PREM 19/263

Part 4

MT

Confidential Filing

Industrial Relations Legislation (covering Picketing; the Closed Shop; Union Ballots; Union Recruitment Activities and Immunities). The Employment Bill.

INDUSTRIAL POLIC

Pt 1: May 1979

Pt 4: February 1980

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~12.2.80~~							
~~19.2.80~~							
~~21.2.80~~							
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~~16.4.80~~							
11.4.80							
ENDS							

PREM 19/263

PART 4 ends:-

s/s Ind to ~~s/s Emp~~ PM 11/4/80

PART 5 begins:-

s/s Ind to s/s Emp 14/4/80.

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
E(80) 6th Meeting, Minutes	18/02/80
Limited Circulation Annexe, E(80) 6th Meeting, Mins	18/02/80
CC(80) 9th Conclusions, Item 1 (Extract)	06/03/80
E(80) 29	20/03/80
E(80) 11th Meeting, Item 2	24/03/80
L(80) 26	28/03/80
L(80) 10th Meeting, Item 1	01/04/80

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed Wayland Date 6 May 2010

PREM Records Team

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

Employment Bill 48/1	06 December 1979
House of Commons Hansard Columns 238-259	19 February 1980 Picketing Law

Signed C M Wayland Date 6 May 2010

PREM Records Team

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cc Mr Wolfson
Mr Hoskyns

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PRIME MINISTER

We await Mr Prior's response to your queries

MJS
14/4

EMPLOYMENT BILL: BALLOTS AT THE WORKPLACE

[A] In his minute to you of 8 April Jim Prior proposes a new Clause in the Employment Bill requiring an employer to provide on request a place for a secret union ballot.

[B] I have also seen your Private Secretary's letter of 10 April.

I welcome Jim's proposed exclusion of firms employing 20 people or less. The requirement could be onerous for many of these, for example, because of lack of adequate premises. It would be inconsistent with our policy towards small firms to place this additional legal obligation on them.

In the absence of any widespread prior consultation with industry on the details of this requirement we must, I think, indicate our willingness to listen sympathetically to any representations from them and to amend the Clause if necessary to avoid any nonsenses.

I assume that the requirement would apply only to ballots for those purposes specified in the Bill in relation to postal ballots (on industrial action; elections; amendment of rules; union amalgamations etc. or other purposes specified by Order).

/Whatever ...

Whatever the precise form of the resulting Clause in the Employment Bill I hope that the preparation of the forthcoming Green Paper on trade union law to be published later this year will give us an opportunity to consider at more leisure the pros and cons of further legislation on the proper role of ballots before industrial action.

I am sending copies of this minute to the other members of E Committee and to Sir Robert Armstrong.

K J
11 April 1980

Department of Industry
Rm 11.01 Ashdown House
123 Victoria Street

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PRIME MINISTER

MS

CONFIDENTIAL

PEPC (80) 2

EMPLOYMENT BILL

Members may find the following notes helpful for the debate on the Employment Bill on Thursday 17th April 1980.

Conservative Research Department
32 Smith Square
London SW1

11th April 1980
PSS/CFM

EMPLOYMENT BILL

The Government has tabled a new clause to the Employment Bill which will impose clearly defined limits on secondary industrial action. With this new clause the Bill now contains restrictions on all forms of secondary action, such as secondary picketing, the blacking of goods or services, and sympathetic strikes. Clause 15 of the Bill as amended in Committee already restricts lawful picketing to an employee's own place of work - secondary picketing is thus made unlawful - and the new clause proposes no further changes to the law on picketing.

In a statement on the publication of the new clause Mr. Prior said that it:

> "will protect employees and employers alike from the unwarranted and indiscriminate use of secondary industrial action . . . this new clause, together with the existing provision in the Bill which limits secondary picketing by restricting lawful picketing to an employee's own place of work, will restore a better and much needed balance between the legitimate objects of industrial action and its effects on third parties."
>
> (3 April 1980)

The introduction of a clause on secondary action was foreshadowed during the Debate on the Second Reading of the Employment Bill (17 December 1979) when Mr. Prior said the Government would be considering the result of outstanding legal cases in this area.

The new proposals are potentially more effective and straightforward than those put forward in the Government's Working Paper on the subject, published in February. As a result of consultations with interested bodies, better protection against secondary action is now to be given to small firms and to those not in any way directly concerned in the original dispute but against whom secondary action might have been directed.

Recent House of Lords' judgements in the cases of Express Newspapers versus McShane and Duport Steels versus Sirs have shown the unsatisfactory and damaging state of the law as it presently stands. Under section 13 of the Trade Union and Labour Relations Act 1974, as amended by the Trade Union and Labour Relations Amendment Act 1976 union officials and others who organise secondary action enjoy immunity from proceedings in civil courts for breaches of any contract however remote such action is from the original dispute, as long as they can show that they believe the action is in furtherance of that dispute. The law has thus become a licence for widespread industrial disruption.

The new clause to the Bill will remove immunity for any secondary action, except where the sole or principal purpose of such action is to interfere directly with business being conducted during the dispute between the employer in dispute and the direct ("first") supplier or customer whose employees

are taking the secondary action, and where it is likely to have that effect. The new clause thus incorporates, in relation to secondary action, the tests of motive, remoteness and capability, as developed by the Court of Appeal and described in the Government's Working Paper.

Under the new clause there will be no immunity for secondary action which interferes with commercial contracts if:

a) it is organised at any firm other than the first supplier or customer of the firm in dispute; or

b) although organised at the first supplier or customer, it is nonetheless aimed at business conducted with firms other than the one in dispute (ie it must not be intended simply to influence the firm in dispute indirectly by damaging a lot of other people).

The new clause will:

a) remove immunity from any secondary action when the original dispute is a total strike, since there would be no business between the firm in dispute and its first suppliers or customers, any secondary action could only be aimed at others.

b) impose tough limits on secondary action by employees of first customers, since such action is almost invariably not aimed at the firm in dispute but intended to disrupt other contracts and spread inconvenience to a wider community; and

c) provide better protection than allowed in the Working Paper for small firms which are first suppliers and customers. The tighter provisions mean that the concept of "substantial" in defining first suppliers and customers can safely be abandoned - most small firms would be "substantial" suppliers or customers, and therefore would in fact have been more exposed than their larger counterparts to secondary action.

Immunity would continue to protect secondary action which:

a) is taken during a dispute by employees of a company which steps in to undertake supplies in place of those which would otherwise have come from an associated employer who is in dispute; and

b) leads to a breach of a contract of employment only but this would no longer constitute a lawful means for inducing a breach or interference with a commercial contract.

The Government will be producing a Green Paper on the broader aspects of trade union immunities later in the year so that there may be informed public debate on this very complex issue.

During the Committee stage of the Bill the Government introduced an additional clause to provide time off to enable pregnant employees to receive ante-natal care. This now stands as Clause 12 of the Bill.

AN ILLUSTRATION: THE NEW CLAUSE AND THE STEEL STRIKE

For the purposes of illustration it is possible to consider what the likely effect of the new clause would have been on the recent BSC dispute. The precise effects in any particular situation will depend, of course, on the facts and circumstances of each individual case.

1. Action by employees of first suppliers and customers of BSC

In future, such secondary action would have immunity:

(i) only if its principal purpose was to interfere with the current business between the first supplier/customer and BSC during the dispute and the action was likely to have that effect.

(ii) but not if its principal purpose was to interfere with contracts between the first supplier/customer and third parties, the motive behind such action being to influence the parties to those contracts or others affected.- eg the general public or the Government - to put pressure on BSC to settle.

The strikes called by the ISTC at the private steel producers would clearly fall in the second category and therefore would not have had immunity. Furthermore, the immunity would depend on there being interference with the current business between BSC and a first supplier or customers. If there were no such current business (eg because the BSC were totally closed by its own employees "primary" action), there would be no immunity for secondary action at a first supplier or customer.

2. Blacking by employees of stockholders of steel purchased from BSC on their premises

Where goods from the employer in dispute have been delivered to a customer (in this case the stockholder), blacking them would affect only the stockholder's contracts with other parties. Hence, there would be no immunity for that interference.

3. Blacking by Transport Workers of Goods in Transit

In the case of non-BSC goods, eg imported steel, where there is no contractual link with BSC, there would be no immunity for blacking.

In the case of any BSC goods being moved from BSC premises there would be immunity for blacking if the goods were being moved under a contract between the employer of the transport workers and the BSC.

In the case of BSC steel purchased by a stockholder and being moved from his premises to a third party, there would be no immunity for blacking.

4. Blacking by Dockers of Steel

In the case of non-BSC steel there would be no contracts with the BSC (the employer in dispute) and therefore no immunity.

B/F 18.4.80

File

MJ

B/C A Duguid

10 DOWNING STREET

From the Private Secretary

11 April 1980

Dear Andrew.

There was a report in the Daily Telegraph on 8 April that your Secretary of State has initiated further consultations on the repeal of certain aspects of the 1975 Employment Protection Act. If this is the case, I would be grateful if you could let us have a note of explanation.

I am sending a copy of this letter to Martin Hall (HM Treasury) and Ian Ellison (Department of Industry).

Yours ever,

Tim Lankester.

Andrew Hardman Esq
Department of Employment

RH

Daily Telegraph 8-4-80

Anti-nuclear demonstrators arousing the curiosity of the countryside as they marched to the American air force base at Lakenheath yesterday.

Prior ready to back jobs Bill changes

By NICHOLAS COMFORT, Political Staff

CHANGES in the Employment Bill so that workers would still be able to seek rises if they were paid less than local or national agreements, are being considered by Mr Prior, Employment Secretary.

He has asked for submissions on the issue by April 29.

If TUC and CBI response supports the law as it stands, Mr Prior is ready to risk an adverse reaction from hard-line Cabinet colleagues and put the case for amending the Bill.

Mr Prior's initiative concerns provisions which would abolish the right under the 1975 Employment Protection Act for workers to go to the Central Arbitration Committee if their pay is less than the general level in their industry.

Lingering doubts

The bulk of this legislation will still be repealed. It is seen as having encouraged "leap frogging" claims when pay policies were in force and to have been abused by workers far outside lower pay brackets.

Doubts linger, however, over the specific right for workers to secure through arbitration agreed national or local wage levels.

Some employers are said to regard the present law as a safeguard against unscrupulous operators cutting corners by paying below the odds.

The point was argued in detail during the Committee Stage of the Employment Bill with Mr Prior conceding that there was much to be said on both sides.

Cabinet ruling

He consequently invited further representations from interested parties last Tuesday and on Thursday confirmed the rethink in a written Parliamentary answer to the Labour employment spokesman, Mr John Grant.

It was being stressed yesterday that the change envisaged was not designed to undermine repeal of the central provisions on comparability pay claims.

It was also being emphasised that although Mr Prior had acted on his own initiative in re-opening consultations any decision to amend the Bill would have to be taken at Cabinet level.

MINISTERS FACE COST DEADLINE

By NICHOLAS COMFORT
Political Staff

MINISTERS have until June to set up machinery to show departmental running costs as a prelude to assessing possible further economies.

The drive stems from Cabinet acceptance that it did not know enough about the cost of Government and had no ready means of finding out.

Sir Derek Rayner, managing director of Marks and Spencer and Mrs Thatcher's chief waste-watcher, has suggested in a letter to Cabinet members that they meet the target by applying business methods of financial analysis.

Among these, he says, should be giving responsibility for finance to officials trained in management accounting, instead of to civil servants without such qualifications.

First step

The aim of the change, being supervised by Sir Derek and Mr Paul Channon, Civil Service Minister, is to introduce effective monitoring of costs as a first step towards identifying overspending.

The hope is that it will reinforce Ministers' hunches that some Departments have been much readier to economise than others.

The monitoring process, it is felt, will let Ministers distinguish between style and substance, and between real and false economy, when the effort to trim the Civil Service is redoubled.

STATE GRAB OF MOTOR FIRMS URGED

By Our Political Staff

The Young Socialists yesterday followed up their call for football to be nationalised by voting overwhelmingly at their Llandudno conference for full public ownership of the steel and motor industries.

Delegates decided that both the steel and motor industries should be taken over with compensation only paid in case of "proven need," and entrusted to boards of shop stewards, trade union representatives and government experts.

In the final debate of the conference, on the police, racialism and fascism, the conference voted unanimously in favour of a national committee statement blaming "systematic police harassment" for last week's Bristol riot.

Editorial Comment—P14

£1,000 CHARITY JUMP BY Pc

A police constable who is frightened of heights jumped off Beachey Head yesterday to raise money for charity. He abseiled down the 500ft. cliff face to pick up around £1,000 in sponsorship to buy equipment for the Merchant Navy's Nautical Training corps.

Now Pc Ivan Huff, 30, who is based at Bexhill-on-Sea, hopes to jump 1,000ft. from a helicopter.

REST FOR POPE

By Our Rome Correspondent

The Pope flew by helicopter yesterday from the Vatican to his holiday residence at Castel Gandolfo, 15 miles south of Rome, for a two-day rest after a heavy Easter programme.

CONFIDENTIAL

RH

cc:- HO
FCO
C.Exch
D.Ind
L.Pres
MAFF
Trade
Energy
Chief Sec

10 DOWNING STREET

From the Private Secretary

10 April 1980

Employment Bill: Ballots at the Workplace

The Prime Minister has considered your Secretary of State's minute of 8 April on the above subject. She is in principle in favour of the CBI proposal that a new provision be inserted in the Bill which would oblige an employer at the request of a union recognised by him to provide a place on his premises at which a secret ballot could be conducted. But she has asked, firstly, who would supervise such a ballot; and secondly, what would happen if the majority of the workforce belonging to the union wanted a ballot but the union does not ask for one. She has suggested that, in order to deal with the later point, the clause might include provision for a ballot under those circumstances.

I am sending copies of this letter to the Private Secretaries of E Committee and David Wright (Cabinet Office).

T. P. LANKESTER

Andrew Hardman, Esq
Department of Employment

CONFIDENTIAL

RA

cc Mr Duguid
Mr Lankester (DE)

CONFIDENTIAL

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PRIME MINISTER

Content, subject to colleagues' views?

PRIME MINISTER

EMPLOYMENT BILL: BALLOTS AT THE WORKPLACE

You will remember that at the meeting of "E" Committee last September (E (79)th) I referred to a suggestion - promoted by Lord Robens - to encourage work-place union ballots which would complement our intention to provide public funds for union postal ballots.

I have been discussing this with the CBI. They have now come forward with the firm proposal that a new provision be inserted in the Employment Bill which would put an obligation on an employer at the request of a union recognised by him to provide a place on his premises at which a secret ballot could be conducted at an appropriate time among the union's members in his employment.

I believe this is a useful idea worth incorporating in the Bill. It would give a further encouragement to union ballots at no cost to the Exchequer and little, if any, to employers; it is a limited facility but one which where requested and provided will enable the objectionable features of votes at mass meetings to be avoided; and it will help to dispel the notion that the Bill is a punitive anti-union measure.

The CBI do not believe that in general a provision on these lines would create difficulties for reasonable employers, but in response to potential concern from small employers have suggested that the new obligation should not be placed on them. Whilst I do not believe that there is any substantial ground for such concern, I am prepared to accept this limitation and accordingly propose that the new provision should not apply to firms with 20 or fewer employees. This would be consistent with the cut off for small firms already in the Bill in relation to unfair dismissal legislation.

With the agreement of colleagues I would therefore propose to put down

if possible at the end of this week an appropriate amendment to the Bill to be taken at Report Stage to give effect to this idea.

I am circulating this to members of E Committee and Sir Robert Armstrong.

JP

Department of Employment

/Approved by the Secretary of State and signed in his absence/

8 April 1980

BRIEFING ON EMPLOYMENT BILL

NEW CLAUSE ON SECONDARY INDUSTRIAL ACTION

1. The Government has tabled a new clause to the Employment Bill which will impose tight limits on secondary industrial action. /For illustration of the effects of the new clause during a British Steel Corporation strike, see Annex/.

2. With this new clause the Bill now contains tough restrictions on all forms of secondary action (eg secondary picketing, the "blacking" of goods or services, and sympathetic strikes). Clause 14 of the Bill already restricts lawful picketing to an employee's own place of work - secondary picketing is thus made unlawful.

3. The new proposals, which will restrict blacking and sympathetic strikes, are more effective and straightforward than those put forward in the Government's Working Paper on the subject, published in February. As a result of the consultations, better protection against secondary action is now to be given to small firms and to those not in any way directly concerned in the original dispute but against whom secondary action might have been targetted.

4. As recent House of Lords' judgements have shown, under the present law (s 13 of TULR Act 1974, as amended by the TULR Amendment Act 1976), union officials and others who organise secondary action enjoy immunity from proceedings in civil courts for breaches of any contract however remote such action is from the original dispute, as long as they can show that they believe the action is in furtherance of that dispute. The law has thus become a licence for widespread

industrial disruption.

5. The new clause to the Bill will remove immunity for any secondary action, except where the sole or principal purpose of such action is to interfere directly with business being conducted during the dispute between the employer in dispute and the direct ("first") supplier or customer whose employees are taking the secondary action, and where it is likely to have that effect. The new clause thus incorporates, in relation to secondary action, the "tests" of motive, remoteness and capability, as developed by the Court of Appeal and described in the Working Paper.

6. There will be no immunity for secondary action which interferes with commercial contracts if

a) it is organised at any firm other than the first supplier or customer of the firm in dispute; or

b) although organised at the first supplier or customer, it is nonetheless aimed at business conducted with firms other than the one in dispute (ie it must not be intended simply to influence the firm in dispute indirectly by damaging a lot of other people).

(The sole exception to this is the very special case involving associated companies as described in paragraph 8 a below).

7. The new clause will:

a) remove immunity from any secondary action when the original dispute is a total strike (since there would be no business between the firm in dispute and its first suppliers or customers, any secondary action could only be aimed at others - see 6 b above);

b) impose tough limits on secondary action by employees of first customers, since such action is almost invariably not aimed at the firm in dispute but intended to disrupt other contracts and spread inconvenience to a wider community (see 6 b above,); and

c) provide better protection than allowed in the Working Paper for small firms which are first suppliers and customers (the tighter provisions mean that the concept of "substantial" in defining first suppliers and customers can safely be abandoned - most small firms would be "substantial" suppliers or customers, and therefore would in fact have been more exposed than their larger counterparts to secondary action).

8. Immunity would continue to protect secondary action which:

a) is taken during a dispute by employees of a company which steps in to undertake supplies in place of those which would otherwise have come from an associated employer who is in dispute; and

b) leads to a breach of a contract of employment only (but

this would no longer constitute a lawful means for inducing a breach or interfering with a commercial contract);

9. The Government will be producing a Green Paper on trade union immunities later in the year so that there may be informed public debate on this very complex issue.

AN ILLUSTRATION: THE NEW CLAUSE AND THE STEEL STRIKE

This note considers for purposes of illustration the likely effect of the new clause on the recent BSC dispute. The precise effects in any particular situation will depend, of course, on the facts of a particular case.

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The strikes called by the ISTC at the private steel producers would clearly fall in the second category and therefore would not have had immunity. Furthermore, the immunity would depend on there being interference with the current business between BSC and a first supplier or customers. If there were no such current business (eg

because the BSC were totally closed by its own employees "primary" action), there would be no immunity for secondary action at a first supplier or customer.

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Where goods from the employer in dispute have been delivered to a customer (in this case the stockholder), blacking them would affect only the stockholder's contracts with other parties. Hence, there would be no immunity for that interference.

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In the case of BSC steel purchased by a stockholder and being moved from his premises to a third party, there would be no immunity for blacking.

4. Blacking by Dockers of Steel

In the case of non-BSC steel there would be no contracts with the BSC (the employer in dispute) and therefore no immunity.

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Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Sir Keith Joseph Bt MP
Secretary of State
Department of Industry
Ashdown House
123 Victoria Street
LONDON SW1

28 March 1980

Dear Secretary of State,

You wrote to me on 25 March pointing out that E(80) 10 defined the ambit of lawful secondary action in terms of "action by the employees of the first supplier" etc rather than in terms of action "at the first supplier" etc (as E(80) 1 had done).

As I mentioned at the meeting of E on 24 March this change was prompted by the Lord Chancellor who pointed out that the legislation would have to be drafted in terms of the inducement (ie the call) to take secondary action rather than in terms of the action itself. The inducer may be a union official who is not employed at the first suppliers' because he is a full time union officer based elsewhere.

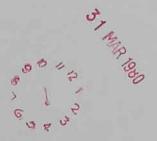
It is therefore strictly speaking more accurate to talk in terms of "action by the employees of the first supplier" but that is all there is to it. The change of wording does not imply any widening of the scope of lawful secondary action. The picketing provisions in the Employment Bill already withdraw immunity from secondary picketing, which is the only form of industrial action which can be taken by employees other than at their own place of work. The new clause on secondary action generally will not change this in any way.

I am copying this letter to the members of E Committee, Robin Ibbs (CPRS), John Hoskyns and Sir Robert Armstrong.

Yours sincerely

RTB Dykes

(Approved by the Secretary of State and signed in his absence)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CONFIDENTIAL

SOLICITOR GENERAL

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

pm seen

27 March, 1980

The Rt. Hon. Margaret Thatcher, MP,
Prime Minister,
10 Downing Street,
London, SW1.

Dear Prime Minister,

Further to our discussion last night:-

(a) As to policy I enclose a note summarising the views I expressed on the questions you asked me. (I have shown this to the Attorney but no copies have gone to anyone else)

(b) You also asked me to send you a copy of the draft clause which was prepared in December to give effect if required to what now seems to be called the "Percival" plan, and I enclose that herewith. It was prepared by Parliamentary Counsel after discussion between him, Paddy Mayhew, the Department's lawyers and myself. I also enclose a copy of a paper which I had submitted in October 1979 and which was in effect used as the instructions to Parliamentary Counsel to draft this clause and the other options we considered.

The draft clause which I am sending herewith was drafted to give effect to, and does give effect to, the proposals which I had put forward in that paper, in Cases 1, 2, 3 and 4 - in brief that the unions should continue to enjoy immunity in Cases 1, 2 and 3, but that, as proposed in Case 4, B, not being a party to the dispute, should be free to sue.

The proposals are of course more readily understood by reference to the paper itself.

Yours ever

JM.

May we talk further about the contents of these documents when you have had time to read them please?

CONFIDENTIAL

IMMUNITIES

1. There is one question of principle which must be decided at this point. There may well be others later - like that of making union funds liable. Of course there are links between what we do now and those further questions. What we do now may well have a great bearing (for better or for worse) on later consideration of such matters. But the one we have to decide now is the fundamental one in this field and it can and must be considered on its own.

2. The basic question is of course: Are we going to "ensure that the protection of the law is available to those not concerned in the dispute but who at present can suffer severely from secondary action (picketing, blacking and blockading)?"

3. However for present and practical purposes that can and must be translated into terms of the options available. What are the choices open to the Government at this moment? In fact that can be reduced to a choice between two alternatives - which of two conflicting interests is to prevail - as set out below.

4. First however it is important to appreciate that the choice is not, as the most recent paper might appear to suggest, whether we should (a) "ban secondary action altogether" or (b) do as the paper suggests. There are several options between the two. One is that which seems now to be known as the "Percival" option, though it is by no means personal to me. The method was designed by me but simply to implement, and would implement in a very simple form, our Manifesto promise quoted above - no more no less. In no way can it be said to "ban secondary action altogether", either directly or indirectly.

5. I return to the actual choices.

6. There are here two conflicting interests:-
(a) On the one hand the unions say that they should be free to use the employees of an employer who is not a party to the dispute to interfere with commercial contracts between him and the employer in dispute in order to bring pressure to bear on the latter - and that in order to enable them to do that the employer who is not a party to the dispute must remain deprived on his Common Law rights to the protection of the Courts for himself and his employees.

They also say that these are "traditional" rights enjoyed for a long time. That is not correct. It is understandable that they would like to keep this addition to their industrial muscle but there is no case for their claiming that it is "traditional". The advantages which they would lose would be advantages which they have enjoyed only since 1974 at the earliest.

/(b) On

(b) On the other hand if that view prevailed and the present proposals were implemented employers who happened to have a contract with the employer in dispute could find that for no better or other reason than that, they could be the object of secondary blacking causing them severe damage, in circumstances in which they would at Common Law have a right of action to protect themselves (and their employees), but, because of the new law, left in their present position i.e., unable to pursue their Common Law rights.

In practise it is inherently unlikely that they would take proceedings unless suffering or likely to suffer severe damage. If when that situation did arise they found they were still unable to exercise their Common Law rights it would be little comfort to them to say that that was necessary in order that those engaging in industrial disruption should have this extra muscle.

7. In those circumstances the choice has to be faced - and decided - as the paper accepts - as a question of "basic principle". Translating that into practical terms, would it not mean that if the Government implemented these proposals the only reasoned argument that could be advanced in support would be on the following lines?" "We have considered all the advantages and disadvantages for the "unions" on the one side and for the "victims" on the other and it is our considered view that the "unions" should retain the privilege of adding to their own muscle at the expense of the "victims" (employees as well as employers) whatever the cost to those "victims" may be." I could not say it.

8. The most serious of the practical consequences would I think be as follows:

(a) Supposing that one were able to limit the immunity by so to speak drawing a ring fence around all those in direct commercial relationship with the employer in dispute, leaving everyone outside that ring free to sue, that would still leave all those in direct commercial relationship with the employer in dispute, deprived of the right to sue, and they are the ones

(i) most likely to be attacked anyway (and even more so if as would be the case on this hypothesis, they were the only ones who could be attacked with impunity); and

(ii) most likely to suffer severely; and

/(iii) most

(iii) most likely to have a cause of action(the benefit of which would still be denied them).

(b) Up to now our position has been clear. We have always condemned such action. If we take the course recommended we could no longer complain. A union could quite properly say: "Why not? As a result of a considered decision, you have confirmed this privilege".

(c) If it were decided as a matter of principle to implement the proposals it is not easy to see how we could in the near future say we were going to restore the rights to sue which we had just, as a matter of principle, declined to restore, but unless the restrictions on the "victims'" right to sue are lifted now or soon it is of no assistance to him to talk about making union funds liable - or any of the other ways of "tightening up". This is the critical decision. Should the "victims" be allowed to pursue their Common Law rights or not? Almost everything else in this field is subsidiary to that.

9. In recent months we have seen many good trade unionists forced* with great reluctance to take action against their own employers with whom they have no dispute, at the risk of causing great damage to their employers and themselves. If the present proposals were implemented they would remain subject to those risks. Accordingly it seems equally in their interests that their employers should have back their rights to sue.

S.P.

* because they have been officially instructed so to do (by the Executive of the Union in the Steel case) and failure to obey the instruction puts them at risk of "losing their cards".

27 March 1980

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

Draft Clause attached at the end of this paper. 9th Oct 79

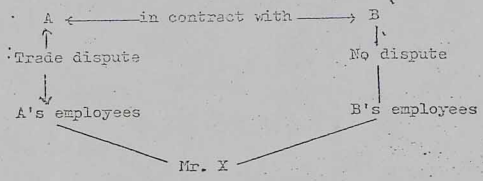
1. Presumed facts

Company A has a contract with Company B under which B supplies A with goods (or services).

A has a "trade dispute" with its employees, B has no dispute with its employees.

Mr. X is the Union official in charge of or other person directing the action to be taken in the course of A's dispute with its employees.

Diagrammatically this may be expressed thus:-



2. Situations in relation to which the question of immunity may arise

(bearing in mind that it only arises when the circumstances are such that at Common Law a person could establish a cause of action for damages and the question is whether he should be deprived of that right in order that the person who would otherwise have been liable shall enjoy immunity from process) and on which a policy decision is required.

(1) "Primary" Action

X calls out A's employees (i) causing or inducing them to commit breaches of their contracts of employment

SOLICITOR GENERAL
01-405 7641 Extn

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

with A and/or (ii) bringing the works to a standstill and thus preventing A from carrying out its commercial contracts.
The questions which must be asked and the answers which I suggest, are:-

CASE 1.

Q.1. Should X continue to enjoy immunity against action by A based on (i) and/or (ii) above?

