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Recommended Citation
Lesnick, Howard, "Job Security and Secondary Boycotts: The Reach of NLRA 8(b)(4) and 8(e)" (1965). Faculty Scholarship. Paper 1414.
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JOB SECURITY AND SECONDARY BOYCOTTS: THE REACH OF NLRA §§ 8(b)(4) AND 8(e)

HOWARD LESNICK †

It is nearly eighteen years since the national legislature weighed the secondary boycott in its balances and, finding it lacking in justification, mandated the National Labor Relations Board to "prevent any person" from engaging in it. While Congress has seemed ready enough to conclude that the secondary boycott ought not to be tolerated, the Labor Board has spent a substantial portion of its eighteen years' administration of the congressional will in trying to decide just what a secondary boycott is, and in developing means by which the condemned practice may be recognized (and distinguished from its favored cousin the primary strike or picket line). Nor does it often appear that prolonged effort has produced a developing consensus.

Of course it is an inevitable hazard of the adjudicatory process to magnify essentially narrow issues merely because they lie in the critical zone within which the line was drawn. In a total appraisal must be weighed those countless instances of conduct clearly condemned or clearly permitted which never come before the Board, or are readily disposed of by the Board when they do. Despite the natural tendency of lawyers to inflate the importance of narrow issues, it may well be that the over-all impact of the statute is only marginally affected by the seemingly substantial current of litigation forcing on the Board the task of drawing lines "more nice than obvious." We all know what a secondary boycott is and what a primary strike, even if we cannot precisely mark out the frontier between them. And we all, at least in calmer moments, would concede that the Board has for the most part condemned the former and permitted the latter, even if we fervently

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I have profited from discussions with two of my students, Dennis Holtz and Peter Sandmann, of the Class of 1965.
2 Doubtless a cause of this difficulty has been that the legislative proscription "seeks to regulate in only the broadest terms a subject highly controversial as a matter of social and economic policy and highly confused as a matter of judicial policy at common law . . . ." Koretz, Federal Regulation of Secondary Strikes and Boycotts—Another Chapter, 59 COLUM. L. REV. 125, 148 (1959).
argue that particular decisions or groups of decisions failed to achieve that goal.  

Yet perspective can in reality distort, if the perspective chosen disregards function. The Supreme Court might be acting wisely to withhold its certiorari review from this aspect of the Board's work, or to resolve a specific dispute on narrow grounds. The courts of appeals, however, best discharge their duty when their opinions do not merely affirm or reverse, but probe the bases of the Board's conclusions, seek articulation of premises and relations, and encourage a dialogue between agency and reviewing court. Congress might accurately be advised that the National Labor Relations Board is ably discharging the impossible task assigned to it. At the same time, one can justly say to the Board that its effort to mark out the line between primary and secondary activity ought to be less intermittent and wavering; more sensitive to the underlying aims of the legislative scheme of regulation and to the structural and institutional needs of the entire system of enforcement; less prone to find refuge in deceptive literalness (whether in applying statutory text or judicial decision), in the glossing over of relevant differences, and in the polar hazards of excessive rigidity and a flexibility so unguided as to be entirely unguiding as well. One can properly ask of the Board that its efforts be marshalled toward an attempt to yield, if not "a glaringly bright line," at least a tolerably visible and reasonably integrated set of standards by which difficult cases may be tested.

The practice the Eightieth Congress was asked to condemn was authoritatively described as "a strike against employer A for the purpose of forcing that employer to cease doing business with employer B . . . (with whom the union has a dispute)."

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4 Perhaps one ought to exclude the 86th Congress from this consensus. See, e.g., S. Rep. No. 187, 86th Cong., 1st Sess. 78 (1959) (minority views of Senators Goldwater and Dirksen), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 474 (1959) [hereinafter cited as 1959 LEG. HIST.], quoting approvingly Professor Schmidt's appraisal: "The original intention of those who framed the Taft-Hartley law has been betrayed or frustrated by a whole series of Board and court decisions." Perhaps, however, 1959 was not one of the legislature's calmer moments. Cf. Senator Dirksen's evaluation: "I think our experience as a legislative body indicates that when we address ourselves to labor legislation, we will always have a certain degree of emotionalism." 105 Cong. Rec. 1295, in 2 1959 LEG. HIST. 988.

half of its administration of section 8(b)(4) \(^{10}\) the Board’s principal problem was to determine whether a union strike (or picket line inducing a strike) was “against employer A,” or whether A’s involvement was simply a lawful by-product of strike action against B, the primary employer.\(^{11}\) In the last several years, partly as a result of the expansion of the statutory proscription to condemn boycott agreements unaccompanied by strike action\(^{12}\) and partly, perhaps, because of pressures


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

\((4)\) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (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—

\((B)\) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:

\(Provided,\) That nothing contained in this clause \((B)\) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

Prior to 1959, what is now the first portion of subparagraph \((B)\) was found in subparagraph \((A)\); accordingly, many of the pre-1959 cases refer to §8(b)(4)(A), while more recent references are to §8(b)(4)(B). To avoid confusion I have referred, except in quotations, simply to §8(b)(4); it will of course be understood that I am only encompassing thereby the secondary boycott provisions of that paragraph.


\(^{12}\) Section 8(e), 73 Stat. 543 (1959), 29 U.S.C. §158(e) (Supp. III, 1962), enacted in 1959, provides as follows:

\((e)\) 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 or agrees to cease or refrain 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, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: \(Provided,\) That nothing in this subsection 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: \(Provided further,\) That for the purposes of this subsection and section 8(b)(4)(B) the terms “any employer,” “any person engaged in commerce or in an industry affecting commerce,” and “any person” when used in relation to the terms “any other producer, processor, or manufacturer,” “any other employer,” or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated
generated by technological change, the Board has had to grapple with an increasing number of cases in which the question is whether the employer against whom the union is concededly striking, or with whom it has concededly made an agreement affecting business relations with another employer, is rightly to be characterized—to use the terms of the congressional example—as employer A (the neutral) or employer B (the primary). If a struck or contracting employer is properly deemed A, the secondary, it is typically because the union hopes to force B, by causing it to lose A’s business, to alter its conduct in a way desired by the union. Here A is a secondary because he is being used as a means of adding to the pressure generated against B. But suppose the union wants a company (XYZ, Inc.) to cease doing business with another employer, not as a tactic designed to exert pressure against the other, but simply because of the effect the cessation will have on the working conditions of XYZ employees; for example, it may want the work involved to remain available for the XYZ employees, whom it represents. There are innumerable ways in which a company’s employees are affected by the business relations which the employer has with other companies, and here, the argument runs, there is no secondary employer: the “boycott” is the entire aim of the strike or contract and not a tactic designed to pressure the “boycotted” company, and XYZ, if it fits into the congressional example at all, is not employer A but employer B—the employer “with whom the union has a dispute.” There is simply a two-party, primary dispute. To be sure, the other employer is affected by the loss of business, but that is merely a by-product of the settlement of the primary dispute rather than a means of settling it.

Yet the statutory text does not reflect this distinction. Section 8(b)(4)(B) prohibits a union to strike or to induce a strike, or otherwise to coerce or restrain an employer, when its object is “forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer or to cease doing business

process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

In addition, §8(b)(4)(A) was amended to add, as an object forbidden by §8(b)(4): “forcing or requiring any employer or self-employed person . . . . to enter into any agreement which is prohibited by section 8(e).” 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(A) (Supp. III, 1962).

The best-known formulation is probably Judge Learned Hand’s:
The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees’ demands.

International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), aff’d, 341 U.S. 694 (1951). (Emphasis added.)
with any other person,” and section 8(e) outlaws agreements between employers and unions “whereby such employer ceases or refrains or agrees to cease or refrain from dealing in any of the products of any other employer, or to cease doing business with any other person.” There is no reference here to a dispute with the boycotted employer, the end to which, in the prototype case put by the congressional report, the boycott is but a means. The only expressed elements of the statutory offense are the bringing of pressure against the “boycotting” employer (indeed, even this element is not present in the text of section 8(e)), and the cessation of business between the two employers. The omission of the element of a primary dispute, however, does not simply expand the statute’s thrust. It substitutes for a regulation seeking to protect neutrals from involvement in the labor disputes of others, a proscription of employee interference with a management decision to choose a particular manner of doing business—a limitation, in the name of management prerogative, on the scope of permitted collective bargaining, in place of a ban on secondary pressure. Yet we have been told from the beginning that these provisions express the congressional response to the problem of secondary boycotts, and indeed as to section 8(b)(4) (B) the Eighty-sixth Congress made this intention clear in specifying that provision’s inapplicability to “any primary strike or primary picketing.” Does a proper implementation of these provisions require that boycott agreements, and union pressure to secure and enforce them, stand condemned only on proof that the agreement is sought as a means of adding muscle to a dispute with one or more primary employers? In light of the answer to this question, what circumstances are to be regarded as sufficient proof of such a secondary aim? This article is addressed to these problems.

I. THE RELEVANCE AND CONTENT OF A PRIMARY-SECONDARY DICHOTOMY

That the problem is not alone a product of the recent enactment of section 8(e), but involves the scope of section 8(b)(4) (B) as well, can readily be demonstrated by the 1952 Sound Shingle case. Union shingle-weavers refused to work on shingles obtained from a Canadian manufacturer; the union president told the employer that the men would work only on shingles manufactured by the employer himself or by another United States company. Canadian manufacturers, the


union asserted, "were unfair in that the workers in the shingle mills there did not enjoy the same wages, hours, and working conditions as employees in the United States." Such boycott action might have one of several principal goals. First, the union might be seeking to induce the employer to manufacture his own shingles, thereby increasing the job opportunities of his employees whom the union represents. Second, and more likely in light of the union's alternative demand, the aim might be to increase the job opportunities of domestic employees generally, by keeping the source of supply within a geographic area. After all, the union represents employees of other American mills as well, and might indeed be a party to a multi-employer bargaining agreement. Third, the union might be concerned that the attractiveness of the Canadian suppliers, whose lower wage structure makes possible a lower price for shingles, will tend to channel an increasing amount of work away from American manufacturers. While the union might have viewed with equanimity any single decision to use a Canadian supplier, the reaction might well be different where the wage-price factor leads it to believe a trend is at work. Fourth, recognizing that it is only natural to succumb to temptation and that a more effective alternative to demanding simply that the employers resist would be to remove the temptation itself, the union might be seeking, by organizational efforts or otherwise, to cause the Canadian manufacturers to raise their wage level, and thereby the price of shingles. The attempt to force the American mill to refuse to buy Canadian shingles is, on this assumption, a means of bringing pressure to bear on the Canadian manufacturer in aid of that aim.

There was substantial evidence in the record that the actual goal of the boycott was that last stated above: an aid to a Canadian organizational campaign. The Board, however, did not rest its findings of a violation on this evidence, which would clearly warrant a characterization of the boycott as secondary. Rather the Board held that "the existence of an active dispute, over specific demands, between the Union and the producer of the goods under union interdict" was not a necessary element under the statute. Although "the usual type of secondary boycott" involved a dispute with one employer and secondary activity against another, the Board gave a somewhat more expansive descrip-

16 101 N.L.R.B. at 1169.
17 A union representative had said that "we have been working on them for quite some time to get their standard up to ours and until such time as we, we can get the mills to sign a contract with us and agree to the same wages, hours and working conditions we absolutely won't allow you to run them." According to the Examiner, another representative stated that "he had been trying to organize the Canadian mills . . . and . . . he was at the point of success in this campaign with one Canadian manufacturer who was eager to find a market for his product in California." Ibid.
tion of the kind of secondary boycott "Congress intended to reach." 18 Senator Taft had spoken in 1947 of product boycotts in which employers were "handling the product of the plant whose management . . . [they] do not like." 19 This statement helped to persuade the Board that, so long as the reason for the union's boycott was the non-union status of the boycotted employer, the boycott "constitutes a secondary boycott of the type proscribed by the statute." 20 Member Murdock vigorously dissented, arguing that section 8(b)(4) did not proscribe union action "when the only 'active' dispute in which it is involved is one with the employer for whom its members refuse to work." 21

Thus the Board's holding condemns the third as well as the fourth goal described above: where the motivation for its boycott is the "nonunion" or "substandard" status of the Canadian manufacturer, even though the union seeks nothing of the manufacturer, there is, in the Board's view, a secondary boycott. Perhaps the second goal would pass muster. Here the union, although going beyond a simple attempt to protect the jobs of the employees of the specific employer involved, is seeking to protect the jobs of a group of employees whom it represents. The union or nonunion character of the competing group is irrelevant, and on the stated rationale of Sound Shingle the boycott may be primary. More recent cases, however, seem to suggest for the statute a broader reach under which the second goal would be condemned as well. 22

The Sound Shingle case can serve as a prototype under sections 8(e) and amended 8(b)(4)(A) as well as 8(b)(4)(B). Section 8(e) would govern the legality of an agreement committing Sound Shingle not to purchase from Canadian manufacturers, while section 8(b)(4)(A) would permit a strike for such an agreement if the agreement in turn would be lawful, but not otherwise.

