispute, and the union requested secondary Employer B to stop doing business with A, and B agreed voluntarily, there would clearly be no violation of the statute. The Act does not affect the right of an employer to choose his customers. Therefore, reasoned the decisions, a secondary employer was free to agree, in advance, with a union to cease doing business with a primary employer at any future time when the latter was involved in a strike. After such an agreement, refusal by employees to handle "hot goods," with the acquiescence of secondary employer, was not a "strike" or "concerted refusal" since employer permission had been obtained and employees were merely abiding by the terms of their contract. *Conway's Express,* 87 N.L.R.B. 972, 981-83 (1949); *enforcement granted sub nom. Rabouin v. NLRB,* 195 F.2d 906 (2d Cir. 1952). Further, the inclusion of a provision relieving employees from handling "hot goods" limited the scope of the employment and refusal to handle the work was therefore not "in the course of their employment" as required by the Act *Pittsburgh Plate Glass Co.,* 105 N.L.R.B. 740 (1953). Thus, a union, prohibited from compelling a secondary boycott, could nonetheless accomplish that end by first inducing employers to agree to include "hot cargo" clauses in employment contracts.

In a subsequent decision of the Board, the "course of . . . employment" rationale was overruled. And since, in that case, the secondary employer had posted a notice ordering his employees to handle the goods in question of the struck shipper regardless of the "hot cargo" contract, the *consent* at the time of the employees' refusal, present in the *Conway* and *Pittsburgh Plate Glass* cases, was lacking and the union was prohibited by the Act from inducing the employees to enforce the "hot cargo" clause by customary strike procedure.

McAllister Transfer Inc., 110 N.L.R.B. 1769, 1788-90 (1954). Thus, although the union could enter into a "hot c argo" contract, it would not be able to use the contract clause, renounced by the employer, as a defense to an unfair labor charge under §8(b)(4)(A) where the employees continued to refuse to handle "hot goods" after the employer's renunciation.

The union's power to use "hot cargo" contracts to avoid §8(b) (4) (A) was further circumscribed by two later decisions of the Board. In the first case, it was held that a union could take no direct action under the "hot cargo" provisions which would be unlawful in the absence of those provisions until the secondary employer positively reaffirmed his consent to the "hot cargo" clause. *Sand Door and Plywood Co.,* 113 N.L.R.B. 1210 (1955), *enforcement granted sub nom. NLRB v. Local 1976 United Brotherhood of Carpenters, AFL,* 241 F.2d 147 (9th Cir. 1957), *cert. granted,* 26 U.S.L. WEEK 3116 (U.S. Oct. 14, 1957) (No. 127). In the second case, it was held that no such action could be validly taken under cover of the provisions regardless of the acquiescence of the employer. *American Iron and Machine Works Co.,* 115 N.L.R.B. 800 (1956), *enforcement denied sub nom. General Drivers Local 886, AFL-CIO v. NLRB,* 247 F.2d 71 (D.C. Cir. 1957) *cert. granted,* 26 U.S.L. WEEK 3116, (U.S. Oct. 14, 1957) (No. 273). Nothwithstanding the last two mentioned NLRB decisions, the Second Circuit has recently reaffirmed the *Conway* decision and has, as did the District of Columbia Circuit in the *American Iron* case, rejected the *Sand Door* concept. *Milk Drivers v. NLRB,* 245 F.2d 817 (2d Cir. 1957), *petition for cert. filed,* 26 U.S.L. WEEK 3077 (U.S. Aug. 29, 1957), (No. 412). The final decision on these three cases, presently before the Supreme Court, will affect the ultimate significance of the most recent NLRB decision. However, this latter case presents squarely the issue of the conflict between "hot cargo" clauses and the public duty of common carriers, not directly contested in the former cases, and thus should not depend on their outcome for its vitality.