A.1. Yes, both (and in my view (a) he did under the pre '71 law - see especially Pearson L.J. in Stratford v. Lindley - (1965) AC at p. and still would even if the more general option were adopted - and (b) if there is any real doubt about that I feel confident that Parliamentary Counsel could readily resolve it).

CASE 2

Q.2. Should X continue to enjoy immunity against action by A's customers?

A.2. Yes. Persons so placed can protect themselves by the terms of their contracts. If the contract is silent on "industrial action" they will have a right of action for breach of it. If they choose to agree to a term excusing A if his performance is prevented by "industrial action", so be it. And it would I think be turning back the clock to remove immunity from these consequences of primary action. (Again I see no difficulty in giving effect to this answer if that is what is desired).

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01-405 7641 Extn

(a) "First secondary" Action

X calls out B's employees (or blacks goods or services provided by B for A) thus interfering with the rights of both B and A under the contract between them and causing them damage#.

The questions which must be asked and my suggested answers to them, are:-

CASE 3.

Q.3. Should X continue to enjoy immunity from action against him by A?

A.3. I think "Yes". So far as A is concerned this does seem to me to be part of the traditional activity of those in dispute with their employer, taking such advantage as they can of the organisation/solidarity etc. of labour - and further it seems very unlikely that an employer in A's position would in any event sue just on those facts and in those circumstances, even if he could.

CASE 4.

Q.4. Should X continue to enjoy immunity from action against him by B?

A.4. No. In some cases it may be possible for B to fulfil his contract by other means and there will be a duty on him to take reasonable steps to mitigate his damages by so doing. But if, as is so often the case, the action was taken deliberately because B cannot otherwise fulfil his contract and so the pressure on A will be real, B may be caused serious damage in respect of which he could obtain an injunction and/or compensation at Common Law but can take no action to protect himself so long as the present immunity remains.

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

(This is the area in which the CBI fear that the wider option would introduce complexities - and it is my feeling that if their minds could be set at rest on that point they too would give the same answer.)

- on drafting the clause we found there were no complexities

In fact the doubts they raise go both to the question of whether B would have a cause of action and of the effect of Section 13 as we have in mind to amend it. I am confident that we can meet all their doubts once the question of principle has been decided - i.e., as to whether we want to do so - but stress yet again that that is a matter primarily for Parliamentary Counsel and what is required urgently is a decision on the principle).

3. It seems to me that when the matter is looked at in terms of objectives rather than means of implementation, the choice is tolerably clear, namely that there can really be little doubt about Q1, 2 or 4, that the only real question is as to 3, and that if one looks at it as a question of principle (or policy whichever is the right word), the arguments in favour of answering 3 as I have done are quite powerful. I would think also that that would be acceptable to the CBI.

4. If those answers were adopted and Parliamentary Counsel were able clearly to implement them we should then be in a good position I would think to take the line that the consultations have been very meaningful, we have allayed the fears of the TUC on Q 1, 2 & 3 and of the CBI on Q 4 and also done what we have to do, held the balance between them by deciding ourselves where the line is to come.

Option (a) (revised) Draft Clause

Acts in contemplation of furtherance of trade disputes

(1) Section 13 of the 1974 Act shall be amended as follows

(2) In subsection (1) -

(a) at the beginning there shall be inserted the words "Subject to subsection (1B) below"; and

(b) for the word "contract" wherever it occurs there shall be substituted the words "relevant contract".

(3) After subsection (1) there shall be inserted -

"(1A) In subsection (1) above "relevant contract", in relation to an act done in contemplation or furtherance of a trade dispute, means a contract which is either -

(a) a contract of employment, or

(b) a contract which is not a contract of employment, but the parties to which include one or more of the parties to the dispute.

(1B) Subsection (1) above shall not prevent an act done in contemplation or furtherance of a trade dispute from being actionable in tort at the suit of a person who is not a party to the dispute in any case where -

(a) the relevant contract is not a contract of employment, but

(b) one of the facts relied upon for the purpose of establishing liability is that another person has -

(i) induced another to break a contract of employment the parties to which do not include a party to the

dispute, or interfered or induced another to interfere with its performance, or

(ii) threatened that such a contract of employment (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another to break such a contract of employment or to interfere with its performance."

(4) For subsection (3) there shall be substituted -

"(3) An act which by reason of subsection (1) above is to any extent not actionable in tort shall nevertheless be regarded as an unlawful act for the purpose of establishing liability in tort in any action not precluded by that subsection.".

This covers an essential and different point

19 12 79

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
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Secretary of State for Industry

25 March 1980

The Rt Hon James Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London SW1

Dear Jim.

At 'E' I referred to the difference between your proposal in E(80)1

> "limiting immunity ..... and, in the case of secondary action, to action taken at the first supplier, customer ..... "

and your reference in E(80)10 to secondary action by employees of first customer, supplier .....

I suggested that "at" would be more desirable since "by" seems likely to entitle such employees to take secondary action outside their own employment.

You kindly said you would consider.

I am copying to the Members of E Committee, Sir Kenneth Berrill, John Hoskyns and Sir Robert Armstrong.

Yours

Ken

24 March 1980

PRIME MINISTER

IMMUNITIES FOR SECONDARY ACTION

1. It is extraordinary that Jim Prior's paper should have been written and circulated before the consultation period ended. Cabinet Office seems at first, to have thought that this period ended last Wednesday, not last Friday. We have this morning been looking at a further 21 documents from external parties, none of which will have been seen by colleagues, or summarised for them by the Department of Employment.

2. Jim Prior's latest memorandum manages to convey a rather misleading impression of the employers' positions: for example, "Employers have expressed conflicting views"; "The range of views shows just how difficult it is to strike a reasonable balance . . .". Our analysis of employers' recommendations does not give this impression.* There is a firm majority in the original papers analysed, and the additional 21 received this morning, for removing immunities for all secondary action. Several mentioned trade union funds - even though the latter was never mentioned in the consultation document. It is quite clear that Jim's latest proposals - though a considerable advance - are not yet right.

3. For today's E, there seem to be two options:

(i) Accept Jim's latest proposals, while getting agreement, in return, for an extension of the scope of the Green Paper, to cover section 14 and the whole question of ballots; and also other possible changes - in other words, the scope should not be restricted in advance. Or:

(ii) Proper consideration must be given to the recommendations from the employers, in which case it is not possible to do justice to them today. The whole exercise would have to be delayed.

4. Our judgment is that, with so much still to do in the area of trade union reform, option (1) would be preferable. It should be agreed by E, preferably today, that the Green Paper review should be carried out inter-departmentally, preferably under Cabinet Office chairmanship, with a wide-ranging remit.

* See Annex.

JOHN HOSKYNS

ANNEX

Immunity should only be provided to participants in a primary dispute

- Delta Metal
- GKN
- BISPA
- CPS
- Lansing-Bagnall
- National Association of Steel Stockholders
- Cement Makers' Association
- Duport Steels Ltd
- Engineering Employers' Federation (to be debated through Green Paper)
- Freedom Association
- Cocoa, Chocolate and Confectionery Alliance
- British Ports Association
- Institute of Directors
- National Federation of Self-Employed and Small Businesses Ltd
- Ductile Steels Ltd
- Birmingham Chamber of Industry and Commerce (majority view)
- Leeds Chamber of Commerce and Industry (through Green Paper)
- Association of Independent Businesses
- National Chamber of Trade
- British Multiple Retailers' Association
- Confederation of British Industry

Note 1 This is a total of 21 out of 33 respondents.

Note 2 Although the general immunity of the trade unions themselves was not raised in the Working Paper, 13 out of the 33 comments received thought it should be changed.

Prime Minister

I also attach Andrew's useful summary of the representations received. (Mr Prior's paper does deal effectively with the weaknesses identified in his earlier proposals by the Solicitor General). JR 21/3

21 March 1980

MR LANKESTER

cc Mr Wolfson
Mr Hoskyns

IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

1. Mr Prior's latest proposals go a very long way to meet the many objections raised to his original proposals. In principle, it would be possible to go still further and remove immunities for all secondary action. The CBI have now proposed this and most of those who have commented on the Working Paper have also argued for it. But this would be going a good deal further than was suggested in the Working Paper. In fact, Mr Prior's proposal will remove immunities from all secondary action in cases where the primary action is fully effective. We think that Mr Prior's latest proposal is a satisfactory step forward if colleagues do not want to go further now. It could be argued that it is better not to go any further now unless a change is also made in the section 14 immunity. Otherwise there is a risk that too many cases of unlawful action might end in martyrdom.

2. Mr Prior does not mention enforceability and the section 14 immunity for trade unions. This is inevitable, given the decision not to raise this matter in the Working Paper. Despite this, six of those who commented on the Working Paper have urged that trade union funds should be put at risk. This subject will be dealt with in the review which leads to a Green Paper later in the year. As far as we know, the CBI have not commented on it yet.

3. We have not yet seen a record of the CBI's representations made to Mr Prior yesterday morning. From newspaper accounts, it appears that they now favour a legal obligation on employers to help stage trade union ballots. We suggest that Mr Prior should be asked to tell the committee what the CBI have recommended. Sir Leonard Neal has argued (see attached letter) that the present Bill should be used as a vehicle for making ballots compulsory before strike action is taken. At a minimum, he has argued for compulsory ballots when a certain number or proportion of union members petition for one. I believe there is substantial back-bench support for this idea, but it seems to differ from the CBI proposal.

4. We doubt whether there is now time to take effective measures on ballots in the present Employment Bill. On a matter involving the conduct of trade union affairs, it would be necessary to consult first.

Instead, we suggest that the Green Paper Review should be extended in scope to cover the CBI proposal on ballots - and any other matters arising out of the working of the new Employment Act. If the conclusion from the Green Paper exercise is in favour of a further Bill, ballots could provide the most popular part of the package.

5. We hope that E Committee can decide now that the Green Paper Review should be carried out inter-departmentally, preferably under Cabinet Office chairmanship.

6. Finally, there are two less important points made in page 3 of Sir Leonard Neal's letter of 12 March (attached) to which we hope Mr Prior has responded positively. These are:

(a) Repeal of section 17 of TULRA 1974. This has the effect of making injunctions a little more difficult for employers to obtain. Sir Leonard rightly argues that the Government's whole approach is to rely on employers seeking injunctions. Although section 17 may have had limited relevance in the past, the reduction in immunities we are now proposing makes it important that this obstacle - if it is one - is removed. Mr Prior does not refer to the point in his paper. We understand that his lawyers say it is not an obstacle.

(b) Sir Leonard argues that lawful picketing should be restricted not only to the place of work, but also to cases where the picket is a party to the trade dispute (or an official of a trade union which is a party). Without this change, circumstances could arise where employees picketed their own place of work in support of a dispute elsewhere. The new proposals diminish this problem, but it is not clear that they eliminate it.

ANDREW DUGUID

Ref: A01765

PRIME MINISTER

TRADE UNION IMMUNITIES FOR SECONDARY ACTION
E(80) 29

BACKGROUND

1. This paper has been circulated very late, because the last comments on the consultation paper were received (from the CBI) only on Wednesday. They represented a substantial change in the CBI's attitude, and caused Mr Prior to re-work his proposals extensively. The resulting proposals are tougher than those approved by E for the consultative document (E(80) 4th Meeting, Item 1) and are not far removed from the Solicitor General's ideas developed at that meeting.

2. The timetable is very tight. Mr Prior wishes to lay the Government amendments to the Employment Bill before Easter. He has made a deal with Mr Varley, under which the Opposition will co-operate to get the Bill out of Standing Committee before Easter, provided that the Government is prepared to make three days available at Report on the floor of the House. The Chief Whip has earmarked 13-14-15 May for this purpose. Allowing for the Lords processes, this means Royal Assent at the end of July, as Cabinet agreed on 18 March. But Mr Prior wants Royal Assent by 10 July, to leave sufficient time for formal consultation with ACAS and with other interested parties before the 'Codes of Practice' come into force in September. Mr Prior's timetable would require the three Commons' Report days immediately after the Easter Break. That in turn requires final decisions next week - either at E on Monday or (cutting it very fine) at Cabinet on Thursday. The amendments would then be laid on Wednesday 2 April.

3. On the substance, there are really two options -

a. to adopt the modified proposals set out in Mr Prior's paper (with any further changes which may be agreed at this meeting);

b. to go the whole hog and ban all secondary action now.

4. A total ban on secondary action would be the CBI's ideal solution, though they are afraid that to go for this in the present Bill would be counter-productive. In particular they do not want to jeopardise the emplacement of the picketing provisions in the Employment Bill before next winter. Accordingly their advice to Mr Prior is that the present Bill should be amended to include a rather tougher version of the proposals made in the consultative document and should be accompanied by a promise of a Green Paper on union immunities later this year. Mr Prior's new proposals are thought to satisfy the CBI's wishes, and the Government has of course already agreed to publish a Green Paper on immunities in general. In the light of the CBI attitude it may therefore prove relatively easy for the Committee to agree to Mr Prior's proposals. It may however be helpful to tighten up a bit on the timing of the Green Paper - eg by promising to produce it "before the end of the summer recess".

HANDLING

5. If the timetable is to be adhered to - and amendments tabled before Easter - decisions must be reached this week. If they cannot be reached at E, then Cabinet on Thursday is the last chance.

6. You might start by asking the Secretary of State for Employment to introduce his paper, and then seek comments from the Chancellor of the Exchequer, the Attorney General (invited for this item) and - on the legislative timetable - the Chancellor of the Duchy and the Chief Whip. Other Ministers will no doubt wish to join in. [We have not invited the Solicitor General to this meeting, assuming from Mr Lankester's letter of 19 February that you had released him from his special duties as a member of Mr Prior's team on the Employment Bill. Since the Attorney General, as the senior law officer, has expressed an interest in attending this meeting, we thought it right to let him come without the Solicitor - who is in any case providing him with a brief].

Would you like me to write to Solicitor General? He would be willing to come, but Mr Prior would think it pretty odd after he had been asked to be released. TL 24/3

7. The essential questions before the Committee are -

a. Are they satisfied that Mr Prior's new proposals plus a promise of a Green Paper this summer will meet the CBI's wishes?

b. Irrespective of the CBI, do they accept Mr Prior's new proposals as a workable package?

c. Can arrangements be made to meet Mr Prior's wishes on timetable, eg to achieve Royal Assent by 10 July?

d. Do they agree that the Government should now promise a Green Paper reviewing trade union immunities to be published say before the end of the summer recess?

CONCLUSIONS

8. Assuming all goes well, you should be able to record firm decisions as follows -

i. that the Committee accepts the proposals in E(80) 29 on the amendments to be made to the present Employment Bill;

ii. that arrangements should be made to enable the Bill as amended to receive the Royal Assent by 10 July;

iii. that the Committee agrees to an early announcement of the Government's intention to publish a Green Paper on trade union immunities before the end of the summer recess.

9. Should, unexpectedly, there be significant disagreement in the Committee which cannot be resolved other than by the Cabinet, you might invite the Secretary of State for Employment to circulate a very quick paper to Cabinet setting out the opposing points of view so that final decisions can be taken on Thursday.

D J Wright

ROBERT ARMSTRONG

21 March 1980

(approved by S. R. Armstrong but signed in his absence)

Prime Minister

20 March 1980

This is a very good summing up of the representations so far received. Paper for E with some recommendations tomorrow night. [illegible] (Motorin is waiting from CBI, but their reported change of position is very significant.)

MR HOSKYNS

Mr Wolfson
Mr Strauss
Mr Whitmore
Mr Lankester

IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

As you know, Department of Employment have provided us with copies of the serious representations they have received in response to the Consultative Document. In varying degrees, all 12 representations are to the effect that Mr Prior's proposals do not go far enough. I have summarised what seemed to me the three most important points in the note attached.

So far, we have seen no written comments from CBI, TUC or the Institute of Directors. I understand that the CBI have undergone a late conversion to the view that all forms of secondary industrial action should be unlawful. There was of course a substantial minority in Cabinet in favour of this view, and the majority of those who have commented have said the same. The more closely one inspects the principle of extending immunity to employees of first customers and first suppliers, the less sound it looks. It is widely regarded as unjust; it cannot be reconciled with the Manifesto commitment to extend the protection of the law to innocent parties; and it is arbitrary. The Secretary of State for Employment told E Committee on 13 February that in an ideal world a complete ban on secondary industrial action would undoubtedly be preferred. His principal argument against attempting it was the lack of clear support from the CBI.

In the light of these representations, Ministers may want to reconsider options 1 and 2 in the paper they discussed on 13 February. These options would remove immunities for secondary action. Alternatively, they could reconsider option 4 (John Nott's approach) which was to specify the cases where there would be immunity for secondary action. This would enable exceptions to be made where, for example, all employees had been sacked. It would also be possible to permit secondary striking where employees sacrifice their income, but not secondary blacking, where they incur no penalty. That way, no-one could say that the Government was affecting the right to strike.

If Ministers do not want to reconsider the basic approach, there are still a number of more minor changes which could be made to the proposals in the working paper. (b) in the attached note is one obvious example. There are several others contained in Sir Leonard Neal's letter, which obviously reflects deep thought and careful research on the subject. We could prepare a note on these points for the Prime Minister's weekend box. Before doing so, we need to see whether Mr Prior has already accepted some of the points. His paper will not be available until tomorrow.

It is very important that other E Committee members should know about the representations that have been received before the E Committee discussion. We ourselves need to know more about the CBI's position. Department of Employment should cover all this in their paper, but I am not sure whether they will.

ANDREW DUGUID

20 March 1980

NOTES ON COMMENTS RECEIVED ON CONSULTATIVE DOCUMENT

1. Department of Employment have supplied us with comments received from 12 companies, employer organisations and individuals. These do not include comments from either the CBI or the TUC.

2. There are several important themes which recur in many of these comments:

(a) Immunity should only be provided to participants in a primary dispute. Extending immunity to employees of first customers and first suppliers is arbitrary and unjustified.

Eight out of the 12 bodies unequivocally favour immunities being restricted to the participants in a primary dispute only. They argue that immunity for employees in first customers and suppliers is in principle unjust as it fails to extend the protection of the law to those not involved in a dispute. The 8 bodies who take this view are:

Delta Metal
GKN
BISPA
CPS
Lansing-Bagnall
National Association of Steel Stockholders
Cement Makers' Association
Duport Steels Ltd.

Two of these organisations would go further: Lansing-Bagnall would like to see trade unions placed on the same basis as any other legal entity - this might make it possible for suits to be brought in respect of primary action under certain circumstances. Duport Steel argue that immunity for primary action should be conditional upon a secret ballot.

Only one comment explicitly endorses the "first customer, first supplier" boundary line - Mars Ltd.

Of the 3 other bodies to comment, the British Chambers of Commerce imply that they do not favour immunity for employees

of first customers and suppliers, but they reserve their full comments for the review which will lead to a Green Paper. The East Midlands Allied Press confine themselves to saying that the working paper proposals are "not as clear-cut as one would wish." Lovell, White and King make a more specific point, referred to at (b) below.

(b) The proposed immunity for employees of first customers and suppliers should not give them blanket freedom to hit any vulnerable target - whether involved in the dispute or not.

This is the loophole about which the Solicitor-General was concerned several weeks ago. The Association of British Chambers of Commerce have pointed to the danger that the employees of a first supplier could stop supplies going to any other customer, and argue that this is unjustified licence. They suggest that these employees should only have immunity to interfere with contracts with the party in dispute.

The same point has been made by Mr Phillipps of Lovell, White and King. He argues that this proposal would enshrine an immunity in the legislation which may not have been there before McShane. (In a note from the Department of Employment's Solicitor, concern is expressed about action at a first supplier which is "directed outwards". But we do not yet know whether Department of Employment are proposing to close this loophole.)

Duport Steels refer to a graphic example of selective secondary blacking action in their letter. They say that supplies of their raw materials normally carried by rail were suspended in early January by the rail unions in support of the ISTC in their dispute with the BSC. Approximately £1.5m worth of stock was held up by the NUR.

(c) The section 14 immunity should be removed, so that employers are free to sue either trade unions (with recourse to their funds) or individuals.

It is significant that the consultation document did not refer to the section 14 immunity. Nevertheless, 6 of those who

commented have unequivocally recommended that trade unions themselves should not be immune. These were:

Association of British Chambers of Commerce
East Midland Allied Press
CPS
Mars Ltd
Lansing-Bagnall
Duport Steels.

In addition, BISPA recommended that if the Government felt unable to remove immunities for all secondary action, then at least the trade union immunity for secondary action should be conditional upon a ballot.

Lovell, White and King queried whether any recourse to union funds was proposed where an injunction is disobeyed. By implication they favoured this.

In most cases, those who favoured removing the section 14 immunity referred explicitly to the danger of individual martyrdom if the only action open to courts in some circumstances would be imprisonment of individuals.

ANDREW DUGUID

We have just received representations from Ford who argue for clarification but no real toughening of the proposals. Also from Institute of Personnel Management who broadly support the Party's proposals except that they want extended use of injunctions against individuals to be strengthened.

T.L. 20/3

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

Rt Hon David Howell MP
Secretary of State for Energy
Department of Energy
Thames House South
Millbank
London
SW1P 4QJ

19 March 1980

REORGANISATION OF THE NUCLEAR INDUSTRY

We agreed in E Committee last October that an urgent priority in reestablishing the UK nuclear power programme was the reorganisation of the National Nuclear Corporation and its operating arm the Nuclear Power Company into a single company under new management, with the termination of the existing supervisory management contract with GEC. Accordingly you made your statement of intent on 18 December. Since then I have received renewed representations from the Chairman of the South of Scotland Electricity Board, who remains deeply concerned about the effect of the continuing uncertainty on the industry, and I believe that you have had similar expressions of concern from Frank Tombs. As you know neither SSEB nor CEGB consider that they can place the main AGR contracts while NNC/NPC remains in its present form, and in SSEB's view any further delay in achieving a reorganisation will necessitate a postponement of the start of construction at Torness, presently scheduled for August.

It now seems possible that the timetable for the AGR stations and for the PWR may be revised as a result of the study being undertaken by the CPRS and the problems over the external financing limit for next year. There appears to me however to be a danger that whatever the outcome of these considerations, our nuclear power programme will be delayed because of the unsatisfactory state of the nuclear construction industry. I should be most grateful, therefore, if you could let me know (of course in strict confidence) what position you have reached in the task of implementing the E Committee decision, and how soon you expect to be in a position to make a further announcement.

I am copying this letter to the Prime Minister, the other members of E Committee, Sir Robert Armstrong and Sir Kenneth Berrill.

GEORGE YOUNGER

vk

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Tim Lankester Esq
Private Secretary
10 Downing Street
LONDON SW1

19 March 1980

Dear Tim, Re.

... I enclose, as requested, copies, of the main comments we have so far received on the working paper on trade union immunities.

We have not yet received comments from the CBI. My Secretary of State is meeting them tomorrow morning to hear their comments, but we may not receive a written submission from them before E Committee meets.

Nor have we yet received written comments from the TUC. The Secretary of State met them on 4 March to discuss the working paper. They made it clear that they were opposed in principle to any change in the law on immunities, but promised to send written comments in due course.

Those comments we have received, therefore, come from a relatively small number of companies, employer organisations and individuals. You will see that they include a letter from BISPA, which the Secretary of State will be discussing with them on ~~Friday~~ Tuesday

Yours sincerely

ANDREW HARDMAN
Private Secretary

PO - Sol only

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OSCAR HAHN
Director

5th March 1980

Rt. Hon. James Prior, MP,
Secretary of State for Employment,
Department of Employment,
Caxton House,
Tothill Street,
London,
SW1H 9NA

Dear Mr. Prior,

Thank you for your letter of the 25th February explaining some of the thinking behind the Employment Bill. In Industrial Relations legislation, more than in any other subject, Disraeli's maxim applies - to do as little as possible as well as possible. I think we both agree on this.

I welcome the idea of a statutory Code of Practice on picketing if the trade union movement does not take adequate steps in its own right and would agree that one postpones further discussion on the "act of picketing" to see how it works.

I am still strongly of the opinion that any legislation on the exclusion of trade union membership should apply equally in establishments where there is union membership agreement to those where there is not. The fear of losing a union card is, in practice, as strong in one as it is in the other.

You asked me, at the end of your letter, for comments on your Working Paper on Secondary Industrial Action. We have had wide discussions amongst ourselves on this Working Paper and I attach a note on our strong reservations.

We have not really changed our position from that which we describe in our earlier paper, namely that it is almost impossible to define secondary action - one has to really define primary action and exclude all else. If such a radical step is not politic at this time, and it probably is not, then it would be better to drop the whole matter for the time being and come back to it in your Green Paper later in the year.

Above all, we must make legislation in trade union affairs respectable.

Yours sincerely

Oscar Hahn

Registered in London under No. 66549
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COMMENT ON
WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Reservations concern the following points:

a) Uncertainty of the law. Perhaps the major reservation is that the proposals would mean that the limits of civil immunity would not be clear to everyone: this uncertainty would mean that there would be accidental breaches of the boundaries even by unions seeking to stay within the law.

Uncertainty would srise from problems of definition - "substantial", "furthering", "regular", "predominantly" etc. Whilst careful drafting might achieve reasonable clarity in the minds of lawyers, we doubt that uncertainty in the minds of employers, employees and unions in general and in particular cases could be overcome.

As the proposals would provide immunity for some secondary actions and not to others by the application of the three tests the proposals must remain inherently complex.

b) Associated Companies. The Paper is silent on the position of associated companies. It is vital if this approach becomes law, that all associated companies within a group of companies are treated as if they are independent when considering cases against the test of remoteness. If this is not done, companies in groups will become comparatively more vulnerable to secondary action than some of their competitors.

c) Arbitrariness. The third broad area of concern relates to the "hit and miss" effects of the proposals. In the present B.S.C. dispute for instance, some companies in the private sector would be prevented from seeking an injunction, and others would not.

There would appear to be little restraint placed on the extension of action where the primary dispute is in certain industries, e.g., road haulage and public services. (In the case of road haulage, where a haulier is working between A (primary dispute) and B(significant customer) both that customer and the haulier would presumably be within the immunity cover).

A corollary of the arbitrary operation is that deliberate and accidental "loopholes" will arise in the future: a company supplying a customer which was prone to strikes might change from direct supply to supplying via an "artificial" trading company so that the real supplier was thus made "remote".

d) The future of legislative reform may be undermined if the proposed law was brought into operation and was found to be unhelpful, or retrograde or unworkable. If the law was ineffective in persuading unions to restrain the extension of disputes, if employers found it an unhelpful arrangement, or if the courts were brought into disrepute, future reform would be made more difficult. In this context, a test where a judge is called upon to assess the motive of a trade union official in calling industrial action, could lead to damage to the legal system without any benefit to industrial relations.

Cont'd...

Conclusions

We find that our reservations and criticisms of the Working Paper are substantial. Whilst some of these (on associated companies) may be dealt with by inclusion in the statute of specific rules, some of the others are not so readily overcome. Even assuming that the drafting of the statute is as unequivocal as it can be, the law must remain complex, uncertain and in some ways arbitrary. One effect will be that the law might act as a "trip-wire", rather than a clear boundary line.

If as we fear, some of the major difficulties and problems outlined above cannot be overcome by detailed revision and careful drafting, we would see it as preferable to wait for a more thorough-going, radical and clear revision of employment law of the sort that may be expected to follow the proposed Green Paper later in the year.

cc Mr. Hattersley
Mr. Williams
Mr. Dalyell

cc Mr. Whitelaw
Mr. Walker
Mr. Heseltine
Mr. Gilmour
Mr. Taylor
Mr. Shepherd

FGT

for advice & draft reply please

RD 13/3.

Centre for Policy Studies

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SofS
To see.
RD 14/3

The Rt. Hon. James Prior, M.P.,
Secretary of State for Employment,
Caxton House,
Tothill Street,
London SW1

13 MAR 1980

12th March 1980

Dear Jim,

We enjoyed our discussions and though we are still far apart on strategy it appears that on some tactical questions there is room for accommodation.

I thought it would be helpful to set out the areas in which our approaches fundamentally differ and also those areas where some modification might be acceptable to you.