A. The Underlying Doctrinal Framework

Administrative and judicial approaches to the construction of section 8(b)(4) have ranged over a wide spectrum, from eager acceptance of the primary-secondary dichotomy and a broad interpretation of

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18 Id. at 1161.
19 93 Cong. Rec. 4199 (1947), in 2 1947 LEG. HIST. 1107-08.
20 101 N.L.R.B. at 1163. Reliance was also placed on the reference, in the Senate Report, to Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945), as involving a "type of secondary boycott" which would be unlawful under the statute. The Board noted: "an examination of the Allen Bradley case shows that Local No. 3 made no express or implied demands on the manufacturers whose products they refused to install." Id. at 1162.
21 Id. at 1164.
22 See pp. 1025-26 infra.
the concept of "primary" action,\textsuperscript{23} to a literal or near-literal reading of the act, virtually disregarding the dichotomy or, what is nearly the same thing, viewing the language of the statute as describing "secondary" activity.\textsuperscript{24} The amendment of the act in 1959, and the Supreme Court's \textit{General Electric} ruling two years later, have placed significant limits on this latter approach. The new proviso makes explicit that section 8(b)(4)(B) does not condemn "any primary strike or primary picketing," and the Supreme Court has said that to appeal "to neutral employees whose tasks aid the [primary] employer's everyday operations"\textsuperscript{25} is primary and not secondary. There has been no authoritative exposition of the underlying rationale of the primary-secondary dichotomy but only sets of "rules" (the "\textit{Moore Dry Dock} rules," the "\textit{General Electric} rules") whose essential terms are vague and metaphorical and whose range of applicability\textsuperscript{26} and specific content\textsuperscript{27} are still largely obscure. There is agreement on the verbal and doctrinal skeleton, however, and the silhouette, if still largely uniformed, is at least partially shaped by that agreement.\textsuperscript{28} In applying section 8(b)(4)(B) to cases within our present area of concern, the Board has not spoken simply of a "cease doing business" object, but has asked whether that object is primary or secondary. Disagreement, while meaningful, centers on the content to be given those terms.

Section 8(e) is newer than section 8(b)(4)(B), its origin and function are more obscure, and the Board's reaction to it has been more ambivalent. It contains no proviso comparable to section 8(b)(4)(B)'s expressly limiting its concern to secondary pressures. Indeed, even the element of pressure is not to be found in the statutory text. Agreement alone, however obtained, suffices to establish a violation. The provision was not yet law when the question first was

\textsuperscript{23} E.g., Seafarers Union v. NLRB, 265 F.2d 585 (D.C. Cir. 1959) (\textit{Salt Dome}); United Elec. Workers (Ryan Constr. Corp.), 85 N.L.R.B. 417 (1949).

\textsuperscript{24} E.g., Superior Derrick Corp. v. NLRB, 273 F.2d 891 (5th Cir.), cert. denied, 364 U.S. 816 (1960); Chauffeurs Union (McJunkin Corp.), 128 N.L.R.B. 522 (1960), \textit{rev'd as to this point per curiam}, 294 F.2d 261 (D.C. Cir. 1961).

\textsuperscript{25} \textit{Local 761, Int'l Union of Elec. Workers} v. NLRB, 366 U.S. 667, 681 (1961). At least, this is so at the primary employer's place of business. See United Steelworkers v. NLRB, 376 U.S. 492 (1964) (\textit{Carrier Corp.}).

\textsuperscript{26} E.g., United Steelworkers v. NLRB, \textit{supra} note 25 (applicability of \textit{General Electric} to picketing on land not owned by the primary employer); Brown Transp. Corp. v. NLRB, 334 F.2d 30 (5th Cir. 1964) (applicability of \textit{Moore Dry Dock} where union has alternative place to picket); International Bhd. of Elec. Workers (Plauche Elec., Inc.), 135 N.L.R.B. 250 (1962) (same).

\textsuperscript{27} \textit{Local 761, Int'l Union of Elec. Workers} (\textit{General Elec. Co.}), 138 N.L.R.B. 342, 345 (1962) (on remand) (requirement that secondary's operation be "unrelated to the normal operations" of the primary); Brown Transp. Corp. v. NLRB, \textit{supra} note 26, at 38-39 (\textit{Moore Dry Dock} does not permit deliberate appeals to secondary employees).

\textsuperscript{28} For a suggested approach to the resolution of existing areas of disagreement, see Lesnick, \textit{supra} note 11, at 1411-30.
raised whether it struck only at secondary pressures, or went beyond them. The fears of its opponents\(^{29}\) that it proscribed primary conduct were declared unwarranted by commentators writing soon after its enactment.\(^{30}\) At the same time more than one lawyer has pressed the contention—or at least raised the possibility not immediately to discount it—that section 8(e) does more than simply speak further to the problem of secondary boycotts.\(^{31}\)

The NLRB has hesitated to give the section a literal construction. In *Minnesota Milk Co.*,\(^{32}\) the Board rejected the view that Congress clearly intended as a matter of public policy . . . to outlaw not only traditional “hot cargo” clauses in contracts made by the Teamsters and other unions in the transportation industry, but beyond that, all similar clauses which directly or indirectly required an employer to cease doing business by contract, subcontract or in any other manner, with any other person.\(^{33}\)

and held that section 8(e) did not bar all contractual prohibitions on subcontracting. But the Board stopped short of accepting for these purposes the primary-secondary dichotomy:

With respect to contracts and agreements prohibiting an employer from the contracting or subcontracting out of work regularly performed by his employees we shall examine each such contract or agreement as it comes before us. The language used, the intent of the parties, and the scope of the restriction vary greatly in such agreements and each must meet scrutiny in terms of the statutory restraint on its own.\(^{34}\)

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\(^{29}\) See notes 36-37 infra.


\(^{32}\) Milk Drivers Union, 133 N.L.R.B. 1314 (1961), aff'd, 314 F.2d 761 (8th Cir. 1964).

\(^{33}\) Id. at 1316 (view of trial examiner).

\(^{34}\) Id. at 1316-17.
These vague criteria do not avowedly reflect a purpose to observe a line between primary and secondary action, and the content the Board has given its "flexible" test is partially but not entirely responsive to the view that section 8(e), like section 8(b)(4)(B), is concerned only with secondary boycotts. To date the Board seems to have been unwilling to confront the demon, either to vanquish or surrender to it; rather, it has pursued an erratic course, responsive to policies unstated and often difficult to discern, and of doubtful relevance to the statutory scheme. The first serious question surely ought to be: Does the section, despite its language, continue to reflect a concern with secondary action, or does it go beyond that, and if the latter, in what respects and for what purposes?

B. Section 8(e) and the Legitimacy of Primary Activity

There are two senses in which one might deem section 8(e) to reach primary conduct. First: unlike section 8(b)(4), which speaks only to inducement of work stoppages or other threats, restraint or coercion, the element of conscription of the neutral is omitted from section 8(e), and some congressmen argued that the act therefore would not simply free the secondary employer to boycott or not as he chose, but would compel him to continue to aid the primary. Second: like section 8(b)(4), the hot cargo provision contains no reference to the notion of the boycott as a tactical weapon designed to exert pressure on the boycotted company and it was argued that "boycotts" not aimed at the noncontracting employer at all, but solely designed to affect conditions within the "boycotting" company, would be proscribed. It should be noted that although both omissions might expand the statute to cover action that may be termed "primary," they describe significantly dif-

35 See pp. 1022-32 infra.
36 See, e.g., 105 Cong. Rec. 17882 (1959) (remarks of Senator Morse), in 2 1959 Leg. Hist. 1426:
If company B continues to do business with company A, it helps that company; if company B discontinues doing business with company A, it helps the union. But whatever company B does it unavoidably helps one side or the other. The union is forbidden to dragoon the assistance of company B by a strike or picketing to induce employees not to work. But surely the union must remain free to persuade company B to help it, exactly as company A is free to persuade company B to continue to do business with it. This is but the exercise of free speech on both sides of the controversy.
Mr. President, what we are asked to do is, in effect, to say that company B cannot take the union's side.
See id. at 16589-90 (Kennedy-Thompson memorandum), in 2 1959 Leg. Hist. 1707, 1708; Note, 45 Cornell L.Q. 724, 744 (1960).
fertent situations; the first is only indirectly relevant to our present problem. I believe, however, that as to neither aspect is the argument well-grounded.

The evidence is overwhelming that the central concern of the Eighty-sixth Congress over hot cargo agreements lay in their utility as a means of evading the existing statutory ban on secondary pressure. The original Eisenhower Administration bill would have expanded section 8(b)(4) to condemn coercion of the secondary employer even though accomplished by means other than the inducement of his employees to refuse to work, and to proscribe obtaining as well as enforcing a hot cargo agreement. The agreement itself was not attacked. The ultimate proscription of the hot cargo agreement represents an expansion of Senator Gore's proposal to forbid such contracts in the case of common carriers. Interestingly enough, the Gore amendment did reflect more than a desire to free trucking companies from pressure, but relied on a special consideration—the duty of a motor carrier to serve all customers—and was limited to the single industry in which that consideration was applicable. Senator Kennedy, in accepting the proposal and its rationale, noted that the measure was needed because of "the extraordinary economic power of the Teamsters Union."

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38 A strike to compel an employer to execute a hot cargo agreement was not a violation of §8(b)(4) where no present boycott object existed. See Operative Plasterers' Int'l Ass'n (Jones & Jones, Inc.), 149 N.L.R.B. No. 106 (Nov. 30, 1964); Northeastern Ind. Bldg. Trades Council (Centlivre Village Apartments), 148 N.L.R.B. No. 93 (Sept. 4, 1964) (§8(b)(4)(B) charge). The Sand Door case, Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958), while construing the 1947 Act to forbid the inducement of secondary refusals to work irrespective of the existence of a hot cargo agreement, held the agreement itself not a violation and made clear that secondary pressure not taking the form of an inducement of employees not to work was similarly outside the enacted prohibition. Several writers have emphasized the varieties of permitted pressure which might have induced employers to honor hot cargo commitments. E.g., Cox, supra note 30, at 272-73; Comments, 45 CORNELL L.Q. 724, 741-42 (1960); 62 MICH. L. REV. 1176, 1178 (1964).


40 The supporters of the Administration proposal in the Senate Labor Committee, dissenting from the failure of the Kennedy Bill to deal with the asserted inability of section 8(b)(4) to accomplish its purposes, made clear their view of the hot cargo problem as a product of their concern with secondary boycotts: "[W]hile there may be circumstances under which a 'hot cargo' contract is not a defense to otherwise unlawful conduct, generally speaking it does provide a large loophole in the ban on secondary boycotts." S. MIN. REP. No. 187 on S. 1555, 86th Cong., 1st Sess. 80 (1959) (remarks of Senators Goldwater and Dirksen), in 2 LEG. HIST. 1195.

41 105 CONG. REC. 6556 (1959), in 2 LEG. HIST. 1161. This rationale is not inconsistent with the traditional view. The restriction on carrier discretion (to deal or not deal with the primary) antedated the NLRA, and its purpose has nothing to do with labor relations. Cf. Galveston Truck Line Corp. v. Ada Motor Lines, Inc., 73 M.C.C. 617 (1957). The Gore proposal sought to prevent unions from achieving, whether by economic pressure or otherwise, an agreement to a course of conduct forbidden by law.

42 105 CONG. REC. 6668, in 2 LEG. HIST. 1195.
urged confining the proscription because of a reluctance to conclude that unions generally had no need of such a weapon. But the prohibition was expanded by the Landrum-Griffin substitute for the House Labor Committee's bill, on the stated ground that "if such contracts are bad in one segment of our economy, they are undesirable in all segments." In the conference, the existing regime was largely preserved for the building and construction unions, and secondary pressure in the garment industry was given the legislature's blessing; with these limitations, the Landrum-Griffin approach was enacted. At the same time, the original Administration proposal to expand section 8(b)(4)'s prohibition of coercion of the secondary employer was adopted. A far broader proposal, banning noncoercive "inducement" of secondary employers to boycott, never received serious consideration.

The Supreme Court has since indicated that a request to a secondary employer to boycott a specific company with whom there is a current primary dispute does not violate section 8(b)(4), and that the employer's voluntary compliance with the request is not proscribed by section 8(e).

So much must follow from the refusal of Congress to broaden section 8(b)(4) beyond coercive approaches to the secondary employer. Congress did not wholly abandon the notion of pressure on the neutral as the touchstone of illegality; rather it moved as far as it thought necessary to reach such pressures. The expansion of section 8(b)(4) makes this clear, and section 8(e), while perhaps not as necessary as it seemed to be while section 8(b)(4) was yet

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46 Local 20, Teamsters Union v. Morton, 377 U.S. 252, 259 & n.14 (1964) (dictum). While the acts complained of arose prior to 1959, the Court several times referred to the amendments made then (including the enactment of § 8(e)) and gave no hint that the case would be decided differently if it arose today. Cf. NLRB v. Servette, Inc., 377 U.S. 46, 49-54 (1964).

