CONFIDENTIAL

IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

Note by Officials

1. We were asked (E(80)3rd Meeting, Conclusion 2) to prepare a note setting out the effects of the various options for amendment to the Employment Bill discussed by Ministers on 6 February.

2. The Employment Bill already contains provisions limiting the immunities enjoyed by those engaged in picketing and SLADE-type recruitment. Ministers are now considering further amendments to the Bill, which would be designed to restrict the immunities applying to other secondary industrial action.

3. This note does not deal with the immunities of Trade Unions themselves as distinct from those granted to their officials, except insofar as it arises in the context of enforcement. The arguments for and against amendment of Section 14 of the Trade Union and Labour Relations Act, 1974 (TULRA), are set out in the minutes of 4 February from the Chancellor of the Exchequer, and 6 February from the Secretary of State for Employment.

4. 'Secondary Action' is understood for this purpose to be industrial action by workers other than employees of the employer in dispute. The extent of the immunity (or secondary action under the present law) relates) to action taken "in contemplation or furtherance of a trade dispute". (It is in theory possible for secondary action to be turned into primary action by the employees concerned picking a dispute with their own employer. But the Courts would normally look to the true purpose of the action).

5. The Nawala case turned on the definition of a "trade dispute" in Section 29 of TULRA 1974. However some of the options discussed below would have the effect of making unlawful action in the circumstances of the Nawala case.

6. The outcome of the judgements of the House of Lords in Nawala, Express Newspapers v McShane, and now Duport, is in effect that immunity in respect of

all interference with contracts applies whenever there is a trade dispute and the person taking the action complained of honestly believes that it will further that dispute. This is the effect of Section 13 of TULRA 1974 (as amended in 1976). Limitation of this rule interpretation is the object of the options considered by Ministers at their meeting on 6 February.

RL 1 2 3 4

Option 1: No Immunity for any Secondary Action:
(This option was not discussed at the E Committee meeting).

7. This would confine immunity to action taken by the employees of the employer in dispute at their own place of work. It would have the merit of clarity. The difficulty with this course is that it gives the trade unions no redress in cases where the employer has dismissed the whole or part of his original workforce, or where the union has no effective way of putting pressure on the employer, as may happen when they are seeking recognition. Some form of secondary action has always been seen as a reinforcement of the strike weapon and a means of showing solidarity. There would be bitter trade union opposition to any attempt to curtail it altogether.

Logically Option 4 should come first.

Option 2: The Solicitor General's Approach:

8. The Solicitor General has drawn attention to the possibility of amending Section 13 so as to provide in effect that any person injured by secondary industrial action should be free to pursue his civil law remedies, provided -

(i) he was not himself a party to the dispute, and

(ii) he was suing on the grounds of interference with a contract other than a contract of employment, eg. for interference with a commercial contract.

9. To illustrate: there is a dispute at a car factory in which the union seeks to get the employees of a component supplier to break their contracts of employment and interrupt supplies. But the action would normally be intended to have precisely this effect, in which case any party to that contract, other than the car manufacturer, could sue the union official.

10. In the Solicitor General's view this would severely restrict secondary action, though there would still be wide-ranging immunity in particular cases where there was no actionable interference with commercial contracts. It would be grounded in common law rights, and could be defended as restoring to those who were not parties to the dispute their common law rights to protect themselves and their employees.

11. Officials believe that this would in fact be a very severe restriction, because it is very difficult to take effective secondary action without interfering with commercial contracts. It would therefore meet very strong opposition from trade unions, who would find it barely distinguishable in practice from Option 1. It is immaterial to the union official calling the action that he is protected from being sued by the employer in dispute if he can be sued for the same action by other employers (possibly at the instigation of the former). Of course, as the Solicitor General has pointed out, it is no comfort to the person who has no dispute with anyone, but who nevertheless suffers serious damage, to be told that he must suffer this so that the union (or even unofficial operators) may have more muscle.

12. An alternative approach, identified in discussion by officials, would be to limit immunity to action affecting commercial contracts to which the employer in dispute is a party. To illustrate: employees of a car manufacturer black components from a particular supplier who is in dispute with his own employees. Provided that the blacking interferes only with the supplier's contracts the action would have immunity. If it interfered with the manufacturer's contracts with anyone other than the supplier it would not have immunity.

13. This would have the merit of clarity, but would be very restrictive because it could effectively 'outlaw' sympathetic strikes (which cannot be targetted specifically on the contracts of the employer in dispute). Apart from the limited immunity it gives for blacking, it would be indistinguishable from Option 1.

Option 3: The Court of Appeal Position

14. The Secretary of State for Employment has proposed that the law should be returned roughly to the state at which the Court of Appeal judgements had left it before they were overturned by the House of Lords. This is intended to draw the line broadly at the level of the first supplier/first customer, although his latest proposal would ensure that immunity for secondary action does not automatically extend to all first suppliers and customers. He has suggested that there are two ways of giving legislative effect to this approach:

a) By providing a legal definition of the area in which secondary action could be protected by immunity by reference to 'first customer/first supplier'. These might be identified as those 'not a party to the dispute, but in regular or substantial, not incidental or minor, commercial relationship with such a party'. Immunity would extend to secondary action by employees of first customers/first suppliers. Beyond that it would extend only to breaches of employ ment contracts which did not interfere with commercial contracts. This method has the advantage of being relatively specific; it would therefore limit the scope of interpretation by the Courts. But the boundary line would inevitably be drawn somewhat arbitrarily. In the current steel dispute, immunity would run for secondary action against those independent steel manufacturers who are in a substantial commercial relationship with the BSC, but not the rest. However, there is some prospect that the trade unions might be brought in time tacitly to acquiesce in a definition on these lines.

b) The other approach is to lay down in statute tests which would need to be satisfied if secondary action is to attract immunity. The tests, developed from those evolved by the Courts prior to the House of Lords judgements in McShane, might include:

(i) that the action was reasonably capable of furthering the trade dispute in question;

(ii) that it was not too far removed from the original dispute;

(iii) that it was not taken principally for some extraneous motive.