We share your desire to avoid unnecessary confrontations with the trade union movement. We appreciate your concern to avoid a General Strike and we note that all at our meeting were agreed that it is arguably illegal at present and would certainly be illegal under your new proposals to ban action taken for 'extraneous' purposes. We feel that our proposals are no more likely to cause confrontation than yours, but that in the event of any confrontation the Government and industry would, under our proposals, be in a better position.

We fear that your approach of putting exclusive reliance on injunctions against individuals could lead to 'martyrs'. Your approach necessarily involves confrontation with the militant minority of trouble-makers on the picket line who are usually men of no financial substance who are only too anxious to be sent to prison for contempt of court for breach of injunctions.

We therefore advocate that legal action be against union funds rather than individuals. Legal action against the funds of large and rich organisations will not provoke the public sympathy and demonstrations that individuals, presented as victims of 'legal persecution', would receive. However, we noted that you were adamant against this proposal.

The Rt. Hon.James Prior M.P.

12th March 1980

On the second major issue of principle between us, we consider that immunities should be confined to the 'primary position', i.e. between employer and union(s) directly involved regarding their own trade dispute. You argued that this would ban sympathetic action. This is correct and we do not retreat from this. For the same reason that you wish to ban 'remote' and 'extraneous' action, we consider that sympathetic action is not justified. It causes widespread disruption and we believe that the public sympathy is confined to unions defending their own vital interests in their own dispute - not interfering in others'.

The third major disagreement of principle related to the use of the criminal law in picketing. Your letter of 10th March stated that you 'understood' and 'sympathised' with the thinking behind our picketing proposals, but foresaw 'considerable difficulties' with them. We are of the view that picketing cannot be tackled by civil law alone - especially when it is difficult for an employer to identify those concerned. We noted your assurance that future legislation would be considered in this general field and we commend these proposals to you if it turns out, as we predict, that in the period following the Employment Act 1980 picketing still poses a problem. In your letter you recognised some of the difficulties, but stated that trade union 'officials' are law-abiding and will obey injunctions. This unfortunately does nothing about picketing where unofficial strikes are concerned. Our proposals covered both official and unofficial strikes. They were designed to make the law more easily enforceable without creating martyrs by putting the emphasis on fines rather than imprisonment and clarifying the law to assist the police. We observe that the police themselves are in favour of fairly similar proposals.

Our following suggestions are designed,within the logic of your own approach, to make the Bill more workable. As it stands we are convinced that it is incomplete, unwieldy and productive of a legal minefield, which could bring the law into disrepute. We must emphasise that we still have great reservations about the efficiency of your fundamental approach and our suggestions, if adopted, are not able to remedy this. However, we commend them to you in the expectation that they will assist you in promoting the purposes to which you have limited yourself in this Bill.

1. Your Bill puts all the eggs in one basket - the basket being that of employers seeking injunctions. We therefore consider it vital not to put unnecessary restriction in the way of obtaining these injunctions. As you know it is at the interlocutory stage that industrial matters are usually thrashed out in the courts - and the first few days of the dispute are the most important.

The Rt. Hon. James Prior M.P.

12th March 1980

Section 17 of T.U.L.R.A. 1974 made it more difficult to obtain ex parte (interlocutory) injunctions. It was headed, appropriately, "Restriction on grant of ex parte injunctions and interdicts". All at our meeting were agreed that this section was designed to hamper the obtaining of injunctions by employers. There was disagreement as to how effective this section had been to date. You felt that it had not made much difference. We understand that it has and, more importantly, can do so once your Bill becomes law. You did not seem to have any objection in principle to removing this privilege which was introduced for the first time in 1974 and represented a sharp departure from the normal law regarding injunctions. We therefore urge you to add a sentence to your Employment Bill repealing Section 17 of T.U.L.R.A.

2. At the meeting we pressed you to tighten up clause 14 of your Bill by defining 'official' of a trade union (14 - (1) 15 - 1(b)) precisely. Otherwise you will have unnecessary disputes over its meaning and also, perhaps, the creation of large numbers of ad hoc trade union officials. We suggest reference to 'paid, permanent, full-time officials'. We were pleased to note that your mind was already moving in a similar direction and that you accepted that this was a weakness in your Bill as at present drafted.

Amendment being tabled on this

3. We noted with great interest and, indeed, enthusiasm, your statement that you were prepared to move 'more towards the primary' in relation to picketing which you described as the outward visible manifestation of industrial action. Your Bill certainly does this in relation to place of work. Your acceptance of the primary standard in the form of primary premises is unfortunately not matched by application of the primary standard in relation to the dispute. Yet for the same reasons that you wish to restrict picketing in respect of premises you should, as a matter of consistency, be prepared to restrict it to those directly involved in the dispute. Emboldened by your general acceptance of the primary principle in relation to picketing we urge you, once again, to apply it to the parties in dispute. We therefore re-submit the proposal we put to you in January (letter of 23.1.80) for amendments as follows:-

14. -(1) For section 15 of the 1974 Act there shall be substituted -

15. -(1) It shall be lawful but only for a person in contemplation or furtherance of a trade dispute and only for a trade dispute to which he is a party to attend -

a) only at or near his own place of work, or

b) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying.

Etc.

The Rt. Hon. James Prior, M.P. 12th March 1980

and to add as Subsection 4 on page 14:-

Save as provided for in subsection 1, 2 and 3 above, acts done in the course of picketing shall be actionable in tort. For the avoidance of doubt, it is hereby declared that the criminal law regarding acts done in the course of picketing is not changed by this section.

4. We welcome your evident disposition to think again about balloting. You were most anxious that your Bill should 'stick' and not become a political football. This search for consensus between the parties is most likely to be successful in the field of ballots - for no-one can argue openly and with great conviction against the obviously democratic nature of the postal/secret ballot. "The Times" recently reported that the unions had unanimously agreed in advance not to make use of the financial facilities for ballots provided in your Bill. You did not think this report was accurate. Our view is that if the ballot proposals are to have any effect and not merely give public money to trade unions for what they are already doing - there must be provision either for the ballots to be compulsory or, at the very least, for union members to be able to demand a ballot in certain circumstances.

The simplest and best approach to make your proposals effective is to make them compulsory instead of merely available. If there is merit in consulting the opinion of ordinary members - and we believe there is - then surely the case is overwhelming to ensure that the ballot is in fact adopted? The voluntary approach offers no guarantee that it will be adopted by a single union that does not have it already.

Failing the above, we would urge you at least to give individual trade unionists some democratic rights by writing into the Bill provision for a certain number or proportion of union members to call for a ballot in order to ascertain the democratic verdict. One of the main objectives must be to extend individual freedoms. There has been growing evidence since 1975 that union leaders are not fully representative of the rank and file: Cowley, Eastleigh, Dagenham, Corby, Leyland, South Wales miners and Hadfields are a few cases in point. We feel there is a growing weariness on the part of ordinary working people about constantly being called out on strike.

We are very strongly of the opinion that when a strike is contemplated or actually under way that there should at least be an opportunity for the workers affected to express their views in a secret ballot.

e Rt. Hon. James Prior, M.P. 12th March 1980

This can be achieved in the following way:-

An addition to clause 1 of the Bill as follows:-

1(9) If the Committee of management of a trade union or any body exercising the functions thereof should, in contemplation or furtherance of a trade dispute, authorise a strike or order industrial action, such strike or action shall not be proceeded with until a secret ballot is held of the entire membership of the union called upon to participate in such strike or industrial action. If, at any time between the authorisation of calling of this strike or action by the body in question and its inception, a petition call for a secret ballot is received either from not less than one hundred members of the union or by not less than five per cent. of the union's members, a ballot shall be held of all the members. Such a ballot shall be conducted by a body independent of the trade union nominated by, and under the general supervision of, the Certification Officer. The strike or industrial action shall not be proceeded with unless a majority of those eligible to vote authorise or approve the strike or industrial action that is contemplated.

1(10) If a strike or other industrial action should be in progress a secret ballot of those trade union members involved shall speedily be held upon a petition, presented by either not less than one hundred of these members or by five per cent of them, calling for the question to be put to all members eligible to vote as to whether the strike or industrial action shall continue. In the event that a majority of those voting do not vote in favour of continuing the strike or industrial action, the committee of management of the trade union in question or the body exercising its functions, shall be required immediately to issue notices instructing all members to discontinue the strike or other industrial action. The ballot shall be conducted by a body independent of the trade union nominated by, and under the general supervision of, the Certification Officer.

We feel that since public moneys are involved a responsible public official must have overall supervision of any ballots - including the conduct of them and the framing of questions to be put. In the Bill, duties, in relation to ballots, are laid upon the Certification Officer. Our committee agrees that he is the appropriate official and we consider that he is eminently qualified to discharge these further, and related, functions. There is no more case, where ballots have any sort of legal basis and in which public money is involved, to leave this total duty either to the trade unions or, for example, to the management. Industrial democracy, like Parliamentary democracy, must mean independent Returning Officers. Some trade unions, regrettably, do not maintain the high standards of democratic practice that most trades unionists require and expect of their unions.

The Rt. Hon. James Prior, M.P. 12th March 1980

5. Despite our valuable discussion we remain of the view that it would be wise to limit immunities to the primary position of the parties in dispute and exclude action against all suppliers and customers. However, we took note of your determination to ensure that certain forms of sympathetic and secondary action enjoyed legal immunity. In the light of this statement of intent we merely submit tidying-up proposals to restrict somewhat the extent of this wide immunity and clarify its nature. We noted that you were unhappy that big suppliers would be affected by the immunity for first suppliers. We agree with you that there is mileage in the 'substantial' amendment. We suggest the following as the new clause 15 of the Bill:-

Section 15 (on p.14) (New Section 15 of the Bill)

15 1) Section 14 of the 1974 Act is hereby repealed.

2) For Section 13 of the 1974 Act there shall be substituted:-

13 1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only:-

a) that it constitutes a breach or threat to break a contract of employment to which he is a party;

b) that it induces or is calculated to induce breach or threatened breach by another person of that other person's contract of employment with the same employer.

2) Further to the immunity granted in 1) above, an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in law on the ground only that it is taken at the behest of, or by, persons in a trade dispute with a given employer, in relation to an established or long-standing and direct current supplier of that employer provided that a substantial portion of the business of that supplier has for the previous year been with the employer concerned and provided that a substantial part of the business of the employer concerned has for the previous year been with the said supplier.

The Rt. Hon. James Prior, M.P.

12th March 1980

3) An agreement or combination by two or more persons to do, threaten or cause to be done an act which, if it were to be done by one person, would not be actionable in tort by virtue of subsections 1) and 2) above, shall not be actionable in tort.

We consider that something must be done to restrict or presently abolish Clause 14 of T.U.L.R.A. if it is not to prevent the Bill from achieving its effects.

We do most strongly urge you to adopt our suggestions in order to remove customers from the purview of the immunities. We noted that you were sympathetic to the idea of releasing customers from damaging secondary action.

I fully understand the political considerations that influence your pragmatism in the construction of your Bill. My fear is, as I have stated, that the Bill will not increase respect for the law but will add to the mythology surrounding the 1971 Act - that the law cannot be used to constrain the present excesses of the picket line.

I hope your cold is much better now.

Yours sincerely,

LEONARD NEAL, C.B.E.

Original in C/R.

cc. D/H
Cause
Ind Pol

DS.

10 DOWNING STREET

THE PRIME MINISTER

19 March, 1980.

Dear Fergus,

Thank you for your letter of 3 March enclosing one from your constituent Mr. David M. Crabtree of 11 Parkfield Court, Parkfield Road, Altrincham.

I well understand and sympathise with Mr. Crabtree's desire to see immediate legislation to restrain the abuse of union power. Our Employment Bill, which does implement our main manifesto commitments on industrial relations, is however now well advanced in its Committee stage in the House of Commons and should become law in the summer. We promised that we would consult on this, and this we have done. The Bill is very widely supported by union members. The Bill's main provisions will make picketing unlawful except at the pickets' own place of work; give much greater protection to individuals in a closed shop; enable public funds to be made available for trade union secret ballots; and ease the burden of the employment protection legislation on businesses, and especially small firms.

The very recent House of Lords decision in the case of Express Newspapers v McShane has made it urgently necessary to restrict other forms of secondary industrial action, like secondary blacking

/ and

and sympathetic strikes. We intend to introduce an appropriate amendment to the Employment Bill before it leaves the Commons. The purpose of our consultation paper, to which Mr. Crabtree refers, is to enable us to get the views of those with practical experience of industry before deciding on the final form of our proposals.

The McShane case established that the last Government's legislation on trade union immunities gives almost unlimited scope for trade unions to take secondary industrial action against those not involved in the original dispute - an intolerably wide power. Our immediate purpose is to restrict immunity broadly to the scope that the law was generally thought to confer in the years immediately preceding those judgements, and that is the aim of the proposals set out in our consultative paper. I was very glad to have Mr. Crabtree's comments, and we shall certainly take these into account.

We will open up for discussion the whole field of trade union immunities in a Green Paper to be published later in the year. These are complex and sensitive matters of judgement, and whatever further reforms may ultimately prove necessary we think it wise not to commit the Government to wider changes until their full implications have been considered.

Yours ever,

(SGD) MT

Fergus Montgomery, Esq., M.P.

FLE

RH

C/F
Your file copy I think.
RD.

18 March 1980

I am writing on the Prime Minister's behalf to thank you for your letter of 17 March and for the copy of the Unquoted Companies' Group's Submission on the "Working Paper on Secondary Industrial Action".

I have placed this before the Prime Minister.

L. P. LANKESTER

Sir Emmanuel Kaye, CBE

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Sir Emmanuel Kaye, CBE
Chairman & Governing Director

Ref: EK/CM

17th March, 1980

R 18/3

The Rt. Hon. Margaret Thatcher, M.P.,
Prime Minister,
10 Downing Street,
LONDON S.W.1.

My dear Prime Minister,

In case it may be of interest to you, I have pleasure in enclosing a copy of the Unquoted Companies' Group's Submission to the Secretary of State for Employment, in response to a request for comments by interested parties on a Working Paper on Secondary Industrial Action.

With every good wish.

Yours very sincerely,

Emmanuel.

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Sir Emmanuel Kaye, C.B.E.
Chairman & Governing Director

Ref: EK/CM

14th March, 1980

The Rt. Hon. James Prior, M.P.,
Secretary of State for Employment,
Caxton House,
Tothill Street,
LONDON S.W.1.

My dear Secretary of State.

In response to your department's press notice of 19th February, 1980 asking for comments by interested bodies on a "Working Paper on Secondary Industrial Action", I enclose herewith the views of the Unquoted Companies' Group on this paper and the related Clause 14 of the Employment Bill.

You will appreciate from the comments made that the U.C.G. remains steadfast in the view that it has consistently maintained over the last five years that, in the end, only when the trade unions of this country are deemed to be bodies corporate, enabling them to sue and be sued to the same extent as any other legal entity, will stability be achieved in the industrial relations scene in the United Kingdom.

We emphasised this point when we met on 31st October, 1979. We understood from that meeting and the subsequent tenor of the clauses in the Employment Bill, that the Government did not then consider that the time was appropriate to make so fundamental a change but would be considering these matters in a future Green Paper.

The events of the last four months, however, tend to give further support to the contentions which we advanced both at the meeting and in our submissions to your department. We can only repeat what we said at the meting on the 31st October that while the Group shares the Government's concern to "get the package of industrial relations

...../over

proposals right", the Group believes it would be better to have no new laws at all than bad law that could not be enforced and in practice could only lead to increased disturbance and industrial unrest.

If you think that a further meeting with our Group would be helpful, we are very ready to meet to discuss our submissions further.

As in the past, we are sending copies of this letter and submission to the Prime Minister, the Chancellor of the Exchequer and the Secretary of State for Industry.

Yours sincerely,

Duncan.

Submission by The Unquoted Companies' Group

on

THE EMPLOYMENT BILL, CLAUSE 14, AND THE GOVERNMENT'S WORKING PAPER ON "SECONDARY INDUSTRIAL ACTION" of 19th February, 1980

Correspondence to:

Sir Emmanuel Kaye, C.B.E.
Lansing Bagnall Limited
Kingsclere Road
BASINGSTOKE, Hants.
RG21 3HQ.

14th March, 1980

THE EMPLOYMENT BILL, CLAUSE 14, AND THE GOVERNMENT'S

WORKING PAPER OF 19TH FEBRUARY 1980

SUMMARY OF CONCLUSIONS

(N.B. References, where given, are to our comments attached on paragraphs in the Working Paper)

PRACTICAL QUESTIONS

1. The definition of "trade dispute" (S.29, 1974 Act) is so wide that almost anyone could claim a lawful reason for becoming involved directly or indirectly in any industrial action - and immunity under S.13 of the 1974 Act.

   (Paras. 2(ii), 6, and 19(i))

2. Under S.28(1) of the 1974 Act "trade unions" can be purely temporary combinations. Thus, any individual can be selected for a particular purpose and called an "official". Under S.30(1) he need not even be a trade unionist. He may be just a professional agitator. Yet his presence as a picket (under Clause 14) or as an organisor

or participant in "secondary industrial action" would be lawful.

(Paras. 2(iii) and (iv))

3. Because of the wide range of people who could claim for one reason or another to be acting lawfully, the locality of picketing provided for under Clause 14 would often be irrelevant.

(Para. 2(iv))

4. Even where there seemed to be blatant "unlawful picketing" under Clause 14 or other "unlawful secondary action" under the Working Paper proposals, the only action available to the employer affected would be to try to locate, and name, individuals responsible in order to sue them. This would often be unwise, impractical or dangerous.

5. If and when an employer succeeded, there would be many circumstances where the individuals would welcome the opportunity to gain the status of martyrdom. Moreover, their places on the picket line, or on the organising committee, would quickly be filled by others.

6. Since Clause 14 makes no provision affecting numbers of pickets - "union officials", ex-employees, or employees (see paras. 2 and 3 above) - it would still be lawful for bus-loads of individuals to travel from one establishment to another. Perhaps, in view of Sub-clause (1)(b), officials would have to be accompanied by at least one employee or ex-employee.

7. Neither Clause 14 nor the Working Paper proposals would inhibit a "trade union" (which includes ad hoc groups) from instructing its "officials" or members to act unlawfully. It could not be held liable: its funds would not be at risk. And, as already mentioned in para. 5 above, many individuals would relish a status as martyrs.
(Para. 2 (i))

8. In regard to the "tests" to be satisfied before individuals can claim immunity:-

(i) We believe they would create a profusion of litigation, with conflicting judgments.

(ii) The complexities would be magnified because the tests would apply to any industrial action - strikes and lockouts, "go-slows", "work-to-rules", as well as boycotts,

blacking, picketing, etc...

(iii) We foresee massive complications stemming from the present wide definition of "trade dispute".

(iv) We foresee difficulties in the interpretation of the term "some extraneous motive" - which could well be the pursuance of another lawful "trade dispute".

(Para. 15(i)-(iv)

9. In regard to the proposed "dividing line" between those injured parties who could take civil proceedings against individuals and those who could not, we envisage some very real difficulties in the formula suggested. For example:-

(i) In large multi-national Groups (and in some small ones) there would often be scope for argument as to who was "the employer".

(ii) In some cases, a decision as to whether an injured party had or had not a right to sue would hinge on a decision as to how "regular" was his business with another party and/or how "substantial" was his business in relation to his total business.

(iii) In other cases, this important decision would apparently be made on the basis of whether or not the injured party was a "first supplier or customer" who was "commercially affected by the outcome of the dispute". But this party might be only the agent or distributor of the main supplier or customer. As we read paras. 18/19 of the Working Paper, the latter may have the basic right to sue, while the former would have no right. Apart from the question of justice, there could clearly be many "marginal" cases concerning who was, or was not, a "first supplier or customer". (Para. 18(i)-(iv))

OTHER QUESTIONS

10. We do not agree that without the S.13 immunities, "a person would be at risk of being sued every time he called or threatened a strike". No comparable provisions exist - nor are sought by trade unions - in other countries where lawful industrial action is an accepted feature of industrial life. Elsewhere, proper notice of such action is given - to accord with the terms of the employment contract and/or

collective agreement.

(Para. 3)

11. Clause 14 of the Employment Bill, and the Working Paper, are concerned only with S.13 immunities granted to individuals. We believe that far more harmful to industrial relations and efficiency are the S.14 immunities granted to trade unions. Most industrial action is organised by unions and union officials. Even where it may be practical for employers to act against individuals this is likely to do more harm than good. We believe that Britain should come into line with the rest of the world by repealing the unique, almost total, immunities of trade unions.

(Paras. 2(i), 3, 7, 14, 15, 15(v), 19, 19(ii) and (iii))

12. We strongly oppose the concept that "common law rights" should be restored to some people and not to others. All should be equal before the law - including anyone damaged by means which are contrary to the general law.

(Para. 11)

13. We therefore oppose, in principle, the concept that normal common law rights should be denied to

people:-

(i) because their operations happen to be "close" to the source of a particular industrial dispute: or

(ii) because they happen to be "first suppliers or customers" of another employer in dispute.

(Paras. 16, 18(i) and (ii))

(NOTE. If there is to be any distinction as between lawful and unlawful "secondary industrial action", including picketing, then it must surely be based on whether or not the third party is allying himself to the employer in dispute - and in so doing is exerting influence against the employees: i.e. whether or not he is acting, in the true sense, as a "neutral".)

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Submission by The Unquoted Companies' Group

on

THE EMPLOYMENT BILL, CLAUSE 14, AND THE GOVERNMENT'S WORKING PAPER ON "SECONDARY INDUSTRIAL ACTION" of 19th February, 1980

Correspondence to:

Sir Emmanuel Kaye, C.B.E.
Lansing Bagnall Limited
Kingsclere Road
BASINGSTOKE, Hants.
RG21 3HQ.

14th March, 1980

OBSERVATIONS ON THE SECRETARY OF STATE'S

WORKING PAPER OF 19th FEBRUARY 1980

Para. 2

We do not agree that clause 14 of the Employment Bill "appropriately limits" the immunities relating to secondary picketing. This assessment has a direct bearing on many of the views expressed in the Working Paper - and on the proposals to deal with "other secondary industrial action". The following comments are therefore important to this Submission.

(i) If Clause 14 were law, trade union executive or branch committees could still instruct union officials and/or members to organise or conduct unlawful picketing, or other unlawful industrial action, without fear that the union could be held to be liable or its funds put at risk.

(ii) The Employment Bill makes no provision for amending section 29 of the 1974 Act to narrow the scope of a "trade dispute". Thus, any form of what was really "secondary

industrial action" could, in our view, be lawful - regardless of the working paper provisions - if the claim were made that it was in furtherance of another cause at the same place or the same cause at another place.

(iii) Clause 14 would in our view be ineffective without amendment to section 28 (1) of the 1974 Act to provide that "trade unions" must be properly established organisations with written constitutions.

So long as a "trade union" in law can be purely a temporary combination, any individual can be selected for a particular purpose and be called an "official".

Under section 30 (1) this person need not even be a member of a trade union. He can be just a professional agitator: yet his presence as a picket, organiser of a picket line, or promoter of secondary industrial action would be quite lawful. Nothing in the Working Paper affects this.

(iv) Thus, without appropriate amendments to Sections 28 (1), 29, and 30 (definition of

"trade union official") of the 1974 Act, we do not consider that the restrictions as to "parties"or "place of work" in clause 14 would have material effect. And the the same considerations apply in regard to persons engaged in other "secondary industrial action".

Para. 3

We question the broad statement "almost any industrial action involves a person....inducing others to break their contracts of employment". This is primarily a British phenomenon. In other countries inducement to act in breach of any contract - including contracts of employment is infrequent - and, of course, illegal.

It follows that we cannot accept that "a person would be at risk of being sued every time he called or threatened a strike". No other country grants these immunities: elsewhere proper notice of industrial action is given - which does not involve breach of the contracts of employment of those concerned.

Para. 6

Here - as elsewhere in the Working Paper - the importance of an act being "in contemplation or furtherance of a

trade dispute" is stressed. But the significance of the wide legal definition of a "trade dispute" in section 29 of the 1974 Act is not mentioned.

If the Employment Bill is effectively to limit even section 13 immunity we regard it as essential to narrow this definition. Otherwise, individuals apparently acting unlawfully under the new provisions will be able to claim that their action is in furtherance of some other matter qualifying as a "trade dispute" under Section 29.

How easy, for example, - when the real reason for secondary industrial action was to support another trade dispute - it would be to claim that the action against the third party related to a "matter of discipline" (section 29(1) (d)); the non-membership of a trade union by certain employees (e); facilities for trade union officials (f); or that the action was simply in support of some "matter" occuring outside Great Britain (Sub-S. (3)).

(See also our comments (ii) under Para. 2 above)

Para. 7

We strongly support the views expressed in this paragraph.

In particular, we agree that the scope of immunity is "dangerously wide for the rest of the community" who are "deprived of their common law rights to protect themselves".

However, we believe that the scope of immunity given to individuals by Section 13 is, relatively speaking, less important than the virtually unlimited immunity of trade unions granted under section 14 of the 1974 Act.

Since the identical principles apply, we are surprised that neither the Employment Bill nor the Working Paper makes provision for amending the latter.

Para. 9

We do not follow the logic in this paragraph. How could the Government hope for "consensus" on the basis of the Court of Appeal decision in the MacShane case when the T.U.C. and the trade unions were totally committed to obtaining a reversal of that decision - if not through the House of Lords then by amendments to statutory law?

Para. 11

We do not see logic or justice in the second sentence. Why should normal common law rights be restored only to "many" people and not to all? And if

the interference in business affairs is "unwarrantable" - why should trade unions be immune against civil proceedings for such interference?

Para. 13

We cannot accept that the law should specify any circumstances in which people can be "deprived of their rights to protect themselves". Thus, in our view, the principle expressed in the last sentence is wholly wrong.

Para. 14

If it is right that "certain tests" should be satisfied before section 13 immunity can be claimed, then how can it not equally be right that the same tests must be satisfied before section 14 immunity can be claimed?

Para. 15

Our comments here, as elsewhere, are made in the context of our opposition in principle to the Employment Bill proposals to limit the limited section 13 immunities and leave the unlimited section 14 immunities untouched.

As to the practical aspects of these proposals:

(i) We believe they would result in a profusion of litigation, conflicting judgments and appeals. Each individual case would require consideration of such terms as "reasonably capable", "predominantly in pursuit of", and "principally for an extraneous motive".

(ii) These complexities would be magnified by the fact that the "general tests" would apply to any "industrial action" - a term yet to be defined but clearly including strikes and lock-outs, "go-slows", "work to rules", "boycotts", "blacking", and picketing.

(iii) We foresee cases where the Courts would find against the defendant (for example, on grounds that the action was not predominantly in pursuit of that trade dispute) and the claim would then be made that there was a dispute with the firm in question connected with another matter listed under section 29 of the 1974 Act.

(iv) We foresee legal complications over the term "some extraneous motive". For example, section 29 (3) - "there is a trade dispute

for the purposes of this Act even though it relates to matters occuring outside Great Britain" - means that immunity is given in the case of disputes which must in the very nature of things have some "extraneous motive". And this could apply to the "primary" dispute which was being supported by "secondary action".

(v) We observe that where the "tests" were not satisfied, those damaged "would be free to exercise their normal rights". But "normal rights" must surely include the right to obtain redress for damage suffered: e.g.- in Lord Diplock's words in the recent private steel industry case - harm inflicted "by means which are contrary to the general law". "Normal rights" would also include the right to act against any person or organisation - including a trade union.

We cannot therefore accept that the Government's proposal does what it claims to do:i.e. restore "normal rights to seek an order from the Courts making the person inducing the action stop it or pay damages appropriate to the harm suffered".

Para. 16

We draw attention to the sentence:-

> "...some secondary action is clearly too remote from the original dispute to justify depriving those who are damaged by it of their right to obtain redress..."

We see no justice in denying fundamental rights to firms simply because their operations happen to be "close" to the original dispute - and no logic in then granting these rights to other firms on the grounds that their operations are further away. The degree of "remoteness" is purely coincidental.

Para. 18

We are strongly opposed to these proposals both in principle and from the aspect of practicability. Our reasons are as follows:-

(i) It seems quite wrong to make distinction - in a matter of basic rights - against persons (in this case employers) simply because they happen to be "first suppliers or customers" of another employer in dispute. To our knowledge, this would be a unique distinction

in democratic society.