47 See Comment, 45 CORNELL L.Q. 724, 742 (1960):

The distinction between the inducement or encouragement of employees prohibited by Section 8(b)(4)(i) and the threatening, coercing or restraining of employers banned by Section 8(b)(4)(ii) was not mere inadvertence. It was designed to allow peaceful persuasion of employers. This being so, it is inconceivable that Congress would take the trouble to preserve labor's right to persuade in one section and then proceed to destroy this right in another section.

Contra, Farmer, supra note 31, at 335.
unamended,\textsuperscript{48} serves the same function: "[T]he freedom of choice for the employer contemplated by . . . [the Act]," said Mr. Justice Frankfurter in \textit{Sand Door}, "is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy."\textsuperscript{49} Even after the amendment of section 8(b)(4), a contractual undertaking to boycott cannot realistically be regarded as voluntarily made,\textsuperscript{50} and even if it were, any preexisting commitment would operate to constrain choice when a situation arose. Congress broadened the notion of coercion—perhaps dangerously far,\textsuperscript{51} although that is far less clear than was the prior act’s failure to reach much that was plainly coercive—but Congress did not transcend that notion. A contemporaneous decision to boycott unencumbered by prior commitment or present coercive pressure is still not within the statute.\textsuperscript{52}

It would be mistaken, then, to approach the immediate issue, the relevance of a primary dispute with the "boycotted" employer, conditioned by a conception of the 1959 amendments as significantly reorienting the thrust of the statute. The shift, though meaningful, was not more than a means of better fulfilling the aims of the original enactment. With respect to that central issue, 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. Only if, without prior contractual arrangement, a strike was undertaken against a specific contracting decision was section 8(b)(4) implicated.\textsuperscript{53} By regulating the contract itself (and via section 8(b)(4)(A) the strike to obtain a contract), section 8(e) for the first time made likely substantial litigation arising from the failure of the statute to refer to an underlying primary dispute with the "boycotted" employer.


\textsuperscript{49} Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 105 (1958).

\textsuperscript{50} In any practical sense, no agreement of this kind made in the context of the negotiation of a collective bargaining agreement, can be termed "voluntary." See, \textit{e.g.}, Rains, \textit{What the New Labor Law Means to Management}, 10 Lab. L.J. 753, 760-61 (1959).


\textsuperscript{52} The court's passing suggestion in \textit{Morton} that the explanation lies in the absence of "consideration" for the union's request to boycott, Local 20, Teamsters Union v. Morton, 377 U.S. 252, 259 n.14 (1964), must be regarded as an unfortunate, but doubtless short-lived, introduction of a wholly extraneous element.

\textsuperscript{53} \textit{E.g.}, the \textit{Sound Shingle} case, p. 1004 supra.
It seems entirely clear that the Eighty-sixth Congress did not expand the reach of the act in respect to the objects proscribed in the cessation-of-business formulation. The only grounds relied on for the contrary view are the assertedly sweeping language of section 8(e); the failure to amend the proposed legislation in response to fears expressed in Congress that primary boycotts would be proscribed; and (reinforcing the previous point) a negative implication drawn from the provisos adopted for the construction and garment industries.\(^54\) Singly or cumulatively these are slender reeds. The section's language is sweeping only in its application to all industry, as distinguished from the Senate bill's limitation to certificated motor carriers, and in its care to embrace "any contract or agreement, express or implied." But these elements are irrelevant to the basic question, the objects forbidden, and in that respect section 8(e) is neither broader nor narrower than the 1947 provisions. It simply repeats the language of section 8(b)(4), and there is no reason to conclude that it does not have the same reach as the earlier statute.\(^55\) Nor can a negative implication justly be found in the provisos; to so find would be to ignore the plain truth that they were designed to permit contractual arrangements which were secondary in character, and therefore undeniably within the proscription of the body of section 8(e).\(^56\)

As to the significance of the failure of the legislature to include, in the face of express reservations manifested in debate, a counterpart to the "primary strike" proviso in section 8(b)(4)(B), it might be

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\(^54\) See articles cited note 31 supra.

\(^55\) There are contexts in which the breadth of the quoted language is relevant. The NLRB has been commendably realistic in holding within the act agreements in which, though the employer does not in terms agree to a cessation of business, his continuing to carry on business relations entails consequences which he would ordinarily want to avoid. Examples are "termination" clauses, whereby the consequence of doing business with disfavored employers is that the union may elect to reopen the contract, free of inhibitions on its right to strike, Amalgamated Lithographers (Employing Lithographers), 130 N.L.R.B. 985, 988 (1961), modified, 309 F.2d 31 (9th Cir. 1962); cf. Essex County Dist. Council of Carpenters (The Associated Contractors, Inc.), 141 N.L.R.B. 858 (1963), enforcement denied, 332 F.2d 636 (3d Cir. 1964), and penalty clauses, which are reasonably found to operate as a financial deterrent, see UMW (National Bituminous Coal Wage Agreement), 148 N.L.R.B. No. 31 (Aug. 7, 1964), discussed at note 148 infra; Truck Drivers Union (Brown Transp. Corp.), 140 N.L.R.B. 1436, 1438-39 (1963), modified, 334 F.2d 539 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964); Orange Belt Dist. Council of Painters (Calhoun Dry Wall Co.), 139 N.L.R.B. 383 (1962), rev'd, 328 F.2d 534 (D.C. Cir. 1964). But cf. Administrative Ruling of the General Counsel, Case No. SR-1332, 48 L.R.R.M. 1210 (1961). See Comments, 62 Mich. L. Rev. 1176, 1193-96 (1964); 71 Yale L.J. 158, 160-67 (1961). Similarly, "discipline" clauses, whereby the employer commits himself in advance not to attempt to require his employees to handle "hot goods," fall within the act. Amalgamated Lithographers, supra.

sufficient simply to draw on the well-worn, yet generally sound, caution that "the fears and doubts of the opposition are no authoritative guide to the construction of legislation," and to note the Supreme Court's recent eagerness to invoke this principle in a closely related context. It must be said, however, that one looking objectively at the mood of Congress in late August 1959 and bearing in mind its traditional antipathy to the boycott might well conclude that had the specific question been put to the legislators, they would have rejected a narrowing proviso and embraced a more restrictive view. While the conference committee was deliberating, Senator Goldwater noted his willingness to make clear the legislature's intention not to prohibit contracts dealing with "farmed-out struck work, unsafe equipment, and matters of that nature." It seems perfectly plain that were the Senator to have considered restrictions motivated by objectives other than safety, he would have deemed them as of "that nature" only (if at all) in contexts where he regarded the union's aims vis-à-vis the "boycotting" employer as justifiable. Where a particular demand, even though concerned solely with relations with the contracting employer and therefore primary, might be thought to constitute "job aggression" or to encroach on a management prerogative, it is difficult to doubt that the Senator would have drawn the line. Nor is there substantially greater ground to question whether, in so doing, he would have been speaking for a majority of his colleagues. As a matter of the legislators' actual attitudes, then, the "fears and doubts of the opposition" may have been well founded.

Even so, I believe such a conclusion should not affect judicial or administrative construction of section 8(e). To ask only how Congress would have voted on a question had it been put ignores the fact that the question was not put. And the legislative process is as much a determination of what issues are not to go to a vote as a decision on

58 NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964) (construing the impact of the addition of clause (ii) to § 8(b)(4) on secondary consumer picketing).
60 Witness the antipathy of the Senate Labor Committee opponents of the Kennedy bill to a "picket line" proviso seeking to insure against trenching on primary conduct. H. REP. No. 741, 86th Cong., 1st Sess. 97 (dissenting views), in 1 1959 LEG. HIST. 855. In NLRB v. Fruit Packers, 377 U.S. 58 (1964) the Court's reluctance to credit the "fears and doubts of the opposition" was probably excessive. Cf. Comment, 63 MICH. L. REV. 143, 144-45 (1964); 12 U.C.L.A.L. REV. 238, 242-45 (1964).
61 105 CONG. REC. 16490, in 2 1959 LEG. HIST. 1360.
those which are voted upon. When a complex regulatory statute embodies "the result of conflict and compromise between strong contending forces and deeply held views," no major redefinition of the reach of legislative regulation of the boycott—meaningfully expansive yet of uncertain scope—should be inferred from beliefs alone, even legislators' beliefs. Unless those beliefs "have translated themselves into action," the status quo ante should be deemed still in force. The answer must therefore be sought not in any new approach thought to have been taken by the 1959 legislature but in the policies and purposes of the 1947 enactment.

C. Section 8(b)(4) and the Protection of Third Parties

Presumptively, the answer is simple indeed: a cessation of business is not secondary if those inducing it are not using the resulting loss of business as a means toward some end involving the "boycotted" employer. The notion of a dispute with the employer, giving the loss of business a tactical function, has been uniformly recognized as central to the concept of secondary pressure. To define a boycott as secondary whenever motivated by the nonunion status of the boycotted employer, as the Board did in Sound Shingle, is to introduce a vague and overly expansive criterion. Surely Member Murdock, putting the case of American workmen who strike to prevent their employer from using Czechoslovakian tools in his factory, correctly argued that such conduct should not be held to violate section 8(b)(4) merely because "the employees protested . . . that those products were 'nonunion' and

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63 Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 99 (1958) (Sand Door) (Frankfurter, J.).
64 HOLMES, SPEECHES 101 (1913). The Justice's words deserve a better fate than to have a single phrase plucked from its setting: "As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field."

65 See 71 YALE L.J. 158, 169-70 (1961). Such a conclusion is not at all inconsistent with expressed views of proponents of the Landrum-Griffin amendments. See S. REP. No. 187, 86th Cong., 1st Sess. 78 (1959) (remarks of Senators Goldwater and Dirksen), in 1 1959 LEG. HIST. 474: "The basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer." (Emphasis added.) The final report of the McClellan Committee spoke of a secondary boycott as "a boycott of one who is not a direct party to the principal dispute." S. REP. No. 1139, 86th Cong., 2d Sess. 2 (1960). (Emphasis added.)

67 See text at note 9 supra (the 80th Congress); note 65 supra (the 86th Congress); note 13 supra (L. Hand, J.).
68 Washington-Oregon Shingle Weavers Dist. Council, 101 N.L.R.B. 1159, 1163 (1952), enforced, 211 F.2d 149 (9th Cir. 1954); text at note 20 supra.
their use would undercut working conditions in the United States . . . ." 69 In such a case, the union wants nothing of the Czech producer. To quote Murdock again:

Of course, the Respondents' general argument in support of their demand [to use American- rather than Canadian-made shingles] was that the standards of Canadian workmen were inferior to those of American workmen and competition from this foreign source was therefore "unfair." This is the traditional position of those who advocate protection of American industry and the high standards of American workmen. 70

When Senator Taft advocated preventing boycotts of employers whom "the union does not like," 71 he assuredly did not mean to make everything turn on whether or not the union subjectively felt that the injured employer deserved the fate that the cessation of business brought him. The Senator's words take on their proper meaning when read in light of the central purpose of section 8(b) (4): the protection of third parties. The Board correctly concluded in Sound Shingle that there need not be "an active dispute, over specific demands." Where the union "does not like" the boycotted employer, and uses cessation of business as a means of expressing that disapproval, the boycott is secondary whether or not any demands (specific or general) are being made, because the boycotting employer's patronage is being used tactically to reach another, if only symbolically or in retaliation. 72 The Board's condemnation in the Tulse Hill litigation 73 of the Longshoremen's refusal to refer employees to a ship ceiling company on a British ship engaged in trade with Cuba, illustrates this notion. That the ILA's disapproval of the Tulse Hill's owners was on "political" rather than "labor" grounds is for present purposes immaterial; 74 in either event the ceiler was being pressured 75 in order to express union censure

69 101 N.L.R.B. at 1165.

70 Ibid.


72 Cf. the reference in the final report of the McClellan Committee to "an employer with whom the union has a labor dispute or whom the union considers and labels as being unfair to organized labor." S. Rep. No. 1139, 86th Cong., 2d Sess. 3 (1960). (Emphasis added.)


74 Whether first-amendment considerations are thereby implicated is another matter. See 332 F.2d at 999.

75 The court of appeals reversed partly because it disputed the finding of coercion, apparently taking the view that a refusal to refer employees is not within
of shipowners who "violated" its Cuban- Boycott policy. Where, however, there is no such tactical purpose in union disruption of business relations, the actual nonunion status of the "boycotted" employer or union reference to that status in describing him or in justifying the boycott, should not alone establish an object proscribed by the Act.76

Nor is a contrary result warranted by the reference in the Senate Report on the Taft bill to the Allen Bradley77 boycott, in which the union "made no express or implied demands on the manufacturers whose products they refused to install."78 The draftsman of the Report said that it would violate section 8(b)(4)

for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3.79

This statement should be read in light of the unusual factual setting of the Allen Bradley case. Since the jurisdiction of Local 3 was limited to New York City, the boycott was not designed to gain an advantage in a dispute with out-of-city manufacturers, many of whom were organized by the IBEW itself, or to give expression to the union's disapproval of them. But neither was the union's objective centered on the working conditions of those employed by the boycotting contractors. The aim was to create a sheltered market for the products of the New York City manufacturers, whom Local 3 had also organized and who competed with companies like Allen Bradley, for the ability of those manufacturers to sell in New York at an inflated price would enhance the employees' wage and employment opportunities. This is a secondary object because the cessation of business was being used tac-

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76 The Board's reasons for its conclusion in Tulse Hill—that the conduct did not involve "traditional primary activity," fell within "the literal ban" of §8(b)(4), and tended "to burden and obstruct commerce"—are unsatisfactory. The first is conclusory, assuming (as I do) that primary activity is lawful whether "traditional" or not, and the second is concededly insufficient. If the insufficiency of the third ground (except perhaps on a basis of Board jurisdiction) is not conceded, it should be.


