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Labor Law—Secondary Boycotts— 8(b) (4) (i) (B) Inducements to "any individual"—Lower Level Supervisors.—NLRB v. Local 294, Teamsters Union (Van Transport Lines, Inc.).

Richard L. Fishman

On the precise point in issue, the case is nearly barren of any decisional support, although it is not exactly unheard of for a court to disregard the usual method of applying the state statute of limitations in order to achieve uniformity within a federal statute.[20] This court reaches a desirable result by attempting to elucidate with general propositions and sheer logic one section of the very confused mosaic that represents this area of the federal labor law.

J. NORMAN BAKER

Labor Law—Secondary Boycotts—§ 8(b)(4)(i)(B) Inducements to "any individual"—Lower Level Supervisors.—*NLRB v. Local 294, Teamsters Union (Van Transport Lines, Inc.)*.[1]—A controversy arose between the union and Van Transport Lines, Inc., an interstate carrier, when the latter refused to comply with an arbitration award reinstating a truck-driver. A strike of the remaining drivers was called and customers of Van were approached and asked "to cooperate." Employees of these customers were also solicited "not to ship by Van," not to "use Van for the purpose of future routing" and, in one instance, not to accept freight of Van already unloaded. Those solicited included, in addition to rank-and-file employees, minor supervisors in charge of shipping and routing and a shipping foreman. The NLRB held[2] that these inducements and encouragements addressed to the employees and minor supervisors employed by customers of Van were in the nature of a secondary boycott in violation of section 8(b)(4)(i)(B) of the National Labor Relations Act.[3] On petition of the NLRB to enforce the order requiring the union to cease and desist from continuing the unfair labor practices, enforcement was granted. HELD: It is a violation of section 8(b)(4)(i)(B) to make inducements and encouragements addressed to

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[20] Clearfield Trust Co. v. United States, 318 U.S. 363 (1942), where in a suit by the U.S. Government concerning forced commercial paper of the United States, the Court denied that a state statute of limitations should apply because "the desirability of a uniform law is plain."

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[1] — F.2d —, 49 L.R.R.M. 2315 (2d Cir. 1961).

[2] Local 294, Teamsters Union (Van Transport Lines, Inc.), 131 N.L.R.B. No. 42, 48 L.R.R.M. 1026 (1961).

[3] 8(b). It shall be an unfair labor practice for a labor organization or its agents—
(4)(i) to engage in, or to induce or encourage *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a refusal in the course of his 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—(emphasis added)
(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.
NLRA, 61 Stat. 140 § 8(b)(4)(B) (1947), 29 U.S.C. § 158(b)(4)(B) (1958), as amended, 73 Stat. 542 § 704(4)(i)(B) (1959), 29 U.S.C. § 158(b)(4)(i)(B) (Supp. 1958).

rank-and-file employees and *minor supervisors*, such as those in charge of shipping and routing operations and the shipping foreman.

There are three general categories of individuals which a court has to consider in applying 8(b)(4). These include high level management, ordinary employees, and supervisors. This last group has presented the greatest difficulty both to the NLRB and to the courts. The problem is that the act divides these people into only two categories: (1) "any individual employed by any person engaged in commerce or in an industry affecting commerce";[4] and (2) "any person engaged in commerce or in an industry affecting commerce."[5]

The instant court reiterated that mere inducements and encouragements addressed to high level management did not constitute an unfair labor practice in violation of section 8(b)(4)(i)(B).[6] The union contended that those addressed in the present controversy fit within this category since they were supervisors. The court stated, however, that a finding that the individuals were "supervisors," as defined in the act,[7] would not be determinative, since certain supervisors might well be embraced by the words "any individual employed by any person."[8] The court then concluded that the supervisors in question were clearly within the terms "any individual employed by any person" and that, therefore, the inducements and encouragements addressed to them did constitute a violation of section 8(b)(4)(i)(B). This conclusion resulted from consideration of a statement delineating "minor supervisors" in an earlier NLRB decision[9] and a conclusion that the 1959 amendments

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[4] Id.

[5] 8(b). It shall be an unfair labor practice for a labor organization or its agents—(4)(ii) to threaten, coerce, or restrain *any person engaged in commerce or in an industry affecting commerce*, where an object thereof is—(emphasis added)
(B) forcing or requiring . . . .

[6] This had already been held in Alpert v. Local 379, Teamsters Union, 184 F. Supp. 558, 46 L.R.R.M. 2319 (D.C. Mass. 1960), and is entirely logical, since 8(b)(4)(ii), principally applicable to those considered to be in management positions, requires threats, coercion or restraints.

[7] The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, or discipline other employees, or responsibility 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.
61 Stat. 137 (1947, 29 U.S.C. § 152(11) (1958).