(ii) We see no justice in depriving people of their basic rights in common law for the sole reason that they "may be said to be commercially affected by the outcome" of a dispute to which they are not a party and in which they are not lending support to either side. It would establish a new, a very undesirable, principle in law.

(iii) As to the practical side - we foresee great problems of interpretation of parties "who regularly conduct a substantial part of their business" with other parties. And on what basis are judges to decide as to parties who are "commercially affected by the outcome of the dispute"? What if the "first supplier" is an intermediatory - obtaining stocks from a manufacturer "round the corner"? Would the latter, too, be regarded as a "first supplier" or not? Moreover, what of the "suppliers" of component parts to the "first supplier"? They, too, might be very much "commercially affected by the outcome of the dispute". One can foresee a minefield of

anomalies and complexities.

(iv) It seems illogical to refer to "first suppliers and customers" as being "commercially affected by the outcome of the dispute" - and therefore to be deprived of basic rights. Innumerable other suppliers and customers may be just as much "commercially affected" by the dispute. Indeed, in many cases, a "second supplier" may be far more so. It is all a question of the degree of dependence of one firm on another for custom or supply.

Para. 19

This begins:-

"But there the immunity for secondary action which interfered with commercial contracts would end".

This statement is, we suggest, misleading. Under the proposals outlined, the principal immunity - that of trade unions under section 14 of the 1974 Act - would remain. We observe that there is no mention of section 14 in the Working Paper.

In regard to the rest of this paragraph, we make the following points:

(i) "...the original trade dispute...". We repeat that, unless the definition of "trade dispute" in section 29 of the 1974 Act is amended, persons who might, under the proposals, be liable to be sued could readily claim that their actions were in furtherance of a different cause of dispute - either at the original place of origin or elsewhere. (See our comments under Para. 6)

(ii) As we have already stated under paragraph 15 a person's "normal rights to seek redress in the courts" would include seeking redress from any person or any organisation. Yet the Working Paper leaves untouched the section 14 immunities of trade unions.

(iii) This same point applies to the positive statement later in the paragraph: i.e. that, in given circumstances, people would be free to exercise "common law rights" to seek redress "appropriate to the damage sustained".

We regard this, too, as misleading. Common law rights would include the right to sue a

trade union in such circumstances. Yet the Working Paper stipulates (paragraph 21) that the Government intend only to limit immunities of individuals under section 13 of the 1974 Act.

Para. 21

We note that "the Government wish to have the views of employers and unions" before introducing amendments to the Employment Bill.

We hope that this Submission will have stressed the importance of much wider consultation before any action is taken. Not only "employers and unions"are affected.

oooooooooooooooooo

cc AG

CONFIDENTIAL

hnd PS 2

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400

Switchboard 01-213 3000

PM asked to see this reply

Prime Minister

A negative response. But it is hard to see how employers could be compelled not to dismiss their employees. The passing of 14 March 1980 compensation seems the only way of dealing with this problem.

RL 14/3

The Rt Hon George Younger MP
Secretary of State
Scottish Office
Dover House
LONDON SW1

Flag A

Thank you for your further letter of 5 March.

I fully share your concern about the developing situation in Scotland. I still believe, for the reasons I have given, that the Employment Bill will provide adequate protection in the circumstances you outline and that, properly presented and publicised, will give the assurances that employees need. The Code will help further.

In my view your own proposal would not work. As I understand it, you wish to prevent employers from dismissing, in accordance with a union membership agreement, an employee expelled from his union for continuing to undertake essential public services contrary to union instructions during a strike. Presumably, you intend that the individual should be able to seek an injunction to prevent the employer dismissing him in these circumstances or to seek an order of reinstatement with which the employer would be compelled to comply.

This approach would be unprecedented and would have profound implications. So far as I am aware, nowhere in the civil law is there any provision under which an employer can be compelled to employ or continue to employ an individual. The law does not give the employee an absolute assurance that he will not be dismissed. What it does is to assure him that if he is unfairly dismissed under the terms of the law, he will be entitled to compensation.

This has been the approach on unfair dismissals since the 1971 Act first introduced that protection and it has been adopted for very sound reasons. Suppose an employer is compelled to keep on an employee in the circumstances you have in mind. What does the employer do if his other employees then refuse to work with that person and thereby threaten the essential services that you desire to maintain? The employee's position can be made insupportable and the employer's position untenable.

CONFIDENTIAL

Even if we were to seek to introduce and apply this totally new concept in labour law - which would have incidentally to be a completely new clause in the Employment Bill - I very much doubt whether we could limit it to the circumstances you have in mind. If employers can be compelled to keep or reinstate employees in one set of circumstances, there would be very considerable pressures to extend this obligation to other cases of unfair dismissal. I need hardly say that this would be exceedingly unpopular with employers.

We have to recognise that this is as much a matter of will - certainly with public sector employers - as of law. You say that under the terms of their UMAs some local authorities may have to dismiss those who maintain essential services during a strike and are expelled from their union as a result. There is, however, generally no absolute obligation of this kind: as you know, collective agreements of this sort are not normally legally binding and, if an employer party to a UMA finds that the UMA is working against his own or, in the case of local authorities, the public interest, there is nothing to stop his repudiating the offending part of the UMA or indeed the whole of the UMA. There are notable examples where employers both inside and outside the public services have done this.

Of course, some local authorities may be determined to be perverse and may not be unwilling to dismiss those union members covered by a UMA who had helped them to maintain essential services during a strike. In that event the employees concerned will have the protection of clauses 3 or 6 of the Employment Bill together with the Code of Practice in the way I outlined in my last letter. This will not guarantee them their jobs but it will put financial pressure on the local authority to retain them and in the last resort a local authority is going to have to reckon with public opinion.

Like you, I believe that we must do all we can to provide assurances to all employees in closed shops that they cannot be unreasonably treated because they refuse to take part in strike action. I also agree that we must do whatever we can, by law or otherwise, to strengthen the resolve of local authority employers. The Bill as it stands and the Code when it is produced will go a long way in this direction. I cannot agree to go beyond it in the way that you propose because this would introduce into labour legislation a totally novel obligation on employers which in my view is open to objection in principle as well as being quite impractical to operate.

I hope therefore you will agree that we should firmly adhere to the approach the Government have so far adopted in this area. I personally believe that we have got the balance of the present Bill about right and I would not want to see this balance put at risk. Of course, if on further consideration you and the Chancellor would still like to discuss the issue with me I would be happy to do so.

I am sending copies of this letter to the recipients of yours.

BK

Original in GR.

CF to ADE

Note: Sent to Mr. Prior

Ind PO.

10 DOWNING STREET

THE PRIME MINISTER

12 March 1980

Thank you for your letter of 10 March.

I have noted your view that we have not gone far enough in the Employment Bill, nor in our proposals for an amendment to cover secondary blacking which were contained in the recent Consultation Document.

I can assure you that we intend to conduct a further thorough-going review of the law on trade union immunities, and our conclusions will be set out in the Green Paper which has been promised for later in the year.

sgd (Margaret Thatcher)

J. H. Forbes Macpherson, Esq.
Glasgow Chamber of Commerce.

JD

CONFIDENTIAL

cc Mr Ryrie

Ind Pol

Caxton House Tothill Street London SW1H 9NA
Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
Treasury
Great George Street
LONDON SW1P 3AG

12 March 1980

Dear Geoffrey

Thank you for your letter of 31 January about the Fair Wages Resolution.

In earlier correspondence I think it was accepted that we cannot lightly set aside our international obligations. These are quite clear. ILO Convention No 94 provides that denunciation can take place only at 10 year intervals following the Convention's being brought into force; the next such occasion in relation to Convention 94 will come in September 1982. Short of simply disregarding our international commitments there is no way we can improve on that timetable.

I suggest therefore that we should continue to proceed on the lines agreed by Cabinet in November, and review the FWR in the light of debate on Schedule 11 during the progress of the Employment Bill. I expect the Standing Committee will reach the clause repealing Schedule 11 towards the end of this month, when the strength of feeling on both sides should become clearer.

I should add that I think there is perhaps a risk of getting the issue out of perspective. In the second half of 1979, for example, only 21 claims were made under the FWR compared with 240 in the second half of 1978. Rather more than half of claims heard last year were not contested by employers, or contested only in part; and a change in employers' attitudes would no doubt help to reduce still further the number of successful claims. In these circumstances I am doubtful whether the price effects of removing the FWR are really likely to be significant.

I am sending copies of this letter to other members of E Committee and Sir Robert Armstrong.

Yours
Jim

Ind Pol.

CCAD

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

6th March, 1980

Dear Richard,

PL 93

PUBLIC AUTHORITIES AND THE
CLOSED SHOP

The Chancellor has followed with interest the correspondence between your Secretary of State and the Secretary of State for Scotland, which now stands with Mr. George Younger's letter of 5th March. He very much agrees with the Secretary of State for Scotland that these issues could usefully be discussed with colleagues, and would like to be associated with any such discussion your Secretary of State may decide to arrange.

I am copying this letter to the Private Secretaries of the recipients of the Scottish Secretary's letter.

Yours ever,
M.A. Hall

(M.A. HALL)
Private Secretary

Welcome!

R. Dykes, Esq.,
Private Secretary,
Department of Employment

cc AD

A 2

SECRETARY OF STATE FOR SCOTLAND

SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

Prime Minister

To glance

7/3

The Rt Hon Jim Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
LONDON
SW1N 9NA

5 March 1980

May I see the reply and

Thank you for your letter of 26 February explaining the extent to which Clauses 3 and 6 of the Employment Bill would provide the protection which I seek for local authority employees continuing to provide essential services during a strike.

I can see that these Clauses give a fair amount of protection, resulting ultimately in compensation, but they do not assure the employee, who has to measure his concept of public service against the possible loss of his career, that he will not be dismissed. Even if compensation were an adequate answer, the employee, before deciding whether or not to continue working against union instructions, has to balance the certainty of union reprisals against the uncertainty of a favourable verdict from an industrial tribunal. The essence of my case is therefore that we should protect individuals undertaking essential services against dismissal by virtue of their loss of membership of a union as a result of failing to obey a strike call.

I do not share your confidence that all public service employers would be unwilling to dismiss people who had helped them to maintain essential services during a strike; indeed under their UMAs they might have to. It would be a substantial protection both to individuals and to employers if it was made clear in clause 6, as suggested in my letter of 8 February, that persons who undertake essential duties would not be subject to dismissal, in pursuance of union manning agreements, if expulsion from the union arose from having continued to provide essential public services.

I hope there is still time to consider this as there is a distinct possibility that there may be a strike in the water industry in Scotland, and I fear that Lothian Regional Council, and possibly others, would put its political sympathy with the unions in front of its public obligations. Even though the Employment Bill would not by then be on the Statute Book on amendment such as I am suggesting would provide encouragement to the conscientious employee and strengthen the resolve of reasonable local authority employers generally.

I am grateful for your undertaking to consider provisions in the Code of Practice on the operation of the closed shop.

I am copying this letter to all members of E Committee, to the Lord Advocate and Sir Robert Armstrong. You may feel that we should arrange to discuss the issues with colleagues.

GEORGE YOUNGER

P.M. for Dw

Original returned to ...

Chambers of Commerce Information

STATEMENT EMBARGOED UNTIL 1800 HOURS WEDNESDAY 5 MARCH 1980   PR 4/80

PM sec

Prime Minister This is helpful - especially X. TL.

ABCC NATIONAL COUNCIL DISCUSSES STEEL STRIKE AND EMPLOYMENT BILL

At its meeting today (5 March) the National Council of the Association of British Chambers of Commerce gave further consideration to the steel strike situation and to the Employment Bill.

Notwithstanding the long term damage that the steel strike will inflict upon industry, Council was unanimous in the view that far greater damage would be caused to the economy if the union demands were conceded. These would mean even higher subsidies from the taxpayer to steelworkers, whose earnings were already well above the national average and who had the opportunity of earning substantially more by greater productivity. Council reiterated its opposition to any interference by Government.

On the Employment Bill, Council reaffirmed its objection to the extent of the immunity given to members of trade unions who took part in industrial action which caused severe damage to innocent parties.

In particular:

(a) it urged that breaches of the law, as amended by the Employment Bill, should give those damaged a right of action against unions and their funds for acts done by their officials or by their members, unless the union could show that it had used its best endeavours to prevent such breaches;

(b) it strongly objected to all forms of "legalised" secondary action and would be putting forward representations on this when the Green Paper on trade union immunities was published. If it is no longer practicable to effect such changes in the present Employment Bill, amendments must be made to the proposals in the Government's Working Paper on secondary action. The principal one is that immunity in the case of "blacking" or other forms of "secondary" action causing breaches of a commercial contract of a first supplier or customer should be strictly limited to contracts with a party to the industrial dispute. X

-ooOoo-

For further information please contact Lynn Howarth on:

Office: (01) 240 5831   Home: (01) 653 8421

2

A good letter.

D.

5/3

CABINET OFFICE

70 Whitehall, London SW1A 2AS Telephone 01-233 8319

From the Secretary of the Cabinet: Sir Robert Armstrong KCB CVO

5th March, 1980

Ref. A01601

Sir Arnold Weinstock has just sent Sir Robert Armstrong a copy of a letter which a colleague of his is proposing to send to The Times. Sir Robert thought that your Secretary of State might like to see it. I enclose a copy herewith.

I am sending copies of this letter to Tim Lankester and John Wiggins.

D. J. WRIGHT

(D. J. Wright)
Private Secretary

R. Dykes, Esq.

The Editor,
The Times,
New Printing House Square,
LONDON WC1X 8EZ.

29th February, 1980

Sir,

In an article by Roger Berthoud in your issue of 29th February 1980 he quotes Len Murray as saying -

> "Mrs. Thatcher says that she wants to make unions responsible for what their members do. The corollary is that the members must do what their unions ask them to do.
>
> If members decide to go to work when their unions have instructed them to stay away from work that may not justify mass picketing, it certainly does not justify violence; but would she or your readers deny the unions the right to discipline, even to expel these members? They can't have it both ways. Either we are in control or not. Either union members obey instructions, when they are taken properly and democratically by their elected representatives, or they do not."

The recent steel strike has made it clear that workers who do not wish to strike nevertheless do so under union orders for fear of expulsion and being effectively prevented from getting another job. This fear is more than justified by the existence of the "closed shop" which is not merely confined to those places of work where there is a Closed Shop Agreement. In practice a very large proportion of factories operate what is in effect a closed shop. The removal of a man's right to work is a penalty of such an extreme nature (appropriate perhaps for treason or murder) that Mr. Murray's assumption

[illegible] perhaps dissidence in the USSR

that The Times' readers would not deny the unions' right to expel such members is quite unwarranted.

The description of union decisions to strike "taken properly and democratically by their elected representatives" is a gross misrepresentation where the elected representatives have been appointed, as is quite normal, by a minute percentage of the members. These undemocratically elected representives, it is suggested by Mr. Murray, should be able to make decisions overriding the wishes of the vast majority of members in the workplace where a strike has been called.

What is perfectly clear is that the penalty of expulsion from a union should never be imposed, or be permitted to be imposed, for disobeying the instructions of union officials, unless those instructions have been the subject of a secret ballot at the relevant place of work giving overwhelming support for the union decision.

Yours faithfully,

D. Lewis

2

PRIME MINISTER

SCHEDULE 11 OF THE EMPLOYMENT PROTECTION ACT 1975

There was a reference in the note on the Employment Bill which Woodrow Wyatt sent you to the repeal of Schedule 11 of the Employment Protection Act 1975. The repeal of this Schedule was criticised by the TUC on the grounds that it withdraws "a minimum floor of wages". You asked about this, and about Order 1305 of 1940 and Order 1376 of 1951 which the TUC document also referred to.

Schedule 11 provided that so-called "recognised terms and conditions" of employment for a particular industry should apply throughout that industry; and that employees could obtain an award from the Central Arbitration Committee in accordance with this principle which the employer would have to comply with. Schedule 11 did therefore imply a minimum wage level in so far as it made it difficult for one employer to pay lower wages, irrespective of his employees' productivity, than wages elsewhere in the same industry.

The Schedule had its antecedents in the war time Order 1305 of 1940 which invented the term "recognised terms and conditions" and made arbitration compulsory. Order 1376 of 1951 included similar provisions, but without quite the same compulsion.

The main objective of Schedule 11 and the earlier Orders was the elimination of "pockets of low pay". But in recent years the provision was exploited by higher paid groups, such as the BBC staff, to ratchet up their wages behind other groups in the same industry. Between January 1977 and July 1979, 850 awards were issued by the Central Arbitration Committee; many of these awards brought wage levels in particular firms up to the level pertaining in other firms which they could not afford, and this must have been bad for employment.

It was largely for this reason that Ministers decided that the Schedule should be repealed.

4 March 1980

PL

Denis Austick

Woodrow Wyatt has sent this. The only ray of light is Frank Chapple's remarks (see page 6). Len Murray's summing up is on page 8.

MS.

TUC - LEAD OF UNIONS

1 Attached is a report of a TUC Conference of principal officers of affiliated unions held on January 22 1980 in Congress House to discuss the Government's Employment Bill. The Conference was attended by 220 delegates from 73 affiliated unions representing over 11 million members of the TUC. A summary of the main issues discussed at the Conference is set out below:

TL 22/2

Ballots

2 With one exception State finance for union ballots was opposed. Some warned that the rules would be laid down by the Certification Officer and might take a long time to comply with - thus prolonging disputes. Others suggested that the scheme might be strengthened if it failed and could result in the imposition of statutory ballots. Others stated that accepting money would suggest co-operation with the Bill when enacted and it was argued that there was a similarity with the registration provisions of the 1971 Act. One speaker said that those unions who accepted this money should be expelled from Congress. The speaker who argued that affiliated trade unions should make use of the proposed provision argued that the TUC had already accepted State finance for union education and that the issue of State aid for union ballots was a matter of tactics not principle.

Union Membership Agreements

3 It was argued that the aim of the Bill was to make new closed shops impossible and established UMA's difficult to enforce. There would be trouble from 'professional compensation seekers'. The proposals on exclusion and expulsion would make the TUC disputes machinery difficult to operate. One union said that it had only expelled two members in ten years and on this basis alone there was no evidence of abuse. The requirement of an 80% vote was contrasted with the 30% of the electorate who voted for the present government in the General Election. One speaker argued that if workers insisted on union membership, before allowing delivery of goods, they would be liable for an action for 'coercion to join'. On the other hand, if the union concerned refused to admit this could lay them open to liability for unreasonable exclusion.

Picketing

4 Speakers said that secondary picketing was not a new development, nor was it a 'typical' development of the last few years. It was merely one of a range of ways in which

workers sought to make disputes effective. In some cases eg, the Steel Strike, it was essential to be able to act in this way. Where secondary picketing had been made unlawful - eg in the USA - the result could be to prolong strikes leading to more serious damage on both sides.

TUC Guides and Principles

5 The General Secretary stated that in the light of the Bill becoming an Act all TUC guides and principles for avoiding disputes would need detailed review.

Other Points

6 Other points made included the following:

a 'civil liability' was not a soft option and could well end in criminal action, if say, injunctions were not fully observed;

b for the first time for many years there would be no effective legal underpinning of wages. Yet most other countries had external provisions - including minimum wage legislation;

c absence of recognition rights and narrowing the base of certain individual rights would lead to more industrial disputes.

Suggestion Action

7 It is suggested that the Committee may wish to circulate the Report to affiliated unions and Regional Councils.

- - - - - -

JM/IF/JK
February 12 1980

Introductory Remarks by the Chairman of
the Employment Policy and Organisation Committee

1 The Chairman of the Conference, Mr C H Urwin, welcomed the 220 delegates from 73 affiliated trade unions who were representing over 11 million trade union members. He stated that the conference was of considerable importance to the trade union Movement. It was designed to ensure that trade union executives and senior officials were fully informed about the provisions of the Employment Bill and to provide an opportunity for the Employment Policy and Organisation Committee of the General Council to hear the views of affiliated unions on these provisions. The General Council's Employment Policy and Organisation Committee had now had three long and contentious meetings with the Employment Secretary - two meetings on the Working Papers and one meeting on the Bill - at which the Employment Secretary had presented the Bill as a limited measure. However, in reality, the Bill attacked traditional trade union safeguards by laying a series of legal landmines around them and also reduced individual employment rights. The Chairman went on to describe in particular four very serious provisions of the Employment Bill namely the repeal of all Schedule 11, the limits on picketing, the weakening of union membership agreements and curbs on union recruitment.

2 In proposing the total repeal of Schedule 11, the Government would be withdrawing statutory provisions for the extension of recognised terms and conditions of employment which had existed since 1940. These provisions or ones similar to them had existed in Order 1305 of 1940, Order 1376 of 1951, Section 8 of the former Terms and Conditions of Employment Act 1959 and now Schedule 11, and had created at least partially, a minimum floor of wages which, in most other developed countries, was provided by statutory minimum wages. In withdrawing these modest provisions on wage protection, the Government was clearly seeking to inflict the full rigours of the market economy on workers.

3 On picketing the existing criminal law gave the police a wide array of powers to deal with anything which went beyond peaceful picketing, but now the Government was introduction new laws to limit lawful picketing to one's own place of work. Although employees could be forced to pay considerable sums in damages for breaking these laws. These proposals would make it unlawful for workers to picket plants to which their own work had been transferred, and it was unclear whether, under these provisions, lorry drivers who picketed docks and depots to which they delivered goods would be acting lawfully.

4 The Government's proposals on union membership agreements could create havoc with long established arrangements and agreements in many sectors of industry. The Director of the Engineering Employers' Federation had even voiced serious concern about the Government's closed shop plans. These could easily lead to demarcation disputes, inter-union difficulties, the formation of break-away unions, and most significantly, the Government's proposals on unreasonable expulsion/exclusion from trade unions would seriously undermine the TUC's own disputes procedures. The Government's Bill contained no definition of 'deeply held personal conviction' so that no one, including the courts, tribunals, employers and trade unions knew what the provision meant. The existing exemption was limited to religious beliefs which provided a clear and recognised test that all parties understood. The Bill's provisions which exempted those who objected to a 'particular' union were particularly vexatious and trouble-some for unions and employers.

5 On union recruitment, the Bill's provisions would give great discretion to the judiciary to intervene in industrial disputes. A great deal would depend, for example, on the courts' interpretation of 'place of work'. In particular, it was unclear whether a docker could lawfully refuse to work with a non union lorry driver: would a dock be a lorry driver's 'place of work'? If not, as the Employment Secretary had indicated, then dockers refusing to work with non-unionist lorry drivers could be acting unlawfully under the Bill's provisions. In general terms the right of trade unionists to refuse to handle the work of non-unionists was threatened by these provisions. Even more disturbing were the combined effects of a number of the Bill's clauses. For example if a docker refused to work with a non-union lorry driver until he obtained a union card, - this could be interpreted as unlawful recruitment. But on the other hand, if the union refused to issue a card then it could be required to pay compensation for unreasonable exclusion. In other words the Bill's provisions could create 'pincer' situations for unions in which the union would be held to have acted unlawfully no matter which way it acted.

6 There was the prospect of even more severe anti-union legislation being introduced shortly by the Government. The Prime Minister had stated that the Government was considering introducing provisions reducing union immunities for breach of commercial contracts. Such a provision could threaten seriously trade union rights to take any industrial action whatsoever.

7 Following the 1979 Congress resolution, the General Council were strongly committed to campaigning against all of the proposals contained in the Employment Bill. The TUC had been carrying out a wide range of activities but it was also necessary for affiliated unions to alert their employers to the manifest dangers in the Bill.

Most importantly, they should be told that their work-places could become the future battleground for possible inter-union disputes instead of the TUC's disputes machinery. Up to now the General Council and its Employment Policy and Organisation Committee have been united in their complete opposition to the anti-union purposes of the Employment Bill and to all of the Bill's clauses, and it was of fundamental importance that affiliated unions should maintain this united stance in seeking to deflect the Government from implementing the Employment Bill.

Contributions from Delegates

8 Mr John Jackson (SLADE) stated that his union strongly supported the action taken by the General Council in totally opposing the Employment Bill. Because of the clauses on union recruitment, SLADE had a particular interest in the Bill. He explained that SLADE had always had an interest in the fields art reprography, artwork and advertising but that in recent years, because of the introduction of new technology, a great deal of art work was being transferred from printing houses, to outside agencies and studios which often operated with non-union labour. SLADE had taken the view that, in order to protect their existing members, the workers employed by these sub-contracts should become union members. Other unions had simply refused to allow work to be sub-contracted and in retrospect this might have been a better tactic for SLADE to have adopted. The most important question to be asked about clause15 of the Employment Bill was whether the judges could find enough in the clause with which to justify the issue of injunctions in a wide range of circumstances. The answer clearly was yes. It was not necessary to inquire into the detailed meaning or fine interpretation of this clause. The Government, by using anti-SLADE propaganda and by carefully manipulating public opinion with the assistance of their friends in the press, were introducing clause 15 ostensibly as an attack on one affiliated union but the clause clearly affected all affiliated unions.

9 Mr Moss Evans (TGWU) stated that the so-called Employment Bill was a result of the political hysteria whipped up by the press during the events of last winter and the Bill had little to do with industrial realities in Britain. The Bill's provisions ignored the fact that secondary picketing was merely one of a large number of methods used by trade unionists to press for the successful conclusion of industrial disputes. No hard and fast rules existed about what kind of action, whether it was picketing or blacking or primary or secondary industrial action, would be necessary in an industrial dispute: industrial action varied widely and often depended on the ingenuity and experience of those taking the industrial action. It was clear that the Government knew this and would seek to make other areas of industrial action unlawful as well. The Bill's provisions on the closed shop provided a charter for the awkward employee and the professional compensation seeker and gave them the opportunity of disrupting long-established bargaining arrangements.

10 The Bill's provisions on expulsion/exclusion from trade unions seemed to be designed to alleviate a major problem of unions expelling their members, but the Tory Government had produced no case histories nor evidence that this was, in fact, the case. The reason for this was of course, that extremely few expulsions or exclusions occurred. Within the TGWU with over 2 million members, only two members had been expelled in the past ten years. Nevertheless the Government was persisting in laying a minefield across the whole of British industrial relations whose effects no one, least of all the Government, could be sure of. As regards the Bill's provisions on secret ballots, every affiliated union had a rule book with detailed procedures and structures to be used for making policy and arriving at decisions. The trade union Movement was considerably more democratic in its procedures and conduct than employers or even the Government, and trade unions constituted a very major part of our democractic society. The Conservative Governments proposals on funds for ballots were a clever and deliberate insult to the trade union Movement. Before any union instituted new ballots to qualify for Government money it should examine whether it would have conducted a ballot but for the money, and if not then it should reject the temptation presented by the Government.

11 The Bill's provisions on picketing could easily result in massive damages being awarded against trade unionists and the distinction between civil and criminal sanctions was blurred in the area of picketing. Although the Government said that its picketing proposals only affected civil law, once an injunction had been granted and ignored then this could constitute contempt of court into which the police would be drawn. In any case civil damages could be higher than criminal fines and under the closed shop and expulsion provisions, compensation of over £10,000 could be awarded against unions. The Prime Minister's argument that these civil remedies would only be rarely used by employers and suppliers was disingenuous and incorrect, because under the Industrial Relations Act, employers did use the penal provisions against trade unions. It was of fundamental importance that all affiliated unions should be united in their opposition to the Bill and to its attacks on the rights of workers and their union.

12 Mr David Basnett (GMWU) stated that the major task which now faced union leaders and executives was to give guidance to trade union members on how best to counter the Bill's proposals and to counter the Government's attempts to make the Bill credible. The Employment Bill attacked the vulnerable, the low paid, the poorly organised and women workers, and affiliated unions had been advised by the General Council to negotiate collective agreements which protected these workers and which maintained the existing levels of statutory employment rights. Unions should also seek to protect the low paid workers who would now be left unprotected with the repeal of Schedule 11 by the traditional trade union means of organisation, negotiation and, where necessary, industrial action.