In the instant case, the main opinion by two members of the Board bases its holding on the duty of common carriers under the Interstate Commerce Act to perform services indiscriminately in response to reasonable requests of anyone willing to comply with the tariff of the company. Interstate Commerce Act §216(d), 54 STAT. 924 (1940), 49 U.S.C. §316(d) (1952). Since, according to this view, the neutral employer's right to choose his customers is specifically denied to common carriers under the law, there is no longer any basis in fact for the premise of the *Conway* and *Pittsburgh* cases allowing agreement between employers and employees to "hot cargo" clauses where common carriers are involved. The clause is, therefore, as to common carriers, invalid and without legal effect in the Board's view.

Member Rodgers, in a concurring opinion, came to the same result without

considering the duty of common carriers, relying instead on the public policy which he perceives in the Act against "hot cargo" clauses of any sort. Member Bean concurred separately on the basis of the *Sand Door* and *American Iron* decisions above mentioned which held the clause valid but directed appeals to employees to enforce the contract clause against the clear language of the Act, and hence unlawful.

One member, dissenting, argued for the original holding of the Board in the *Conway* case, unmodified by the doctrine of later decisions, echoing the criticism of the Second Circuit that there is no reason for allowing the inconsistency that a union may enter into a "hot cargo" contract but may not enforce it. *Milk Drivers Union v. NLRB, supra.* As to common carriers, the dissent argued that the NLRB should not presume to settle the issue of the lawfulness of refusal by carriers to render service when it has a "hot cargo" agreement with its employees inasmuch as the Interstate Commerce Commission had not decided that such contracts would not constitute an excuse of the carrier's public duty.

Although, as pointed out by the dissent, carriers may be excused from their public duty where extraordinary circumstances outside their control make a request for service unreasonable or hazardous, *Minneapolis and St. Louis Ry. v. Pacific Gamble Robinson Co.,* 215 F.2d 126, 132 (1954), this should have caused no hesitation to adopt the majority view that a carrier does not have such a general power to choose its customers as to justify its prior giving of consent. If a "hot cargo" clause is justified because the secondary employer may voluntarily boycott a primary employer *(Conway's Express, supra),* then where the employer cannot lawfully boycott, the "hot cargo" clause should fall.

Three weeks following the NLRB decision in the *Genuine Parts* case, its view was reinforced by a holding of the ICC that, whatever their status might be under the Taft-Hartley Act, "hot cargo" contracts could not be advanced by common carriers as an excuse for non-performance of their statutory duty to serve the public under the Interstate Commerce Act. *Galveston Truck Line,* No. MC-C-1922 (1957). In that case, Galveston, a common carrier, filed charges against a group of other carriers which had boycotted its goods during a strike by the Teamsters.

It was urged in defense that the carriers were justified in refusing Galveston's goods because of "hot cargo" contracts between the carriers and Teamsters, entered into, the carriers claimed, under duress. This was rejected by the Commission. Under the Interstate Commerce Act, common carriers have a duty to serve the public on "reasonable request" which is "almost absolute" in nature. These statutory obligations cannot be bargained away. As stated in the *Galveston* decision:

> Labor difficulties arising in connection with the performance of such common carrier duties cannot be permitted to be used as a valid excuse for the carriers to discontinue rendering to the public the service which they are obliged to perform and to which the public is entitled.

The legislative history of the Taft-Hartley Act has not shed much light upon the intent of Congress with regard to "hot cargo" controversies. The language of §8(b)(4)(A) against strikes, is opposed to that of §§7 and 13 of the Act which seek to preserve the right to strike in the unions. However, as stated in *Quaker City Motor Parts v. Inter-State Motor Freight System,* 148 F. Supp. 226, 228 (1957), it seems unreasonable to infer that Congress, in passing the Taft-Hartley Act, meant to overrule its previously expressed intent in the Interstate Commerce Act regarding the duty of common carriers. The Commission holding above is in line with a consistent legal policy of imposing strict duties of performance upon the carriers. The Taft-Hartley provisions ought to be interpreted, where possible, in a manner consistent with that policy.