[8] In Amalgamated Meat Cutters, AFL-CIO (Peyton Packing Co.), 131 N.L.R.B. No. 57, 48 L.R.R.M. 1048 (1961), the Board had similarly stated that,
Concerning the . . . employees who were allegedly induced, the record contains no more than the naked stipulation of the parties that each is a "supervisor" within the meaning of the Act and during the normal course of his employment purchases the meat supplies. . . . There is no evidence . . . which we might use to make the determination we deem basic to the disposition of the complaint in this case, namely, whether either of the supervisors herein is an "individual employed by any person" within the meaning of Section 8(b)(4)(i)(B).

[9] . . . although they are managements' representatives at a low level, [they] are through their work, associations, and interests, still closely aligned with those whom they direct and oversee.

to the NLRA were intended to plug the "illogical loophole" previously present,[10] by including certain supervisors within section 8(b)(4)(i) and others within section 8(b)(4)(ii).

This distinction between upper level supervisors and lower level supervisors is often difficult to make. A 1960 district court case in Massachusetts stated:

> [Section] 8(b)(4)(i) is concerned with appeals addressed to those who perform services manually or clerically, or who manually use goods, or who have *minor supervisory functions*. It does not cover appeals to those who on behalf of their employer have power lawfully to terminate, cease, or otherwise control business relations with the so-called primary employer.[11] (Emphasis added.)

In that case a superintendent with power to hire, fire, hear grievances, to handle routine sub-contract problems and to terminate a sub-contract was held not to be an "individual." The NLRB has a term which it uses to exclude supervisors from the category of "individuals employed by any person." It is "top management representative on the job."[12] This is never the sole test, however, and some type of authority or policy-making ability[13] is almost always a prerequisite.[14] The Board has stated that:

Local 505, Teamsters Union (Carolina Lumber Co.), 130 N.L.R.B. 1438, 1443, 47 L.R.R.M. 1502, 1505 (1961).

[10] The words "any individual employed by any person" replaced the words "employees of any employer" and the words "any person engaged in commerce or in an industry affecting commerce" replaced the words "any employer or self-employed person" in 1959. Prior to that time supervisors were not considered to be "employees of any employer" or "any employer or self-employed person" and so were not covered by the act under either section. This was the "illogical loophole" referred to.

[11] Supra note 6, 184 F. Supp. at 561, 46 L.R.R.M. at 2321.

[12] See Local 324, Operating Engineers Union (Brewer's City Coal Dock), 131 N.L.R.B. No. 36, 48 L.R.R.M. 1013 (1961) and Local 299, Sheet Metal Workers Union (S. M. Kisner & Sons), 131 N.L.R.B. No. 147, 48 L.R.R.M. 1226 (1961). Obviously this is not the only prerequisite for being classified as an "individual." In both cases the supervisors had the authority to make independent policy judgments. In the latter case, an "estimator" with duties including taking jobs off prints, pricing them up and placing employees on the job was held to have limited authority and to be within the category of an "individual."

[13] See the Board ruling in Local 61, Upholsterers Union (Minneapolis House Furnishing Co.), 132 N.L.R.B. No. 2, 48 L.R.R.M. 1301 (1961), where supervisors with authority to determine purchasing or selling policies of their stores without referring to their supervisors or with authority to influence such policies were held not to be "individuals," since their tasks were considered to be managerial functions affecting the employer's relationship with outsiders.

[14] See the interesting Board rulings in Local 537, Teamsters Union (Lohman Sales Co.), 132 N.L.R.B. No. 67, 48 L.R.R.M. 1429 (1961), where a cashier, two store managers and a drug department manager were held pro forma to be "individuals" because of a failure of the union to except to the Trial Examiner's finding and Local 848, Wholesale Delivery Drivers and Salesmen's Union (Servette, Inc.), 133 N.L.R.B. No. 152, 49 L.R.R.M. 1028 (1961), where the Board stated, "We agree with the Trial Examiner's conclusion that the appeals to the various store managers . . . did not constitute a violation of section 8(b)(4)(i)(B), since the record establishes that the store managers

> It will . . . be necessary in each case . . . to examine such factors as the organizational setup of the company, the authority, responsibility, and background of the supervisors, and their working conditions, duties and functions on the job involved in the dispute, salary, earnings, prerequisites and benefits. No single factor will be determinative.[15]

In addition to these tests, it would seem useful to determine whether a particular supervisor has the ability, on behalf of management, to commend, reward, reprimand, or punish employees for their performance. This distinction between upper-level and lower-level supervisors seems to be a reasonable and necessary one in light of the purpose of the act to prevent secondary boycotts. It appears that supervisors of the lower echelon would, in all likelihood, have interests more apt to coincide with other workers than with management. Moreover, it is apparent that solicitations to them to aid in a strike would be more likely to fall on receptive ears than would pleas addressed to management. It has been the policy of the NLRB, and apparently of the courts in enforcing the Board's orders, to place lower-level supervisors, as determined by the tests previously set out, within the category of "individuals." The *Van* decision thus appears to have properly applied the 1959 amendments to the National Labor Relations Act in the light of prior authority and the realities of the labor-management arena.