13 As regards the Bill's provisions on picketing, it was evident that, after the Bill had been enacted, a major test case would arise from which the Government would attempt to make political capital. Trade unions would then have to be ready to demonstrate that the conflict was the fault of the Government and not the unions. The use of State finance for ballots should be opposed by affiliated unions. Unions were not opposed to the use of ballots, but these ballots had to be done by and through trade union control and not the control of the Certification Officer or any Government agency. The provisions on finance for ballots clearly represented the thin edge of a substantial wedge of State control over unions and was a serious incursion into the autonomy of trade unions. It was not difficult to predict the next step by the Government, which would be to make State ballots mandatory on trade unions. These provisions could be seen as a deliberately divisive tactic by the Government designed to split the unity of the trade union Movement as were the tax advantages of registration under the Industrial Relations Act. Accordingly the General Council should advise all affiliated unions not to take advantage of these provisions on financial support for ballots.

14 Mr Roy Evans (ISTC) stated that the Bill's provisions on picketing would outlaw all kinds of picketing apart from the picketing of one's own place of work. Over 45% of UK steel consumption was provided by the private steel sector and imports, and it would have been unlawful in the current dispute to picket these plants if the Bill was law. 'Secondary picketing' was merely one of a number of ways in which workers sought to make disputes effective, and in some disputes, eg steel, it was necessary to act in this way. The proposals on picketing were similar to the anti-union laws in the United States where it was illegal for unions to conduct secondary picketing and secondary industrial action. As a result unions could only bring industrial action against single plants and this meant that strikes lasted for very long periods and required very large strike funds to be carried by unions.

15 Mr Lief Mills (BIFU) stated that the Government's reaction to the legal problems over the recognition provisions of the Employment Protection Act had been to scrap them, which is what the CBI had recommended to the Government. This was objectionable and now that ACAS' functions were to be voluntary the result would be that employers would simply refuse to co-operate with ACAS or to comply with its requests in the recognition field. Already there was a deafening silence by the Government to the legitimate requests for recognition by responsible unions. The proposals on picketing were quite impractical because a strike at one national bank would involve the picketing of thousands of branches each of which were a 'place of work' and the clause meant that workers could only picket their own workplace. The Government was taking great care to present its proposals as reasonable and limited.

16 Mr E Winterbottom (AUEW-TASS) questioned whether one of the paragraphs concerning clause 15 in the Employment Bill in the TUC commentary on the Employment Bill could be amended to make clear the full threat posed by this clause. He stated that it was necessary for affiliated unions to remain united in their opposition to the Employment Bill in view of the Employment Secretary's close contact with some trade union leaders. Given the Government's massive press and propaganda campaign against the union Movement it was vitally important that trade unions should not publish views which could be construed as supporting the Employment Bill.

17 Mr Hammond (USDAW) stated that the Bill's provisions on the closed shop would make it very difficult for unions to secure new closed shop agreements and to maintain existing ones. The requirement to obtain a 80% support level for new agreements was arbitrary and unfair particularly in situations of high labour turnover and compared unfavourably with the 33% vote on which the Government was elected. The Government's Bill was based on the premise that trade unions initimidated workers but the fact of the matter was that the weak, women workers and part time workers were intimidated and exploited by their employers and not their unions.

18 Mr K Thomas (CPSA) stated that the general impression in the community was that the Bill was designed to curb the effects of last winter's disputes. The Bill went much wider than this and was a very serious matter for trade unions. The Government's attempt to provide trade unions with money for secret ballots should be seen as a bribe - and it was to be hoped that affiliated trade unions would not apply for such monies. The Government's provisions on finance for ballots seemed to be based on thebelief that union leaders continually involved docile workers in unwanted strikes when, in fact, the opposite was often the case. The Conservative Party's manifesto had stated that there should be no closed shops in the non-industrial civil service. These developments were a reflection of the Government's true attitude towards trade unions and their rights.

19 Mr F Chapple (EETPU) stated that the problems facing unions needed both principles and tactics rather than rhetoric. Trade unions had campaigned for greater legal intervention in industrial relations and employment and this put unions in a poor position to oppose legislation which affected them. If it was acceptable for the arbitrary acts of employers to be restrained by law, then the same should be the case for trade unions. The trade unions' opposition to the Bill was handicapped because in some areas trade unions were on weak grounds. In particular the Government proposals on secret ballots and the closed shop should be accepted. The trade union Movement was currently accepting funds from the Government for trade union education from State funds and therefore there was no reason in principle why trade unions should refuse to accept State money for ballots. Some unions feared State regulation in internal union affairs if finance for ballots

were accepted, but trade unions would be free to reject the offer of funds. But if trade unions rejected these ballot proposals they would lose a great deal of public support for their opposition to the other, more serious, provisions of the Bill. The Bill did not propose to outlaw closed shop agreements and those workers who wanted them could still have them. Most of the problems concerning the closed shop have been due to the intolerance of unions which had relied on the law rather than on persuasion, sometimes to the detriment of other unions' interests, and this had been largely recognised by the TUC when the agreement was signed with the Labour Government last February. The Government had a clear mandate for trade union legislation which was supported in various public opinion polls, and trade unions had to understand both the disillusionment among many in the Movement and the long term implications which flowed from a policy of total opposition to a democratically elected Government.

20 Mr W Keys (SOGAT) stated that the attitude of the Employment Secretary in introducting the Employment Bill was quite clearly that of blind arrogance towards the rights of workers and their trade unions. The main aim of the Employment Bill was to harmonise existing employment and IR law with the harsh economic policies of the Government. The trade union Movement should seek no compromise with any part of the Employment Bill and any affiliated union which sought to accept Government for ballots should be subject to expulsion from Congress. The Employment Bill, if enacted, could very easily result in another major confrontation similar to the imprisonment of the 'Pentonville Five' in 1972, and also in the sequestration of union funds. It was necessary for the day of action on May 14 to be a real day of action and not just a day of information. Many people including the young and ethnic minorities were rejecting the unequal and unfair society which was rapidly developing under the Thatcher Government and it was necessary for trade unions to make a stand against this Government's plans particularly in the area of industrial relations.

21 Mr N Stagg (Union of Communication Workers) stated that affiliated unions should have no part or parcel of accepting Tory funds for ballots. The UCW would be handlingthese postal ballots but it recognised that the advantage of any increased business would be insignificant compared with the loss of autonomy of affiliated unions. The Bill's provisions on picketing and immunities meant that small disputes could easily be inflamed into big national disputes as occurred from 1972-74. None of the measures in the Bill strengthened the rights of unions or their members: they only weakened them. Affiliated unions should look to Australia, New Zealand and the Caribbean countries to anticipate what kinds of anti-union legislation could be passed in the UK in the context of the present world recession and the increasing domination of multi-national corporations.

22 Mr B Rubner (FTATU) stated that when the TUC was fighting the Industrial Relations Bill and later the Act, the successful tactic adopted by the TUC was non-registration

under the Act despite the loss of tax advantages. The same situation applied now with regard to the financial attractions of money for ballots. Then, as now, the arguments were made that parts of the Industrial Relations Act were good and other parts were curative. However the Employment Bill like the Industrial Relations Act should be totally opposed. As regards the repeal of Schedule 11, the CBI was split: the employers' associations within the CBI were opposed to the repeal of all of Schedule 11, as was the largest employers association in the footwear industry, but the private employers in the CBI did not want Schedule 11. It should be up to trade unions themselves whether they wanted secret ballots or whether these were practical in their industries and the Government should not interfere in this matter. The General Council should be preparing a strategic view as to what they would do when the first casuality falls in the present conflict between the unions and the Tory Government. Such a strategy should include a major propaganda offensive against the distortions in the daily press.

Conclusion

23 The General Secretary of the TUC, Mr L Murray, stated in his concluding remarks that the conference had resulted in many practical experiences being reported ranging from the civil service to the manufacturing industries of how the Bill would adversely affect trade unions. An instructive method of assessing any new proposal was to ask who benefits? and it was clear that workers and their unions did not benefit from the Bill. Instead the Bill's provisions fitted in with the Government's harsh and unfair economic policies.

24 The Bill had four major aspects to it. Firstly it weakened the rights of individual workers, the weak and poorly organised workers. Second it attacked the basic rights of trade unions to combine, to organise and to bargain effectively. In the past, as now, workers have always had the wit and ingenuity to invent and apply new means of industrial action to secure collective agreements and to promote improvements in wages and conditions. The Government was now laying down minefields across these traditional rights and declaring that certain industrial actions which trade unions considered to be legitimate were to be unlawful. Third the Bill would severely affect the TUC's own procedures including the disputes machinery and the TUC would have to examine its position if the Bill were to be enacted. Finally the Bill could bring with it heavy costs to employers and to the Government from the occurence of major confrontations similar to the Goad case and the Pentonville case in the 1972-74 period. In this respect, employers should be reminded that inter-union disputes could in future be fought on their premises rather than peacefully resolved through the TUC's disputes procedures.

25 The provisions on finance for ballots were a deception and a snare for affiliated unions. These provisions seemed to be designed to benefit the silent majority but the Government did not appear to realise that many ballots

overturned the moderating recommendations of union executives. Cicero had said 'I fear the Greeks even when they bear gifts' many years ago and the same circumspection needed to be shown to the financial inducements in these proposals. Following the 1979 Congress resolution the TUC were campaigning strongly against the Employment Bill, and had published a number of pamphlets against the Bill, were covening a number of regional conferences, were liaising with the PLP front bench spokesmen as regards the Bill in Parliament and were organising a major demonstration on March 9 and day of action on May 14. It was now for the affiliated unions to play their part in the campaign by making sure that the leaflets and publicity material was distributed that the TUC educational materials were used, and that there were massive turnouts on March 9 and May 14.

26 The Chairman thanked the union officials for attending and declared the conference closed.

- - - - - -

JM/IF/JK
February 13 1980

10 DOWNING STREET

N. Lawson.

are you going to acknowledge his letter?

C.P.

3/3

no need.

5/3

(1) M. Lawson
(2) Prime Minister.

MT.

2

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RH/PVW

27th February 1980

The Rt. Hon. Margaret Thatcher, M.P.,
Prime Minister,
10 Downing Street, London SW1.

Dear Mrs Thatcher,

Thank you very much for inviting me to your lunch discussion last Friday. It was a most enjoyable occasion and it was very encouraging to hear the views being expressed round the table on the need to change the immunities of union funds.

I am also very grateful for the convincing and forthright way in which you put over the Government's views on the steel strike in Panorama on Monday night. It will go a long way towards helping us to settle the dispute and I am sure that it has already accelerated the return to work in the private sector.

I am rather puzzled about what is happening in the communications process between the CBI and your Cabinet. In your letter of 10th February and at the lunch meeting, you implied that the CBI was advocating a 'softly softly' approach and that this was acting as a restraint on the extent to which you could push forward trade union reform at the present time. On the other hand, at the CBI Council we are being asked to accept restraint and adopt the 'softly softly' approach because we are told this is what the Government wants at the present time!

I am proposing to look further into the matter from a CBI point of view, but at this stage I can assure you that the mood of the CBI Council is very much in line with your own thinking. We shall be commenting on the latest consultative document very soon now and I hope that the recommendations on this occasion will more accurately reflect our views.

With many thanks to you and Mr. Thatcher for inviting me to lunch.

Yours Sincerely,
Ron Halstead

R. Halstead

CONFIDENTIAL 27 February 1980

MR HOSKYNS

cc Mr Wolfson
Mr Lankester

TRADE UNION IMMUNITIES

I mentioned that there seems to be an important loophole in the proposals contained in Mr Prior's working paper on secondary industrial action. While it is possible that some bodies will respond to the working paper by pointing this out, I do not think we should rely entirely on this. I attach a draft letter which one of the members of E Committee could send to Mr Prior to expose the point. If it is not exposed now, it seems likely that there will be inadequate time at the end of the consultative period in which to put this right.

I hope the draft letter is self-explanatory. If not, it will have to be improved.

If the draft is clear, I suggest we ask whether the Chancellor, Sir Keith Joseph or John Nott would be willing to send it. Obviously the approach would need to be very discreet.

ANDREW DUGUID

CONFIDENTIAL

CONFIDENTIAL 27 February 1980

DRAFT LETTER FOR A MINISTER TO SEND TO MR PRIOR

Working Paper on Secondary Industrial Action

1. There is one point in the working paper proposals that is troubling me and which does not accord with my understanding of the decision we reached at E Committee on 13 February.

2. Although several of us would have liked to restrict immunities still further, we accepted your view that the line should be drawn broadly at the level of the first suppliers and customers to the party in dispute - although you explained that immunity would not automatically extend to all first suppliers and customers. I think we all recognised that this was less than a complete fulfilment of the Manifesto commitment to ensure that the protection of the law was available to those not concerned in the dispute, but we felt that this line was defensible - at least as a first step. In describing option 3, the official paper, E(80)10, explained that in the current steel dispute, immunity would run for secondary action against those independent steel manufacturers who were in substantial commercial relationship with BSC, but not the rest.

3. The draft of the working paper that you circulated on 14 February /on which I commented/ contained - at para. 16 - the reassuring sentence:

> "Those customers and suppliers falling outside this definition would be free to exercise their normal rights under the law in the case of interference with their commercial contracts."

I thought - and I am sure that some of our colleagues did - that we had at least extended the protection of the law to customers and suppliers - and competitors - who were not in substantial and regular contractual relationship with the employer in dispute.

5. My concern is this. The final version of the working paper seems to suggest that employees of first customers and suppliers to the employer in dispute will enjoy immunity for any action directed at any victim, no matter how remote, so long as the tests of capability and motive are met. This leads me to fear that we are not proposing to extend the protection of the law even to those who are more remote than first customers or suppliers. For example, despite the assurance contained in E(80)10 that independent steel producers without substantial commercial relationships with BSC would be protected, they could be the targets of selective blacking action by the employees of any first supplier to BSC. Thus, if British Rail have a substantial commercial relationship with BSC, it would be open to the NUR to black the supply of coking coal and other raw materials to independent steel producers. Similarly, the movement of private sector steel or even imported steel could be blacked in order to prevent supply to steel users whether they were substantial first customers of BSC or not.

6. More generally, in any dispute a trade union only needs to identify the first supplier or customer whose employees have the most wide-ranging muscle and ask them for support. I would accept that we have agreed on continuing immunity for the employees of first customers and suppliers to take sympathetic

strike action. But I am sure it was not the intention of the Committee to confer immunity on these employees for selective blacking action directed against any target they may choose.

7. I hope very much that it will be possible to plug this loop-hole. It has been suggested to me that it may be possible to do this by a close definition of the tests of capability and motive, but I am sceptical about this. Surely it would be much clearer to specify in the new clause that immunity will not extend to selective secondary action directed against suppliers or customers who do not have substantial contracts with the employer in dispute? If for any reason this seems impossible, an alternative route might be to introduce a third test of remoteness.

cc A Duguid
Ind Pol

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

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The Rt Hon George Younger MP
Secretary of State
Scottish Office
Dover House
LONDON SW1

26 February 1980

MBM

RJ

Dear George

Thank you for your letter of 8 February. I agree that it is deplorable that the Lothian closed shop agreement for manual workers was rushed through as you describe; and it is to be hoped that, if the negotiations for white collar staff should be concluded before the Employment Bill reaches the statute book, they are not implemented without a ballot. I too have considered whether Clause 6 might be made to take effect retrospectively but have rejected this course for the very strong reasons you give, in addition to the general undesirability of retrospective legislation.

You make two proposals. First, you suggest that Clause 6 of the Bill might be amended to provide that persons who undertake essential duties "would not be subject to dismissal and would be given the other protections of the clause, if as a result of their activities in maintaining such services they were expelled from their union". In this general area it is necessary to look at the protection provided by Clause 3 of the Bill (unreasonable exclusion or expulsion from a union) in conjunction with the protections in Clause 6. If, in the circumstances to which you refer, a union member disregarded a strike call because of his concept of professional duty in maintaining essential services, and if he were subsequently expelled from the union he would be able to claim that he had been unreasonably expelled within the meaning of Clause 3.

I have little doubt that he would succeed. The Industrial Tribunal would then declare that he had been unreasonably expelled and should be readmitted, and our expectation, based on experience of union behaviour generally, is that he would be readmitted. But even if he were not it does not follow necessarily that he would be dismissed. That would depend on the terms of the union membership agreement and the attitude of the employer. At the moment, as you have outlined, the attitude of these particular employers is not encouraging, but I would have thought that even they would be reluctant to dismiss people who had helped them to maintain essential services during a

strike. If the employer did, however, dismiss contrary to the terms of the UMA, the individual(s) concerned would be able to bring a claim for unfair dismissal. In the worst situation where the union had expelled an individual in these circumstances, had refused to readmit him following a tribunal declaration, and where the individual was dismissed in accordance with the UMA, the individual would be able to obtain substantial compensation (on a par to what is available for unfair dismissal) from the union.

An alternative situation is where the individual withdraws from the union because its policy as revealed in the strike action offends against his conscience or other deeply held personal conviction. This is where Clause 6 comes into play. The more directly his participation in the strike would affect services essential to the life and health of the community the more likely he would be able to demonstrate to an industrial tribunal, if dismissed, that membership of the union concerned could be offensive to his concept of professional duty/conscience. I therefore consider that Clauses 3 and 6 as they stand do provide the protection you seek in your first proposal.

Your second suggestion - that a Code of Practice on the operation of the closed shop should be drafted by the Secretary of State - will, I am glad to be able to tell you, be taken up. The Code will also provide guidance on what should be regarded as unreasonable exclusion/expulsion from a union and tribunals will be required to take this into account. I note your suggestion that the Code should refer to the desirability of closed shop arrangements being restricted to those not providing essential services and will consider how this might best be covered in the Code when we come to draft it.

I am copying this letter to all members of E Committee, to the Lord Advocate and to Sir Robert Armstrong.

BRIEFING NOTES ON THE GOVERNMENT'S PROPOSALS ON SECONDARY INDUSTRIAL ACTION

1. The Government have made it clear from the outset that they believe reasonable limits must be set on the scope for secondary industrial action. The Employment Bill already deals with the most common and most abused form of secondary action: secondary picketing (including flying pickets). The Bill limits lawful picketing to an employee's own place of work. The Bill's other provisions on the closed shop, coercive trade union recruitment tactics and secret ballots will also give essential protection to workers against union pressure on them to take industrial action when they are not involved in a dispute and do not wish to take such action /see attached note/.

2. The Government's new proposals, foreshadowed in the Second Reading debate on the Employment Bill, apply to all forms of secondary action. They will therefore deal in particular with "blacking" and "sympathetic" strikes. The Government propose to set the limit so that immunity will not extend beyond such action by the employees of those first suppliers and first customers who regularly conduct a substantial part of their business with the employer in dispute. Beyond that there would be no immunity for any industrial action which interferes with commercial contracts.

3. In addition, the Government propose that before any industrial action can attract immunity it must satisfy two tests

- that it is reasonably capable of furthering the trade dispute;
- that it has been taken predominantly in pursuit of the dispute and not principally for some extraneous motive.

4. These proposals are based on the approach taken by the Court of Appeal in a number of cases before the House of Lords judgements in the MacShane case. Their aim is to get a fair balance between protecting employers and workers who are not involved in disputes and allowing trade unions to function in a manner acceptable within a modern industrial society.

5. Under the law as very recently interpreted by the House of Lords there is virtually unlimited immunity for industrial action, so that strikes and other forms of industrial action can be extended to firms which have no interest in the dispute and no means of affecting its outcome. The only limitation is a purely subjective one: whether those taking the action believe that it will further the dispute. This licence to spread industrial disruption must be immediately restricted. This is what the new proposals are about.

6. They do not mean simply "leaving it to the judges". The most important element is the line drawn at secondary action by employees of first suppliers or first customers. This limitation is a statutory application of the "remoteness from the dispute" test which was developed by the Court of Appeal. The additional tests of capability and motive will operate mainly as additional restrictions on the scope of lawful secondary action at first suppliers and first customers.

7. The tests proposed are commonsense. Why should trade union officials not have to consider the full consequences of calling secondary industrial action and whether it really does have anything to do with the dispute at issue?

8. The Government's proposals are designed to deal urgently and in a practical way with the abuse of power which the Lords' recent interpretation of the law has declared to be legitimate. The Government's general review of the law on trade union immunities for industrial action will continue, and the Government intend to publish a Green Paper later this year, so that there may be informed public debate of the whole subject.

9. These recent proposals are consultative. They deal with difficult and sensitive issues and a complex area of law. The Government have therefore allowed time to hear the views of all those with experience in industry before they bring forward detailed legislative proposals for inclusion in the Bill.

Paymaster General's Office
Privy Council Office
68 Whitehall
SW1

22 February 1980

The picketing, closed shop and other relevant provisions in the Employment Bill

These new proposals have to be seen in the context of the existing provisions in the Employment Bill.

- The Bill already deals with the most common and serious form of secondary action - secondary picketing (including flying pickets) - by giving a civil remedy to anyone whose business is damaged. (The existing law gives no immunity for any criminal offences committed - such as violence, threats of violence or intimidation - in the course of picketing and the police already have powers to limit the number of pickets).

- The Bill already provides protection against the abuse of union power in a closed shop by creating a new right against unreasonable exclusion or expulsion from a trade union in a closed shop where the loss of a union card may mean the loss of a job; by protecting those who object to union membership on grounds of conscience or other deeply held personal conviction; and by making it possible for trade unions to be joined in proceedings if they take industrial action to force an employer to dismiss someone for not belonging to a union.

- the Bill already removes immunity from industrial action which is intended to compel workers to join a union against their will.

- the Bill provides finance for secret ballots held by unions.

How would employers take legal action to protect their businesses where immunity is withdrawn?

The Government propose that employers should be able to seek legal redress in the way that they have customarily done when faced with unlawful industrial action: by means of a civil action against the union official or other organiser of the action. An injunction against the organiser of the action is the quickest and most effective means of getting industrial action stopped - which is what employers want. Putting union funds at risk of actions for damages would not help the employer faced with unofficial action (and 95% of disputes are unofficial) for which the unions were not liable.

ANNEX 'B'

PICKETING LAW

The Attorney-General (Sir Michael Havers): With permission, Mr. Speaker, I will make a statement on the criminal law on picketing.

The recent events outside the private steel firms have renewed public anxiety about the law on picketing and intimidation. I must emphasise that the law on picketing does not, in any real way, change the criminal law and in no way diminishes the rules that govern public order.

The criminal law of the land applies to pickets as it does to anybody else. Let there be no illusion that the immunity provided under the civil law enables pickets to break the criminal law.

Peaceful picketing in contemplation or furtherance of a trade dispute is lawful so long as it is the honest belief of those involved that their action will advance the interests of those in dispute. This does not mean that the freedom to picket is a licence to obstruct or intimidate. The law permits picketing solely for the purpose of peacefully obtaining or communicating information or of peacefully persuading another person to work or not to work.

The immunity from civil proceedings given by section 15 of the Trade Union and Labour Relations Act 1974 does not extend to any wrongful act such as violence, threats of violence or similar intimidation—whether by excessive numbers of pickets or otherwise, or molestation amounting to a civil wrong. In those circumstances it may be open to the employer, on his own behalf or on that of his work force, to take action in the civil courts. In addition, the criminal law is perfectly clear. Each of us has the right to go about his daily work or pleasure free from interference by anybody else. Each one of us is free, as an individual, to come and go as he pleases to his home or to his place of work.

The law specifically protects our enjoyment of those rights. If anyone tries to deter us from exercising those rights by the use of violence or intimidation, or obstruction, he is breaking the law and may be punished.

The freedom to picket does not confer or imply any right to stop vehicles; still less do pickets have the right to stop people going about their lawful business. Pickets have no right to link arms or otherwise prevent access to the place that they are picketing. This is not a new situation. The present law was made clear by my predecessor on 25 January last year, in column 706 of the *Official Report* and by my noble and learned friend Lord Rawlinson in 1972, when he was Attorney-General.

If pickets by sheer numbers seek to stop people going to work or delivering or collecting goods they are not protected by the law, since their purpose is to obstruct rather than persuade. Are large numbers really necessary in the name of lawful, peaceful persuasion? They are more likely to lead to unlawful assembly, or even an affray.

So far as excessive numbers are concerned, the courts have recognised that the police may limit the number of pickets in any one place where they have reasonable cause to fear disorder. In my view, this includes, in the appropriate case, not only asking some of those present to leave but also preventing others from joining the pickets.

The enforcement of the law is, and must remain, a matter for the police and the courts. I recognise the difficult task that chief officers of the police have in deciding how order can best be maintained so as to ensure that ordinary people can exercise their own rights.

It is the function of the law to protect the rights of people—employers and employees—to go about their daily business, to work or not to work, and to make their own decisions whether to exercise those rights. If we let go of that principle then we risk abandoning the rule of law and risk surrender to the rule of violence.

I hope that by stating the main principles of the law, with which the Lord Advocate agrees, I have removed the doubts and encouraged all those concerned, whether pickets or others, to respect and uphold the law. I am sure that the great majority in this country will support this.

file

Original in 6/12 MFT

CF to MDE

10 DOWNING STREET

THE PRIME MINISTER

21 February 1980

Dear Jayne.

Thank you for your letter of 6 February with which you enclosed one from your constituent, Mrs. C.M. Worthington of 60 Hoylake Road, Sale.

I hope that Mrs. Worthington will have seen reports of the proposals we have published this week to change the law affecting trade unions so as to achieve a better balance between their rights and their responsibilities. This week we have also made clear the criminal law on picketing, which I suspect covers many of the matters which Mrs. Worthington is most worried about. I have also made it clear in the last few weeks that we intend to take action to implement the promise we made at the last election that unions should bear their fair share of the cost of supporting those of their members who are on strike. We are well aware that many people share Mrs. Worthington's concern on these matters, and we are determined to take action to meet that concern.

I am sorry that Mrs. Worthington feels that we have not taken action to eliminate waste within Government. We have in fact set in motion a large number of projects, co-ordinated by Sir Derek Rayner (of Marks and Spencer) to bring home to the whole of the Government machine the need to organise itself more economically and more efficiently; and we have cut the unrealistic public spending plans of the last Labour Government so as to bring public expenditure more into line with what the

/country

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country can afford. We shall have to give still more attention to that subject, and in so doing we shall help the economy as a whole and reduce the pressure on interest rates which is one of the factors leading to higher prices at the moment. The reduction of inflation is one of our central policies, and I am confident that the steps we are taking will lead to an enduring reduction in the rate of price rises. The pace at which we can do this will depend in part on people not taking more in pay settlements than their employers can afford, since the inevitable consequence of doing that must be higher prices or higher unemployment, but our aim is clear. I hope that Mr. and Mrs. Worthington will give us their continued support in achieving that.

Yours ever

Margaret

Fergus Montgomery, Esq., M.P.

CONFIDENTIAL

hard copy to file
third copy to CO

10 DOWNING STREET

From the Private Secretary

19 February 1980

The Solicitor General has asked the Prime Minister if he can be released from his special duties as a member of your Secretary of State's team on the Employment Bill. The Prime Minister has agreed to this, and the Solicitor General will now revert to his normal duties as a Law Officer. As such, he will of course continue to be available to your Department to provide advice on matters of law as requested.

I am sending a copy of this letter to Bill Beckett (Law Officers' Department).

T. P. LANKESTER

I. A. W. Fair, Esq.,
Department of Employment.

CONFIDENTIAL

GB

PRIME MINISTER

cc Mr Wolfson

The Solicitor General has asked to see you about his continued role on the Employment Bill. As he has put it to me, he wants to be "released from his special assignment" on the Bill.

As I mentioned to you in a note last night, Sir Ian was consulted on the redrafting of the consultation document, and he thought he had got Mr. Prior's agreement to tightening up and clarifying the last section of the paper. However, when he saw the penultimate draft yesterday afternoon, he was still very unhappy about it - and in particular, he felt that it left open the possibility of immunities extending to second customer/supplier. Later in the evening he rang me at home to say that his real concern was that Mr. Prior had not accepted Mr. Nott's suggestion that Nawala-type situations should be covered, nor some of the Chancellor's suggested amendments (see also his letter at Flag A). Mr. Prior has written to both Mr. Nott and the Chancellor that their suggestions are unacceptable because they go beyond the policy that was agreed in E last week.

Sir Ian is particularly incensed that Mr. Prior has seen fit to say in his minute to you that he has "had very substantial assistance from the Solicitor General in recasting the last part of the paper". He feels that his name has been taken in vain.

Sir Ian has told me that his Department will of course continue to assist the Department of Employment as required, but he personally wants to be no longer involved. This seems to me a distinction which cannot stand up very long. I am sure you will want to calm Sir Ian down; and specifically assure him that, when you approved the document last night, you were aware that he was far from happy with it - but that you could not see any point in arguing about the draft further.

19 February 1980

2nd Pol

PRIME MINISTER

Both Mr Varley and David Basnett were interviewed on "World at One" on reactions to the working document on trade union immunities.

The main reactions to emerge were: VARLEY

- would give rise to the most contentious legal cases in the midst of disputes;
- would make industrial relations a field day for lawyers and agitators;
- it is all very complex and not the place for the law, quoting Mr Heath that industrial relations are human relations and the TUC ~~are~~ their the best kind of industrial relations ~~being~~ as self-regulation;
- what is undeniable is that whenever a Conservative Government is in power industrial relations deterioriate; when challenged on this by Robin Day he agreed that last winter was a most serious blemish on Labour's record which had, however, to be viewed as a whole. ~~From 75 pc~~
- it was not necessarily wrong to seek to legislate but the big question was whether it was practical;
- but surely the Government is mandated? Response: Mr Prior has got a terrific battle against Tory Party extremists but what we are now seeing by way of industrial relations legislation is a smokescreen for the collapse of the economy and mounting unemployment

BASNETT

- the action being taken by the Government is extremely dangerous; creating a climate of conflict in society.
- instead, given our very serious economic problems, we ought to be sitting down around a table to see how we can solve them - a theme repeated later in the interview;
- judges notoriously incapable of interpreting an industrial situation;
- proposals will inflame and exacerbate;
- but surely Government has a mandate? Maybe but if only people understood how complicated the issues are.... Government anti-trade union.

B Ingham 19.2.80

Department of Employment PRESS NOTICE

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February 19, 1980

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION PUBLISHED

Mr James Prior, Secretary of State for Employment, has today published for consultation a working paper setting out proposals for changing the immunity which the law provides for secondary industrial action, such as blacking and strikes so as to give greater legal protection for those who are not concerned in a dispute to go about their business without unwarrantable interference.

Mr Prior announced in Parliament on December 17, 1979 that the Government would take whatever action seemed necessary in the light of the judgements by the House of Lords in the case of Express Newspapers v. MacShane.

The working paper has been sent to the TUC and the CBI and copies are available to any other interested bodies. Comments are asked for by March 21, 1980.

DE

February 1980

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Secondary industrial action in furtherance of a trade dispute can severely curtail the freedom of people who are not concerned in the dispute to carry on their business and for that purpose to have free access to or from their place of work and to their customers and suppliers. Those so damaged are barred from exercising their normal rights to seek redress in the courts against such interference by the immunities given to those pursuing industrial action by the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976.

2. The Government have the law on immunities under review. They have already consulted on the appropriate limitation of the immunities in relation to secondary picketing and have made provision for this in Clause 14 of the Employment Bill. In the Government's view recent interpretation and application of the law, notably by the House of Lords in the case of Express Newspapers v MacShane, demonstrate the need for immediate amendment also of the law on immunities as it applies to other secondary industrial action, such as blacking.

THE STATUTORY PROVISION

3. It is Section 13 of the 1974 Act (as amended by the 1976 Act) which provides immunity for a person from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. This is of great importance to trade unionists, because almost any industrial action involves a person, usually a trade union official, inducing others to break their contracts of employment; and without some immunity in respect of that such a person would be at risk of being sued every time he called or threatened a strike. It is, however, of equally great importance to everyone else, because the effect of the immunity is to remove from those persons who are damaged by that action the right that they would otherwise have to obtain from the court such redress as may be appropriate to the damage being suffered.

4. The practical effect of the operation of the immunity should be made clear. First, people who sue union officials for inducing breaches of contract are not usually concerned with getting damages. They want the action complained of stopped at once by an order from the court. It is unusual for legal proceedings to be pursued to a final order for damages. Even if damages are sought, there is a duty in law to do all that reasonably can be done to mitigate the loss that

been suffered and damages will be awarded only for loss which could not reasonably have been avoided. Secondly, the courts will not normally grant an injunction or interdict unless serious loss is being suffered which cannot be compensated for in money.

5. The scope of the immunity given by Section 13 for acts "in contemplation or furtherance of a trade dispute" was extended substantially in 1976. Before that (save for the period of operation of the Industrial Relations Act from 1972-1974) Section 3 of the Trade Disputes Act 1906, and subsequently Section 13 of the 1974 Act, provided immunity only for inducement of breaches of contracts of employment. However, the 1974 Act (Section 13(3)) was designed to establish, on a statutory basis, a wider immunity in certain cases. For instance, it enabled a person to induce employees to break their contracts of employment as a means indirectly, and without legal liability, of preventing their employer from performing a commercial contract.

6. In 1976 the immunity was extended to inducing breaches of all contracts, whether directly or indirectly. From then on the union official (or others) could safely interfere with any contract provided he did so "in contemplation or furtherance of a trade dispute" - and in such case neither party to the contract had any remedy against him, however great the damage suffered. If anyone else did such damage to them they would have common law rights to take proceedings against him; but these common law rights were completely removed if the damage was inflicted by a union official (or others) "in contemplation or furtherance of a trade dispute".

7. The Conservative Party as HM Opposition in Parliament fought vigorously against the extensions proposed in 1974 and made them and in 1976 on the ground that the resulting scope of the immunity given would be unnecessarily and dangerously wide. It was unnecessarily wide for trade union officials doing their job of protecting the interests of their members in a dispute; and it was dangerously wide for the rest of the community who would be deprived of their common law rights to protect themselves against industrial action taken against them when they were not parties to the trade dispute.

THE CURRENT POSITION

8. However, in a number of cases decided in 1978 and 1979 the Court of Appeal held that the industrial action in question had not been taken "in furtherance of a trade dispute" and therefore did not qualify for immunity under Section 13,

even as extended in 1974 and 1976. For a time it appeared, therefore, that the extent of the immunity might be governed by the application of tests, such as whether the action taken was too far removed from the original dispute or too lacking in effect or pursued for too extraneous a motive to be reasonably regarded as furthering the dispute. By these tests action "in furtherance" had to be reasonably closely related to the original dispute and the way the tests were applied by the Court of Appeal in the cases which came before them suggested that, although the immunity would extend to action taken to interfere with performance of a contract by the first supplier or customer of the party in dispute, it would not go far beyond that.

9. There were some hopes, particularly following the decision of the Court of Appeal in the MacShane case, that this development might afford a basis for consensus on the extent of immunity, provided that the immunity for secondary picketing was statutorily restricted because of its special connotations for public order. Since the Government would much prefer to proceed in these matters by consensus, it was felt that further consideration must await the decision of the House of Lords in the case of MacShane.

10. That decision was given in December 1979. Their Lordships found that, under the existing statutes, the test of what is "in furtherance of a trade dispute" is wholly subjective, that is, it depends on whether the person taking the action honestly believes that it will further the cause of those taking part in the dispute. The effect of their judgements seems to be that Section 13 is to be interpreted and applied as conferring immunity in every case in which, for example, "blacking" is undertaken in the belief that it will in some way further an imminent or existing "trade dispute". Thus, so long as there is such a belief it does not seem to matter how remote the person (or business) whose contractual arrangements are thereby interfered with may be from the party to the "trade dispute" whose interests the "blacking" is intended to attack or whether he has any commercial concern in that dispute and its outcome. That this is the current position has been confirmed by their Lordships' more recent judgements in the case of Duport Steels v. Sirs. In short, the fears expressed in 1974 and 1976 about the virtually unlimited extent of the immunity which would result from the changes then made have been shown by the Lords' judgements to be fully justified.

THE GOVERNMENT'S PROPOSAL

11. It is the view of the Government that this position cannot be allowed to continue and that the law must be amended so as to restore a more widely acceptable

balance of interests. In short, there must be restored to many of those who were deprived of such rights in 1974 and 1976 their rights at common law to seek the protection of the courts against any who interfere unwarrantably in their business affairs.

12. Because of its special significance in the context of public order (so well illustrated by recent events), the Government included provisions as to secondary picketing in its Employment Bill presented to Parliament last December. Whatever else may be shown to be required to deal with abuses of picketing, what is now required is to decide how best to restore to those who may otherwise be damaged (sometimes gravely) by other forms of secondary action, e.g. blacking, their rights at law to protect themselves - so that provisions to secure that may also be included in the Bill.

13. One course would be to adopt by statute the approach which the Court of Appeal sought to adopt, that is, by prescribing general tests of the kind suggested by the Court of Appeal, but this time by statute - tests which would then be applied objectively by the courts when called upon to decide in any particular case whether the action in question fell within Section 13 or not. The Government do not believe, however, that this approach on its own would be sufficiently clear. People need to know with greater certainty than that when and in what circumstances they are to be deprived of their rights to protect themselves.

14. The Government therefore propose that the existing legislation should be amended so as to achieve those objectives by a combination of two approaches:-

(a) laying down certain tests which must be satisfied before Section 13 immunity can be claimed in respect of any industrial action; and

(b) restoring to parties damaged in the circumstances to be identified in the Bill their rights to bring civil proceedings to protect themselves from interference with commercial contracts by means of secondary industrial action.

(a) General tests

15. In future, in order to attract immunity under Section 13, any industrial action taken by employees in a trade dispute would first need to satisfy two tests. The action taken would need (a) to be reasonably capable of furthering the trade dispute in question and (b) to be taken predominantly in pursuit of that trade

dispute and not principally for some extraneous motive. In the case of any industrial action which failed to satisfy these tests, those damaged thereby would be free to exercise their normal rights to seek an order from the courts making the person inducing the action stop it or pay damages appropriate to the harm suffered. In these circumstances this would apply in relation to inducements to break or interfere with any contract, whether a commercial contract or a contract of employment.

(b) Those whose rights would be restored

16. These two tests of capability and motive are not sufficient on their own to set more reasonable limits to secondary industrial action. Even if both tests were met, some secondary action is clearly too remote from the original dispute to justify depriving those who are damaged by it of their right to obtain redress in the courts. So, in addition to these two general tests, it is proposed that persons should be free to bring civil proceedings for any interference with their commercial contracts if this arose from secondary industrial action which took place beyond bounds that would be set in statute.

17. These bounds would be set as follows. Where the inducement to break or interfere with any commercial contract arose in connection with industrial action, threatened or actual, taken in furtherance of a trade dispute by employees of the employer in dispute, the person inducing the breach or interference would continue to have immunity under Section 13. In the case of such "primary action", no one whose commercial contracts suffered as a result would be able to obtain redress in the courts.

18. Exactly the same position would hold in the case of secondary industrial action in furtherance of that trade dispute by employees of those first suppliers or customers of the employer in dispute who were not themselves party to the dispute but who regularly conduct a substantial part of their business with such a party. These particular first suppliers and customers may be said to be commercially affected by the outcome of the dispute and there would continue to be immunity under Section 13 for a person to induce a breach of or interfere with any commercial contract through secondary action by their employees in furtherance of the trade dispute in question - provided, of course, that the tests of capability and motive were satisfied. If that were so, no one whose commercial contracts suffered as a result of such secondary action would be able to obtain redress in the courts.

19. But there the immunity for secondary action which interfered with commercial

contracts would end. So, if a person were, in furtherance of the original trade dispute, to induce a breach of or interfere with any commercial contract through secondary action, threatened or actual, taken by employees of anyone who was neither a party to that dispute nor a first supplier or customer (as defined in paragraph 18 above) of such a party, then the parties to that commercial contract would be free to exercise their normal rights to seek redress in the courts for such interference. This would be the case even if the secondary action in question satisfied the tests of capability and motive. The inducement would have passed beyond the area in which secondary industrial action would have immunity and anyone whose commercial contract was interfered with as a result would be free to exercise such common law rights as he had to seek redress appropriate to the damage sustained. For all such people their normal rights to seek legal protection would be restored.

20. It will be clear that the proposal is to restore these rights where the inducement is to break or interfere with a commercial contract. Inducements to break only contracts of employment in furtherance of a trade dispute would continue to attract immunity - provided that the general tests of "in furtherance" were satisfied. This would be so wherever the secondary action in furtherance of the original dispute was taken, even if it were beyond the bounds set by paragraph 18 above. Where the breach of employment contract took place within those bounds, there would continue to be immunity under Section 13 even if it interfered with a commercial contract. Where, however, the breach took place outside those bounds, anyone whose commercial contract was thereby interfered with would be free to exercise his normal rights to seek redress in the courts.

CONSULTATIONS

21. Comments are invited on these proposals, to which the Government would intend to give effect by amendment of Section 13 of the 1974 Act (as amended by the 1976 Act). These are complex issues and the Government wish to have the views of employers and unions before introducing the necessary amendments to the Employment Bill currently before Parliament. The Government's general review of the law on trade union immunities for industrial action will continue and the Government intend to publish a Green Paper later this year, so that there may be informed public debate of the whole subject.

Department of Employment **PRESS NOTICE**

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February 19, 1980.

STATEMENT BY MR JAMES PRIOR, SECRETARY OF STATE FOR EMPLOYMENT, ON PUBLICATION OF WORKING PAPER ON SECONDARY INDUSTRIAL ACTION.

"No one can doubt after the last few weeks that the present law on immunities is unsatisfactory. The House of Lords judgement in the MacShane case - delivered after the Employment Bill was published - confirmed the fears the Government have always had of the effect of the 1976 Act: that it established a virtually unlimited immunity for industrial action. I foreshadowed the need for change in my second reading speech. The House of Lords judgement in the most recent case involving the strike at the independent steel producers has provided further confirmation of the need for change.

There is widespread and justifiable concern that the law allows third parties to be caught up in damaging industrial action in furtherance of disputes in which they have no interest and over whose outcome they have no control.

The Employment Bill already includes a provision to limit the most important and controversial form of secondary action - secondary picketing. Clause 14 of that Bill restricts the immunity to acts done in the course of picketing undertaken by employees at their own place of work. This means that anyone whose business is damaged by secondary picketing will be able to seek an injunction in the courts to get that picketing stopped. However, in the light of the House of Lords judgement we believe that something must be done immediately about the immunities for other forms of secondary action like blacking and strikes.

There must be some legal immunity for industrial action. Otherwise trade unions would not be able to function. But that immunity necessarily means limiting the common law rights of people to go freely about their business and to seek redress in the courts for any interference with those rights. It is a question of great public concern whether the present state of the law on immunities for industrial action does not need to be brought up to date so that it is more appropriate to modern conditions. This is what our review of the law on trade union immunities is concerned with and that review will be continuing. We intend later this year to publish a Green Paper so that there may be informed public debate of the whole subject.

DE

But it is obvious that the present unsatisfactory position on secondary action cannot be allowed to continue and that a change in the law is urgently needed.

Accordingly I am today publishing a working paper setting out proposals for consultation. What we are proposing is that the law should be changed in the following ways.

In the first place we propose that there should be 2 tests - laid down in legislation - which industrial action must satisfy before it can be regarded as 'in furtherance' of a dispute and therefore attract immunity. These tests would be

- whether or not the action taken was reasonably capable of furthering the dispute in question
- and whether or not it was taken predominantly in pursuit of that dispute and not principally for some extraneous motive.

These are of course two of the basic tests which the Court of Appeal was developing before the recent House of Lords judgements.

Secondly, we propose to restore the right to bring civil proceedings for any interference with commercial contracts where this arises from secondary action taken outside limits which would be specified in legislation. These limits would be drawn so that there was immunity for industrial action involving the employees of the employer in dispute - that is, all primary action - and for industrial action involving the employees of first suppliers or customers of the employer in dispute who were not themselves party to the dispute but who regularly conduct a substantial part of their business with such a party. Provided this action satisfied the two tests of 'in furtherance', there would continue to be immunity for any interference with commercial contracts arising from that action.

For any industrial action taken outside these limits there would be no immunity for interference with commercial contracts but the existing immunity for inducing breaches of contracts of employment alone would remain. In other words we are proposing a specific limitation on the immunity for secondary action which interferes with commercial contracts. This corresponds broadly with the effect of the third test developed by the Court of Appeal - that of 'remoteness' from the original dispute. The normal right to seek redress in the courts would be restored to anyone who was party to a commercial contract which was broken by secondary action outside these limits.

These are complex and difficult issues. We are therefore seeking views on our proposals. In the light of the comments we receive, my intention is to seek a change in the existing legislation by means of a new clause in the Employment Bill now before Parliament."

ORAL STATEMENT BY THE ATTORNEY GENERAL ON
THE CRIMINAL LAW ON PICKETING

With permission, Mr Speaker, I will make a statement on the criminal law on picketing.

The recent events outside the private steel firms has renewed public anxiety about the law on picketing and intimidation.

I must emphasise that the law on picketing does not, in any real way, change the criminal law and, in no way, diminishes the rules which govern public order.

The criminal law of the land applies to pickets as it does to anybody else.

Let there be no illusion that the immunity provided under the civil law enables pickets to break the criminal law.

Peaceful picketing in contemplation or furtherance of a trade dispute is lawful so long as it is the honest belief of those involved that their action will advance the interests of those in dispute.

This does not mean that the freedom to picket is a licence to obstruct or intimidate - the law permits picketing solely for the purpose of peacefully obtaining or communicating information or communicating information or of peacefully persuading another person to work or not to work.

The immunity from civil proceedings given by Section 15 of the Trade Union and Labour Relation Act 1974 does not extend to any wrongful act such as violence or intimidation - whether by excessive numbers of pickets or otherwise or molestation amounting to a civil wrong. In these circumstances it may be open to the employer on his own behalf or on that of this workforce to take action in the civil court. In addition the criminal law is perfectly clear. Each of us has the right to go about our daily work or pleasure free from interference by anybody else. Each one of us is free as an individual to come and go as we please to our home or to our place of work.

The law specifically protects our enjoyment of those rights. If anyone tried to deter us from exercising those rights by the use of violence or intimidation or obstruction then he is breaking the law and may be punished.

The freedom to picket does not confer or imply any right to stop vehicles - still less do pickets have the right to stop people going about their lawful business. Pickets have no right to link arms or otherwise prevent access to the place they are picketing. This is not a new situation; the present law was made clear by my predecessor on 25 January last year (Hansard col.706) and by my noble and learned friend Lord Rawlinson in 1972 when he was Attorney General.

If pickets by sheer numbers seek to stop people going to work or delivering or collecting goods they are not

/protected

protected by the law since their purpose is to obstruct rather than persuade.

Are large numbers really necessary in the name of lawful peaceful persuasion? They are more likely to lead to unlawful assembly or even an affray.

So far as excessive numbers are concerned the Courts have recognised that the police may limit the number of pickets in any one place where they have reasonable cause to fear disorder. In my view this includes, in the appropriate case, not only asking some of those present to leave but also preventing others from joining the pickets.

The enforcement of the law is and must remain a matter for the police and the courts. I recognise the difficult task chief officers of the police have in deciding how order can best be maintained so as to ensure that ordinary people can exercise their own rights. It is the function of the law to protect the rights of people - employers and employees - to go about their daily business, to work or not to work, and to make their own decisions whether to exercise those rights.

If we let go of that principle then we risk abanding the rule of law and risk surrender to the rule of violence.

I hope that stating the main principles of the law I have removed the doubts and encourage all those concerned, whether pickets or others, to respect and uphold the law. I am sure that the great majority in this country will support this.

cc Nat. Ind (Steel) Pt 5.

cc Wolfson / Hoskyns / Ingham / Lankester

SECRETARY OF STATE FOR EMPLOYMENT

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Rt Hon Lionel Murray OBE
General Secretary
Trades Union Congress
Congress House
Great Russell Street
London WC1B 3LS

19 February 1980

Dear Len,

I am sure that, like me, you share the deep and widespread public concern about the recent and well-publicised incidents of mass picketing during the steel dispute, and the threats that are now being made from within the trade union movement of further picketing of this kind. Mass picketing which involves the blockading of premises, the obstruction of supplies and actual or potential physical intimidation of employees attempting to reach their place of work is contrary to the criminal law. It is also clearly not in keeping with the advice the TUC itself issued just a year ago to all unions in its Guide on the Conduct of Industrial Disputes.

The law is clear. Pickets, if they are to act lawfully, must do no more than peacefully obtain or communicate information or seek peacefully to persuade another person not to work. The law in this respect has not changed in any significant way for over a century and is now contained in Section 15 of the Trade Union and Labour Relations Act 1974. The immunity provided by the law for picketing in the furtherance of a trade dispute is dependent on the actions of pickets being taken peacefully. Mass picketing which either by sheer obstruction or by instilling fear prevents anyone who would otherwise pass a picket line is not protected by the law. It has always been an essential feature of the law that no-one should be prevented from going about his lawful business and this clearly applies to an employer seeking to conduct his normal business as well as to an employee attempting to reach his place of work. Needless to say, any act or threat of violence can attract severe penalties under the criminal law.

The immunities provided by the law enable peaceful picketing to take place where this is in contemplation or furtherance of an industrial dispute. Without some such immunities unions could be handicapped in furthering their members' interests when in dispute with an employer. But it is also the function of the law to protect the rights of people - employers and employees - to go about their daily business, to work or not to work, and to make their own decisions whether to exercise those rights. In a democratic society it is not tolerable for these individual rights to be put at the mercy of threats, intimidation or obstruction, and I know that the TUC would never argue that it should be.

The TUC's own Guide sets out a clear statement of the law which is very much in accord with the position as I have stated it in this letter. The Guide also provides responsible advice on the way picketing should be conducted. In particular, it makes clear that pickets should be advised to act in a disciplined and peaceful manner and that an authorised and experienced union member, preferably a union official, should be in charge of the picket line and should ensure that the number of pickets is no larger than is necessary. The authorised union official is expected to advise those who picket to avoid insulting words or behaviour which would constitute an offence, and to refuse the assistance on a picket line of anyone who does not undertake to accept instructions and behave in a lawful and disciplined manner. Armbands or badges are to be provided as a means of identifying authorised pickets. In providing this guidance, the TUC is clearly acutely conscious of the difficulties to which the assembly of large numbers at a picket can give rise and of the risks of obstruction or intimidation in situations which are difficult to control.

Given the widespread public concern which has arisen from recent picketing incidents and the threats now being made by some trade union spokesman of further mass picketing and blockading, I hope that we can look to the TUC to reaffirm its advice to all affiliated unions to observe the guidance the TUC itself has provided. In particular, I hope the TUC will urgently advise unions against all aspects of picketing which are unlawful and of the rights of individuals not to be impeded or intimidated in moving freely to and from their place of employment. The trade union movement in this country has long been proud of its readiness to uphold the law and respect the rights of individuals. I hope that it will be ready to demonstrate this again today.

18 February 1980

DRAFT LETTER FROM THE SECRETARY OF STATE FOR EMPLOYMENT TO MR. LEN MURRAY

The Home Secretary has seen the draft letter circulated with Sir Robert Armstrong's minute to your Secretary of State dated today. The Home Secretary is entirely content with the draft as it stands, but offered two comments. First, he wondered whether Mr. Prior might find it a touch long for his purpose and wondered if the penultimate paragraph might be omitted or shortened; second, he wondered if the sentence at the foot of page one, "No-one may be subjected ....." might be redrafted to make clear that it is the victim, rather than the agent, of picketing who should not be subjected to any kind of restraint or restriction - but he wondered whether the sentence added anything, given that the same point is brought out in the following sentence.

I am sending copies of this letter to Tim Lankester, Bill Beckett and David Wright.

J. A. CHILCOT

Ian Fair, Esq.

10 DOWNING STREET

Prime Minister

The Home Secretary has engineered a request from the Association of Chief Constables for a meeting with him on Wednesday morning (20 Feb) to discuss the whole issue of picketing. He will of course see them & thinks it will be useful

Teresa Rowaston
Duty Clerk
18.2.1980

Attach to draft letter from S/S Employment to T.U.C.

Prime Minister

Are you content with this? It ought to go out as early as possible tomorrow as I have heard from Sally Gross that Sheerness are threatened with a very large picket indeed on Wednesday. The Home Office are following up. T 18/2

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CABINET OFFICE

70 Whitehall, London SW1A 2AS Telephone 01-233 8319

From the Secretary of the Cabinet: Sir Robert Armstrong KCB CVO

Ref. A01456

SECRETARY OF STATE FOR EMPLOYMENT

At this morning's meeting of the Ministerial Committee on Economic Strategy you were invited to write to the General Secretary of the TUC today a letter which would restate the application of the criminal law to mass picketing, would recall the guidance which the TUC had given a year ago both on the law and on the conduct of picketing, and would invite the TUC to reaffirm its advice to unions to observe the guidance which it gave.

2. I attach a draft letter herewith. It is based on a draft prepared in the first instance by your officials, and has been revised in consultation with them and with officials of the Home Office and the Law Officers' Department.

3. I am sending copies of this minute and of the draft letter to the Prime Minister, the Home Secretary and the Attorney General.

ROBERT ARMSTRONG

Spoken to Ian Fair [illegible]
T 19/2

18th February, 1980

The only points I have are drafting ones and they must not hold up the letter. Some points seem to be repeated but perhaps that is no bad thing. Is it clear that we are not relying on the Concordat but on the TUC guide to the law? MT.

cf Wolfson
Ingham
Dugmid

DRAFT LETTER FROM THE SECRETARY OF STATE FOR EMPLOYMENT TO THE RT. HON. LIONEL MURRAY, ESQ., OBE, GENERAL SECRETARY, TRADES UNION CONGRESS, CONGRESS HOUSE, GREAT RUSSELL STREET, WC1B 3LS

I am sure that, like me, you share the deep and widespread public concern about the recent and well-publicised incidents of mass picketing during the steel dispute, and the threats that are now being made from within the trade union movement of further picketing of this kind. Mass picketing which involves the blockading of premises, the obstruction of supplies and actual or potential physical intimidation of employees attempting to reach their place of work is contrary to the criminal law. It is also clearly not in keeping with the advice the TUC itself issued just a year ago to all unions in its Guide on the Conduct of Industrial Disputes.

The law is clear. Pickets, if they are to act lawfully, must do no more than peacefully obtain or communicate information or seek peacefully to persuade another person not to work. The law in this respect has not changed in any significant way for over a century and is now contained in Section 15 of the Trade Union and Labour Relations Act 1974. The immunity provided by the law for picketing in the furtherance of a trade dispute is dependent on the actions of pickets being taken peacefully. Mass picketing which either by sheer obstruction or by instilling fear prevents anyone who would otherwise pass a picket line is not protected by the law. ~~No one may be subjected to any kind of restraint or restriction in an attempt to make picketing effective~~. It has always been an essential feature

Does this mean that the Factory is picketed have remedy against the pickets now?

of the law that no-one should be prevented from going about his lawful business and this clearly applies to an employer seeking to conduct his normal business as well as to an employee attempting to reach his place of work. Needless to say, any act or threat of violence can attract severe penalties under the criminal law.

The immunities provided by the law enable peaceful picketing to take place where this is in contemplation or furtherance of an industrial dispute. Without some such immunities unions could be handicapped in furthering their members' interests when in dispute with an employer. But it is also the function of the law to protect the rights of people - employers and employees - to go about their daily business, to work or not to work, and to make their own decisions whether to exercise those rights. In a democratic society it is not tolerable for these individual rights to be put at the mercy of threats, intimidation or obstruction, and I know that the TUC would never argue that it should be.

The TUC's own Guide sets out a clear statement of the law which is very much in accord with the position as I have stated it in this letter. The Guide also provides responsible advice on the way picketing should be conducted. In particular, it makes clear that pickets should be advised to act in a disciplined and peaceful manner and that an authorised and experienced union member, preferably a union official, should be in charge of

the picket line and should ensure that the number of pickets is no larger than is necessary. The authorised union official is expected to advise those who picket to avoid insulting words or behaviour which would constitute an offence, and to refuse the assistance on a picket line of anyone who does not undertake to accept instructions and behave in a lawful and disciplined manner. Armbands or badges are to be provided as a means of identifying authorised pickets. In providing this guidance, the TUC ~~are~~ is clearly acutely conscious of the difficulties to which the assembly of large numbers at a picket can give rise and of the risks of obstruction or intimidation in situations which are difficult to control.

