Federal Labor Laws

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XXX. Regulation of Hot Cargo and Featherbedding Agreements

A. Definitions and Scope of Regulation

1. Broadly defined, a hot cargo agreement is any agreement under which an employer agrees to cease doing business with another entity. Traditionally, hot cargo agreements have helped protect union work by allowing union members to refuse to handle or process struck or nonunion work.

    a. Many forms of hot cargo agreements were outlawed by the Landrum-Griffin amendments to Taft-Hartley in 1959.

    b. Since Taft-Hartley, it has been unlawful to apply secondary pressure to stop many forms of business relationships. The § 8(e) amendments extended the secondary prohibitions of Taft-Hartley to voluntary agreements.

2. The major categories of agreements which are regulated by Section 8(e) include:

    a. Agreements, including picket line clauses, under which union members may refuse to handle the work of struck or nonunion companies,

    b. Work preservation or expansion clauses, including insourcing agreements, under which a union brings work into its jurisdiction which has previously been done by another company, and

    c. Subcontracting agreements, under which a union attempts to limit the companies to which its employer may subcontract bargaining unit work.

3. The relationship between general contractors and subcontractors in the construction industry has led to a limited exception under § 8(e) for subcontracting agreements in that industry.[1]

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[1] The first proviso of §8(e) which states:

Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:

4. Similarly, the close interrelationship between contractors and subcontractors in the clothing and apparel industry present unique problems for the enforcement of union standards in the industry. As a result, subcontracting agreements among interdependent employers in that industry are exempt from regulation by § 8(e)[2] and related parts of § 8(b)(4).

B. Refusals to Handle Struck or Nonunion Work

1. An agreement giving to union members the blanket right to refuse to handle struck or nonunion work is unlawful under § 8(e).

   a. Unions may negotiate struck work clauses, but only to the extent that the workers would have the right to strike in support of another unit.

   b. Agreements which restrict the handling of products in the normal course of the employer's business are unlawful.

   c. If a union has a struck work clause limited to work which would not have been done but for the existence of a labor dispute, the clause is valid. The union, therefore, has the right to negotiate language limiting the ability of its primary employer to act as an ally of another struck employer.[3]

2. Similar restrictions apply to contract clauses giving workers the right to honor a picket line. Such a clause cannot give to workers the right to honor a secondary picket line. Valid picket line clauses must be limited to the right to honor legal, primary picket lines.[4]

C. Work Preservation or Insourcing Issues

1. Agreements which attempt to expand the jurisdiction of the union to work which has previously been done by another employer are

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[2] The second proviso of § 8(e) states:

> *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shalll not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry:

[3] *See*, Lithographers Local 17 (Graphic Arts Employers Association), 130 NLRB 985, 47 LRRM 1374 (1961), *enforced,* 309 F2d 31, 51 LRRM 2093 (9th Cir. 1962).

[4] *See,* Teamsters Local 413 (Patton Warehouse, Inc.), 140 NLRB 1474, 52 LRRM 1252 (1963) and Musicians Local 2 (Associated General Contractors), 206 NLRB 581, 84 LRRM 1404 (1973).

technically hot cargo agreements. Depending upon the history of the work, such agreements may or may not violate § 8(e).[5]

2. Work preservation clauses are generally legal. An agreement bringing work back to a bargaining unit would be a valid effort to reclaim lost work, even though an effect would be to cut off the business relationship between the primary employer and the company which had also done the work.[6]

3. Work expansion clauses are generally illegal under § 8(e). If a union is able to extend its contractual jurisdiction to work which has always been done by an outside contractor, the agreement would be unlawful.

4. As a means of preserving work, a union may negotiate language restricting the ability of the employer to introduce new work processes. Two important examples of this form of work preservation clause are:

    a. Construction union agreements prohibiting the use of prefabricated materials on new construction projects, and

    b. Requirements by longshoring workers that shipping containers be unloaded onto a dock and then onto a truck, rather than directly onto a truck.

5. The legal status of this type of work preservation clause has been clarified somewhat in a series of cases involving construction and waterfront unions.

    a. As with other limitations on subcontracting, a clause which is designed to force the employer to use processes within the jurisdiction of the primary union are presumably legal, even though it might be more economical to use outside contractors.[7] In the leading case, carpenters were able to enforce a prohibition against the use of pre-hung doors on a construction project, thus preserving the on-site work of carpenters.

    b. Similar agreements which force the employer to implement entirely new processes in a manner that creates bargaining

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[5] See, *e.g.,* Newspaper & Mail Deliverers of New York (Hudson County News Co.), 298 NLRB 564, 134 LRRM 1138 (1990).