78 See note 20 supra.

tically, with an eye to its effect on conditions elsewhere. The contractors were third parties with respect to the union's objective, even though that objective did not, as in the more typical case, relate to the boycotted employer.80

The legislative history which troubled the Board in Sound Shingle justly did so, for it forces one to redefine and somewhat expand the core concept of a primary dispute as the sine qua non of a secondary boycott. But it does not warrant either discarding that concept, or transmuting it into a concept whose scope is not responsive to the reasonably determinate underlying principle of protecting neutrals.81 By looking at the position of the boycotting employer in the union's overall aim, and asking whether his patronage is being employed for its effect elsewhere—(a) in order to affect the outcome of an actual dispute with the boycotted employer; (b) in order to give expression, symbolically or in reprisal, to disapproval of the boycotted employer; or (c) in order to aid the employees of a competitor of the boycotted employer—one can determine whether or not the boycotting employer is a third party legislatively deemed entitled to a free choice. If approached realistically, with a greater fidelity to the underlying aim of the statute than to the invocation of abstract and conclusory phrases, application of the suggested standard to litigated facts should not prove unduly elusive.82

80 Member Murdock's hypothetical boycott of a Czech producer, text at notes 69-70 supra, might properly be found secondary on this basis. If, as will often be the case, the aim of a "buy America" boycott is to create or preserve job opportunities not for the boycotting employer's own employees but for other American workers, the case seems substantially like Allen Bradley. (Perhaps, however, the legislature would more readily tolerate secondary pressure in support of a "buy America" campaign than in response to a threat to union standards coming from domestic competitors). See 105 Cong. Rec. 17899 (1959) (removal of Senators Goldwater and Kennedy), in 2 1959 Leg. Hist. 1432. The application of a primary-secondary dichotomy is more difficult when the work is being sought for one or more of a group of employers which includes the boycotting employer. See pp. 1025-28 infra.


82 An illustration of a difficult issue, in my view, is the insistence by employees, as a matter of standing policy, that the clothing and individual tools they are given for use on the job be "union-made." In such a factual setting, the boycott is not in fact aimed specifically at the particular nonunion company whose product the employer might have bought. And it is difficult to say that there is simply a symbolic manifestation of disapproval where the matter so intimately touches the employees' own work. The case seems meaningfully different to me than, for example, refusal to work on nonunion goods. Similarly, in Tidse Hill the ships on which the employees would not work were not Cuban ships, but merely those which stopped at a Cuban port. Cf. I.P.C. Distributors, Inc. v. Chicago Moving Picture Mach. Operators Union, 132 F. Supp. 294, 299 (N.D. Ill. 1955) (projectionists' refusal to work at showing of allegedly Communist-sponsored film). But I recognize the elusiveness of such distinctions; cf. NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 692-93 (1951) (Douglas, J., dissenting): "The employment of union and nonunion men on the same job is a basic protest in trade union history. That was the protest here. . . . All the union asked was that union men not be compelled to work alongside nonunion men on the same job."
II. THE PATTERNS OF LITIGATION

A. Restrictions Protecting Job Opportunities

When faced in 1960 with the argument that union demands affecting the employer's business relations with other employers were simply attempts to hold on to bargaining-unit job opportunities and were therefore primary and lawful, the National Labor Relations Board's initial reaction was decidedly cold. Food Employers Council\(^83\) involved a long-standing objection by a union representing grocery clerks to their employers' practice of permitting employees of certain suppliers to make deliveries direct to the selling floor. The arrangement was apparently employed to facilitate merchandising but obviously cut into the work of clerks employed by the stores. The union claimed a breach of agreement with the grocers and induced a work stoppage. Recognizing that there was a dispute with the stores, the Board nonetheless held the inducement unlawful:

> It is just as true, however, that the dispute between the clerks and the council was over the right of the markets to permit employees of other employers to complete their deliveries in the selling areas. By engaging in work stoppages to enforce the agreement, Local 770 was attempting to ban from the market premises all driver-salesmen whom it did not represent. Its object, in effect, was to interfere with the practice of the markets of buying from the distributors on a delivered basis. Whether Local 770 was engaged in a controversy with the distributors which was as active or as real as its controversy with the markets is immaterial. The distributors were performing a service, in connection with their products, which Local 770 considered objectionable and which it hampered. This is a type of secondary boycott, referred to as a product or service boycott, which the Board uniformly proscribes.\(^84\)

This broad rationale, seemingly regarding irrelevant the reason the union "considered objectionable" the use of suppliers' employees on the selling floor, troubled the court of appeals. In a thoughtful and influential opinion, Judge Prettyman asked the Board to rethink the problem. The product-boycott analogy did not persuade the court: "These employees are not refusing to handle goods; they want to handle them; at least one emphatic phase of their dispute with the market is that they . . . are not permitted to handle them." \(^85\) The


\(^{84}\) 127 N.L.R.B. at 1524.

\(^{85}\) 296 F.2d at 372.
court doubted that “every change” in the employers’ method of doing business constituted a cessation of business within section 8(b)(4)(B). Probing further Judge Prettyman noted that in the typical product-boycott case there was a dispute with the supplier of the boycotted product, and asked whether the Board’s position would bar a strike to enforce a contractual “no-subcontracting” provision seeking to protect bargaining-unit work. He suggested that such a strike would be permissible, but asked the Board to consider the matter further. The clause in the case at bar, the court reasoned, might well be deemed secondary because the portion of it restricting subcontracting of work not performed on the premises contained an exception for unionized contractors. “[T]he work was being claimed for members of the Union in general and not merely for those employed by the markets.”

In adhering to its order to cease and desist on remand, the NLRB somewhat narrowed its rationale. First, the Board declared it not determinative that a union’s “ultimate objective” is not to sever but to increase business relations between the primary and secondary employers, thereby increasing job opportunities, where the “immediate objective” of a refusal to work is cessation of business, “as a means of exerting pressure to achieve the ultimate object.” Such emphasis on the tactical nature of the cessation of business illuminates the problem, but the essential question remains: “exerting pressure” against

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86 Id. at 370.
87 145 N.L.R.B. at 309.

Where the boycotting employer’s patronage is being used tactically, there is a “cease doing business” object even though that aim is only “conditional,” as where grocery clerks seek to force their employer to stop buying from a supplier unless the latter recognizes the union. See Local 47, Int'l Bhd. of Teamsters (McCann Constr. Co., Inc.), 112 N.L.R.B. 923, 925 n.2 (1955), aff'd, 234 F.2d 296 (5th Cir. 1956). A similar result follows though the intended cessation is “partial” rather than “total”; so long as the disruption of business relations would be sufficiently disadvantageous or injurious to the boycotted employer to exert substantial pressure on him, the conduct is of the type contemplated by the act and should be treated as such. Union attempts to narrow the reach of §8(e) by reliance on its reference to “cease doing business,” rather than “cease or refrain,” have been uniformly rejected. For a good discussion, see NLRB v. Joint Council of Teamsters, 338 F.2d 23, 26-27 (9th Cir. 1964).

Where, as is ordinarily the case, the secondary employer carries on business with the primary through use of his own employees, a cease-doing-business object can be inferred simply from the inducement of secondary employees to refuse to work. Where the secondary uses primary employees, as in some construction projects, the inference of the prohibited object merely from the strike of secondary employees is more difficult. See Local 825, Int'l Union of Operating Eng'rs (Nichols Elec. Co.), 138 N.L.R.B. 540, 543-44 (1962), enforcement denied, 326 F.2d 218 (3d Cir. 1964). Cf. Douds v. International Longshoremen's Ass'n, 224 F.2d 455, 459 (2d Cir. 1955), where the court's unwillingness to see a tactical aim in the disruption of the secondary employer's business led it to refuse to infer a cease-doing-business object from the refusal to work.

There are some cases in which there clearly seems to be pressure on a neutral to aid in the settlement of a primary dispute, but in which the aim is to compel the neutral to take action other than to cease doing business with the primary. In National Maritime Union (Delta S.S. Lines, Inc.), 147 N.L.R.B. No. 147 (June 30, 1964), enforced, 342 F.2d 536 (2d Cir. 1965), the NMU picketed neutral employers in New Orleans in an attempt to force them to persuade MEBA, a rival union, to stop picketing an NMU-
whom? Was the Board prepared to condemn the pressure even if it is directed only against the retailer, seeking to obtain from him more work opportunities for his employees? The Board's answer to this crucial question was equivocal. Relying on the contract provision analyzed by Judge Prettyman and agreeing with him that the clause was directed at nonunion suppliers, the Board inferred that the union's object in striking was similarly secondary. However, the object of the contract was not directly in issue, and the specific strike in question might well have been designed simply to obtain the work even if the broad contract clause went further. Moreover, in examining the union's "ultimate object," the Board continued to speak of a cessation of business as occasion for a finding of illegality. Such a concern is inconsistent with a view of the primary-secondary dichotomy which organized ship in Philadelphia. That the primary dispute was with a rival union rather than an employer should present no substantial barrier to invocation of the act, since a labor organization is apparently a "person" within the meaning of § 8(b)(4)(B). See § 2(1), 49 Stat. 450 (1935), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1959). One might argue, however, that the neutrals were not being asked to "cease doing business" with the rival. Yet regardless of the means by which the neutral employers might have been able to influence the rival union, they were being subjected to secondary pressure not significantly different from that involved in the more typical case described by the statutory language. But cf. Local 1976, United Bld. of Carpenters v. NLRB, 357 U.S. 93, 98 (1958) (Sand Door); Note, 71 YALE L.J. 158, 169 (1961) (on the effect of the narrowness of the statute's terms). The Board, seizing on the fact that several secondary employers were involved, found it possible to avoid the problem by holding that the NMU intended that they cease doing business with each other. Perhaps because of this finding the union on review dropped the "cease doing business" issue and emphasized the absence of a primary "employer." The court of appeals relied on the evident applicability of the legislative purpose to reject the union's position. See also Orange Belt Dist. Council of Painters (Calhoun Drywall Co.), 139 N.L.R.B. 383 (1962), remanded, 328 F.2d 534 (D.C. Cir. 1964), involving a contract clause making a general contractor personally liable for fringe benefits not paid by a subcontractor to his employees. The Board did not pass on the lawfulness of the clause under § 8(e).

89 See International Longshoremen's Ass'n (Board of Harbor Commrs), 137 N.L.R.B. 1178, 1192 (1962) (Member Brown, dissenting), modified, 331 F.2d 712 (3d Cir. 1964).

90 One possible object (i.e., one way the strike could have been settled) was to force the retailers to "change the terms of purchase so that the 'rack-jobbers' would stop selling in-store services as well as merchandise, the in-store work being thereafter performed by the store's own employees . . . ." 145 N.L.R.B. at 310. The Board called this a partial cessation of business, and seemed to regard it as a proscribed object under § 8(b) (4). Id. at 310-11.

See also Highway Truck Drivers (E. A. Gallagher & Sons), 131 N.L.R.B. 925 (1961), enforced, 302 F.2d 897 (D.C. Cir. 1962). A union contract demand would have barred Gallagher from using independent owner-operators to make over-the-road deliveries to local consignees unless the trucks were first brought in to Gallagher's terminal, where either the load would be transferred to one of Gallagher's own trucks or the independent would hire a local driver to make the delivery. This latter alternative, involving the independent's employment policies, provided a narrow ground for deeming the proposed contract a violation of § 8(e). In so holding, however, the Board relied simply on the finding that a "partial cessation" of business with the independents was involved, and that the most likely effect of the contract—given the economic infeasibility of compliance with either of the two conditions—would be that Gallagher would stop using independents for local deliveries. Thus, the Board concluded, the implied agreement sought was within the ban of § 8(e).
(as other parts of the opinion recognize) makes cessation of business by the retailer relevant only as a tactical object, aimed at another.91

Further experience has yielded a clearer idea of the line the Board has drawn in this area, but has provided very little attempted justification of that line. A majority of the Board has held that attempts to preserve bargaining-unit work are lawful,92 but has confined this principle within its literal formulation. If the union seeks work not formerly done by the employees involved,93 or if the employee group to be protected is broader than the "established" bargaining unit involved,94 the attempt is proscribed. The definition of "work regularly performed" has involved the Board in nice distinctions which seem essentially semantic. For example, a union representing drivers employed by a wholesale dairy had an agreement providing that "no customer who normally receives milk or dairy products via deliveries by drivers of the Employer will be permitted to pick up products at the Employer's docks or premises whenever that may possibly result in loss of employment of drivers or a reduction in their hours of work."95 The union was permitted to induce a refusal to work in order to require the employer to apply the agreement to a newly opened retailer in the area. The Board rejected the General Counsel's

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91 The Board noted on remand in Food Employers Council that "a strike may have a number of objects. Some may be ultimate, others alternative, conditional or immediate." 145 N.L.R.B. at 308. The act is violated, the Board went on to hold, where the "immediate" object is the cessation of business, and is used tactically, even though the ultimate object envisages restored or enhanced business relations between the two employers. See note 88 supra. Where, however, it is the union's "ultimate" object that the struck employer use his own employees to do certain work and thereby wholly or partially cease doing business with another, the boycott is not secondary at all, since it is not sought for its effect elsewhere. See pp. 1015-18 supra. Indeed, this is so even if the "immediate" objective is cessation of business, for in such a case the cessation is not tactical. The boycotted employer may be hurt, but that is not the union's aim. See note 133 infra. The statute's reference to "an object" does not imply any rejection of this position; Congress simply did not speak to the tactical aspect of the secondary boycott in the language of the act. Cf. pp. 1034-35 infra.