Given the widespread public concern which has arisen from recent picketing incidents and the threats now being made by some trade union spokesmen of further mass picketing and blockading, I hope that we can look to the TUC to reaffirm its advice to all affiliated unions to observe the guidance the TUC itself has provided. In particular, I hope the TUC will urgently advise unions against all aspects of picketing which are unlawful and of the rights of individuals not to be impeded or intimidated in moving freely to and from their place of employment. The trade union movement in this country has long been proud of its readiness to uphold the law and respect the rights of individuals. I hope that it will be ready to demonstrate this again today.

Discussed with Mr. Prior

10 DOWNING STREET

Prime Minister

The Solicitor General has rung to say that he has seen the latest draft and is still not happy with it: he believes it leaves open the possibility of communities extending to second customs / second capitals. Mr Prior is unwilling to change it further.

Mr Prior and Sir Ian are available if you wish to discuss the draft this evening.

TL 16/2

Original returned to A. Diggins

LANKESTER

cc: Mr Wolfson
Mr Hoskyns

1. We spoke briefly this morning about paragraphs 15 and 16 of the draft working paper on secondary industrial action circulated by the Secretary of State for Employment on 14 February. As I explained, the paragraphs contained two different ways of restricting immunities:

(a) Paragraph 15 and the first two sentences of paragraph 16 talk about first suppliers and customers not being free to seek injunctions.

(b) However the third sentence of paragraph 16, and that which follows, talks about the immunity applying only to industrial action taken by the employees of the party in dispute or the employees of his first customers or suppliers.

2. The first passage says who may sue, while the second says whose actions may be the subject of a suit.

3. As we discussed, there seems to be an important difference between these two approaches. If first customers and suppliers are prevented from suing under any circumstances, this is obviously more restrictive than a regime which allows them to sue when affected by the action of employees other than their own or those in the primary dispute. For example if a car manufacturer (which has commercial contracts with BSC) is trying to import steel and the dockers or the railwaymen black it, does he have a remedy? Under the first route, the answer is no. Under the second route, it would be yes.

4. It seems important therefore to go for the restricted version contained in the third sentence of paragraph 16. To my way of thinking, that makes paragraph 15 and the first two sentences of 16 slightly inaccurate. However it may be felt that this degree of imprecision can be tolerated in a working paper and that these passages only convey the general intention. The important thing is to stick to the more restrictive formulation at the end of paragraph 16.

5. There are three further points of interest about the position of dockers (or railwaymen) blacking imported steel supplies to a car manufacturer:

(a) The Port Authorities would have a basis for taking legal action against the officials of the union who instructed the dockers to black imported steel. But it seems unlikely that they would pursue this.

(b) It is possible that blacking action would fail the tests described in paragraph 18 of the draft working paper. But there can be no certainty about this.

(c) The continental supplier of the steel would have a basis for taking action, but again it seems unlikely that he would pursue this.

ANDREW DUGUID
18 February 1980

CONFIDENTIAL

cc A Duguid

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

The Secretary of State for Employment

Dear Tim,

Working Paper on Secondary Industrial Action

I have considered the latest draft of your working paper given to me by your officials this morning. I have also read the comments sent on behalf of the Prime Minister and the papers and letters circulated by the Chancellor of the Exchequer, the Secretary of State for Trade, the Paymaster General and the Lord Advocate.

You will no doubt have received my comments on matters of detail given over the telephone and the comments I made on one point of substance. However that one point seems to me to be of such importance that I feel that I should confirm it in writing.

It does seem to me, comparing what you say in the latest draft of your proposals with what the Chancellor of the Exchequer said in para 2(ii) of his minute and what the Secretary of State for Trade said in the second paragraph of his letter, that there is a real possibility that there is misunderstanding as to what has been agreed and is to be proposed.

It may be that you have resolved such questions. If not I am of course at your disposal if I can be of any help in doing so.

I am copying this letter to the Prime Minister, to other members of E, and Sir Robert Armstrong.

Yours ever,

18 February, 1980

CONFIDENTIAL

cc WSyfron

CONFIDENTIAL

PRIME MINISTER

JP seen and approved 12 19/2

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

I now attach a copy of the working paper in the form in which it will be published tomorrow. It is plain from some of the comments received that the draft failed to express aspects of the proposal with clarity and I have had very substantial assistance from the Solicitor General in recasting the last part of the paper to remedy those defects. The working paper now clearly sets out the combination of Options 3 and 5 on which E Committee agreed at our meeting on 13 February.

I have written to those concerned explaining where one or two comments could not be incorporated and I attach copies of these letters for information. I am most grateful to you and to other colleagues for commenting quickly on the draft of the paper.

I am sending copies to the TUC and CBI early tomorrow morning The working paper will shortly after be made available to the Standing Committee on the Employment Bill and I shall be holding a press conference around midday.

I am sending copies of this minute and the working paper to other members of Cabinet, the Minister of Transport, the Attorney General, the Solicitor General, the Lord Advocate and Sir Robert Armstrong.

JP

18 February 1980

February 1980

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Secondary industrial action in furtherance of a trade dispute can severely curtail the freedom of people who are not concerned in the dispute to carry on their business and for that purpose to have free access to or from their place of work and to their customers and suppliers. Those so damaged are barred from exercising their normal rights to seek redress in the courts against such interference by the immunities given to those pursuing industrial action by the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976.

2. The Government have the law on immunities under review. They have already consulted on the appropriate limitation of the immunities in relation to secondary picketing and have made provision for this in Clause 14 of the Employment Bill. In the Government's view recent interpretation and application of the law, notably by the House of Lords in the case of Express Newspapers v MacShane, demonstrate the need for immediate amendment also of the law on immunities as it applies to other secondary industrial action, such as blacking.

THE STATUTORY PROVISION

3. It is Section 13 of the 1974 Act (as amended by the 1976 Act) which provides immunity for a person from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. This is of great importance to trade unionists, because almost any industrial action involves a person, usually a trade union official, inducing others to break their contracts of employment; and without some immunity in respect of that such a person would be at risk of being sued every time he called or threatened a strike. It is, however, of equally great importance to everyone else, because the effect of the immunity is to remove from those persons who are damaged by that action the right that they would otherwise have to obtain from the court such redress as may be appropriate to the damage being suffered.

4. The practical effect of the operation of the immunity should be made clear. First, people who sue union officials for inducing breaches of contract are not usually concerned with getting damages. They want the action complained of stopped at once by an order from the court. It is unusual for legal proceedings to be pursued to a final order for damages. Even if damages are sought, there is a duty in law to do all that reasonably can be done to mitigate the loss that

[redacted] been suffered and damages will be awarded only for loss which could not reasonably have been avoided. Secondly, the courts will not normally grant an injunction or interdict unless serious loss is being suffered which cannot be compensated for in money.

5. The scope of the immunity given by Section 13 for acts "in contemplation or furtherance of a trade dispute" was extended substantially in 1976. Before that (save for the period of operation of the Industrial Relations Act from 1972-1974) Section 3 of the Trade Disputes Act 1906, and subsequently Section 13 of the 1974 Act, provided immunity only for inducement of breaches of contracts of employment. However, the 1974 Act (Section 13(3)) was designed to establish, on a statutory basis, a wider immunity in certain cases. For instance, it enabled a person to induce employees to break their contracts of employment as a means indirectly, and without legal liability, of preventing their employer from performing a commercial contract.

6. In 1976 the immunity was extended to inducing breaches of all contracts, whether directly or indirectly. From then on the union official (or others) could safely interfere with any contract provided he did so "in contemplation or furtherance of a trade dispute" - and in such case neither party to the contract had any remedy against him, however great the damage suffered. If anyone else did such damage to them they would have common law rights to take proceedings against him; but these common law rights were completely removed if the damage was inflicted by a union official (or others) "in contemplation or furtherance of a trade dispute".

7. The Conservative Party as HM Opposition in Parliament fought vigorously against the extensions proposed in 1974 and made then and in 1976 on the ground that the resulting scope of the immunity given would be unnecessarily and dangerously wide. It was unnecessarily wide for trade union officials doing their job of protecting the interests of their members in a dispute; and it was dangerously wide for the rest of the community who would be deprived of their common law rights to protect themselves against industrial action taken against them when they were not parties to the trade dispute.

THE CURRENT POSITION

8. However, in a number of cases decided in 1978 and 1979 the Court of Appeal held that the industrial action in question had not been taken "in furtherance of a trade dispute" and therefore did not qualify for immunity under Section 13,

even as extended in 1974 and 1976. For a time it appeared, therefore, that the extent of the immunity might be governed by the application of tests, such as whether the action taken was too far removed from the original dispute or too lacking in effect or pursued for too extraneous a motive to be reasonably regarded as furthering the dispute. By these tests action "in furtherance" had to be reasonably closely related to the original dispute and the way the tests were applied by the Court of Appeal in the cases which came before them suggested that, although the immunity would extend to action taken to interfere with performance of a contract by the first supplier or customer of the party in dispute, it would not go far beyond that.

9. There were some hopes, particularly following the decision of the Court of Appeal in the MacShane case, that this development might afford a basis for consensus on the extent of immunity, provided that the immunity for secondary picketing was statutorily restricted because of its special connotations for public order. Since the Government would much prefer to proceed in these matters by consensus, it was felt that further consideration must await the decision of the House of Lords in the case of MacShane.

10. That decision was given in December 1979. Their Lordships found that, under the existing statutes, the test of what is "in furtherance of a trade dispute" is wholly subjective, that is, it depends on whether the person taking the action honestly believes that it will further the cause of those taking part in the dispute. The effect of their judgements seems to be that Section 13 is to be interpreted and applied as conferring immunity in every case in which, for example, "blacking" is undertaken in the belief that it will in some way further an imminent or existing "trade dispute". Thus, so long as there is such a belief it does not seem to matter how remote the person (or business) whose contractual arrangements are thereby interfered with may be from the party to the "trade dispute" whose interests the "blacking" is intended to attack or whether he has any commercial concern in that dispute and its outcome. That this is the current position has been confirmed by their Lordships' more recent judgements in the case of Duport Steels v. Sirs. In short, the fears expressed in 1974 and 1976 about the virtually unlimited extent of the immunity which would result from the changes then made have been shown by the Lords' judgements to be fully justified.

THE GOVERNMENT'S PROPOSAL

11. It is the view of the Government that this position cannot be allowed to continue and that the law must be amended so as to restore a more widely acceptable

balance of interests. In short, there must be restored to many of those who were deprived of such rights in 1974 and 1976 their rights at common law to seek the protection of the courts against any who interfere unwarrantably in their business affairs.

12. Because of its special significance in the context of public order (so well illustrated by recent events), the Government included provisions as to secondary picketing in its Employment Bill presented to Parliament last December. Whatever else may be shown to be required to deal with abuses of picketing, what is now required is to decide how best to restore to those who may otherwise be damaged (sometimes gravely) by other forms of secondary action, e.g. blacking, their rights at law to protect themselves - so that provisions to secure that may also be included in the Bill.

13. One course would be to adopt by statute the approach which the Court of Appeal sought to adopt, that is, by prescribing general tests of the kind suggested by the Court of Appeal, but this time by statute - tests which would then be applied objectively by the courts when called upon to decide in any particular case whether the action in question fell within Section 13 or not. The Government do not believe, however, that this approach on its own would be sufficiently clear. People need to know with greater certainty than that when and in what circumstances they are to be deprived of their rights to protect themselves.

14. The Government therefore propose that the existing legislation should be amended so as to achieve those objectives by a combination of two approaches:-

(a) laying down certain tests which must be satisfied before Section 13 immunity can be claimed in respect of any industrial action; and

(b) restoring to parties damaged in the circumstances to be identified in the Bill their rights to bring civil proceedings to protect themselves from interference with commercial contracts by means of secondary industrial action.

(a) General tests

15. In future, in order to attract immunity under Section 13, any industrial action taken by employees in a trade dispute would first need to satisfy two tests. The action taken would need (a) to be reasonably capable of furthering the trade dispute in question and (b) to be taken predominantly in pursuit of that trade

pute and not principally for some extraneous motive. In the case of any industrial action which failed to satisfy these tests, those damaged thereby would be free to exercise their normal rights to seek an order from the courts making the person inducing the action stop it or pay damages appropriate to the harm suffered. In these circumstances this would apply in relation to inducements to break or interfere with any contract, whether a commercial contract or a contract of employment.

(b) Those whose rights would be restored

16. These two tests of capability and motive are not sufficient on their own to set more reasonable limits to secondary industrial action. Even if both tests were met, some secondary action is clearly too remote from the original dispute to justify depriving those who are damaged by it of their right to obtain redress in the courts. So, in addition to these two general tests, it is proposed that persons should be free to bring civil proceedings for any interference with their commercial contracts if this arose from secondary industrial action which took place beyond bounds that would be set in statute.

17. These bounds would be set as follows. Where the inducement to break or interfere with any commercial contract arose in connection with industrial action, threatened or actual, taken in furtherance of a trade dispute by employees of the employer in dispute, the person inducing the breach or interference would continue to have immunity under Section 13. In the case of such "primary action", no one whose commercial contracts suffered as a result would be able to obtain redress in the courts.

18. Exactly the same position would hold in the case of secondary industrial action in furtherance of that trade dispute by employees of those first suppliers or customers of the employer in dispute who were not themselves party to the dispute but who regularly conduct a substantial part of their business with such a party. These particular first suppliers and customers may be said to be commercially affected by the outcome of the dispute and there would continue to be immunity under Section 13 for a person to induce a breach of or interfere with any commercial contract through secondary action by their employees in furtherance of the trade dispute in question - provided, of course, that the tests of capability and motive were satisfied. If that were so, no one whose commercial contracts suffered as a result of such secondary action would be able to obtain redress in the courts.

19. But there the immunity for secondary action which interfered with commercial

tracts would end. So, if a person were, in furtherance of the original trade dispute, to induce a breach of or interfere with any commercial contract through secondary action, threatened or actual, taken by employees of anyone who was neither a party to that dispute nor a first supplier or customer (as defined in paragraph 18 above) of such a party, then the parties to that commercial contract would be free to exercise their normal rights to seek redress in the courts for such interference. This would be the case even if the secondary action in question satisfied the tests of capability and motive. The inducement would have passed beyond the area in which secondary industrial action would have immunity and anyone whose commercial contract was interfered with as a result would be free to exercise such common law rights as he had to seek redress appropriate to the damage sustained. For all such people their normal rights to seek legal protection would be restored.

20. It will be clear that the proposal is to restore these rights where the inducement is to break or interfere with a commercial contract. Inducements to break only contracts of employment in furtherance of a trade dispute would continue to attract immunity - provided that the general tests of "in furtherance" were satisfied. This would be so wherever the secondary action in furtherance of the original dispute was taken, even if it were beyond the bounds set by paragraph 18 above. Where the breach of employment contract took place within those bounds, there would continue to be immunity under Section 13 even if it interfered with a commercial contract. Where, however, the breach took place outside those bounds, anyone whose commercial contract was thereby interfered with would be free to exercise his normal rights to seek redress in the courts.

CONSULTATIONS

21. Comments are invited on these proposals, to which the Government would intend to give effect by amendment of Section 13 of the 1974 Act (as amended by the 1976 Act). These are complex issues and the Government wish to have the views of employers and unions before introducing the necessary amendments to the Employment Bill currently before Parliament. The Government's general review of the law on trade union immunities for industrial action will continue and the Government intend to publish a Green Paper later this year, so that there may be informed public debate of the whole subject.

CONFIDENTIAL

cc Wolfson

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
Treasury Department
Great George Street
LONDON SW1

14 February 1980

Dear Geoffrey

Thank you for your comments on the draft as set out in your minute of 15 February to the Prime Minister.

This working paper is all about industrial action "in furtherance" and the immunity given by Section 13. Putting union funds at risk does not therefore fit in here and I do not think it wise to threaten what we are a long way from deciding to do. I have, however, inserted into paragraph 12 of the paper an intimation that we have not necessarily said the last word on picketing if abuses continue and I have also, in meeting your separate point about the Green Paper in the review, made plain in paragraph 21 that our continuing review is of the law on "trade union" immunities, which indicates that it will cover the question of union (as well as individual) liability.

The amendment you suggested to paragraph 16 of the draft is not consistent with the agreed policy. It would have the effect of limiting immunity to action affecting commercial contracts to which the employer in dispute is a party. Apart from giving limited immunity to blacking, this would have the effect of virtually banning secondary action. It was an approach identified in the paper before us at E on 13 February as a variant of option 2 (E(80)4, paragraphs 13-14) which was not adopted.

I have taken up suggestions (iii) and (iv) of your minute with the Home Secretary and the Lord Chancellor respectively. Both advise that it is not desirable to include anything on either point in the working paper or in my accompanying statement. If either matter is raised with me I shall, of course, say that we have these matters under consideration and I shall certainly publicise the clause on criminal offences in the course of picketing if it is finally decided, after the agreed consultation, to introduce this into the Bill.

I am circulating copies of this letter to all concerned under cover of a minute to the Prime Minister conveying the working paper as it is to be published tomorrow.

Yours
Jim

CONFIDENTIAL

cc WSfm

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon John Nott MP
Secretary of State for Trade
Department of Trade
1 Victoria Street
LONDON SW1

16 febeuary 1980

Dear John

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Thank you for your letter of 15 February commenting on the draft paper.

The final version of the paper meets your second point, but your suggestion in relation to Nawala is not in accord with what we have agreed to do. Although there was no dispute between the owners of the Nawala and their Hong Kong crew, there was a dispute between the owners and the International Transport Federation which came within the definition of "trade dispute" in Section 29 of the 1974 Act (as the House of Lords subsequently confirmed). The only certain way of removing immunity from disputes between an employer and a trade union which do not involve that employer's employees would be to redefine "trade dispute". That would take us much wider than the Nawala case and we have certainly not agreed to do that. Insofar as your suggested amendment is designed to have similar effect, it seems to take us back to an approach (Option 4) which was specifically considered and rejected at E on 16 February.

I hope, however, it is understood that, under the proposals in the working paper, a shipowner in a Nawala-type situation might be protected in two ways. First, if the employers of the dockers or tugmen taking the blacking action were not "substantial" first suppliers or services to the shipowner, then their action would not attract immunity. Secondly - and this could be either alternatively or additionally - a court might consider the action taken by the ITF was mainly for a motive extraneous to the primary trade dispute (eg hostility to flags of convenience). Under my proposals, therefore, a shipowner in Nawala-type circumstances would have an arguable case for seeking redress.

I am circulating copies of this letter to all concerned under cover of a minute to the Prime Minister conveying the working paper as it is to be published tomorrow.

Yours

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Lord MacKay Of Clashfern PC QC
The Lord Advocate
Lord Advocate's Department
Fielden House
10 Great College Street
LONDON SW1

16 February 1980

Dear James

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Thank you for your letter of 15 February commenting on the draft paper.

The proposals are not based on action against particular employers, because that could extend immunity to such action taken far from the original dispute eg a long way down the chain of supply. They are instead based on action taken by employees of particular employers (including first suppliers in a substantial commercial relationship with the employer in dispute). This covers not only actual action by those employees but also threats of such action uttered by a union official. Your suggested redrafts of paragraphs 15 and 16 would not therefore reflect the policy. We have, however, in the light of your comments and others recast the description of the proposals in the working paper to make the intention quite clear.

Your other amendments have generally been incorporated in the final version, save for the reference to Section 13(1) which we think is too specific because the proposals would also require amendment of Section 13(3).

I am circulating copies of this letter to all concerned under cover of a minute to the Prime Minister conveying the working paper as it is to be published tomorrow.

Yours
Jim

Five

DSC

cf.

18 February 1980

The Prime Minister has asked me to thank you for your letter of 13 February, which she read with interest.

T. P. LANKESTER

Sir John Greenborough, KBE.

TLR

FILE

CONFIDENTIAL

RH

Blind cc: John Hoskyns
David Wolfson

18 February 1980

BF 18.2.80

Working Paper on Secondary Industrial Action

The Prime Minister has read the draft working paper enclosed with your Secretary of State's minute of 14 February. She has also read the letter of 15 February from the Secretary of State for Trade.

The Prime Minister has asked me to say that she agrees with both of Mr Nott's comments. That is to say, paragraph 15 of the draft ought to be amended to cover Nawala type incidents, and the last sentence of paragraph 11 should be deleted. In addition, she is unhappy with the last part of the second sentence of paragraph 16, and has suggested that it be changed to - " ... and so are commercially affected by the dispute".

Although the Prime Minister has not yet had an opportunity to consider the Chancellor's comments in detail (his minute of 15 February refers), she hopes that Mr Prior will consider them carefully in finalising the draft. I understand that the Solicitor-General has also commented. It would be helpful if Mr Prior could put round a revised draft this evening.

I am sending copies of this letter to Private Secretaries to members of Cabinet, Minister of Transport, the Attorney-General, the Solicitor-General, the Lord Advocate and Sir Robert Armstrong.

J. P. LANKESTER

Ian A W Fair Esq
Department of Employment

CONFIDENTIAL

CB

SECRET

Original on Nat. Ind - Steel Pt 4

SUMMARY OF TELEPHONE CONVERSATIONS ON SUNDAY 17 FEBRUARY

(1) Sir Keith Joseph telephoned the Prime Minister at 1040 hours.

Sir Keith asked whether the Prime Minister had consulted the Lord Chancellor about events at Hadfields which seemed a massive breach of common law. It seemed to be an issue of enforcement of criminal law, not the form of the civil law. The Prime Minister thought that on picketing, it was an issue of changing the civil law. Once this had been done, injunctions could be taken out against individuals to test the efficacy of the new proposals. There was a case for changing the business in the House to have the picketing provisions taken as a one-clause bill and passed through all stages next week. Sir Keith reiterated that the actions of Mr. Scargill and his colleagues seemed a clear breach of common law, in the form of organising an affray. The Lord Chancellor would know the alternatives. The Prime Minister agreed that she would speak to the Home Secretary, and would leave Sir Keith to speak to the Lord Chancellor.

(2) The Prime Minister telephoned the Home Secretary at 1100 hours.

The Prime Minister referred to the aggressive picketing at Hadfields. The Government could not sit aside doing nothing. It might be necessary for somebody to propose to Mr. Prior that the picketing clause should be taken out of the main Employment Bill and handled as a one-clause bill in one day next week. The efficacy of the injunction procedure could then be tested immediately. The strike was going on much longer than anybody had expected and was getting uglier day by day. It might be possible to clear Commons business on Tuesday.

The Home Secretary said that he would talk to Mr. Prior. The Prime Minister said that he should not easily accept rejection of the one-clause bill alternative.

The Home Secretary said that he was now very disturbed on his own front. He would be investigating matters further the

/next day.

next day. He had seen the South Yorkshire Chief Constable on Thursday evening. The Chief Constable had reported that Mr. Norton of Hadfields and his colleagues had been absolutely resolute in the morning but had received instructions from Lonrho in London at lunchtime that they were to give in. This gave the impression that picketing had won.

The Prime Minister said that the Government had to be seen to act. It was not possible to continue with a bill upstairs which the Government maintained would work, but which was only slowly proceeding through the Parliamentary process. Apart from other considerations, it was unfair to expose the police without the Government attempting to take some action. The Home Secretary said that he was pleased to hear the Prime Minister's expression of support for the police. Their role was far from pleasant and could well get intolerable. Hadfields, of course, had a convenient story to explain why they had closed down. He would tell the Prime Minister the next day what Mr. Scargill had really done. He and others like him were clever. He had only been there for five minutes, made his number, and departed. This was not what the police had been quoted as saying. The Prime Minister said that she would be prepared to call an emergency meeting the next day. There was a Bill in Committee. The CBI's proposed modifications would need to be taken into account. But the picketing clause would need to be tackled separately to sort out the issue of how effective it could be.

(3) Sir Keith Joseph telephoned the Prime Minister at 1135 hours.

Sir Keith had been in touch with the Lord Chancellor, who had merely quoted the law, and had suggested that the Attorney General should be consulted on enforcement. Sir Keith felt that Mr. Scargill must be liable in law for the organisation of unlawful affray. The Prime Minister said that it might suit Mr. Scargill very well to be charged. She would like to see

/the Government's

the Government's new picketing clause passed through so that injunctions could be taken out. This would force the union to decide whether to stand behind Mr. Scargill. If this did not work, then the inadequacy of this approach would be clear for all to see. She would speak to the Attorney General.

The Prime Minister asked what was the significance of the "no confidence" motion passed by the staff of British Steel. Sir Keith said that there were many factors involved, but they probably included a desire on the part of the staff to protect their own jobs. The Prime Minister said that the situation was a failure of both unions and management. She doubted whether the two would ever get together in a sensible way. Sir Keith said that the "other man" would be putting in his proposals in the coming week. The Government could not move before they had considered these. The Prime Minister said that she feared that Mr. Prior was trying to push the Government into a Court of Inquiry. An alternative strategy was necessary. One possibility would be to get Lord Robens to mediate if the unions would accept this. Sir Keith thought that the unions would be weakened by the strike before the employers, unless violent picketing drove the private sector linked to steel into retreat.

The Prime Minister said that the Government had never liked the use of the criminal law, partly because of the time it took to pursue a case. She would herself talk to the Attorney General.

(4) The Prime Minister telephoned the Attorney General at 1245 hours.

In reply to the Prime Minister's query, the Attorney General said that Thursday's situation had developed into an affray. The issue was whether the police could gather effective evidence in this kind of case. The Prime Minister said that if nothing could be achieved with the criminal law, the Government would have to consider accelerating clause 14 from the Employment Bill and

/putting this

putting this through the House in one day. The Government could not simply stand by in the face of the threat of further scenes like those at Hadfields. The Attorney General saw no obstacle to this course. The Prime Minister said that this strategy would allow one of those companies who were being picketed to test the power of an injunction. The Attorney General said that there was great advantage in using the civil law, which could be brought into operation much more rapidly than criminal penalties. He had the feeling that Mr. Sirs had lost control. He offered to talk to the Home Secretary, and the Prime Minister agreed.

(5) The Chancellor of the Exchequer telephoned the Prime Minister at 1930 hours.

The Prime Minister asked whether the Chancellor had yet put in his comments on the Consultative Document. The Chancellor said that he had sent these off on Friday evening. He had also written the Prime Minister a personal note. The Prime Minister acknowledged the personal note. She said she was concerned about the Hadfields problem. It was likely to be impossible to bring prosecutions for affray or unlawful assembly. If this was so, she wanted to consider accelerating clause 14 of the Employment Bill as a No. 2 bill which could be taken through all stages on Tuesday. The power of injunction could then be tested. If injunctions were not observed, then trade unions' immunities could be tackled in the main Bill. The Government would also need to take account of comments by the CBI on the existing Bill.

The Chancellor said that he took the view that section 14 would make picketing unlawful in various places. He explained the history of the criminal law on the offence of watching and besetting which was the key to the effect of this clause. However, the Department of Employment had not shared his interpretation. The Prime Minister said that her concern was to test the new clause 14. The Chancellor commented that the

/Government

Government would look very foolish if they rushed the clause through and found that it didn't work. The Prime Minister said that it would be worse to find it ineffective next winter.

The Chancellor quoted a personal letter he had received from Muriel Bowen describing the scenes at Hadfields. The Prime Minister said that she expected to have a further conversation with the Home Secretary later in the evening. She also felt that she or Mr. Prior should write to Mr. Len Murray about the brutal face of trade unionism which had been exhibited the previous week. The Chancellor agreed that the Government should be challenging them, particularly over the working of the previous winter's miserable code.

The Chancellor said that he wanted to talk to the Prime Minister as soon as possible about Budget presentation. The way in which we put across the forward look, which was extremely gloomy, was a critical aspect of this.

(6) The Home Secretary telephoned the Prime Minister at 2130 hours.

The Home Secretary had been unable to contact Mr. Prior, although he had spoken to the Chancellor of the Exchequer. The Prime Minister said that the "People" leader was right. The Hadfields situation had not been a matter of mass picketing but of mass intimidation. It was a public order situation. The Government needed to know where the pickets would turn up the next day and would have to stop pickets before they got there. It was not a civil law issue but one of criminal law. The Home Secretary quoted the South Yorkshire Chief Constable who had drawn attention to a clash of priorities between keeping the works open and maximising arrests. The Prime Minister said that the Chief Constables should meet the Law Officers. The Home Secretary said that this would have to be treated with great care, as Chief Constables could not take direction from Law Officers.

/The Prime Minister

The Prime Minister stressed the need to stop pickets before they arrived at their destination. The Home Secretary undertook to investigate and do whatever he could. He hoped to speak to the Solicitor General early the next day. The Prime Minister said that she had it in mind to call Cabinet or a Cabinet Committee at 1000 a.m. the next day. She could not leave matters for a further day. The police must have guidance over their handling of the criminal offences. If the Home Secretary needed more time, she would call the meeting of Ministers at 1030.

The Home Secretary stressed that the keeping of public order would inevitably mean a major confrontation and the Government must be aware of this before embarking on that course.

(7) The Home Secretary telephoned the Prime Minister at 2245 hours.

The Home Secretary reported that the private steel company in Manchester had worked that day, but would close on Monday. In respect of Sheerness, he had been in touch with the Chief Constable of Kent. The Chief Constable had warned that he might have to arrest a great many people. He was quite determined to keep Sheerness working: he hoped that Ministers would support him although he feared that they would not. The Prime Minister hoped that Mr. Whitelaw had made it quite clear that the Government would be fully behind the Chief Constable. Mr. Whitelaw confirmed that he had done.

His sources indicated that problems at Sheerness would probably not arrive until Wednesday, although the police would be ready to deal with them on Monday if necessary. The Chief Constable disputed some of the Solicitor General's interpretation of the relevance of the criminal law on picketing. The Chief Constable had, however, had a meeting with the Assistant Chief Constable of South Yorkshire in order to learn what he could from the Hadfields experience. The Prime Minister commented that at Grunwick the police had had the means of stopping pickets

/before

before they arrived at the factory site. The Home Secretary wondered why Hadfields had not shown the same determination as Grunwick's management. The Prime Minister said that people should not have to run the gauntlet of intimidation like that at Hadfields. The Home Secretary agreed. It might become necessary to arrest thousands of people and the Government would have to be clear what it intended to do with them. The Prime Minister said that this was why it was necessary to be clear on criminal law provisions in relation to affray and riot.

The Home Secretary recalled the South Yorkshire Chief Constable's assurance to Hadfields. The man now felt let down. The Prime Minister reiterated that the scenes at Hadfields had been in contravention of criminal law. The Home Secretary asked where this conclusion led to. The Prime Minister believed that the criminal law could not cope and it was therefore essential to get the common law right. The Sheerness steelworks had at present no basis on which to seek an injunction. The proposed new law would provide this. She had just received a telegram from Sheerness wives. The Home Secretary undertook to establish by 1030 the next morning what powers the police had to stop busloads of pickets on route for steel companies. It was fortunate that he had rung the Kent Chief Constable, and had had the opportunity to reassure him that he would have full Government backing. He was determined.

The Prime Minister said that the next day's meeting would need to consider three matters: the public order aspects of current picketing; the possibility of taking clause 14 of the Employment Bill as a separate measure; and the question of a Government Minister writing to Mr. Len Murray asking whether he supported or condoned the trade union activities at Hadfields.

19/2.

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

cc A Bryant

cc Wolfson

From the Secretary of State

CONFIDENTIAL

The Rt Hon James Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London, SW1H 9NA

15 February 1980

Dear Secretary of State.

I have now seen a copy of the draft consultative document following our agreement in E on Wednesday to combine Options 3 and 5. If I may say so, subject to two points which I make below, the draft sets out very clearly what we agreed. I was especially glad to see the reference in paragraph 18(b) to "predominantly in pursuit of the trade dispute in question". It seems to me to strengthen considerably the earlier wording which referred to action "not too far removed".

First, given the general thrust of our agreement that we should draw the line in such a way that immunity for secondary action does not go beyond the first customers or suppliers of an employer in primary dispute with his own employees, I wonder whether the document should make clearer that it does not extend to the case of secondary action where no employer is in dispute with his own employees. I have in mind incidents of the Nawala type: as you know I am anxious to avoid repetitions of this if possible. I think we are at one in regarding this as one of the forms of secondary action which falls outside the limits we have agreed - namely first customers and suppliers.

CONFIDENTIAL

From the Secretary of State

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The method may perhaps be to insert "with his own employees" after the word "dispute" in the second line of paragraph 15: and by adding "own or other" after "his" in line 5. The paragraph would then read as attached. But of course I am not wedded to the particular wording as long as the purpose is made clear.

Secondly I wonder whether the final sentence of paragraph 11 might tie our hands unduly when we come to publish the proposed Green Paper later this year. You might want to consider deleting this sentence, which seems rather to argue the case against extending things further: I would prefer to keep our options open for the future.

I am copying this letter to the Prime Minister, to other members of E, the Solicitor General and Sir Robert Armstrong.

Yours sincerely

Stuart Hampson

JOHN NOTT

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PARAGRAPH 15

Under this approach anyone who was neither a party to a trade dispute with his own employees nor in an immediate commercial relationship to such a party would be protected from any interference with his commercial contracts where this arose from threatened or actual industrial action taken by his own or other employees in furtherance of that trade dispute. He would therefore be free to exercise his normal rights to seek redress in the courts for any such interference with his commercial contracts.

15 February 1980

PRIME MINISTER

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

1. I have several comments on the latest draft of the working paper on secondary industrial action circulated by Jim Prior.

2. The introductory paragraphs (1-10) are a clear exposition of the problem and the background. They could include a brief and neutral reference to the general immunity conferred on the trade unions by section 14, in order to avoid misunderstanding, encourage debate, and show the moderation of our present proposals. There is wide-spread ignorance about section 14 and our -proposals. For example, Fred Emery in the Times on 14 February endorsed what he mistakenly thought were Jim's proposals - that an employer who was not a first supplier, first customer, could sue a union if he was affected by secondary action. Emery's job is to "explain" to the Times readers what these issues are all about!

3. The last sentence of paragraph 11 is almost doing the Opposition's job for them:

   (a) We may at some future date want to move towards what were described as options 1, 2 and 4 in the E Committee paper, so it is best to remain neutral about these options for the time being. I don't think the last part of the sentence is neutral. It suggests that the Government believes that it is "fair" that companies which are unfortunate enough to have direct contractual links with a company in dispute is fair game for secondary action.

   (b) The preceding sentence singles out blacking as an example of secondary action. It would in principle be possible to distinguish between blacking (essentially selective action) and sympathetic striking (where wages are forgone) in the future. But the last sentence of paragraph 11 seems to dismiss these distinctions.

   (c) I don't think that removing immunities - which give people a right to seek a civil remedy - should be described as "the proscription of all forms of sympathetic action". The concepts may be interchangeable to lawyers, but to the layman "proscription" suggests something tougher than we have so far contemplated.

4. The second sentence of paragraph 16 describes first customers and suppliers as "commercially concerned in the dispute". This phrase suggests that they are somehow partly responsible for the dispute. I think Jim should be asked to find a phrase which does not suggest that wholly innocent parties are somehow implicated in the dispute. The objection we really have to meet is that we are suggesting that first customers and first suppliers are "contaminated", just through the accident of having contractual relationships.

5. In the last sentence of paragraph 19, there is a reference to a Green Paper on immunities "later this year". My clear recollection is that Jim offered to publish this Green Paper in the summer. The Financial Times report certainly referred to the summer yesterday. I think we should keep up the momentum and hold Jim to his own suggested timing. He said that he had lots of material on the file and, when I questioned Rob Shepherd today, with special reference to section 14, he said that much work had been done. There are also two practical arguments:

(a) Once we get past August we enter the new pay round; October onwards is the season for big strikes. Surely it would be preferable to publish a Green Paper against a less controversial background?

(b) If we publish in the summer, in the light of responses and events (like the armies of pickets we saw yesterday) we may want to introduce another Bill in October/November. Even then, it would not be on the Statute Book in time to affect our second winter in office. But if publication is delayed until towards the end of the year and reasonable time is allowed for consultation, I can see the danger that we could be entering our third winter without the right measures in force.

6. As we have always realised, the first customer, first supplier principle is morally indefensible. It is accepting an arbitrary injustice in order to give the unions at least some of the coercive powers they want. The draft is obviously worded carefully to ensure that this is not picked up and explored in consultation. It may be that we would ourselves prefer to avoid that embarrassment. Alternatively, we can press - as I have suggested here - for less ambiguous wording and if this leads to public questioning of the justice of these proposals, it may well be a good thing. It would certainly help set the stage for a further step forward, in the Green Paper, towards the preferred option of removing individual immunities altogether, except for primary action.

JOHN HOSKYNS

With the Compliments
of

LORD ADVOCATE

18 February 19 80

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CONFIDENTIAL

15 February 1980

The Rt Hon James Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London SW1

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Thank you for sending me a copy of your minute of 14 February to the Prime Minister enclosing the revised working paper which you intend to publish on 19 February.

My main comment on the substance of the paper is that it may be misleading, in paragraph 15, to refer to the protection of rights. The underlying law here is very difficult, as the Donovan Report showed - e.g. page 234 of Cmnd paper 3623 - and it would be dangerous to raise false expectations of what the proposed reform would achieve. It might be better to express the idea in terms of removing obstacles to the exercise of a party's common law rights. Perhaps paragraph 15 could be rephrased as follows -

> "Under this approach, immunity would no longer extend to action taken against anyone who was neither a party to a a trade dispute nor in any immediate commercial relationship to such a party. With these exceptions, anyone whose commercial contracts were interfered with by threatened or actual industrial action in furtherance of that trade dispute would be free to exercise his normal rights to seek redress in the courts for any such interference."

In paragraph 16 it seems wrong to refer only to action by employees: action by trade union officials etc., must also be covered. The relevant passage might read -

> "... the action, threatened or actual, was taken in furtherance of a trade dispute -
>
> (a) against the party in dispute;
> (b) against those of his first customers or suppliers who were not themselves party to the dispute but ..."

For the same reason, the first two lines of paragraph 18 might refer to "any secondary action taken in a trade dispute". Also for the same reason I have omitted the words "by his employees" in the above re-draft of paragraph 15.

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I have also one or two drafting points. Paragraph 4 should take account of both English and Scottish procedure. I suggest, for "injunction" and "judgement" in lines 3 and 5 respectively of page 2, the neutral term "order", and in line 9 "injunction or interdict". Perhaps the penultimate sentence could be re-worded -

> "Even if damages are sought, there is a duty in law to do all that reasonably can be done to mitigate the loss that has been suffered, and damages will be awarded only for loss which could not reasonably have been avoided."

(You may in fact feel that this sentence does not add anything substantial to the argument and might reasonably be omitted.) In paragraph 5, the reference in the fifth line should more accurately be to section 13(1) of the 1974 Act, and the phrase "it enabled" in the fourth last line is - in the light of the amendment made in 1976 to section 13 - perhaps too definite. May I suggest, "might enable" ? On page 4, line 1, it may be helpful to add, after "thus" the words "so long as there is such a genuine belief".

I am copying this to the Prime Minister and to those to whom you sent your minute.

MACKAY OF CLASHFERN
Approved by the Lord Advocate and signed in his absence.

cc WSGfson.

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

PRIME MINISTER

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

Jim Prior has sent you his revised draft of the working paper setting out proposals which are intended to reflect our decisions at E Committee on 13th February.

2. I should like to suggest the following amendments to the text proposed:

(i) It is not clear (for example from paragraphs 4 and 19) that we do intend to consider further whether union funds (as well as individuals) should be put at risk. We agreed at E that the immunities of trade unions, as well as of officers and members, should be reconsidered. Whilst we have so far agreed not to act on that in the present Bill, this week's events are making it increasingly clear that there is a strong case for making this change; it is becoming more and more difficult to believe that action against individuals will enable us to restrict mass picketing and other action manifestly promoted by unions, such as the ISTC (and NUM?) picketing at Hadfields. This would be permissible only so far as the pickets were drawn from Hadfield's employees; but the only way of enforcing that restriction would be by action (civil or criminal) against individuals. Would it not be helpful for the

/picketed

picketed employers to know that such action could be restrained (so far as authorised by a union) by means of an injunction, enforceable if necessary against the union's funds? It would be helpful if the text could indicate that this aspect is one which we shall be examining in the Green Paper, and draw attention to the dilemma which we face. (Incidentally, the last sentence of paragraph 4 is not, I think, an entirely accurate statement of the law.)

(ii) Paragraph 16. Since our aim is to restrict the damage inflicted in trade disputes to the employer engaged in the primary dispute and those first customers and suppliers who conduct a substantial part of their business with him, this paragraph should be rather more tightly drawn. I suggest that the words "with a party to the dispute" should be added after the words "commercial contracts" in line 6 of that paragraph. Without these words it would still be possible for a union to impose a more or less complete block ade upon a third party; with them the immunity would be sensibly limited.

(iii) I would hope that the working paper could also refer to our intention to amend the Employment Bill in the way suggested by the Lord Chancellor in paragraph 2 of the Annex to his letter of 12th February. This would provide us with the opportunity (on the need for which we are all agreed) to draw attention to the criminal law offences of which those who engage in picketing can properly be convicted. This declaratory

/statement

statement will not only clarify the circumstances in which injunctions can be granted but should also serve as a salutary reminder of the limits of the criminal law and thus assist the police in making prosecutions where necessary. Even if the need to consult Chief Constables means that we cannot include it in the working paper, however, I should hope that we could at least publicise this Clause when the amendment is moved in the House.

(iv) Though it is not recorded in the minutes, we did agree at E that if, as a result, inter alia, of Lord Diplock's judgement in the case of Duport Steels Limited v Sirs, the present law did not provide an adequate remedy against individual pickets (i.e. if an injunction against one picket cannot be used to prohibit picketing by other, "rotating", pickets), then the law should be changed. This might best be effected by means of an additional clause in the Contempt of Court Bill rather than in the Employment Bill; but it is so closely related to the question of trade union immunities that I would hope that a reference to this could also be included either in the working paper or in an accompanying statement at the time of its release.

(v) Paragraph 19. This implies that our review of the law on immunities will be ended by the publication of the Green Paper. Might it not be wiser to imply that the Green Paper will merely be a further event in our continuing review?

/3. I am

3. I am sending copies of this minute to recipients of Jim Prior's.

(Principal Private Secretary)

for (G.H.)

15 February, 1980

(prepared by the Chancellor & signed in his absence)


17 FEB 1980

PMG Note 6/80

TRADE UNION IMMUNITIES

The law on immunities as it stands is unsatisfactory.

The law allows for action in furtherance of a trade dispute to be taken at places far removed from the original dispute thereby dragging in people - employers, employees, customers and suppliers - who have nothing to do with the dispute.

The Government firmly believes in the need for strong, independent trade unions. And in pursuing their members' interests trade unions must have certain and closely defined immunity from action. But it becomes unreasonable when this is at the expense of others not directly involved.

The Government is committed to restoring a fair balance to industrial relations legislation. It has therefore decided that it would be fair to return the law to the point which was generally believed to exist before the House of Lords judgement in the Express v MacShane case.

A line must be drawn so that unions do not have a carte blanche in the action they can take in furtherance of a trade dispute.

(On picketing strong action is already contemplated in the Employment Bill. Picketing conducted only by those in dispute - plus their union officials - and at their own place of work would enjoy immunity from action. Any other forms of picketing would not enjoy such immunity.)

There is nothing to be gained by rushing new laws through in the hope that they will solve a particular short term problem. The law is very complex and any change must be able to stand the test of time.

The Government will consult with those directly involved with industrial relations before laying firm proposals before Parliament in the form of an amendment to the Employment Bill.

IMMUNITIES AND COURT CASES

The Court of Appeal's test

In a number of cases, particularly Express Newspapers v MacShane, the Court of Appeal (Lord Denning) has examined the wording 'in contemplation or furtherance of a trade dispute' (Sec 13 TULRA 1974 & 1976).

The Court decided that some secondary industrial action was too remote from the seat of a dispute, could not be regarded as being capable of directly furthering the dispute and accordingly the Court held that such action did not enjoy immunity from action in tort and it granted injunctions to restrain such action.

It will be remembered in the MacShane case that NUJ journalists were in dispute with provincial newspaper proprietors. The provincial newspapers kept going using Press Association (PA) copy, therefore the NUJ instructed its PA members to stop copy going to provincial newspapers. Some refused to do so, and in order to put pressure on PA the National Union of Journalists (NUJ) instructed its members on the nationals to black PA copy. The Daily Express took out an injunction against the NUJ - Mr MacShane.

The House of Lords

In unanimously overturning the above decision, the House of Lords said that the only test to be applied in deciding whether industrial action was in furtherance was the subjective one of whether the trade union official calling the action genuinely believed such action would further the dispute.

Duport Steels v Sirs

In this case the Court of Appeal (Lord Denning) granted the injunction restraining secondary industrial action on the grounds that there were arguably two disputes. One between the Iron and Steel Trades Confederation (ISTC) and the British Steel

Corporation (BSC) and one between the ISTC and the Government about financial assistance for BSC.

The private sector strike was intended to further the latter dispute which was not a trade dispute (as defined in Sec 29 of the Trade Union and Labour Relations Act (TULRA)), therefore that strike did not fall within the scope of the trade dispute immunity.

The House of Lords unanimously reversed this ruling, rejecting the 'two disputes' argument and holding that the private sector strike was clearly designed to further the dispute with the BSC and was therefore action 'in contemplation or furtherance of a trade dispute'.

The Paymaster General's Office
Privy Council Office
68 Whitehall
London
SW1

15 February 1980

CONFIDENTIAL

1

Prime Minister

See John Hoskyns' and Tom Scott's comments at Flags A and B. D/Employment felt we may be trying to tighten up the last few sections in consultation with the Solicitor General.

12 15/2

PRIME MINISTER

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

I attach a copy of the revised working paper which now puts forward the policy proposal agreed by E Committee yesterday. The policy proposal is presented so far as possible on the lines suggested by the Lord Chancellor - namely, with more emphasis on the protection accorded to the rights of people to carry on their businesses without interference. I have also inserted a commitment to produce a Green Paper later this year for public debate of the whole subject of trade union immunities.

I intend to publish the working paper next Tuesday 19 February, so that it can be made available on a day when the Standing Committee on the Bill is in session and before I attend the Select Committee on Employment on Wednesday in connection with their examination of immunities. If therefore you have any comment on the presentation of the paper I shall be most grateful to have it in time to put the paper in final form on Monday.

I am sending copies of this minute and the working paper to other members of Cabinet, the Minister of Transport, the Attorney General, the Solicitor General, the Lord Advocate and Sir Robert Armstrong.

Tim - Day I see the minutes of E. I thought we agreed that the Watt clause should contain the language of the Lord Chancellor's suggested amendment. As the working document does it to include it in para 1 of the document but makes no reference to it in connection with the wider issue. Agree with John Hoskyns' observation - delete last sentence of para 11 and amend para 12 - community affected by the dispute.

J P
14 February 1980

SECONDARY INDUSTRIAL ACTION

1. Secondary industrial action in support of a trade dispute can severely curtail the freedom of people who are not concerned in the dispute to carry on their business and for that purpose to have free access to or from their place of work and to their customers and suppliers. Often, those so injured are barred from exercising their normal rights to seek redress in the courts against such interference by the immunities given to those pursuing industrial action by the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976.

2. The Government have the law on immunities under review. They have already consulted on the appropriate limitation of the immunities in relation to secondary picketing and have made provision for this in Clause 14 of the Employment Bill. In the Government's view recent interpretation and application of the law, notably by the House of Lords in the case of Express Newspapers v MacShane, demonstrate the need for immediate amendment also of the law on immunities as it applies to other secondary industrial action, such as blacking.

THE STATUTORY PROVISION

3. It is Section 13 of the 1974 Act (as amended by the 1976 Act) which provides immunity for a person from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. This is of great importance to trade unionists, because almost any industrial action involves a person, usually a trade union official, inducing others to break their contracts of employment; and without such immunity that person would be at risk of being sued every time he called or threatened a strike. It is also of great importance to everyone else, because the effect of the immunity is to remove from those persons who are injured by that action the right that they would otherwise have to obtain from the court such relief as may be appropriate to the injury being suffered.

4. The practical effect of the operation of the immunity shouldbbe

made clear. First, people who sue union officials for inducing breaches of contract are very seldom concerned with getting damages. They want the action complained of stopped at once by an injunction from the court. It is most unusual for legal proceedings to be pursued to a final judgement for damages. Even if damages are sought, there is a duty in law on the plaintiff to do all he reasonably can to mitigate the loss that is being wrongfully done to him and he will get damages awarded only for loss which he could not reasonably have avoided. Secondly, the courts will not normally grant an injunction unless very serious loss is being suffered which cannot be compensated for in money.

5. The scope of the immunity given by Section 13 for acts "in contemplation or furtherance of a trade dispute" was extended substantially in 1976. Before that (save for the period of operation of the Industrial Relations Act from 1972-1974) Section 3 of the Trade Disputes Act 1906, and subsequently Section 13 of the 1974 Act, provided immunity only for inducement of breaches of contracts of employment. However, the 1974 Act (Section 13(3)) was designed to establish, on a statutory basis, a wider immunity in certain cases. For instance, it enabled a person to induce employees to break their contracts of employment as a means indirectly, and without legal liability, of preventing their employer from performing a commercial contract.

6. In 1976 the immunity was extended to inducing breaches of all contracts, whether directly or indirectly. From then on the union official (or others) could safely interfere with any contract provided he did so "in contemplation or furtherance of a trade dispute" - and in such case neither party to the contract had any remedy against him, however great the damage suffered.

7. The Conservative Party as HM Opposition in Parliament fought vigorously against the extensions proposed in 1974 and ultimately enacted in 1976 on the ground that the resulting scope of the immunity given would be unnecessarily and dangerously wide. It was unnecessarily wide for trade union officials doing their job of protecting the interests of their members in a dispute; and it was dangerously wide for the rest of the community who would be unable

to protect themselves against industrial action taken against them when they were neither parties to the trade dispute nor had any immediate commercial concern in its outcome.

THE CURRENT POSITION

8. However, in a number of cases decided in 1978 and 1979 the Court of Appeal held that the industrial action in question had not been taken "in furtherance of a trade dispute" and therefore did not qualify for immunity under Section 13, even as extended in 1974 and 1976. For a time it appeared that the extent of the immunity would be governed by the application of tests, such as whether the action taken was too far removed from the original dispute or too lacking in effect or pursued for too extraneous a motive to be reasonably regarded as furthering the dispute. By these tests action in furtherance had to be reasonably closely related to the original dispute and the way the tests were applied by the Court of Appeal in the cases which came before them suggested that the immunity might often extend to action taken to interfere with performance of a contract by the first supplier or customer of the party in dispute, but would rarely go beyond that.

9. There were some hopes, particularly following the decision of the Court of Appeal in the MacShane case, that this development might afford a basis for consensus on the extent of immunity, provided that the immunity for secondary picketing was statutorily restricted because of its special connotations for public order. Since the Government would much prefer to proceed in these matters by consensus, it was felt that further consideration must await the decision of the House of Lords in the case of MacShane.

10. That decision was given in December 1979. Their Lordships found that, under the existing statutes, the test of what is "in furtherance of a trade dispute" is subjective, ie it depends on whether the person taking the action honestly believes that it will further the cause of those taking part in the dispute. The effect of their judgements seems to be that Section 13 is to be interpreted and applied as conferring immunity in every case in which, for example, "blacking" is undertaken in the genuine belief that it will in some way further an imminent or

existing "trade dispute". Thus, it does not seem to matter how remote the person (or business) whose contractual arrangements are thereby interfered with may be from the party to the "trade dispute" whose interests the "blacking" is intended to attack or whether he has any commercial concern in that dispute and its outcome. That this is the current position has been confirmed by their Lordships' more recent judgements in the case of Duport Steels Ltd v Sirs. In short, the fears expressed in 1974 and 1976 about the virtually unlimited extent of the immunity were shown by the Lords judgements to be justified.

THE GOVERNMENT'S PROPOSAL

11. The Government believe that the statutory immunity should now be amended to restore a more widely acceptable balance of interests; and thereby give greater protection for those who are not concerned in a dispute to go about their business without unwarrantable interference. In the case of secondary picketing, where the immunity has been much abused, Clause 14 of the Employment Bill now provides for the immunity to be restricted to acts done in the course of picketing undertaken by employees at their own place of work. It has been argued that, similarly, immunity should no longer extend to other secondary industrial action, like "blacking", but should be restricted to action taken by employees in dispute only with their own employers. [This would, however, result in the proscription of all forms of sympathetic action, even in cases where this may be the only effective industrial action available to assist employees in dispute with their own employer.]

12. The Government consider that considerably more thought needs to be given to the framework of immunities for industrial action appropriate to modern conditions and this is the purpose of their continuing review. However, since the current immunity clearly cannot be allowed to run virtually unlimited, the Government believe that the best basis on which to proceed immediately is to bring the position on immunity broadly into line with that suggested by the Court of Appeal decisions before the House of Lords judgements in Express Newspapers v MacShane (ie as indicated in paragraph 8 above).

13. One approach to this would be to lay down general tests of the kind

adopted by the Court of Appeal which would have to be objectively applied in determining whether secondary action is genuinely in furtherance of a trade dispute. The Government, however, do not believe that this approach on its own would be sufficiently clear. People need to have greater certainty as to when, if at all, their freedom to go about their business without interference can be lawfully constrained by secondary industrial action.

14. The Government accordingly propose that legislation should make clear

(i) the persons whose rights to bring civil proceedings for any interference with commercial contracts as a result of secondary industrial action are to be protected; and

(ii) the tests that have to be satisfied before any industrial action can begregarded as "in furtherance of a trade dispute" and so attract immunity.

THOSE WHOSE RIGHTS WOULD BE PROTECTED

15. Under this approach anyone who was neither a party to a trade dispute nor in an immediate commercial relationship to such a party would be protected from any interference with his commercial contracts where this arose from threatened or actual industrial action taken by his employees in furtherance of that trade dispute. He would therefore be free to exercise his normal rights to seek redress in the courts for any such interference with his commercial contracts.

16. This would, however, not apply to anyone who was a party to the trade dispute. Nor would it apply to those of his first suppliers or customers who regularly conduct a substantial part of their business with a party to the dispute and so are commercially concerned in the dispute. Accordingly, the Section 13 immunity would continue to apply to inducements to break, or interfere with, commercial contracts where the action, threatened or actual, was taken in furtherance of a trade dispute by

(a) employees of the party in dispute;

(b) employees of those of his first customers or suppliers who were not themselves a party to the dispute but who regularly conduct a substantial - not an incidental or minor - part of their business with such a party. Those customers and suppliers falling outside this definition would be free to exercise their normal rights under the law in the case of interference with their commercial contracts.

17. Inducements to break only contracts of employment in furtherance of a trade dispute would continue to attract immunity wherever the secondary industrial action was taken, ie even outside the limits proposed in paragraph 16. Where the breach of employment contract took place within these limits, there would be immunity even if it interfered with a commercial contract. Where, however, the breach took place outside these limits, anyone whose commercial contract was thereby interfered with would be free to exercise his normal rights to seek redress in the courts.

TESTS OF 'IN FURTHERANCE'

18. Furthermore, in order to attract immunity under Section 13, any industrial action taken by employees in a trade dispute would need to satisfy two tests. The action taken would need (a) to be reasonably capable of furthering the trade dispute in question and (b) to be taken predominantly in pursuit of the trade dispute in question and not principally for some extraneous motive. Thus, in the case of any secondary action which failed to satisfy these tests those injured would be free to exercise their normal rights under the law. This would be the case in relation to inducement in these circumstances to break any contract, whether a commercial contract or a contract of employment.

19. Comments are invited on this proposal. These are complex issues and the Government wish to have the views of employers and unions before introducing the necessary amendment to the Employment Bill currently before Parliament. The Government's general review of the law on immunities for industrial action will continue and its results will be published later this year in a Green Paper, so that they can be the subject of public debate.

PART 3 ends:-

CC(80) 6th Conc Item 1 Extract
14.2.80

PART 4 begins:-

S/S Emp to PM + attn 14.2.80