15. These tests would normally extend immunity to secondary action involving first customer and first supplier, and rarely beyond, but could according to circumstances restrict immunity even at that level. This method has the advantage of adaptability to the varied industrial situations which arise and is indeed the method that the Court of Appeal were using. But it places considerable discretion in the hands of the judges, and leaves uncertainty about the meaning of the law (particularly on the test of extraneous motive) until it has been tested in the Courts. It would be regarded by the unions with suspicion.

16. Approaches (a) and (b) above are not necessarily mutually exclusive. It would be feasible to achieve the intended effect of Option 3 by drawing the line at the level of first customer/first supplier (as in (a)), but with a clearer legal definition (eg those in commercial contractual relationship with the party in dispute); and provide that immunity within that line would apply only to action which met the tests of capability and motive in (b). This would be rather more

flexible in operation than (a), and give less scope for judicial discretion than (b).

Option 4: Immunity for Specific Forms of Secondary Action

17. The Secretary of State for Trade suggested at E that the line should be drawn "a few notches up", as he had argued in his letter of 11 January. There would be no blanket immunity for secondary action or for action against an employer whose own employees were not in dispute (as in the Nawala case): but immunity could apply to certain specific kinds of secondary action which the Government thought justifiable on their merits. Two possibilities mentioned as illustrations in his letter were:-

(i) Action in support of a workforce who had been sacked en masse during a strike (so that primary action became impossible);

(ii) Action against an employer giving material support to the employer in primary dispute (eg when the latter has a partial strike at his factory and arranges to buy components from another company to replace those his employees are refusing to produce, that other company could be held to be giving material support and secondary action against it would attract immunity);

Other illustrative possibilities that might be put forward by the Government for consideration are:-

(iii) Action by employees of a first customer or supplier solely affecting the contracts of the employer in primary dispute, and not injuring third parties (ie the same approach as in paragraph 12 above).

(iv) Secondary (sympathetic) strikes voted in a secret ballot by the workers taking part in them (if Ministers were anxious to avoid the charge that the legislation abridged workers' rights to withdraw their labour.

In consultation the Government could suggest (i) and (ii) and offer to consider other instances on their merits.

18. This is a completely different approach from the other Options, since it removes immunity from all secondary action save as specified. But each exception is liable to problems of definition and there would be pressure for others to be added. The exemptions would be uneven in application, eg that for sympathetic strikes would allow the immunity to extend well beyond any other Option.

ENFORCEMENT

19. If the Section 13 immunity were reduced in any of the ways outlined above an employer whose business was damaged by unlawful secondary action would be able – as at present – to bring civil proceedings against the union officials organising the action. Everything would, of course, turn on the willingness of employers to use the remedies available.

See p. 17 of Dip Lobby

20. The employer would normally apply for an injunction requiring the officials to call off the action. (Injunctions apply not only to those named in them but to any who stand in their place). If they refused to do so they would be liable for contempt and might be fined and ultimately (if the contempt continued) for imprisonment. Employers do not normally seek damages in such cases; their primary concern is to get the action stopped. If they were to pursue the action for damages the union would normally stand behind the official concerned and meet the cost.

21. This procedure carries the risk that individual officials may seek martyrdom by deliberately ignoring the injunction. This risk could be reduced if the Courts were enabled by amendment of Section 14 of TULRA to issue injunctions against the union itself and fine the union for non-observance of the injunction. In the event of failure of the union to pay such a fine, the assets of the union could be sequestrated. Putting union funds at risk in this way might have the additional advantage of making unions more responsible for the actions of their officials and members. It could, however, be a less certain and speedy means of getting unlawful action stopped. This is particularly so in the case of unofficial disputes (the vast majority) which are often carried on in defiance of union instructions; it would indeed put a premium on unofficial action. It is likely, therefore, that employers would wish to continue to be able to seek injunction against individuals and hence the risk of martyrdom would remain. Furthermore, the present immunity of union funds from civil actions is of great symbolic significance to the trade union movement and any change to this would provoke very strong opposition and would drive the moderates into the hands of the extremists.

Surely it has been breached in the case of loss of job because of closed shop.

CABINET OFFICE,
WHITEHALL.

8 February 1980

(1) The first main route is
can one limit the phrase "in furtherance
of" Page 5 gives three ways - there
are not sufficiently certain to be
easily or clearly justiciable.

This route leads to trouble.

(2) We will decide where line is to be drawn
Option 1, 2, 3a, 4

There is a real divide between
2 & 3.

3. jt contract, employees,

2 - party nature, regard dispute ~~[illegible]~~ common law right to protect himself. Interference with commercial contracts.

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(3) S. 13. -