[6] See the limitations noted in Plumbers Local 455 (American Boiler Manufacturers Association), 404 F2d 547, 69 LRRM 2851 (8th Cir. 1968).

[7] National Woodwork Manufacturers Assn. v NLRB, 386 U.S. 612, 64 LRRM 2801 (1967).

unit work are probably valid, unless the new work is already in the domain of a neutral employer.[8]

c. To enforce work preservation clauses, a union is limited by the Board's "right of control" test. If the employer has no control over the selection of processes or materials used, the union may be forced to handle the improper work, even though the contract is being violated.

1) If the primary employer has control over the choice of materials or processes, the union may be permitted to refuse to handle the objectionable work.

2) If the employer has no choice of materials, then coercive efforts (refusals to work, picketing, etc.) to enforce the work preservation clause are prohibited. The theory is that in these cases, the union's dispute is with a secondary employer (general contractor, developer, etc.) against whom the union may not direct its pressure.[9]

3) In either case, the union may be able to sue for damages resulting from the violation of the collective bargaining agreement.

D. Application of § 8(e) to Subcontracting

1. Prohibitions against the subcontracting of bargaining unit work are legal, as direct and primary efforts to preserve bargaining unit work.

2. Section 8(e) regulates agreements limiting the subcontracting of work to specific employers or to specific terms.

3. Union signatory clauses, under which an employer agrees to subcontract work only to employers which have signed collective bargaining agreements, are generally illegal.[10]

a. The theory of § 8(e) is that these agreements are secondary activity, with the objective of the union being to dictate labor policy to independent employers.

b. It is this type of agreement which has led to the apparel and construction industry exceptions. In those industries, the labor policies of the primary employer are closely connected to the policies of others.

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[8] NLRB v. International Longshoreman's Assoc. (Dolphin Forwarding Co.), 447 U.S. 490, 104 LRRM 2552 (1980).

[9] NLRB v. Plumbers Union Local 638 (Austin Co.), 429 U.S. 527, 94 LRRM 2628 (1977).

[10] See Machinists District 9 (Greater St. Louis Automotive Trimmers & Upholsterers Association), 315 F2d 33, 51 LRRM 2496 (D.C. Cir. 1962).

4. Union standards clauses are generally legal. Standards clauses restrict subcontracting to employers which pay wages and benefits comparable to those of the primary employer.[11]

   a. Union standards clauses are valid because of the legitimate work preservation goal. The union has a direct interest in assuring that its employer is not subcontracting work to reduce labor costs.

   b. There is a fine line between signatory and standards clauses. The union cannot, under the auspices of a standards clause, require that subcontractors pay identical wages and benefits to the primary employer.

5. In the construction industry, broader contractual restrictions on subcontracting are permitted than in other industries.

   a. Union signatory clauses are legal in construction to the extent that they limit the subcontracting of work which is done on-site.

   b. For a construction site signatory clause to be valid, the union must have a bargaining relationship with a contractor. That contractor may agree to limit its subcontracts to only union companies. This requirement of a primary relationship is know as the *Connell* limitation on the construction industry exception.[12]

   c. Under current Board interpretation, it is legal to picket to obtain a subcontracting clause on a construction site as this would be primary picketing under the *Connell* limitation. However, picketing to enforce a clause would violate § 8(b)(4) as an attempt to coerce an employer to cease doing business with another company.

E. Relationship of Hot Cargo Agreements to Anti-Trust Laws

1. Hot cargo clauses are the type of agreements and secondary action which would have historically subjected unions to potential liability under the Anti-Trust Laws. Even after the Clayton Act of 1914, the Supreme Court ruled that secondary pressure by unions would be subject to anti-trust regulation.[13]

2. The Norris-LaGuardia Act further restricted the application of anti-trust law to labor disputes by removing the injunctive power of federal courts. Under Norris-LaGuardia, the definition of labor

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[11] See, *e.g.,* George Ryan Co., 609 F2d 1249, 102 LRRM 2885 (7th Cir. 1979).

[12] Connell Construction Co. v. Plumbers and Steamfitters Union Local 100, 421 U.S. 616, 89 LRRM 2401 (1973).

[13] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

disputes was sufficiently broad to include secondary boycotts and strikes.