94 Raymond O. Lewis (National Bituminous Coal Wage Agreement), 148 N.L.R.B. No. 31 (Aug. 7, 1964); Milk Drivers Union (Pure Milk Ass'n), 141 N.L.R.B. 1237 (1963), enforced, 335 F.2d 326 (7th Cir. 1964).

attempt to limit permitted job-protection efforts to existing customers rather describing the drivers’ work customarily performed in terms of the geographic area in which deliveries were made. In the Wilson case, however, the Board reacted somewhat differently. The union there represented Chicago drivers employed by meat packers who until 1955 were located in Chicago. As packers began to move their plants from the Chicago area, the local drivers who had formerly made deliveries to local consignees lost this work to over-the-road drivers at the new locations. The union’s effort to obtain a contractual provision committing the packers to use local drivers for local deliveries was held unlawful. The result was based on the Board’s decision to formulate the concept of work customarily performed as deliveries originating in the Chicago area rather than made there. Since the problem arose only when the packers moved from Chicago, the dissenters objected that such a description was “meaningless.” Local drivers had always done local deliveries for the packers, and to the dissenters the challenged clause only sought to restore this state of affairs despite the change in the employers’ location.

The essential question is of course the criteria for choosing one formulation of the concept of “traditional unit work” rather than another. The Board has to date revealed little regarding those criteria and virtually nothing regarding the relevance of the criteria chosen to the statutory purposes. The majority in Wilson was apparently disturbed by the disruptive effects of the union’s demand on the relations between the packers and the over-the-road drivers. It emphasized that the packers already had contractual arrangements dating back to 1955 guaranteeing the carriers a certain tonnage each year and that the employment opportunities of the over-the-road drivers depended on these arrangements. Since the union raised no objection at the time of the actual relocation, the Board was apparently unwilling to permit the employees to recapture their lost work “by infringement upon the rights of other employees in other units of the same or different em-

96 Milk Wagon Drivers, supra note 95, at 448-49. See also United Dairy Workers (Arthur Elias), 146 N.L.R.B. No. 88 (April 8, 1964).

97 Supra note 93.

98 The clause read:

[A]ll meat and meat products which originate with or are processed or sold by the employer and are destined to be sold or consigned to customers or consignees located within the city limits of Chicago shall be delivered to such customers or consignees from the Chicago city dock or other Chicago distribution or terminal facility of the employer within the Chicago city limits by employees covered by this agreement.

143 N.L.R.B. at 1227.
ployers." In Precon,100 where the issue also involved jurisdiction over deliveries to customers, a similar rationale was employed by the trial examiner, and adopted by the Board. Precon had long sold materials to Consolidated Edison, which ordinarily picked them up in its own trucks. Precon drivers, however, had delivered merchandise sold to one of Consolidated's subsidiaries. When the subsidiary merged with the parent, Consolidated Edison drivers began picking up the goods formerly delivered by Precon's personnel. In renewal negotiations, the union sought a contract clause requiring Precon to use its drivers, when available, for all deliveries. Thus the union was seeking not only to recapture the recently lost work, but to expand its job opportunities. A majority of the Board held that section 8(b)(4) barred a strike over this demand. The trial examiner considered relevant "equitable and practical considerations" between Consolidated Edison and Precon drivers, emphasizing the economic importance to Consolidated Edison of using its own trucks for the purpose involved, and noting that it had always given some delivery work to Precon's drivers, somewhat more recently than formerly. This offset to some extent the loss of work occasioned by the merger. The union, in this view, was not primarily seeking "to hold on to what it has but to prevent Con Edison and its drivers from continuing to work as they have historically." The work was "traditionally and equitably" that of the customers' drivers. Finally, the examiner emphasized the "equitable and practical difference" in his mind between "striving to maintain conditions in a bargaining unit as they are for the life of the agreement and in seeking to disrupt an existing arrangement determined by existing contracts of reasonable duration." 101

In neither Wilson nor Precon was there any discussion of the relevance of the considerations described above to the primary or secondary quality of the union's action, or the purposes of sections 8(b)(4) and 8(e). These are not work assignment disputes under section 10(k), as the examiner in Precon recognized.102 And while as an economic matter they may well involve the same problems as give rise to section 10(k) proceedings, one must ask whether the secondary boycott and hot cargo provisions of the act embody similar considerations. Does

99 Id. at 1230. However, the Board disclaimed any intention "to decide whether the interest of the packers 'outweighs' the interest of the Union in this case. It is sufficient that the work sought by the Union . . . was not necessarily work within the scope of the existing Chicago unit." Ibid. The conclusory nature of the Board's characterization of "work within" the existing unit justifies some skepticism toward this disclaimer.

100 Local 282, Int'l Bhd. of Teamsters (Precon Trucking Corp.), 139 N.L.R.B. 1077 (1962).

101 Id. at 1088; see Comment, 62 Mich. L. Rev. 1176, 1189 (1964).

102 See 139 N.L.R.B. at 1088.
JOB SECURITY AND SECONDARY BOYCOTTS

Section 8(b)(4)(B) prohibit primary strikes attempting to get work to which the employees are not "equitably" entitled? There has, of course, always been a strong antipathy in some segments of the community to union "job aggression" or "featherbedding," or to interference with a felt management prerogative to assign work and bestow patronage as it wishes. But, as we have seen, sections 8(b)(4)(B) and 8(e) did not enact these views into law. To the extent such views find partial expression in other provisions of the act, the limitations on the scope of those provisions must be respected. To seek, in the secondary-boycott provisions of the act, an escape from those limitations is seriously to alter the complex set of balances enacted by the legislature. It is only beliefs "that have translated themselves into action" that are to be enforced by the processes of the NLRB.

The second limitation the Board has imposed insists that protective efforts involve bargaining-unit employees only, as distinguished from "members of the union in general." This idea originated to contrast job protection pressures, thought to be primary, from boycotts.

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105 Several well-known recent reversals of Board doctrines have emphasized this problem. Local 357, Int'l Bhd. of Teamsters v. NLRB, 356 U.S. 667 (1961), or (perhaps) are inconsistent with duties arising out of the union representative status; Miranda Fuel Co., Inc., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

107 The court of appeals reversed the Wilson decision, text at notes 97-99 supra, holding that "activity and agreement which directly protect fairly claimable jobs are primary under the Act." Meat & Highway Drivers v. NLRB, 335 F.2d 709, 713 (D.C. Cir. 1965) (Wright, J.) (Emphasis added.) Work is "fairly claimable" if "of a type which the men in the bargaining unit have the skills and experience to do," even though they have not traditionally done it. Id. at 714.
used in aid of organizational attempts, which are clearly secondary.\textsuperscript{108} In one sense, however, permitting job protection within the bargaining unit may immunize truly secondary pressure, where the unit is multi-employer in scope. Its purpose here may well be to exert pressure against unorganized employers to join the unit in order to qualify for subcontracts.\textsuperscript{109} But in other contexts, the limitation operates to prescribe conduct arguably primary in character. \textit{Pure Milk},\textsuperscript{110} for example, involved a dispute with a Chicago dairy processor who purchased milk from a farmers' association in Wisconsin. Originally the shipments were f.o.b. Wisconsin, and Wanzer, the processor, hired local drivers represented by Local 753 to transport the milk to its Chicago plant.\textsuperscript{111} When Wanzer obtained the farmers' agreement to deliver to the Chicago plant, the association contracted with a Wisconsin carrier to do the hauling. Local 753's jurisdiction was confined to the Chicago area, while the drivers of the Wisconsin carrier were represented by Local 43. The union protested to Wanzer, invoking a claimed contractual right to the work. The evidence made clear that the union did not care whether the particular employees employed by Wanzer kept the work, so long as Local 753 people had it; thus the Board found the strike in support of this demand in violation of section 8(b)(4). It was plain, however, that while the union was seeking the work for "members of the union in general," it was not attempting to "boycott" the Wisconsin carrier because of an organizational or any other dispute with it. This demand was purely a geographic restriction, designed to be sure to save job opportunities for drivers in the area as a whole, but the Board has not faced explicitly the question whether such a demand is not to be distinguished under the statute from attempts to use the boycott as an aid to a dispute with the boycotted employer.\textsuperscript{112}

\textsuperscript{108} See the discussion of Judge Prettyman's opinion in \textit{Food Employers Council}, text at note 86 \textit{supra}.

\textsuperscript{109} NLRB v. Joint Council of Teamsters, 338 F.2d 23, 28 (9th Cir. 1964); \textit{cf.} Bakery Salesmen's Local 227 (Associated Grocers, Inc.), 137 N.L.R.B. 851, 857 (1962). The Board seems to recognize as much; see Raymond O. Lewis (National Bituminous Coal Wage Agreement), 148 N.L.R.B. No. 31 (Aug. 7, 1964).

\textsuperscript{110} Milk Drivers' Union, 141 N.L.R.B. 1237 (1963), \textit{enforced}, 335 F.2d 326 (7th Cir. 1964).

\textsuperscript{111} Wanzer arranged with a carrier to do the delivery work, and the carrier actually hired the Local 753 people. However, the Trial Examiner ruled that Wanzer and the carrier were co-employers of the drivers, 141 N.L.R.B. at 1253-54, and the Board did not upset this finding, holding that on its view of the case the result would not be affected. \textit{Id.} at 1241. The discussion in the text therefore assumes that the drivers were employees of Wanzer.

\textsuperscript{112} To say, as did the court of appeals in enforcing the Board's order, that the union sought a disruption of the existing business arrangement "unless Quality's [the Wisconsin carrier's] drivers were members of Local 753," 335 F.2d at 328, is misleading in a context where there is no desire on the part of Local 753 to organize any Wisconsin carrier. \textit{Cf.} Local 282, Int'l Bhd. of Teamsters (U.S. Trucking Corp.), 146 N.L.R.B. No. 112 (1964), where the union was seeking to replace a rival as the representative of the boycotted carrier's employees.
Whether it should be so distinguished is not an easy question. I have argued that the core of the Allen Bradley boycott was secondary and not primary, despite the absence of a dispute with out-of-city manufacturers, because Local 3 was using the termination of the contractors' business with those manufacturers, not to affect working conditions of the contractors' employees, but to aid the employees of New York manufacturers; as to that aim the contractors pressured to "boycott" companies like Allen Bradley were third parties. That reasoning is not wholly inapposite in Pure Milk, where Wanzer was being pressured to provide work opportunities for employees of any Chicago carrier. Nevertheless there are differences which, at the least, command attention. The employee group sought to be protected included Wanzer's own employees although it was not limited to them. Moreover, partly by reason of his status as employer or potential employer, Wanzer's relation to the other potential employers (whose employees the union was seeking to benefit) was not simply vertical, as in Allen Bradley, but horizontal as well. This is relevant to the question of his involvement in the union's concern over general employment opportunities, in a way that makes meaningful resort to the Board's notion of the scope of the "established bargaining unit." If, for example, Wanzer and the carriers in Local 753's jurisdiction had bargained on a multi-employer basis, he could hardly be regarded as a third party with respect to the union's aims merely because they sought to benefit employees of other employers in the unit. Where there is no multi-employer unit, however, the problem is more difficult. As a substantive matter, the issue should turn on whether the union has any substantial expectation that, were the boycott demand to be accepted, the work would be given to the employees of the boycotting employer. If there is no such expectation, the employer's connection with the issue is sufficiently attenuated that he should not lose the protection afforded third parties merely because his employees are nominally included in a group some of whose members are sought to be benefited. There is, however, obvious difficulty in determining the presence or absence of such an expectation through litigation. At the same time, the question is one to which the parties will often know the answer, and once the materiality of the issue is made clear to them, it is not unlikely that they will respond with evidence which will mitigate the elusiveness of the question. The Board can take advan-

113 See pp. 1017-18 supra.

114 Query the significance of bargaining which is de facto multi-employer in scope, but without an established unit so broad. There is a strong temptation to focus on the realities of the actual bargaining pattern rather than the often fortuitous factor of a formal multi-employer unit. However, to do so would introduce an often elusive factual element.
tage of whatever aid is forthcoming in a particular case, while providing a workable means of resolving those disputes where the fact in question simply cannot be determined with reasonable confidence, by adopting a rebuttable presumption that the requisite reasonable expectation exists where the boycotting employer's own employees had formerly done the work in question, but that a contrary presumption arises on a showing that they had not.\footnote{115}

B. Objections to Substandard Contractors

There has been substantial controversy over the lawfulness of union attempts to limit subcontracting to employers meeting the labor standards of the unionized companies, whether or not they actually recognize a union. To date, a majority of the Board has uniformly condemned such restrictive provisions. At first, the Board was content to rely on the observation that the clause could not be defended as a job-preservation provision because it "dictates to the Employer those persons with whom he shall be permitted to do business, rather than obliging him to refrain from contracting out work previously performed by employees in the bargaining unit."\footnote{116} This reasoning fails to explain how union "dictation" provided the element of secondary activity, or was otherwise related to the intended thrust of section 8(e),\footnote{117} but soon thereafter the Board did attempt an explanation.