It is interesting to note that when the Board considered the *Van* case it concluded that an independent contracting trucker, who owned his own freight terminal, and who operated a trucking service for one of Van's customers, was not an "individual" under section 8(b)(4)(i), but a "person" under section 8(b)(4)(ii). The trucker's business was conducted entirely with such customer and the Board reasoned that, since his independence was somewhat compromised by this exclusiveness, he was an "agent," and since the act equates agents with their employers, he is a "person" and not an "individual." In a prior case,[16] the Board had stated that four self-employed carpenters, who were independent contractors, were not "individuals employed by any person," since they worked for themselves. It would thus appear that an independent contractor must always be a "person," either in his own right, as were the carpenters, or by virtue of his "agency" relationship, as was the truckdriver.

The tests used to separate supervisors into the categories provided by the act speak only in terms of authority and control; sympathy with management or labor is not a relevant factor. Yet the total effect of the tests permitted is to divide the supervisors according to sympathy as surely as if sympathy were in fact the ultimate measure. Thus adverse interests are

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. . . were not 'individuals' as that term is used in section 8(b)(4)(i)(B). We do so, however, only for the reasons set forth in the Carolina Lumber Co. and Minneapolis House Furnishing Co. cases." Is the Board retreating from prior conclusions?

[15] Supra note 9, 130 N.L.R.B. at 1444, 47 L.R.R.M. at 1505.

[16] Local 1921, Carpenters Union (Spar Builders, Inc.), 131 N.L.R.B. No. 116, 48 L.R.R.M. 1182 (1961).

brought into natural apposition. But the tests used to categorize a man as an independent contractor do not with equal success result in the desired apposition. As to him, a preexisting body of agency law is applied which takes no account of the philosophy of the Labor Act. If such is the case, might not sympathy be a proper test in the case of the independent contractor? The Board has yet to go so far.

RICHARD L. FISHMAN

Negotiable Instruments—Forgery Insurance—Definition of Forgery as a Policy Term.—*Home Federal Sav. & Loan Ass'n v. Peerless Ins. Co.*[1] —Plaintiff savings and loan association brought an action in the United States District Court in Iowa against defendant, a New Hampshire bonding company, to recover under the forgery clause of a Savings and Loan Blanket Bond (Standard Form No. 22).[2] A real estate agent, for a commission of one percent, would aid persons who had purchased homes from him in applying to plaintiff for loans. The agent submitted to plaintiff fraudulent loan applications upon the basis of which plaintiff's officers issued five checks payable to the fictitious applicants.[3] The checks were indorsed by the agent in the names of the payees and were charged to the plaintiff's account by the payor bank. By judicial interpretation in Iowa, an act must change the legal efficacy of an instrument in order to constitute a forgery. Relying upon section 541 of the Iowa Code, which makes such checks bearer paper, defendant claimed that since the indorsements by the agent did not change the legal efficacy of the instruments, being mere surplusage on bearer paper, the loss was not covered by the forgery clause of the bond.[4] The District Court rejected the defendant's contentions and allowed recovery. HELD: (1) The loss was sustained through acts amounting to forgery under a general commercial definition of that word; (2) recovery is not limited to losses sustained through acts amounting to forgery as defined by the local criminal law, but even if so limited, the acts here meet that standard; (3) defendant's reliance upon section 541 in his denial of forgery loss,

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[1] 197 F. Supp. 428 (N.D. Iowa 1961).

[2] The policy provided, "The Losses Covered By This Bond Are As Follows . . . Forgery Or Alteration. 2. Any loss through forgery or alteration of, on, or in any instrument."

[3] One of the names was that of a person in existence, but since he was not intended to have any interest therein, he is deemed a fictitious payee nonetheless. Britton, Bills and Notes § 149 (1953). The UCC has eliminated as misleading the words "fictitious or nonexisting person," since the existence or nonexistence of the named payee is important only as it may bear on the intent that he shall have no interest in the instrument. UCC § 3-405, Comment 1.

[4] Iowa Code § 541.9(3) (1958), corresponds to NIL § 9(3) and reads as follows: The instrument is payable to bearer:

. . . .

3. When it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee . . . .