

## SECTION 8(e)—ENFORCEMENT OF A LAWFUL “HOT CARGO” CLAUSE AGAINST A “NEUTRAL” CONTRACTOR

A “hot cargo” clause in a collective bargaining agreement typically prohibits an employer from doing business with any firm not affiliated with the contracting union. While such agreements are generally proscribed by section 8(e) of the Labor Management Relations Act,<sup>1</sup> construction industry unions are outside this general prohibition by virtue of an express exemption.<sup>2</sup>

The scope of the exempting proviso to section 8(e) was examined by the National Labor Relations Board in *Ets-Hokin Corp.*<sup>3</sup> In that case, Ets-Hokin and the International Brotherhood of Electrical Workers had entered into a collective bargaining agreement which contained the following clause:

The local Unions are part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW as the collective bargaining representative on any electrical work in the jurisdiction of this or any other such Local Union by the Employer, will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.<sup>4</sup>

Nevertheless, Ets-Hokin sublet electrical work to a subcontractor, Rose-Phoenix, whose employees were members of the Operating Engineers, a union which competes fiercely with the IBEW for jobs at construction sites. The IBEW threatened to terminate its contract pursuant to the above clause unless Rose-Phoenix was removed from the job. Ets-Hokin then removed Rose-Phoenix in order to avoid the impact of the threatened IBEW termination.

In response to unfair labor practice charges arising from these facts, the National Labor Relations Board held that the threat of

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<sup>1</sup> 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . .

<sup>2</sup> *Ibid.*:

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

<sup>3</sup> 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045 (1965).

<sup>4</sup> 60 L.R.R.M. at 1046.

termination violated sections 8(b)(4)(A) and (B) of the Labor Management Relations Act,<sup>5</sup> but that the dismissal of Rose-Phoenix under the agreement was lawful.<sup>6</sup> The Board arrived at these conclusions by finding that the clause in question was composed of two severable elements: an agreement by Ets-Hokin not to subcontract to non-IBEW employers, and a "termination" power to be invoked should Ets-Hokin fail to comply with the subcontracting clause. The first element was held to be lawful as coming within the construction industry proviso to section 8(e),<sup>7</sup> but the second was found to be a "powerful private economic sanction to insure compliance with the subcontracting clause,"<sup>8</sup> a sanction which the Board felt was forbidden by the act:

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<sup>5</sup> 73 Stat. 542 (1959), 29 U.S.C. §§ 158(b) (4) (A), (B) (1964) :

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) ;

(B) forcing or requiring any person to cease . . . doing business with any other person . . . .

In regard to the 8(b)(4)(ii)(A) violation, which will not be further discussed in this Comment, the Board said:

Having found the termination and sympathetic action features of the clause unlawful under Section 8(e), notwithstanding the proviso, we do find, as did the Trial Examiner, that Respondents IBEW and Local 796 violated Section 8(b)(4)(ii)(A) in coercing Ets-Hokin to remove Rose-Phoenix from the Glen Canyon project, by threatening to enforce the termination clause in Local 640's contract.

60 L.R.R.M. at 1049. (Citation omitted.)

<sup>6</sup> Ets-Hokin, under §§ 8(a)(1) and 8(a)(3), and the IBEW, under §§ 8(b)(2) and 8(b)(1)(A), had been charged with unlawful discrimination resulting in the discharge of Rose-Phoenix's employees. The sections under which the charges were brought read as follows:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

61 Stat. 140 (1947), as amended, 29 U.S.C. §§ 158(a) (1), (3) (1964).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; . . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . .

61 Stat. 141 (1947), as amended, 29 U.S.C. §§ 158(b) (1), (2) (1964).

<sup>7</sup> The "no subcontracting" contract provision has the following aspects: a prohibition against subcontracting on a building construction site, and an annulment clause. The first of these we have found to be lawful under the construction industry proviso to Section 8(e) . . . .

60 L.R.R.M. at 1049. After finding that the two aspects of the IBEW-Ets-Hokins no-subcontracting clause—termination and prohibition—were severable, the Board said that the lawful "prohibition" provision gave the union the right "to insist, albeit not by proscribed means, that the Employers subcontract work only to IBEW subcontractors as required by the lawful part of the . . . contract." *Ibid.*

<sup>8</sup> *Id.* at 1047. The IBEW stated in a supplemental memorandum to the Board that such action could have "forced Ets-Hokin out of business." *Ibid.*

[A] contract within the construction industry proviso . . . may be enforced only through lawsuits and not by threats, coercion or restraint proscribed by Section 8(b)(4)(B).<sup>9</sup>

Self-help is not judicial action, even if a court or *its equivalent* might grant the same remedy for breach of contract . . . . Neither is the contract principle controlling, that [when] . . . one party to a contract breaches a material provision thereof, the other may elect to rescind it. We are not administering the law of private contracts.<sup>10</sup>

The Board continued:

In Centlivre Village Apartments . . . [Northeastern Ind. Bldg. Trades Council, 148 N.L.R.B. 854 (1964)] the Board held that coercion by a union to interrupt business relations between a neutral general contractor and an identified subcontractor came within the prohibition of Section 8(b)(4)(B). Here the Trial Examiner found that the Union, by threatening to cancel its contract with Ets-Hokin, forced Ets-Hokin to cancel its contract with Rose-Phoenix and thus violated Section 8(b)(4)(ii)(B) of the Act. We agree.<sup>11</sup>

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<sup>9</sup> *Ibid.* The Board's position is buttressed by the courts. The clear implication of the decisions has been that only a judicial remedy would be allowed. See, e.g., Local 48, Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964); Orange Belt Dist. Council of Painters v. NLRB, 328 F.2d 534 (D.C. Cir. 1964). See generally Grove, *Obtaining and Enforcing Hot-Cargo Contracts in the Construction Industry*, 51 A.B.A.J. 732 (1965); 40 N.Y.U.L. Rev. 1198 (1965).

The Board quoted the following passage from Local 48, Sheet Metal Workers v. Hardy Corp., *supra* at 686, to clarify what it meant by "coercion" forbidden by § 8(b)(4)(B):

The term "coercion" as used means "non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute."

Ets-Hokin Corp., 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045, 1047 (1965). (Emphasis added by NLRB.)

<sup>10</sup> *Ibid.* (Emphasis added.) The "equivalent" the Board had in mind was probably arbitration.

The Board included the following in a footnote:

We realize that this conclusion may leave the union with a valid contractual provision and with no means of enforcing it other than in a civil suit. We also realize the difficulty the building crafts have with the secondary boycott provision of the Labor-Management Relations Act, but this court is not the forum in which to seek relief from what the union characterizes as "the shackles" of this statute.

*Id.* at 1047 n.6, quoting from Local 5, United Ass'n of Journeymen Plumbers v. NLRB, 321 F.2d 366, 370 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963). Presumably the Board, like the circuit court, is not "the forum in which to seek relief from . . . 'the shackles' of [the] . . . statute."

<sup>11</sup> *Id.* at 1049. Member Fanning, dissenting in part, said:

I disagree with the majority's conclusion that the contractual reservation of the right to take economic action to enforce a lawful no-subcontracting clause is itself violative of Section 8(e) of the Act. It seems anomalous to find . . . that the incorporation of the so-called self-help provision . . . operates lawfully to prohibit the employer from subcontracting to nonunion subcontractors, even though the self-help provision itself violates Section 8(e). . . .

Thus the Board found that any attempt to enforce a lawful hot cargo clause by means prohibited by section 8(b)(4)(B) would be unlawful. It should be noted that in order to reach this conclusion, the Board must have considered Ets-Hokin to be a "neutral" third party,<sup>12</sup> disinterested in the outcome of the union's "primary" dispute with Rose-Phoenix. However, since Ets-Hokin put Rose-Phoenix on the job it is difficult to believe that Ets-Hokin was, in fact, "neutral," par-

I should think that this case is governed by the rule . . . in *Amalgamated Lithographers* . . . [Miami Post], 130 N.L.R.B. 968, 47 L.R.R.M. 1380. . . . The clear import of the Board's holding in *Amalgamated Lithographers* is that a termination clause is lawful whenever the clause which it supports is lawful, and it is wholly immaterial whether the latter clause is lawful because it is primary in nature or because it falls within the construction industry proviso and is thus excepted from the prohibition of Section 8(e). . . .

Thus, the controlling distinction is that between economic action, such as strikes, picketing, and other related conduct, on the one hand, and resort to recognized legal or judicial remedies for breach of contract on the other. Clearly, the IBEW lawfully could have filed suit . . . . But another, long-accepted, remedy is available . . . . That remedy is the right to rescind the contract. . . .

Certainly the articulation within the contract of this lawful right of election of remedies should not have the anomalous effect of rendering unlawful the exercise of that right, particularly where there is not the slightest evidence that the Congress, having granted specific contractual rights to employers and unions in the construction industry, then intended to deprive the parties to such agreements of the well-established remedies for breach of those very rights. . . .

Finally, the majority's conclusion cannot be supported on the theory that termination of the contract will be followed by a strike or picketing; a "no contract-on [*sic*] work" theory. The record herein will not sustain a finding that the termination threat included a threat to withdraw men or to picket Ets-Hokin.

*Id.* at 1050-51. Cf. Hickey, *Subcontracting Clauses Under Section 8(e) of the NLRA*, 40 NOTRE DAME LAW. 377, 388-89 (1965). See also Victor, "Hot Cargo" Clauses, 15 LAB. L.J. 269, 282 (1964).

<sup>12</sup> The congressional policy behind § 8(b)(4) as it existed in 1958 was best explained by the Supreme Court in *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 100 (1958) (*Sand Door*):

Congress' purpose was . . . narrowly conceived. It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: *the coercion of neutral employers*, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods.

See note 19 *infra* for the text of the old § 8(b)(4)(A).

The 1959 amendments adding § 8(e) and expanding and clarifying § 8(b)(4) seem to confirm both aspects of the Supreme Court's statement that neutral parties should be protected, and that the conflict should not be expanded. In fact, the protection of neutrals seems to be one of the best ways of limiting the spread of the dispute, since otherwise they will be drawn in as either side seeks to strengthen its position by finding allies. Viewed in this manner, the fundamental policy of the secondary boycott provisions is the limitation of labor disputes and their impact upon the rest of the economy. See 357 U.S. at 105-06. This is in accord with the declaration of policy contained in § 1(b) of the act, 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964), which reads in relevant part as follows:

It is the purpose and policy of this Act, in order to promote the full flow of commerce . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The protection of "neutrals," then, is not sacred in itself, but is merely a means of achieving a desired end. Cf. Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1041 (1965). See also Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

ticularly since subcontracting to Rose-Phoenix would have lowered Ets-Hokin's labor costs, thus enabling it to make lower bids and, consequently, to obtain more jobs. The present situation, then, is anomalous in that the Board has reached a result which is called for by the law, but which is belied by the facts.

There is, however, a partial recognition in the law that Ets-Hokin and similar firms are not entirely "neutral" in that they can be "coerced" into entering subcontracting agreements which are lawful under the proviso to section 8(e).<sup>13</sup> The union may strike or apply other economic sanctions to obtain such a clause as long as such action is not aimed at an identified or existing subcontracting relationship.<sup>14</sup> But when the union seeks to enforce the clause by direct means in the face of a breach, the mantle of "neutrality" envelops the employer with the protection of section 8(b)(4)(B),<sup>15</sup> and the union is forbidden to act, except through lawsuits or their equivalent.<sup>16</sup> The result is that the so-called "neutral" employer can be subjected to union pressure which will affect his choice of action in a labor conflict as long as the pressure is removed in time and place from the incident—for example, Ets-Hokin's breach of its subcontracting clause with the IBEW—which provokes it. This removal is the essence of the only "enforcement" procedure lawfully open to the union.

Thus the effect of the present law is to restrict labor conflict by prohibiting the union from subjecting a "neutral" employer to economic coercion at the time of provocation (*i.e.*, breach). However, the law does not prohibit the spread of the conflict to another time and place;

<sup>13</sup> See *Orange Belt Dist. Council of Painters v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Construction Laborers v. NLRB*, 323 F.2d 422, 424 (9th Cir. 1963).

<sup>14</sup> See *Ets-Hokin Corp.*, 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045 (1965). A strike for a lawful hot cargo clause is unlawful only if it is an attempt by the union to cause the employer to cease doing business with an identified subcontractor. Such an attempt falls within the prohibition of § 8(b)(4)(B). *Northeastern Ind. Bldg. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *rev'd on other grounds*, 352 F.2d 696 (D.C. Cir. 1965); *cf.* *Building & Constr. Trades Council v. NLRB*, 328 F.2d 540 (D.C. Cir. 1964).

<sup>15</sup> *Orange Belt Dist. Council of Painters v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 326 F.2d 213 (3d Cir. 1964); *Construction Laborers v. NLRB*, 323 F.2d 422 (9th Cir. 1963); see *Essex County & Vicinity Dist. Council of Carpenters v. NLRB*, 332 F.2d 636, 641 (3d Cir. 1964): "[A lawful hot cargo clause] is not a defense to an unfair labor practice charge made under § 8(b)(4)(B) . . . ."

<sup>16</sup> 105 CONG. REC. A8254 (daily ed. Oct. 2, 1959), in 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1858 (1959) [hereinafter cited as 1959 LEG. HIST.] (remarks of Senator Goldwater):

Thus, although employers and unions who are under this exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—economic or otherwise—may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it.

See *Local 5, United Ass'n of Journeymen Plumbers v. NLRB*, 321 F.2d 366 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963); cases cited note 15 *supra*; 105 CONG. REC. 17900 (1959), in 2 1959 LEG. HIST. 1433 (remarks of Senator Kennedy); 105 CONG. REC. A8359 (daily ed. Sept. 24, 1959), in 2 1959 LEG. HIST. 1829 (remarks of Senator Goldwater).

the so-called "neutral" employer can be attacked in court, harassed at the next bargaining session<sup>17</sup> or even prospectively disciplined by the mechanism of a "hard" strike over some other issue, which nonetheless serves as a warning not to breach the hot cargo clause. A fragmentation of the conflict through time is thus encouraged. The limitation envisioned by Congress seems only to work momentarily to preserve the employer's freedom of choice at the point of open conflict.<sup>18</sup>

The situation with regard to construction industry unions, as it presently exists, cannot be understood without reviewing the history which produced it. In 1947, when the Labor Management Relations Act was passed, the NLRB obtained jurisdiction over the on-site practices of the building trades unions for the first time.<sup>19</sup> It has

<sup>17</sup> In other words, the union, at the next contract negotiation period, can "get even" with an employer who has failed to live up to his lawful hot cargo obligation. It might even be a good idea for the union to "get tough" prospectively, while bargaining for the hot cargo clause, in order to discourage the employer from even considering a breach of the agreement.

There is an inherent fault here, in that the law does not allow attention to become focused on the breach at the time of its occurrence. There is not a present examination of a concrete problem leading to a specific solution. If a test of strength is necessary, it is postponed (or anticipated) and disguised, in a sense making it a dry run. This may be a good reason for a union to demand an arbitration clause dealing with the hot cargo provision. At least this would result in timely action on the specific problem. Cf. Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1012 (1965):

It is apparent that the enactment of section 8(e) merely laid bare a problem which was largely latent before then. Previously a subcontracting restriction embodied or attempted to be embodied in a contract fell within the 1947 act only if sought to be enforced through strike action; because of arbitration and no strike provisions, generally such action was rarely taken. (Emphasis added.)

Senator Kennedy commented:

The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.

105 CONG. REC. 17900 (1959), in 2 1959 LEG. HIST. 1433. From the foregoing comments, and the NLRB's qualification "a court or its equivalent," see text accompanying note 10 *supra*, it seems safe to conclude that arbitration is the best method of enforcement open to a union faced with the breach of a lawful hot cargo agreement, if the union wishes to avoid going to court or being charged with an unfair labor practice. See Hickey, *supra* note 11, at 388-89; 40 N.Y.U.L. REV. 1198, 1202 (1966).

<sup>18</sup> Cf. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 105-06 (1958) (*Sand Door*).

<sup>19</sup> Section 8(b)(4)(A) was enacted in 1947. In relevant part it read as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring . . . any employer or other person to cease . . . doing business with any other person . . .

61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(A) (1964). Until this section entered the law, the right of the construction industry unions to strike and shut down an entire job was legally unchallenged. See *Hearings Before the Special*

been said that inexperience with the peculiar problems of the construction industry resulted in the NLRB's action in *Denver Bldg. & Constr. Trades Council*.<sup>20</sup> In that case, the Denver Building Trades Council picketed a construction site to protest the use of nonunion labor by a subcontractor. As a result of the picketing, the employees of the general contractor left their jobs. The Board found that the picketing violated what was then section 8(b)(4)(A),<sup>21</sup> in that it put pressure, by means of concerted activity, on the general contractor to "cease doing business with any other person." The general contractor was regarded as a "neutral" to whom, therefore, the act extended protection.<sup>22</sup> In affirming the Board's action, the Supreme Court said:

We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.<sup>23</sup>

That *Denver Bldg. Trades* did not preclude union strikes against contractors with whom they had primary disputes was made clear in

*Subcommittee on Labor of the House Committee on Education and Labor on H.R. 6411 and Similar Bills*, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as *Hearings on H.R. 6411*] (statement of Secretary of Labor Willard Wirtz).

<sup>20</sup> 82 N.L.R.B. 1195 (1949), *rev'd*, 186 F.2d 326, 335 (D.C. Cir. 1950). After noting that the usual secondary boycott seeks to cause a neutral to cease doing business with some other employer with whom the union has a dispute, the circuit court said:

The situation before us is not of this character. . . . The pressure was limited to the one job, which was picketed as a whole to make it wholly union and in protest against the employment there of the nonunion electricians.

The Supreme Court reversed the circuit court and affirmed the Board. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). For a discussion of the inexperience which may have led to this decision, see House Comm. on Education and Labor, *Situs Picketing*, H.R. REP. No. 1041, 89th Cong., 1st Sess. 4-7 (1965) [hereinafter cited as H.R. REP. No. 1041].

<sup>21</sup> The scope of this section was enlarged by the 1959 amendments to the act. See text accompanying notes 34-35 *infra*.

<sup>22</sup> It seemed to matter little to the Supreme Court, on review, that the subcontractor had been hired by the general contractor, or that if the general contractor had put nonunion men on the job, the strike would have been lawful. See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). Mr. Justice Douglas made this point in his dissent. *Id.* at 692.

The problem is seen in its clearest form if a production line analogy is used. Suppose that the general contractor were the owner of a single plant, and each step on the line were performed by a subcontractor. Would there be separate businesses for purposes of § 8(b)(4)? It is ironic that a Board which does not "administer the law of private contracts," see text accompanying note 10 *supra*, draws upon the concept of an "independent contractor" found therein in order to sustain the finding of an unfair labor practice under § 8(b)(4) against a construction industry union. See text accompanying note 23 *infra*.

<sup>23</sup> 341 U.S. at 689-90.

*Moore Drydock Co.*<sup>24</sup> In that case, the NLRB laid down the rules which were to be applicable to "common-situs" picketing—picketing which takes place where two or more independent employers occupy the same premises or place of business.<sup>25</sup> The union could picket or strike the primary, but only under conditions which minimized the possibility that the neutral's workers on the construction site would leave their jobs.<sup>26</sup>

These two cases taken together left open the question whether the union could strike, subject to the limitations of the *Moore Drydock* rules, to enforce a contractual clause prohibiting the general contractor from allowing men not affiliated with the contracting union to be put on the job. The *Denver Bldg. Trades* case had settled the question only with respect to striking the general contractor in the absence of such a clause.

In 1958, the *Sand Door*<sup>27</sup> decision by the Supreme Court provided the answer. The Court held that a union could not enforce a hot cargo agreement by means forbidden by section 8(b)(4)(A), *i.e.*, a strike or an inducement of its members to strike.<sup>28</sup> The hot cargo clause remained available to the contracting parties,<sup>29</sup> but its effectiveness was limited by the restriction placed on the means of enforcement.<sup>30</sup>

<sup>24</sup> *Sailors' Union (Moore Drydock Co.)*, 92 N.L.R.B. 547 (1950). See Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1374 (1962), for a discussion of the development and application of the *Moore Drydock* rules.

<sup>25</sup> [The Board] set out four standards for picketing in such situations which would be presumptive of valid primary activity: (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

Local 761, *Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 677 (1961).

<sup>26</sup> [I]n the interest of shielding "unoffending employers" from disputes not their own, the Board has taken a . . . restrictive view of common situs picketing, requiring that it be conducted so as "to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees."

*Building Trades Council (Markwell & Hartz, Inc.)*, 155 N.L.R.B. No. 42, 60 L.R.R.M. 1296, 1298 (1965). This case contains a lengthy discussion of the present application of the *Moore Drydock* rules to construction sites.

<sup>27</sup> *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958) (*Sand Door*). The case came up in the form of a contention that a hot cargo clause was a sufficient defense to an unfair labor practice charge under § 8(b)(4).

<sup>28</sup> "[I]nducements of employees that are prohibited under § 8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision." *Id.* at 106. The version of § 8(b)(4)(A) referred to in this case is that which was in force before the 1959 amendments to the act. The text appears in note 19 *supra*.

<sup>29</sup> Certainly the voluntary observance of a hot cargo provision by an employer does not constitute a violation of § 8(b)(4) . . . its mere execution is not . . . prima facie evidence of prohibited inducement of employees . . .

357 U.S. at 108.

<sup>30</sup> A lawsuit definitely remained a possible means of enforcement:

It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases [as a defense to § 8(b)(4) charges] that it may not, in some totally different context . . . still have legal radiations affecting the relations

Thus, after the *Sand Door* decision, a union in the construction industry could strike to obtain a hot cargo clause as long as the *Moore Drydock* rules were observed;<sup>31</sup> however, its enforcement of the clause, once obtained, was limited to whatever threats could be made against the employer without violating section 8(b)(4)(A).<sup>32</sup> The unions also could, and apparently did, rely upon arbitration provisions for enforcement of their lawfully obtained hot cargo clauses.<sup>33</sup>

In 1959, Congress amended the act: section 8(e) was added, which generally prohibited hot cargo agreements. Had section 8(e) been enacted without an exception for the construction industry, the building trades unions would have been virtually without means of preventing unionized contractors from subcontracting their work to nonunion employers and thereby subverting and avoiding their collective bargaining agreements. This seemed to be enough of a disadvantage to the unions to cause Congress to include a special exemption in section 8(e).<sup>34</sup>

Another change was a broadening of section 8(b)(4) which previously forbade only a strike or inducement of union members to strike. The amended section was broken down into two parts: 8(b)(4)(A) forbade a union from entering into any agreement prohibited by section 8(e); 8(b)(4)(B) made coercion or threats aimed at an employer for the purposes of causing him to cease doing business with "any other person" an unfair labor practice.<sup>35</sup> Under this new

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between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in § 8(b)(4)(A) [strike or inducement to strike] . . . .

*Ibid.*

<sup>31</sup> Cf. *id.* at 101-08.

<sup>32</sup> See *id.* at 99:

Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion . . . .

<sup>33</sup> See Lesnick, *supra* note 17, at 1012:

It is apparent that the enactment of section 8(e) merely laid bare a problem which was largely latent before then. Previously a subcontracting restriction embodied or attempted to be embodied in a contract fell within the 1947 act only if sought to be enforced through strike action; because of arbitration and no strike provisions, generally such action was rarely taken. (Emphasis added.)

<sup>34</sup> Remarks of Senator Kennedy:

Fourth. Hot cargo: . . . . The Senate insisted upon a qualification . . . . for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries.

105 CONG. REC. 17899 (1959), in 2 1959 LEG. HIST. 1432. Cf. 105 CONG. REC. A8372 (daily ed. Sept. 24, 1959), in 2 1959 LEG. HIST. 1834 (remarks of Senator Douglas).

When § 8(e) was added to the law, there was also an attempt made to include a proviso to § 8(b)(4)(B) which would have made union picketing in the *Dewey Bldg. Trades* situation lawful; however, it failed. The proposed addition to § 8(b)(4)(B) was eliminated from the proposal of the House-Senate Conference Committee because of a threatened point of order to be raised on the floor of the House. 105 CONG. REC. 17901 (1959), in 2 1959 LEG. HIST. 1434. Its proponents dropped the measure upon the promise that it would be brought up for action in the next session; they were subsequently unable to gain passage of the proviso. *Hearings on H.R. 6411*, at 9 (statement of Secretary of Labor Willard Wirtz).

<sup>35</sup> See note 5 *supra* for relevant text.

language, the union could neither induce its own members to take action nor threaten a neutral employer without violating section 8(b)(4). This expansion of section 8(b)(4) limited to an even greater extent the means by which a building trades union could obtain compliance with the terms of a hot cargo clause.

The question of what kind of enforcement action remains available after the 1959 amendments to a union which has lawfully obtained a hot cargo agreement<sup>36</sup> is one to which the answer is not immediately clear. Under the statutory language, there are at least three alternatives, all of which are consistent with the legislative history indicating that prior law—specifically, *Denver Bldg. Trades*, *Moore Drydock* and *Sand Door*—was to remain undisturbed.<sup>37</sup> Since *Sand Door* held that any enforcement measures which violated section 8(b)(4) would be illegal, the extent to which a hot cargo agreement is enforceable by the union depends upon the interpretation given to section 8(b)(4)(B)'s new operative words, "coerce, restrain or threaten."

The first alternative is to read the words very broadly as prohibiting any attempt whatsoever at enforcing the clause, even through judicial action (or arbitration, which seems indistinguishable),<sup>38</sup> in order to keep the employer's course of action as free from compulsion as the law can make it. Although one district court espoused this position,<sup>39</sup> it was overruled,<sup>40</sup> and no other court has entertained this broad interpretation of "coerce."

The rejection of this broad interpretation rests in part on the notion that Congress would not have made an exception for hot cargo clauses in the construction industry if it had not intended that these clauses were to be enforceable in some manner. Moreover, there is substantial legislative history to the effect that Congress anticipated that judicial enforcement of the exempted clauses would be available

<sup>36</sup> Although the Board was slow in accepting the view, the courts and the Board now hold that the language incorporating § 8(e) into § 8(b)(4)(A) also incorporates the provisos to § 8(e). See *Ets-Hokin Corp.*, 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045, 1048 (1965):

In *Centlivre Village Apartments* [148 N.L.R.B. 854 (1964)] the Board re-examined its approach to this section and decided to adopt the view of various courts that the proviso to section 8(e) is incorporated by reference into section 8(b)(4)(A); hence an attempt by means condemned by section 8(b)(4) to obtain such a clause which is lawful under the construction industry proviso falls outside the scope of section 8(b)(4)(A).

<sup>37</sup> See Senator Kennedy's analysis of the construction industry proviso to § 8(e), 105 CONG. REC. 17900 (1959), in 2 1959 LEG. HIST. 1433; remarks of Senator Goldwater concerning hot cargo agreements, 105 CONG. REC. A8359 (daily ed. Sept. 24, 1959), in 2 1959 LEG. HIST. 1829.

<sup>38</sup> See notes 10, 17 *supra* and note 43 *infra*.

<sup>39</sup> *Local 48, Sheet Metal Workers v. Hardy Corp.*, 218 F. Supp. 556, 561-62 (N.D. Ala. 1963).

<sup>40</sup> *Local 48, Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682, 685 (5th Cir. 1964):

[W]e think clear language would be necessary to convey a congressional intent that a party to an otherwise valid labor agreement may not turn to the courts for relief upon its breach.

to the unions.<sup>41</sup> This evidence is reinforced by the following argument: judicial enforcement, by definition, could not actually violate the strictures of section 8(b)(4)(B), since a court, not a union, would be doing the coercing.<sup>42</sup> Thus the essence of the second alternative open under the language of the statute is that judicial enforcement (or arbitration) is the only lawful means by which a union may vindicate its rights should the clause be breached. This position has achieved general acceptance by the Board and the courts.<sup>43</sup>

The third alternative, which has not as yet been explored by either the courts or the Board, is to hold lawful a self-executing clause, such as a liquidated damages provision, which would, without any forbidden coercion by the union, encourage the employer not to breach the hot cargo clause. This provision could be arranged as an escrow account to be forfeited upon the employer's breach.<sup>44</sup>

While this third alternative seems consistent with the general statutory language and purpose, there remains a conceptual objection to its acceptance by the Board and the courts: the self-enforcing liquidated damages provision would allow the union to transmit strike pressure through the conduit of the contract to the point in time when the employer actually makes the decision whether to breach.<sup>45</sup>

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<sup>41</sup> Remarks of Senator Kennedy, *supra* note 37; remarks of Senator Goldwater, *supra* note 37; 105 CONG. REC. A8524 (daily ed. Oct. 2, 1959), in 2 1959 LEG. HIS. 1858 (remarks of Senator Goldwater).

<sup>42</sup> Cf. note 10 *supra*. A threat to apply judicial sanctions may initially look the same as a threat to invoke economic sanctions of the forbidden type; however, to use Member Fanning's logic (note 11 *supra*) in another application, in the view of the NLRB the threat of termination takes on the same character as the underlying sanction which supports the threat, and therefore, the threat itself is considered unlawful. Further, there has been a legislative judgment that judicial action is permissible, see note 41 *supra*, while self-help is not. The distinction is logical in that it is reasonable to think that the courts would not engage in the excesses commonly associated with secondary boycott action. Perhaps only such excesses are to be condemned, not the actual boycott, at least in the *Denver Bldg. Trades* situation.

<sup>43</sup> E.g., cases cited notes 15, 16 *supra*; *Northeastern Ind. Bldg. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964). This is not to say that arbitration is precluded. See notes 10, 17 *supra*. It can be considered as synonymous with a judicial remedy, since, particularly in the context of this discussion, it has all the attributes of judicial action. See Jones, *Specific Enforcement of "Hot Cargo" Provisions in Collective Bargaining Agreements by Arbitration and Under Section 301(a) of the Taft-Hartley Act*, 6 U.C.L.A.L. REV. 85 (1959). Cf. *Todd Shipyards Corp. v. Industrial Union of Marine Workers*, 344 F.2d 107 (2d Cir. 1965).

<sup>44</sup> The Ets-Hokin agreement contains what appears to be an attempt at such a self-enforcing clause, see text accompanying note 4 *supra*, but it is flawed, in that the termination provision can be used as an implied threat to strike, a threat which is clearly forbidden by § 8(b)(4)(B), and one which cannot be rendered harmless by clothing it in the language of contract.

It was argued in *Ets-Hokin Corp.* that the invocation of the termination clause would not necessarily mean a work stoppage; this argument was accepted by Member Fanning in his dissent. Member Fanning thought that a "no contract-no work" theory was inapplicable to the case, based on the findings of the trial examiner. 60 L.R.R.M. at 1051. A close examination of the clause lends credence to this theory, since the union would not have to strike if the other IBEW-affiliated contractors did not breach their hot cargo clauses. Such a development by itself could have crippled *Ets-Hokin*.

<sup>45</sup> Cf. *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 106 (1958) (*Sand Door*).

This could occur in the sense that the union, being able to strike to obtain the clause, could thereby extort terms so severe as effectively to deprive the employer of any choice even at the time when Congress has seen fit to protect this freedom of action.<sup>46</sup>

This "conduit" theory may underlie the Board's language in *Ets-Hokin*, which would outlaw any "private economic sanction to insure compliance with the subcontracting clause."<sup>47</sup> The Board read the legislative history as "outlawing every form of private contract rendered permissible by the building construction proviso to Section 8(e)," <sup>48</sup> which would leave judicial action as the only means of enforcing hot cargo clauses.

In summary, then, the present NLRB interpretation of sections 8(b)(4)(A) and (B) and 8(e) as they apply to the construction industry is consistent with the statutory language and history. The Board allows strikes to obtain hot cargo clauses permitted by section 8(e); <sup>49</sup> it does not allow inclusion of provisions in those clauses which would violate section 8(b)(4)(B) if implemented,<sup>50</sup> nor does it allow enforcement of lawful clauses by strikes or other means of coercion forbidden by section 8(b)(4)(B).<sup>51</sup> The Board maintains that only judicial enforcement is available when the employer (construction contractor) breaches a valid section 8(e) clause, because otherwise, applying both *Sand Door* and *Denver Bldg. Trades*, there would be unlawful coercion aimed at causing the employer to cease doing business with another person.

Of course, this entire legal structure, particularly the specific prohibitions concerning lawful enforcement of legal hot cargo clauses, rests on the continuing vitality of *Denver Bldg. Trades*. It hardly matters at this point whether the case was the result of inexperience. It has been the law for the building trades unions for over fifteen years, and, although several attempts have been made to secure congressional approval of an amendment to section 8(b)(4) which would overrule it and permit picketing of a "neutral" subcontractor, all such attempts have failed.<sup>52</sup>

<sup>46</sup> See note 12 *supra*.

<sup>47</sup> *Ets-Hokin Corp.*, 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045, 1047 (1965).

<sup>48</sup> *Id.* at 1046. The Board is unlikely to retreat from this position since it was reached over Member Fanning's strong dissent, see note 11 *supra*, which took a position akin to that which would hold valid self-policing hot cargo clauses. The Board feels rather strongly that it is "not administering a law of private contracts." See *Muskegon Bricklayers Union*, 152 N.L.R.B. No. 38, 59 L.R.R.M. 1081 (1965); 40 N.Y.U.L. Rev. 1198 (1965).

<sup>49</sup> *Northeastern Ind. Bldg. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964); *accord*, *Ets-Hokin Corp.*, 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045 (1965).

<sup>50</sup> See notes 5, 7 *supra* and text accompanying notes 5-8 *supra*; 40 N.Y.U.L. Rev. 1198 (1965).

<sup>51</sup> *Ets-Hokin Corp.*, 154 N.L.R.B. No. 52, 60 L.R.R.M. 1045 (1965).

<sup>52</sup> See note 54 *infra*. Although the proposed amendments all failed, the fact that the attempts were made seems to indicate that the proviso to § 8(e) does not protect conduct forbidden by § 8(b)(4)(B); it adds weight to that part of the legislative

The most recent in the chain of attempts to add a proviso to section 8(b)(4)(B) which would allow common situs picketing in the *Denver Bldg. Trades* situation is H.R. 10027.<sup>53</sup> Under the provisions of this bill (and its many predecessors),<sup>54</sup> a union which faced a breach of a section 8(e) clause by the employer-contractor could strike the entire project in its attempt to eliminate the nonaffiliated subcontractor. That a less broad solution would allow the union successfully to enforce a lawful hot cargo clause cannot be doubted, since H.R. 10027 would allow common situs picketing whether or not there was a valid hot cargo clause in effect. However, if the past is a guide, any legislative relief which does come will very likely be in the form of H.R. 10027.<sup>55</sup>

Unless and until the legislature chooses to act, the present conflict will remain in the law; the unions will be allowed a hot cargo clause they cannot directly enforce, and the courts will be expected to apply sanctions which would violate section 8(b)(4)(B) if used by the unions. The structure of the statute is at war with itself; a situation which can be explained in view of its legal history, but which can be fully understood only by recalling the history of "conflict and compromise"<sup>56</sup> out of which the act was born.

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history which states that the existing law was to remain unchanged with reference to the construction industry unions, specifically that the *Sand Door* and *Denver Bldg. Trades* cases were to remain unimpaired. See H.R. REP. No. 1147, 86th Cong., 1st Sess. (1959), in 1 1959 LEG. HIST. 943.

<sup>53</sup> The relevant text of H.R. 10027, 89th Cong., 1st Sess. (1965), is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That section 8(b)(4) of the National Labor Relations Act, as amended, is amended by inserting before the semicolon at the end thereof: *Provided further*, That nothing contained in clause (B) of this paragraph (4) shall be construed to prohibit any strike or refusal to perform services or any inducement of any individual employed by any person to strike or refuse to perform services at the site of the construction, alteration, painting, or repair of a building, structure, or other work, and directed at any of several employers who are in the construction industry and are jointly engaged as joint venturers or in the relationship of contractors and subcontractors in such construction, alteration, painting, or repair at such site, and there is a labor dispute, not unlawful under this Act or in violation of an existing collective-bargaining contract, relating to the wages, hours, or other working conditions of employees employed at such site by any of such employers and the issues in the dispute do not involve a labor organization which is representing the employees of an employer at the site who is not engaged primarily in the construction industry . . . . In determining whether several employers who are in the construction industry are jointly engaged as joint venturers at any site, ownership or control of such site by a single person shall not be the only factor considered.

<sup>54</sup> There has been a legislative attempt to overrule *Denver Bldg. Trades* in nearly every Congress since the decision came down. See H.R. REP. No. 1041 (1965); *Hearings on H.R. 6411*, at 2-12 (1965) (statement of Secretary of Labor Willard Wirtz).

<sup>55</sup> Every attempt made so far has been in the general form of H.R. 10027. *Ibid.*

<sup>56</sup> See Local 1976, *United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 99-100 (1958) (Frankfurter, J.) (*Sand Door*).