Two members of the majority in the NLRB case under review would go further than the majority holds, stating the need for an "affirmative decisional rule" that entrance into a "hot cargo" contract plus the refusal of service to a shipper at a subsequent time should suffice to constitute prima facie evidence of a violation of §8(b) (4) (A) by a union. *Genuine Parts Co., id. at Note 30 (dictum).* This suggestion is questionable, inasmuch as it does considerable strain to the statutory elements of proof outlined in the Act. The Act specifically prescribes an action constituted of two elements, an unlawful means (a strike or inducement to strike) and an unlawful purpose ("forcing or requiring" the neutral employer to cease doing business with a primary employer). To be an unfair labor practice, union action must contain both elements. *Wadsworth Bldg. Co. Inc.,* 81 N.L.R.B. 802, 805 (1949), *enforcement granted sub nom. NLRB v. United Brotherhood of Carpenters, AFL,* 184 F. 2d 60 (10th Cir. 1950), *cert. denied,* 341 U.S. 947 (1951); Lawless, *"Hot Cargo" Clauses: A Problem in their Application to Secondary Boycotts,* 15 FED. BAR JOURNAL 76, 78 (1955). The negotiation of a "hot cargo" contract involves the inducement of *management* rather than *employees* and is not, in itself, proscribed as an unfair labor practice. There is a difference between holding a "hot cargo" clause of no effect and holding it as evidence of an unfair labor practice. Whatever utility there might be in the proposed rule, there seems to be little authoritative basis for it.

The decisions of the two boards, although in sharp contrast to the situation prevailing under the early "hot cargo" cases, seem eminently defensible. Prior cases have held that labor unions may not, in the guise of legitimate labor activity under labor legislation seek to coerce an employer to violate a state statute against agreements in restraint of trade, *Giboney v. Empire Storage and Ice Co.,* 336 U. S.

490 (1949), or assist him to create a monopoly prohibited under the Sherman Antitrust Act, *Bradley v. Local Union,* 325 U.S. 797 (1945). It would seem no less orthodox to say that a labor union may not seek to compel an employer to commit an unlawful act by violating the Interstate Commerce Act. Interstate Commerce Act, §216(d), 54 STAT. 924 (1940), 49 U.S.C. §316(d) (1952).

The change in the law resulting from the NLRB decision in the *Genuine Parts* case affects common carriers and their employees only and will have no impact upon the construction industry or other businesses in which "hot cargo" plays an important part. But it should settle the law in the transportation area, regardless of the Supreme Court decision on the cases presently before it. If the Board's view in *Genuine Parts* is rejected, and "hot cargo" clauses are allowed in the transport industry, common carriers will be in the unenviable position of having to tread a frail tightrope to obey the law. On the one hand, they would be subject to the pressures of unions seeking to have included in employment contracts "hot cargo" clauses, valid under the Taft-Hartley Act. On the other, as the latest decision of the ICC demonstrates, such a clause, if accepted by the carriers, would not protect it from charges before the ICC resulting from refusal, under the provisions of the "hot cargo" clause, by the carrier's employees to perform transportation services.

William H. Gardner

Invasion of Privacy in Debt Collection

Plaintiff brought an action for invasion of privacy based upon a letter written by defendant to plaintiff's employer requesting assistance in the collection of a bill which plaintiff claimed she did not owe. The Supreme Court of Georgia, in reversing the decision of the court below and sustaining defendant's demurrer, held that such a letter was a reasonable means of collection and therefore did not constitute an invasion of plaintiff's right of privacy. *Gouldman-Taber Pontiac v. Zerbst,* 100 S.E.2d 881 (Ga. 1957).

Where creditors have sought collection by disclosure of the claim to the debtor's employer with the threat, implicit if not explicit, to initiate garnishment proceedings should it remain unpaid, debtors have brought action against them on three different theories: intentional infliction of mental suffering, *La Salle Extension University v. Fogarty,* 126 Neb. 457, 253 N.W. 424 (1934); libel, *Schieve v. Cincinnati and Suburban Bell Telephone Co.,* 71 Ohio L. Abs. 350, 126 N.E.2d 817 (1955), *Keating v. Conviser,* 246 N.Y. 632, 159 N.E. 680 (1927); and invasion of privacy, *Patton v. Jacobs,* 118 Ind. App. 358, 78 N.E.2d 789 (1948), *Housh v. Peth,* 165 Ohio St. 35, 133 N.E.2d 340 (1956). Since an action based upon intentional infliction of mental suffering would seem to