3. In the leading case interpreting the relationship between the Norris-LaGuardia and Clayton Acts, the Supreme Court eliminated most anti-trust concerns for labor.[14] As long as a union is involved in a labor dispute and is engaged in activity designed to advance its self-interest in collective bargaining matters, anti-trust laws are inapplicable.

    a. The *Hutcheson* case was decided in 1941. By 1947, Congress had replace the anti-trust limitations on secondary pressure with the detailed provisions of Taft-Hartley.

    b. The area of activity which is left open to anti-trust regulation is combinations between unions and non-labor groups designed to interfere with the business interests of other employers.

4. Combinations between unions and employer groups designed to eliminate competition from other employers may contravene the anti-trust laws.

    a. In the leading case,[15] a single union negotiated agreements with construction electrical contractors and suppliers of electrical materials. Under these agreements, the construction contractors agreed to purchase supplies only from the covered suppliers, and the suppliers agreed to sell only to signatory contractors. The intent of the various agreements was to prevent outside suppliers and contractors from gaining access to the New York City market. This was held to be a violation of the anti-trust laws.

    b. In a related case, the Mineworkers negotiated an agreement with a multi-employer association under which member coal companies were required to make contributions to a joint pension fund. Using this agreement as a pattern, the union attempted to negotiate identical contribution plans with independent companies in separate agreements.[16]

        1) The Court ruled that the union could legally use the master agreement as a pattern for separate negotiations with the small producers.

        2) However, if the union and the employer association had conspired to drive the small producers out of

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[14] United States v. Hutcheson, 312 U.S. 219, 7 LRRM 267 (1941).

[15] Allen Bradley Co. v. International Brotherhood of Electrical Workers, Local 3, 325 U.S. 797, 16 LRRM 798 (1945).

[16] United Mine Workers v. Pennington, 381 U.S. 657, 59 LRRM 2369 (1965).

business, the anti-trust laws would have been violated.

c. A similar result was reached in a case involving butchers who negotiated a prohibition against the sale of meat by retail grocery stores during hours in which no butchers were working. The union, acting alone for purposes of pattern bargaining, did not violate anti-trust laws by forcing a company which bargained independently to accept the same limitations as the multi-employer association.[17]

5. The *Connell Construction* case, discussed above, represents another type of potential anti-trust liability. In that case, the union attempted to negotiate a union-only subcontracting agreement with a general contractor. Because the union had no primary collective bargaining relationship with the general contractor, the effort to restrict market access went beyond the Norris-LaGuardia exemption from anti-trust regulation.[18]

F. Featherbedding

1. To regulate a type of agreement directly related to the work preservation goals of a union, Taft-Hartley attempted to outlaw featherbedding agreements through § 8(b)(6) which makes it an unfair labor practice for a union to demand payment of wages for services which are not performed or not to be performed.

2. Broadly defined, featherbedding agreements require the employer to pay union members wages whether their work is needed or not.

3. The prohibitions against featherbedding under § 8(b)(6) has been interpreted narrowly. In the two leading cases, the Supreme Court has ruled that only payments for workers not to work are prohibited.

   a. A union may require that the employer pay workers for totally unnecessary or useless work, as long as the work, no matter how useless, is actually performed. In one of the leading cases, a newspaper accepted ads from customers which were prepared by the customer for printing. However, the collective bargaining agreement required the employer to recopy the prepared work using union members. This is not unlawful featherbedding because the printers did their work, even though the employer ultimately used the customers original copy.[19]

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[17] Amalgamated Meat Cutters and Butcher Workmen, Local 189 v. Jewel Tea Co., 381 U.S. 676**,** 59 LRRM 2376 (1965).

[18] Connell Construction Co., *supra* at note 12.

[19] American Newspaper Publishers Assn. v. NLRB, 345 U.S. 100, 31 LRRM 2422 (1953).

b. Even payments to workers who do nothing are legitimate, as long as the union workers remain willing to work. In a second case, a theater agreed to schedule concerts using union musicians whenever out of town orchestras were brought in for appearances. The employer was required to pay the union orchestras even though no actual performances were scheduled. Because the union musicians were willing to perform, this was not illegal featherbedding, even though no work was performed.[20]

c. In both cases, the agreements were legal because the workers were paid to work, even though the employer had no use for their labor. Thus, minimum crew sizes and other "makework" agreements are legal, despite the wording of § 8(b)(6).[21]

[20] NLRB v. Gamble Enterprises, Inc., 345 U.S. 117, 31 LRRM 2428 (1953).

[21] *See, e.g.*, New York District Council, Carpenters (Graphic Displays, Ltd.), 226 NLRB 452, 93 LRRM 1305 (1976).