\footnote{115}{The weakness of a wooden application of any "established bargaining unit" requirement is well-illustrated by the unusual fact pattern in International Ass'n of Heat Insulators (Armstrong Contracting & Supply Corp.), 148 N.L.R.B. No. 86 (Sept 4, 1964). Armstrong was a member of a multi-employer association whose contract with Local 22 prohibited subcontracting of certain precutting work and also provided that employers, when operating in geographical areas outside the local's jurisdiction, would observe conditions provided for in contracts between the sister local having jurisdiction over the area and employers normally operating there. Armstrong hired members of Local 113 to install precut asbestos fittings on a job within that union's jurisdiction. They refused to do so until assured that the precutting had been done by Armstrong's employees represented by Local 22. It is plain that Local 113, which was not in the same bargaining unit as its sister local, was not seeking to protect "bargaining unit" work. However, the inference that Local 113 was therefore seeking to deprive nonunion suppliers of work, drawn by Member Leedom in dissent, seems unwarranted. The locals represented men with similar skills, and were geographically contiguous; their employers often operated outside their "home" jurisdiction. It is quite credible to think that each local would agree to protect the others' work opportunities, since it could do so much more directly and with less cost than could the affected local, which would not be present at the job in dispute. Since a sympathetic boycott by one employee group in support of another's demands is not secondary if both are employed by the same employer, the conduct of Local 113 was primary and lawful. The Board reached this result, without upsetting its "established bargaining unit" requirement, through the convenient fiction that Local 113 was acting as the agent or third-party beneficiary of Local 22.}

\footnote{116}{Truck Drivers Local 413 (The Patton Warehouse, Inc.), 140 N.L.R.B. 1474 (1963), enforcement denied as to this issue, 334 F.2d 539 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964). The Board observed that "standards" clauses were "even more restrictive [than union-preference clauses] since their prohibition against subcontracting to substandard contractors] is absolute." Id. at 1486. See also Local 585, Bhd. of Painters (Falstaff Brewing Corp.), 144 N.L.R.B. 100 (1963).}

\footnote{117}{Cf. p. 1025 supra.}
In the *Wilson* case,\textsuperscript{118} the clause in question provided that, in the event that the employer did not have sufficient equipment on hand, “it may contract with any cartage company whose truckdrivers enjoy the same or greater wages and other benefits as provided in this agreement for the making of such deliveries.” In holding this provision secondary, the Board emphasized:

The main thrust of the clause is regulation and establishment of approved conditions for employees of another employer rather than with the definition and preservation, for the exclusive performance of employees in the bargaining unit, of work that traditionally has been performed in that unit. The only “dispute” between the Union and the packers is that the packers are subcontracting their overflow cartage to local cartage companies whom the Union does not approve, and it is well settled that when a union’s sole dispute is not with the contracting employer subject to its pressure, but with an employer with whom he is doing business, the conduct is secondary . . . \textsuperscript{119}

The Board made more explicit the sense in which it spoke of contractors “whom the Union does not approve” in its opinion striking down the 1958 standards provision of the National Bituminous Coal Wage Agreement.\textsuperscript{120} There the union argued that no violation of section 8(e) could be established unless it was found that the boycott was in aid of a union attempt to organize the employees of the affected subcontractors, or otherwise to affect their working conditions. The Board rejected this argument, holding that a boycott could be secondary, rather than primary, even though there was no “active dispute” with the boycotted employer or employers; “it is sufficient that the union objects to the use of the disfavored employer’s products or services because of its failure to maintain conditions of work approved by the Union.”\textsuperscript{121} This does not seem sufficient. As I have argued above,\textsuperscript{122} in the absence of an underlying dispute a boycott with a contractor “whom the union does not approve” is secondary only if in

\textsuperscript{118} *Meat & Highway Drivers* (Wilson & Co.), 143 N.L.R.B. 1221 (1963), modified, 335 F.2d 709 (D.C. Cir. 1964).

\textsuperscript{119} 143 N.L.R.B. at 1230-31.

\textsuperscript{120} Raymond O. Lewis (National Bituminous Coal Wage Agreement), 144 N.L.R.B. 228, 232 (1963). The “Protective Wage Clause” provided: “[T]he Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.”

\textsuperscript{121} Id. at 235. See also McLeod v. AFTRA, 234 F. Supp. 832 (S.D.N.Y. 1964); Kennedy v. Local 683, Int'l Bhd. of Teamsters, 55 L.R.R.M. 2389, 49 CCH Lab. Cas. ¶ 18,947 (S.D. Cal. 1964).

\textsuperscript{122} See pp. 1016-17 *supra.*
fact designed as a means of expressing such disapproval. Otherwise, the cessation of business is not being used for its effect elsewhere, and the contracting employer is not in the position of a third party.\textsuperscript{123}

Although the majority in \textit{Wilson} did not find it necessary to make any individual assertions of fact, Chairman McCulloch, concurring, emphasized that he found an adequate factual basis in the case for inferring that the union did wish to affect working conditions of the subcontractor. He noted that the clause was limited to "overflow" work, which would be subcontracted in any event, and accordingly reasoned that the provision was "primarily directed" at the working conditions of the subcontractor rather than those of the represented employees. He was at pains to note that in "other circumstances" contractual restrictions on subcontracting might be "so clearly and directly related to the protection of the unit employees' work that they are permissible under the statute . . . ."\textsuperscript{124} The unanimous panel opinion in the \textit{Bituminous Coal} case\textsuperscript{125} seems similar in approach to the McCulloch \textit{Wilson} concurrence: a willingness to consider the relevance of the union's assertion that it was not seeking to affect working conditions of the subcontractor, coupled with a reluctance to credit the assertion. The National Bituminous Coal Wage Agreement, the union argued, permitted subcontracting in order to facilitate the purchase of "supplementary" coal which an operator needed in order to fulfill a purchase contract with large utility and steel users but could not feasibly produce himself. To permit such purchases would be to preserve work opportunities by enabling employers to bid on contracts which otherwise would impose requirements they could not meet. On this reasoning, the "standards" limitation was designed to deter the employer from going beyond "supplementary" purchases to "substitute" purchases—purchases of coal which the employer could produce himself but which he sought to buy elsewhere to take advantage of lower costs arising from substandard wage structures. The Board accepted the union's assertions regarding the "economic reasons" for the contract provisions, yet held the clause unlawful. Since purchases were not confined to other signatory operators the Board reasoned that no bar-

\textsuperscript{123} The insubstantiality of expressions about a "disfavored" employer is illustrated by the significant body of arbitral opinion finding the "substandard" character of a contractor highly relevant to the question whether a collective agreement permits subcontracting. \textit{E.g.}, Bendix Corp., 41 Lab. Arb. 905 (Warns, 1963); Thriftimart, Inc., 40 Lab. Arb. 449 (Meyers, 1963); Simplex Wire & Cable Co., 41 Lab. Arb. 237 (Wallen, 1962); see Crawford, \textit{The Arbitration of Disputes Over Subcontracting}, in \textit{CHALLENGES TO ARBITRATION} 51, 67 (McKelvey ed. 1960). Would the Board hold that such arbitral views render the agreement, as interpreted, a violation of § 8(e)? \textit{Cf.} Todd Shipyards Corp. v. Industrial Union of Marine Workers, 232 F. Supp. 589, 592 (E.D.N.Y. 1964); Powell, \textit{supra} note 30, at 898.

\textsuperscript{124} 143 N.L.R.B. at 1239.

\textsuperscript{125} \textit{Supra} note 120.
gaining-unit employees "have any assurance that the work of producing such coal has been preserved for them," for (as in Wilson) the contracting employer will not mine the coal himself in any event and the subcontractor may be an employer not signatory to the contract. "Had the contracting parties been concerned with preserving contract work to employees covered by the contract, they could have completely banned 'substitute' purchases from employers not covered by the contract." Thus the Board concluded that the principal purpose of the clause "was to create pressures conducive to the extension of the Union's contract to unorganized producers, rather than to preserve work for employees under the BCWA." 126

Member Brown's dissenting position has been that "standards" restrictions are lawful if their purpose is not to affect working conditions of the subcontractor and he has refused to infer such a purpose from the kind of circumstances present in Wilson and Bituminous Coal. 127 He has argued that a clause permitting some subcontracting should not be construed as designed primarily to protect subcontractors' employees; such a clause "serves both the packer's interest in flexibility and the Union's interest in preventing that flexibility from undercutting the job security of the packer's own employees through subcontracting their work for performance under substandard conditions." 128 Flexibility is needed because, as the union recognizes, "situations sometimes do arise when the packer may have drivers of his own available but insufficient equipment to carry out his operations." For the union to concede the force of the employer's interest in this regard is not to destroy the force of its own concern. 129

The Court of Appeals for the District of Columbia in a series of opinions by Judge Wright has accepted Member Brown's position. 130 Whether the Board will be affected by these reversals is not yet apparent. Certainly the Bituminous Coal majority and the Wilson concurrence seems rigid to the point of obstinancy in their insistence that primary objectives be uncompromisingly pursued on pain of having their very existence disbelieved. The approach taken by Member Brown and Judge Wright is far more attuned to the

126 144 N.L.R.B. at 237.
127 He did not participate in the latter decision.
129 143 N.L.R.B. at 1242-43.
130 See, e.g., Meat & Highway Drivers v. NLRB, 335 F.2d 709, 715-16 (D.C. Cir. 1964); Truck Drivers Union v. NLRB, 334 F.2d 539, 548 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964); Orange Belt Dist. Council of Painters v. NLRB, 328 F.2d 534, 537-38 (D.C. Cir. 1964). These rulings were foreshadowed in District 9, Int'l Ass'n of Machinists v. NLRB, 315 F.2d 33, 36-37 (D.C. Cir. 1962), and Retail Clerks Union v. NLRB, 296 F.2d 368, 374 (D.C. Cir. 1961).
realities of industrial relations. To the extent that the majority is concerned that hypothetical objectives be taken as actual ones, it can meet the problem by allocating the burden of proof and articulating those factors which will affect the inference made. As one example, the burden might well be placed on the union initially to show a concrete basis in fact for its asserted fears that the presence of "sub-standard" suppliers or contractors would erode bargaining-unit work opportunities.\textsuperscript{131} Once the essentially factual nature of the inquiry is exposed the process of litigation will doubtless uncover other elements whose relevance can be appraised in context. But the substantive inadequacies of resting solely on the "disapproval" notion\textsuperscript{132} are not avoided by a test giving lip service only to the materiality of the union's actual objective.\textsuperscript{133}

\textbf{C. Objections to Nonunion Contractors}

The NLRB has been least troubled where the union's demand expressly makes relevant the union or nonunion status of the boycotted employer. A contract clause permitting subcontracting only to

\textsuperscript{131} See also Comment, 62 Mich. L. Rev. 1176, 1186, 1190-91 (1964).

\textsuperscript{132} See text at notes 122-23 supra.

\textsuperscript{133} Consideration of the purpose of the statutory proscription suggests the view that, under §8(e) no less than §8(b)(4), the primary or secondary quality of the union's action should be tested by examination of its object rather than its effect. See Chauffeurs, Teamsters & Helpers (Milwaukee Cheese Co.), 144 N.L.R.B. 826, 831 (1963). Compare Comment, supra note 131 at 1188, with id. at 1189. (On §8(b)(4), see Local 47, Int'l Bhd. of Teamsters (McCann Constr. Co.), 112 N.L.R.B. 923 (1955), enforced, 234 F.2d 296 (5th Cir. 1956)). The statute is not designed to protect primary employers. Indeed, one cannot even say that its aim is to protect primary employers from secondary pressures, in the sense of loss of a secondary employer's business \textit{simpliciter}. Unless the loss of business is occasioned by unlawful means vis-à-vis the secondary employer, there is no violation. Local 20, Teamsters Union v. Morton, 377 U.S. 252, 259 & n.14 (1964) ; see text at note 46 supra. Thus, the crucial question is whether the secondary's rights have been infringed, and merely to show, for example, that a "standards" restriction operates to pressure substandard contractors to change working conditions is not conclusive; if the effect is not the union's "object," the contracting employer—who is the party sought to be protected—is not being subject to secondary pressure. And while it is certainly true that "the discernment of the actual objectives behind a given subcontracting clause is . . . [an] imprecise science," Comment supra, at 1189, one should not too quickly "balk at the prospect." \textit{Ibid.} Until it has been made clear to the parties that it is the actual objective which they are being asked to litigate, one cannot know to what extent litigation will enable the imprecision to be kept within acceptable bounds. Of course, evidence of the effect is certainly relevant to the issue of object, and may in appropriate circumstances have substantial probative force.

The District of Columbia Circuit has professed to test the lawfulness of a restriction by its "terms" rather than its object or its effect. Truck Drivers Union v. NLRB, 334 F.2d 539, 542 (D.C. Cir.), \textit{cert. denied}, 379 U.S. 916 (1964). But the words themselves have no meaning apart from the aim or impact they are inferred or presumed to have. A clause drafted so ambiguously that its "terms" cannot be deemed secondary certainly should not pass muster where the total circumstances persuade the Board that it was designed to generate secondary pressure, and did so in practice; nor should a clause whose "terms" appear to be secondary be condemned where intent and effect are both primary. In application, the court's views may well be consistent with this analysis. See 334 F.2d at 548 n.14.
organized companies or requiring preference to such employers is readily held unlawful. Here the Board thinks it plain that the union is not seeking to keep the work in question within the unit but to prevent nonunion subcontractors from getting it. A similar result attends a no-subcontracting clause which on its face is unconditional but which is shown to have been invoked selectively against nonunion contractors only. The problem may be somewhat more difficult where there has been but a single incident, and the union strikes or threatens to strike to prevent the subcontract or the use of outside personnel. In some instances, the avowed basis of the union's objection concerns the subcontractor's nonunion status or his asserted violation of a union contract, and it is clear that were he to acquiesce in an implicit demand to sign or adhere to a collective agreement, the objec-

134 Retail Clerks Union (The Frito Co.), 138 N.L.R.B. 244, 245 (1962): "[A]ny future work created by the Employer within the Employer's stores or markets which would ordinarily be performed by retail clerks, shall be performed only by members of the bargaining unit, . . . except that such work may be sub-contracted to an employer who is signatory to an Agreement with the Union." See also Retail Clerks Union v. NLRB, 296 F.2d 368, 370 (D.C. Cir. 1961) (Food Employers Council); Meat & Highway Drivers (Wilson & Co.), 143 N.L.R.B. 1221, 1222 (1963), enforced in part, 335 F.2d 709 (D.C. Cir. 1964) (the First Addendum); Essex County Dist. Council of Carpenters (The Associated Contractors, Inc.), 141 N.L.R.B. 858 (1963), enforcement denied, 332 F.2d 636 (3d Cir. 1964); Joint Council of Teamsters No. 38 (California Ass'n of Employers), 141 N.L.R.B. 341 (1963), enforced, 338 F.2d 23 (9th Cir. 1964).

135 Automobile Employees Union (Greater St. Louis Automotive Trimmers Ass'n, Inc.), 134 N.L.R.B. 1363, 1364 (1961): "Whenever the Employer finds it feasible to send work out that would ordinarily be performed by his employees, preference will be given to such shops or subcontractors having contracts with the Union." See also Highway Truck Drivers (E. A. Gallagher & Sons), 131 N.L.R.B. 925 (1961), enforced, 302 F.2d 897 (D.C. Cir. 1962); Wilson, supra note 134 (the original contract).

136 In International Ass'n of Heat Insulators (Insul-Coustic Corp.), 139 N.L.R.B. 659 (1962), the contract forbade the employer to "sublet or contract out any work" covered by the agreement, but the evidence showed that the union would apply premoulded fittings if they carried the union label, but not otherwise. In Butchers Union (Monarch Bldg. Maintenance Co.), 134 N.L.R.B. 136 (1961), there was a similar contractual provision. The union had not objected to a subcontract of cleanup work to Halls, which had a contract with the union, but when Halls was replaced by Monarch, which did not, the union struck in protest. See also Administrative Ruling of the General Counsel, No. SR-1912, 50 L.R.R.M. 1081 (1962). But cf. Milk Drivers' Union (Pure Milk Ass'n), 141 N.L.R.B. 1237, 1240 (1963), enforced, 335 F.2d 326 (7th Cir. 1964), where the Board, in the case of a §8(e) challenge to a clause "unambiguously" valid on its face, refused to consider evidence seeking to show unlawful administration. Cf. note 133 supra.

tions to his employment would be met. The Board has been willing to probe still further, however, even in the case of an unconditional demand that work be retained within the bargaining unit, and ask whether the actual motive was a desire to keep job opportunities for the boycotting employer's men or was the union's antipathy to the boycotted employer. Here the ground quickly becomes quite slippery indeed. If, for example, an employer has regularly been using a contractor for noncommercial glazing work and six months after the contractor's union contract expires he is given, for the first time, commercial glazing work on the employer's own premises, is a strike to compel the employer to use his own men for the job an attempt to protect the work of bargaining-unit personnel or to keep the work from a nonunion subcontractor? 138 Both effects are inevitably present, and it should occasion no surprise that the Board members would not agree on which was the "real" motive. 139

The more fundamental issue is the wisdom of the Board's asking the question at all. In the case described, Member Fanning, having dissented from the majority's evaluation of the union's motives, went on to argue that, "even assuming arguendo that Respondent's strike was partly motivated by the expiration of its contract with [the contractor], ... such subjective motivation is [not] relevant where there is no indication that the strike in question sought anything more than to have the employer assign the work to his own employees." 140 Adoption of this view would have the undoubted advantage of eliminating an elusive issue from litigation. Were a particular union demand to be invoked in a series of contexts, it would doubtless become clear whether the "boycotting" employer or the nonunion contractor was the true target. 141 And it can be argued that until then the need to probe for the "real motive" behind an unconditional demand for work is simply not worth the difficulties and dangers which attend the effort. Such a view, however, rests on an implicit conception of the reach of the act in "mixed motive" cases which is, in my judgment, too restricted. Where both motives are in fact present to a substantial degree, there

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139 The majority, relying on evidence of discussions during the six months' period prior to the strike regarding the employer's use of the contractor in question, thought it "clear" that the actual motive was secondary. Member Fanning discounted that factor, and emphasized the fact that the union struck only when the employer contracted out work on its own premises.
141 Cf. cases cited note 136 supra.
is a primary object (seeking work for unit personnel) and a secondary object (expressing disapproval of a nonunion supplier); this is exactly the type of case the draftsmen intended to reach by substituting "an object" for "the purpose" in describing the sought cessation of business.\textsuperscript{142} Thus, the Board is not to search for the predominant or "real" motive,\textsuperscript{143} but only to ask the far easier question whether the secondary object is present to a substantial degree.

There has been general agreement that a boycott of nonunion suppliers or contractors is secondary whether or not there are any organizational efforts or other disputes with the boycotted employers. Indeed one court of appeals has gone so far as to express the view, \textit{obiter}, that "it would make no difference if there were no existing non-signatory concerns which might be affected by the boycott agreement."\textsuperscript{144} Two grounds of justification for this broad rule of illegality can be advanced. The first—the notion that any boycott of an employer "whom the union does not like" is secondary—seems to me too broad, for reasons previously explored.\textsuperscript{145} The second is in effect to presume conclusively that a contract or demand barring contracts to nonunion companies in fact manifests an attempt to extend organization to unorganized employers. A rebuttable presumption to this effect can certainly be justified by experience.\textsuperscript{146} And in light of the elusiveness of the factual issue raised by an attempted rebuttal, and the satisfactory alternative restrictions available to a union really seeking only to protect unit jobs,\textsuperscript{147} no strong objection can be voiced to a rule making the presumption conclusive.\textsuperscript{148}

\textsuperscript{143}Cf. NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963) (concurring opinion) (dual motives for discharge).
\textsuperscript{144}NLRB v. Joint Council of Teamsters, 338 F.2d 23, 29 (9th Cir. 1964). In fact there were nonunion concerns operating, and the court found that the union was seeking to organize them. \textit{Ibid.}
\textsuperscript{145}See pp. 1016-17 \textit{supra}; text accompanying notes 122-23 \textit{supra}.
\textsuperscript{146}Even a "boycott" in a context where there are no nonunion contractors in the area, see text accompanying note 144 \textit{supra}, could give rise to such a presumption, for it might well manifest a purpose to prevent the appearance of any nonunion employers. \textit{Cf.} Amalgamated Lithographers (The Employing Lithographers), 130 N.L.R.B. 985, 990-91 (1961), \textit{modified}, 309 F.2d 31 (9th Cir. 1962), holding there need be no proof that a specific nonunion employer was sought to be boycotted.
\textsuperscript{147}Cf. District 9, Int'l Ass'n of Machinists v. NLRB, 315 F.2d 33, 36-37 (D.C. Cir. 1962): [T]he questioned provision is not, as it could have been drafted to be, one which has work preservation as its aim, such as a provision barring all subcontracting; nor is it in terms a provision to make certain that the subcontractee shall maintain labor standards commensurate with those of the neutral employer. It is, rather, a provision to make certain that the primary employer is under contract with the Union or for unspecified reasons is approved by the Union.
Of course, such a position can only be taken once the Board abandons its view that "standards" restrictions are secondary per se. See pp. 1028-32 \textit{supra}.
\textsuperscript{148}Whether or not a contractual restriction is in fact a boycott of nonunion contractors may sometimes not be self-evident. The 1964 amendment to the National
D. The Relevance of the "Right of Control"

The cases considered above have involved objections by employees of an employer who has given out work to a contractor or supplier. A more complex situation arises when it is the supplier's or contractor's employees who are seeking to prevent diminution of their job opportunities. If employees concededly seeking to preserve work they have traditionally done strike in protest of a disadvantageous change in the relations between their employer and the company which has engaged them, what is the relevance under the statute of the fact (if it be a fact) that the effective power of decision does not lie with their own employer? The NLRB first faced this problem in Wiggin Terminals.490 Bay State provided stevedoring services in connection with the unloading of Renault automobiles, and Wiggin operated a marine terminal nearby. Under the original unloading arrangements the cars remained in the dock area until ready for shipment. Bay State's clerks, represented by the union, had several days' work for each shipload of automobiles. When Renault changed its unloading procedures to facilitate the removal of the cars from the dock area by storing them at the terminal to await shipment, the union objected, first to Wiggin and then to Renault, stating that the cars would not be moved unless the clerks were guaranteed five days' pay for each vessel. Several other importers had given such a guarantee, but Renault refused until a slow-down forced it to reinstate the former procedure. The Board approached the problem as one of identifying the primary and secondary employers. If Bay State, whose employees struck, were termed the primary and Renault the secondary, the slow-down would be lawful; if the relationships were reversed, there would be a violation of section 8(b)(4). A majority of the Board, upholding the complaint, termed Renault the primary employer and Bay State the secondary. It deemed

Bituminous Coal Wage Agreement, made in response to the Board's invalidation of the "standards" provisions in the 1958 agreement, note 120 supra, illustrates the problem. The clause required operators to pay to the UMW Welfare and Retirement Fund a royalty of eighty cents per ton on all coal acquired from another producer on which the standard forty-cent royalty had not been previously paid, i.e., on all purchases from non-signatories. The Board held this to constitute an agreement "to cease doing business" with nonsignatories, and a violation of §8(e). Raymond O. Lewis (National Bituminous Coal Wage Agreement), 148 N.L.R.B. No. 31 (Aug. 7, 1964). Had there been a showing that the added forty-cent charge was reasonably calculated to compensate for the competitive advantage enjoyed by reason of the substandard conditions of the non-signatory operators, the clause should have been treated as a "standards" restriction. See pp. 1028-32 supra. In the absence of such proof—and certainly the burden of going forward with evidence on this score should be on the union—the Board's conclusion was proper. (Member Jenkins' dissent, arguing that the clause simply sought to protect the Welfare Fund by assuring royalty would be paid on subcontractural coal as well as on employer-produced coal, fails to accord any significance to the double-royalty payment). 349 Local 1066, Int'l Longshoremen's Ass'n, 137 N.L.R.B. 45 (1962).
“revealing and significant” the fact that the union’s demands were
addressed to Wiggin and Renault rather than to the employer of the
clerks. “It is apparent . . . that the Respondents looked to Renault
and not to Bay State to satisfy their demands, just as Renault’s com-
petitors had already done, and that when Renault refused, the Re-
spondents took measures to force compliance with them.” Members
Fanning and Brown, dissenting, insisted that the dispute was with
Bay State and was “merely one of the myriad types of traditional pri-
mary disputes.” They deemed the case no different than one where
the strike was to obtain from Bay State a guarantee of five days’ pay
irrespective of the arrangement with Renault; no different result was
indicated merely because the union “first appealed to Renault to take
action which it could have taken without disrupting or affecting its
business relationship with Bay State.”

If the rationale employed in Wiggin suggested that the outcome
would be different were the union’s demands to be addressed to its
employer, the suggestion was nearly stillborn. The Venneri case, decided very shortly thereafter, involved just such a situation. The
union had an agreement with Akron, a plumbing contractor, which
committed the employer not to contract for any job where less than
all of the plumbing work was given by the owner or the general
contractor to “journeyman plumbers and their apprentices.” Venneri,
a general contractor, subcontracted the inside plumbing work only to
Akron and the outside work to Nickles, which was under contract to
the Hod Carriers. The union induced Akron employees not to fab-
ricate any pipe on the project. In holding the conduct secondary, the
Board deemed the contractual commitment from Akron insufficient; the
factor held critical was that control over allocation of plumbing work lay
not with Akron but with Venneri. Regardless of the contractual pro-
vision, the Board thought it clear “that Venneri was the target of
Respondent’s conduct,” for the union was seeking, through with-
drawal of the services of Akron employees, to force Venneri to take
the plumbing work from Nickles and reassign it to Akron. Member
Brown, again dissenting, did not dispute the majority’s view of the
union’s objective but took issue with what he considered “undue em-
phasis” on the right of control and the consequent characterization
of Akron as “a disinterested neutral all the while.”

150 Id. at 47.
151 Id. at 49-50.
153 137 N.L.R.B. at 831.
154 Id. at 840 & n.17.
The Board majority clarified the basis of the weight it has given the right of control in *Board of Harbor Commissioners*. Even though a union may be seeking to force its employer to increase job opportunities for the employees it represents, where the employer has "no legal power" to take the action requested, the only aim of the pressure can be to use the economic leverage which the cessation of business involves to induce the employer which does have control to alter the contractual arrangements so as to permit the struck employer to meet the union's demands. On this reasoning, the Board regards the employer having the control as the primary employer, against whom secondary pressure is being brought to bear. The Board majority seems on sound ground in characterizing the employer with "control" as the primary employer, in the sense that he is probably the party to whom the union in fact looks for a favorable resolution of its demands. Nevertheless, the statute is designed to protect neutrals, and the critical question is whether the employer held to lack control is properly termed the secondary. Ordinarily, of course, the two characterizations are opposite sides of a single coin. But in the present context, there is much to support Member Brown's unwillingness to regard the struck employer as a neutral. To be sure, the employer is being used as a means of influencing another, the ultimate source of decision. The union's aim, however, is to affect working conditions not of the "primary" employer, but of the employer who is subjected to pressure. It is difficult to regard such an employer as a disinterested third party with respect to the dispute.

155 International Longshoremen's Ass'n, 137 N.L.R.B. 1178 (1962), enforced, 331 F.2d 712 (3d Cir. 1964).

156 The Board used the term "legal power" to contrast it with the case of an employer who simply cannot afford to meet a given demand. The power the Board had in mind was evidently contractual power under the agreement between the employers. It is not clear whether the Board looks to evidence of actual economic control not resting on a contractual right. Cf. Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.), 144 N.L.R.B. 91 (1963), enforced, 339 F.2d 142 (6th Cir. 1964); International Longshoremen's Local 19 (J. Duane Vance), 137 N.L.R.B. 119 (1962).

157 137 N.L.R.B. at 1181-84. See also International Ass'n of Heat Insulators (Reilly-Benton Co.), 149 N.L.R.B. No. 102 (Nov. 25, 1964); Metropolitan Dist. Council (Charles B. Martin), 149 N.L.R.B. No. 65, enforced, 332 F.2d 559 (3d Cir. 1964); Local 1291, Int'l Longshoremen's Ass'n (Pennsylvania Sugar Div.), 142 N.L.R.B. 257 (1963), enforced, 332 F.2d 559 (3d Cir. 1964).

158 The Board opinion in *Wiggins* wisely did not acknowledge that its characterization of Renault as the primary employer would render picketing of that company in support of the union demand lawful. 137 N.L.R.B. at 48. It seems clear that such pressure should be deemed secondary. To say so, however, only demonstrates the limited relevance of the locus of "control."

159 137 N.L.R.B. at 1190-92.

160 The employees are seeking work from their own employer. Had he "legal power" to provide it, the answer would be clear. If their employer enters into an arrangement whereby the power to provide such work is lodged (albeit entirely properly) in another, the employees should be able to include both employers
To hold the union conduct primary would not be to hold it free of legal regulation. Section 8(b)(4)(D) restricts economic pressure, whether primary or secondary, in support of a demand that an employer assign work to members of one union, trade, craft or class rather than another. In place of such pressure, the act provides for Board arbitration of the conflicting job demands. A union can be enjoined from economic pressure pending this adjudication and if the Board determination is adverse, section 8(b)(4)(D) provides the same remedy as provided for a secondary boycott. In those cases—and they are rare—where the boycotting union is held “entitled” to the disputed work, the Board should not employ section 8(b)(4)(B) to insulate the employers from economic pressure.

CONCLUSION

In the foregoing attempt to explicate a primary-secondary dichotomy, I have emphasized those elements which section 8(e) and section 8(b)(4)(B) cases have in common. The NLRB has too often tended to treat hot cargo and secondary boycott cases as if they were hardly related at all, making only intermittent attempts to

within the ambit of their job-protective efforts. One is reminded of John Steinbeck’s tenant farmer facing the tractor about to tear down his house, and hearing the tractor driver tell him that neither he (the driver), his employer nor the local bank can save the tenant’s home: “Who can we shoot? I don’t aim to starve to death before I kill the man that’s starving me.” STEINBECK, THE GRAPES OF WRATH 52 (1939).

164 Cf. New York Paper Cutters’ Union (Automatic Sealing Serv., Inc.), 148 N.L.R.B. No. 132 (Sept. 25, 1964), where the Board, having determined a § 10(k) dispute adversely to the respondent union, found it unnecessary to decide the question of a violation of § 8(b)(4)(B). Member Fanning has argued that the Board should follow a similar practice in any case subject to § 8(b)(4)(D) and § 10(k), even though proceedings under those sections have not been completed. E.g., Local 5, United Ass'n of Journeymen Plumbers (Arthur Venneri Co.), 137 N.L.R.B. 828, 834 (1962) (dissenting opinion), modified, 321 F.2d 366 (D.C. Cir.), cert. denied, 375 U.S. 921 (1963).
165 While I cannot document this assertion, my observation is that the union or craft which prevails in a § 10(k) determination is almost never the union whose resort to economic pressure brought on the proceedings. The standards for decision were articulated generally in International Ass'n of Machinists (J. A. Jones Constr. Co.), 135 N.L.R.B. 1402, 1410-11 (1962).
166 In some cases, § 8(b)(4)(D) might be unavailable, in which event the permissibility of union pressures against an employer lacking the “right of control” would wholly depend on the construction given § 8(b)(4)(B). Cf. the separate opinions of Member Fanning in International Longshoremen’s Ass’n (Board of Harbor Comm’rs), 137 N.L.R.B. 1178 (1962) (concurring), and New York Paper Cutters’ Union (Automatic Sealing Serv. Inc.) (dissenting), 146 N.L.R.B. No. 49 (March 20, 1964). The proper reach of § 8(b)(4)(D) and § 10(k) is beyond the scope of this article.
integrate its approaches to the two provisions.\textsuperscript{167} Of course Sand Door\textsuperscript{168} holds that a valid contract is not a defense to a secondary boycott. But it would be a serious misreading of that case, and indeed of the entire statutory evolution, to apply that notion in the context of the problem dealt with in this article. Prior to 1959, a contract was lawful whether primary or secondary; Sand Door spoke only to the effect of the latter type of agreement on section 8(b)(4). Section 8(e) now generally prohibits the mere execution of such agreements. But if a contract is "primary"—i.e., not within section 8(e) at all—it is equally primary to enforce it by economic pressure on the contracting employer.\textsuperscript{169} By the same token, the mere fact that a union demand is in support of a claimed contractual right does not establish its lawfulness. It may prove that there is a "dispute" with the contracting employer, but the crucial question is whether the dispute is primary or secondary.\textsuperscript{170}

Section 8(b)(4)(B) is in terms inapplicable to primary action; I have argued that section 8(e) should be recognized as of no broader scope.\textsuperscript{171} In attempting to give content to the primary-secondary dichotomy in this area, I have sought (if it is not inappropriate to borrow Judge Cardozo's words) "not to declare a rule, but to exemplify a process."\textsuperscript{172} The central question is whether the struck or contracting employer is properly to be regarded as a third party with respect to the union's objective. Is the union seeking his aid for its effect elsewhere, or does it intend the impact, even if achieved through injurious disruption of business with another, simply to relate to the working conditions of the employees of the struck or contracting

\textsuperscript{167} Many cases illustrate this. A direct (albeit characteristically tacit) holding is Metropolitan Dist. Council (Charles B. Mahin), 149 N.L.R.B. No. 65 (Nov. 12, 1964), dismissing a §8(e) challenge to a subcontracting restriction but finding a §8(b)(4)(B) violation in its enforcement. See also Ohio Valley Carpenters Dist. Council v. NLRB, 339 F.2d 142, 145 (6th Cir. 1964).

\textsuperscript{168} Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958).

\textsuperscript{169} In the construction industry, where the first proviso to §8(e) preserves the Sand Door regime, an agreement may be lawful and yet not enforceable by strike action. See Orange Belt Dist. Council of Painters v. NLRB, 328 F.2d 534, 537-38 (D.C. Cir. 1964). But if a construction-industry clause were held lawful, not because saved by the proviso but because not in violation of the body of §8(e), a strike to enforce it would not violate §8(b)(4)(B). See \textit{ibid.}; cf. Retail Clerks Union v. NLRB, 296 F.2d 368, 372-73 (D.C. Cir. 1961).

\textsuperscript{170} Cf. Bakery Wagon Drivers v. NLRB, 321 F.2d 353, 357-58 (D.C. Cir. 1963).

\textsuperscript{171} See pp. 1009-15 \textit{supra}. The effect of the primary-secondary dichotomy on the scope of §8(e) has arisen in several areas not involving job security. For authorities dealing with clauses permitting secondary employees to respect primary picket lines at another employer's plant, see Truck Drivers Union (The Patton Warehouse, Inc.), 140 N.L.R.B. 1474, 1476-82 (1963), \textit{enforcement denied}, 334 F.2d 539, 542-45 (D.C. Cir. 1964), 113 U. PA. L. REV. 151 (1964); Comment, 45 CORNELL L.Q. 724, 747-48 (1960). On the impact of the "ally" doctrine, see 334 F.2d at 546-47; NLRB v. Amalgamated Lithographers, 309 F.2d 31, 36-38 (9th Cir. 1962), \textit{cert. denied}, 372 U.S. 943 (1963); Employing Lithographers v. NLRB, 301 F.2d 20, 27-29 (5th Cir. 1962); Note, 38 N.Y.U.L. Rev. 97, 121-25 (1963).

\textsuperscript{172} Yome v. Gorman, 242 N.Y. 395, 403, 152 N.E. 126, 129 (1926).
While I have attempted to indicate a suggested resolution of the problem in a number of litigated fact patterns, it is far more important to seek a consensus on the questions to be asked and the issues on which one answer or another is to depend. It would be inconsistent with the spirit of that priority to recapitulate here a series of preferred specific rulings.174

Viewed in a broader context, the litigation which I have discussed illustrates the impoverished quality of our national labor policy. The pressures created by momentous problems of productivity and job security under changing technological and market conditions are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others. It can be anticipated that those who administer the act will be asked to refashion that instrument to serve weightier purposes. And, while I have argued here that the NLRB and the courts should rebuff any such endeavor, we delude ourselves if we think that either response represents an adequate legal reaction to the underlying problem. An insistence on fidelity to a primary-secondary dichotomy, and to "free collective bargaining," should not lead one to eulogize what is often short-sighted, self-defeating, or anti-social protectionism. But the competing banner has to date carried only the threadbare rallying cries of "management prerogative," opposition to "featherbedding," and similar reflections of cozy notions of management as the honest broker whose benevolent pursuit of self-interest will bring blessing on us all, in just that proportion which each deserves. While I have rather freely exercised my academic prerogative to criticize particular NLRB actions, and Congressmen (with their more fearsome powers) do the same, one must ask who the true sinners are, when Legislature, Bar, and University have been so long fixated at so arid a stage of ideological development. The parties to labor disputes go where they can to seek aid: If the paucity of ideas and programs leads them to demand from the Board what it cannot give, may the NLRB not claim at least the sympathy, if not the protection, our law affords third parties forced to take a position "in controversies not their own"? 175

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173 See p. 1018 supra.
174 While the NLRB may properly be strongly concerned with adjudication of particular disputes, that concern has too often seemed to have been permitted to overshadow more compelling demands. In light of the impact of the mandatory injunction provision of the act, §10(f), 61 Stat. 149 (1947), 29 U.S.C. §160(e) (1958), one might well argue that the primary role of the NLRB in this area is not the adjudication of disputes: To the parties, that is in effect resolved in the district court proceedings. Rather it is the articulation of a rational and integrated doctrinal framework for administration of the statutory scheme of regulation. See Lesnick, supra note 11, at 1409-10; cf. Graham, How Effective is the NLRB?, 48 MINN. L. REV. 1009, 1045 (1964).