SECONDARY BOYCOTTS: UNDERSTANDING NLRB INTERPRETATION OF SECTION 8(b)(4)(b) OF THE NATIONAL LABOR RELATIONS ACT

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Nothing is pointless, and nothing is meaningless if the artist will face it. And it's his business to face it. He hasn't got the right to sidestep it like that. Human life itself may be almost pure chaos, but the work of the artist—the only thing he's good for—is to take these handfuls of confusion and disparate things, things that seem to be irreconcilable, and put them together in a frame and give them some kind of shape and meaning.†

For more than twenty years, there has been virtually no significant scholarly work exclusively devoted to explaining the National Labor Relations Board (NLRB or Board) interpretation of the secondary boycott provisions of the National Labor Relations Act (Act or NLRA).² Yet the

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2. A number of law review and journal articles addressing the subject were written at or about the time the Supreme Court issued its second and final decision in Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council, 485 U.S. 568 (1988), in which the Court held, inter alia, peaceful handbilling free from those proscriptions. See, e.g., Steven L. Brown, Nonpicketing Labor Publicity Not Within the Secondary-Boycott Prohibition of Section 8(b)(4) of the National Labor Relations Act: Edward J. DeBartolo Corporation v. Florida Gulf Coast Building and Construction Trades Council, 31 B.C. L. Rev. 139 (1990) (describing the nonpicketing labor publicity exclusion from the definition of secondary boycotts); Brian K. Beard, Comment, Secondary Boycotts After DeBartolo: Has the Supreme Court Handed Unions a Powerful New Weapon?, 75 Iowa L. Rev. 217 (1989) (debating the impact of the DeBartolo decision); see also infra notes 91–100 and

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law continues to evolve, as manifest in the numerous reported decisions discussed and explained below, and the importance of such cannot be overstated.\(^3\)

Perhaps the dearth of scholarly work in this area is due to frustration with a law that many find chaotic and confusing.\(^4\) Others find section 8(b)(4)(B) Board case law unjust or outdated against the backdrop of an ever-changing industrial landscape.\(^5\) Regardless of the reason, after twenty


4. See LEROY S. MERRIFIELD ET AL., LABOR RELATIONS LAW, CASES AND MATERIALS 399 (9th ed. 1994) (viewing secondary boycott law as complicated); see also JULIUS GETMAN & BERTRAND P. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 259 (1998) (observing that section 8(b)(4)(B) functions in ways that are economically deceptive and functionally confusing); CHARLES GREGORY, LABOR AND THE LAW 420, 426 (2d ed. 1958) (characterizing the Taft Hartley Act’s secondary boycott provisions as a complicated and “dreadful mess”).

5. See, e.g., GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 111 (1999) (opining that it is difficult to justify the secondary boycott prohibitions in the NLRA); Julius Getman, The National Labor Relations Act: What Went Wrong; Can We Fix it?, 45 B.C. L. REV. 125 (2003) (advocating for the repeal of section 8(b)(4)(B)); see also Katherine V.W. Stone, Employee Representation in the Boundaryless Workplace, 77 CHI. KENT L. REV. 773, 798–99 (2002) (expressing the view that the secondary boycott provisions of the NLRA are no longer viable or tenable); Daniel J. Chepaitis, The National Labor Relations Act, Non-Paralleled Competition, and Market Power, 85 CAL. L. REV. 769, 771 n.8 (1997) (noting that the prohibition on secondary boycotts is viewed unfavorably by those in favor of unionization) (citing PAUL C. WEILER,
years of doctrinal development one cannot dispute the value associated with the placement of this area of law into a scholarly frame, where it can be given a measure of shape, meaning, and understanding. Although this task may prove more a lawyerly art than a science, it is hoped that after the final stroke is applied to this canvas, the reader will understand this subject better than before she opened this volume, and that it may serve as a reference for those confronted with problems or confusion in the area.

Accordingly, this Article will present a comprehensive explanation of the most common and some not so common problems that arise under sections 8(b)(4)(B) and 8(e). After defining terms and setting forth history and the applicable NLRA sections, this Article will explore NLRB case law, breaking down those sections into their various constituent parts and offering the kind of statutory dissection pivotal to understanding the entire area.

I. DEFINING THE SECONDARY BOYCOTT

As is often the case, the Act fails to provide a statutory definition for a term so often in need of interpretation. Perhaps the most widely cited definition was written more than seventy years ago by Felix Frankfurter and Nathan Greene in The Labor Injunction. The authors described the secondary boycott as a combination to influence A by exerting economic or social pressure against persons with whom A deals. It has been put more succinctly as “a combination to harm one person by coercing others to harm him.”


6. Although the majority of this Article is devoted to section 8(b)(4)(B), discussion of secondary boycotts compels analysis of section 8(e) as well. See infra notes 321–369 and accompanying text (discussing section 8(e)).

7. Comment, The Landrum Griffin Amendments: Labor's Use of The Secondary Boycott, 45 Cornell L.Q. 724 (1960); IBEW, Local 98 (The Tel. Man, Inc.), 327 N.L.R.B. 593, 597 (1999); Minda, supra note 5, at 101; Theodore J. St. Antoine, Secondary Boycotts and Hot Cargo: A Study in Balance of Power, 40 U. Det. L.J. 189, 195 (1962). The genesis of the term “boycott” is itself the subject of an interesting anecdote, having been traced to the difficulties experienced by one Captain Boycott, an agent of England’s Lord Earne, and who, upon serving certain notices on Earne’s tenants, was shunned by all those he employed, forcing the Captain and his wife to harvest their own fields and produce their own food. W.A. Martin, A Treatise on the Law of Labor Unions 101–02 (1910).


9. Id.; see also Ralph M. Dereshinsky et al., The NLRB and Secondary Boycotts 1 (1981) (referencing the Frankfurter-Greene definition); St. Antoine, 40 Univ. Det.L.J 189, supra note 7, at 189 (discussing the definition of secondary boycotts).

10. Duane McCracken, Strike Injunctions in the New South 13 (1931) (citing
The typical paradigm in the industrial context features a labor organization with a dispute against A, but instead of merely pressuring A directly with a strike, picket, handbill or other action, the labor organization pressures A indirectly, by making A’s clients, suppliers or other persons with whom A conducts business the target of such activity. The desired effect is to pressure A to capitulate to union demands by virtue of the threat of those other persons terminating their relationships with A in order to be rid of the unwanted union pressure.

There can be no question that a union’s use of the secondary boycott has potentially devastating effects upon parties neutral to the dispute between the union and its more direct target. At issue for the Board, and the subject of this Article, are the boundaries between lawful and unlawful secondary conduct, and the Board’s case law setting out those boundaries.

II. SECTIONS 8(b)(4)(b), 8(e), AND HOW WE GOT THERE

Organized labor’s use of the secondary boycott can be traced to America’s earliest years. Even before 1900, courts routinely held secondary boycotts unlawful as criminal conspiracies. Later, they were enjoined by courts of equity through broad application of antitrust law, part of a sweeping wave of anti-union sentiment culminating with the imposition of the Sherman Antitrust Act upon the activities of organized labor. Some of the earliest injunctions against union activities involved secondary components, and these cases played a major role in the doctrinal development of antitrust applicability to the right to strike, picket, and boycott.

L.D. CLARK, THE LAW OF THE EMPLOYMENT OF LABOR 289-90); see also IBEW, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950) (reasoning that the gravamen of the secondary boycott is having 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, in an effort to cause said party to stop doing business with that employer in the hope this will induce the employer to give in to certain demands), aff’d, 341 U.S. 694 (1951).

This Article does not discuss political boycotts. See Stone, supra note 5 (discussing and proposing an application of the constitutional political boycott law to industrial disputes).

11. DERESHINSKY, supra note 9, at 1.

12. DERESHINSKY, supra note 9, at 1–2; ERNST, supra note 14, at 72 (citing State v. Stewart, 9 A. 559 (Vt. 1887) and State v. Glidden, 8 A. 890 (Conn. 1887)); Russell Jones, Secondary Picketing Under the Railway Labor Act: Burlington Northern Resolves the Dispute, 19 S.U. L. REV. 1, 3 (1992).

13. Id.


15. DERESHINSKY, supra note 9, at 1; ERNST, supra note 14, at 72 (citing State v. Stewart, 9 A. 559 (Vt. 1887) and State v. Glidden, 8 A. 890 (Conn. 1887)); Russell Jones, Secondary Picketing Under the Railway Labor Act: Burlington Northern Resolves the Dispute, 19 S.U. L. REV. 1, 3 (1992).

16. DERESHINSKY, supra note 9, at 1; Jones, supra note 15, at 3; see Loewe v. Lawlor, 208 U.S. 274 (1908).

17. JOHN P. FREY, THE LABOR INJUNCTION: AN EXPOSITION OF GOVERNMENT BY
The United States Supreme Court decision in *Loewe v. Lawlor*¹⁸ is a proper starting point. In *Loewe*, the 9000-member strong United Hatters of America organized a nationwide boycott of one Danbury, Connecticut hat manufacturer in an effort to organize the manufacturer's employees.¹⁹ The boycott included, *inter alia*, efforts to intimidate wholesale dealers into foregoing their purchases or deals with the hat manufacturer.²⁰ The manufacturer sued under section 7 of the Sherman Act, with the Court reversing a lower court's dismissal of the complaint.²¹ The impact of the Court's decision at the time cannot be overstated.²² While the secondary boycott aspect of the fabled Danbury Hatters case is often lost on history,²³ *Loewe*'s significance stems from its application of antitrust principles to the activities of organized labor, viewing unions as unlawful combinations, capable of engaging in restraint of free trade.

Only six years later, with increasing labor unrest, Congress responded with passage of the Clayton Act, an apparent effort to reverse the effects of the *Loewe* decision.²⁴ While on its face, labor's Magna Carta²⁵ served as a

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¹⁸. 208 U.S. 274 (1907).
¹⁹. *Id.* at 304–05.
²₀. *Id.* at 307.
²₁. *Id.* at 309.
²². *See* ERNST, *supra* note 14, at 167–69 (observing Gompers' view that the decision in *Loewe* brought the continued viability of unions into doubt). The effect of the Court's decision was so dramatic that the union was forced to levy assessments upon the earnings of its members to collect what amounted to more than $400,000 in costs. *Id.* at 152–55. Hundreds of union members faced threats of foreclosure on their homes in order to meet the cost of the damages, with several workers, whose life earnings were attached by the Court, committing suicide. LOUIS WALDMAN, LABOR LAWYER 208 (1945).
²³. *See* GREGORY, *supra* note 4, at 208–10 (discussing that the Court found jurisdictional components significant rather than the secondary nature of the conduct in holding that there was a violation of the Sherman Act); *see also* PHILIP S. FONER, THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR 1900-1909, IN HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (Vol. III) 309–13 (1981) (stressing the significance of the fact that the suit was filed against individual members of the union).
²⁴. 15 U.S.C. §§ 12–27 (2000). Section 6 of the Clayton Act declared the labor of a human being not to be a commodity or article of commerce, and further set forth that the antitrust laws would not prohibit the existence of unions or hold them to be unlawful combinations. Section 20 of the legislation, on its face, limited the jurisdiction of federal courts to enjoin strikes and other matters arising out of cases between employers and employees. The Clayton Act was passed against the backdrop of increasing labor unrest, culminating with the 11,000-employee strike against Colorado Fuel and Iron in 1913. Strikers departed the company's camps and set up tent colonies nearby, one of which was attacked by armed guards resulting in the deaths of 21 strikers and their children. PRISCILLA MUROLO & A.B. CHITTY, FROM THE FOLKS WHO BROUGHT YOU THE WEEKEND: A SHORT ILLUSTRATED HISTORY OF LABOR IN THE UNITED STATES 150 (2001).
²⁵. The Clayton Act was given this moniker by labor leader, Samuel Gompers, a key figure in the *Danbury Hatters* case who, upon its enactment, lauded the legislation as, "the
Congressional sanction for that which the Court condemned in *Loewe*, organized labor’s victory was fleeting. In *Duplex Printing Press Co. v. Deering*, 26 the Supreme Court held that the Clayton Act did not provide statutory protection to secondary boycotts, and worse yet, actually gave employers a private right of action to seek injunctive relief and treble damages for such activity. 27 Only four years later, in *Coronado Coal Co. v. United Mine Workers*, 28 the Court reaffirmed the view that antitrust law could put a stop, not only to secondary activity, but to primary union protests as well.

Organized labor lived with the law of *Loewe*, *Duplex* and *Coronado* throughout the 1920’s, the intensity of its lobbying effort to legislate away those decisions reaching a crescendo after the United States Supreme Court decision in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association*. 29 The American Federation of Labor spent the next five years strongly urging Congressional action to provide more meaningful relief than the Clayton Act could offer, finally achieving success in 1932. 30 That year saw passage of the Norris LaGuardia Act, 31 which put a statutory end to the use of injunctive relief to stop a wide array of union activity, including the secondary boycott. 32 However, while Norris LaGuardia represented a victory for organized labor, its significance must nevertheless be measured against the troubled economic environment present at the time of its enactment. As free as unions were to strike, picket, or engage in secondary boycotts, they were in no position to combat the deteriorating

Magna Carta upon which the working people will rear their structure of industrial freedom.”

ERNST, supra note 14, at 165.


27. See GREGORY, supra note 4, at 209 (discussing the right of private parties to obtain injunctions against violations of the Sherman Act).

28. See 268 U.S. 295 (1925) (holding in a primary strike that the union’s intent to interfere with company’s ability to move produce in interstate commerce violated the Sherman Act).

29. 274 U.S. 37 (1927). In *Bedford*, in an effort to force the company into recognizing the union, the Journeymen Stone Cutters Association of North America directed its members who worked for various contractors not to work on stone produced by Bedford. *Id.* at 42–43. The Court enjoined the activity. *Id.* at 54–55.

30. See EMANUEL STEIN ET AL., LABOR AND THE NEW DEAL 78 (1934) (describing union efforts to obtain passage of a federal anti-injunction law); see also Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 805 (1945) (tracing the history of antitrust applicability to union activity).


32. DERESHINSKY, supra note 9, at 2. While section 3 of that Act put an end to so-called Yellow Dog contracts, pursuant to which employees agreed not to join or to withdraw their membership from a union, section 4 and its constituent subsections (a) through (i) precluded courts of equity from enjoining secondary boycotts. Specifically, it divested courts of jurisdiction from enjoining strikes, picketing and other activities growing out of a labor dispute, and, as set forth in subsection (i) “advising, urging or otherwise causing or inducing” those enumerated activities.” *Id.* at § 104(a)–(i).
economic circumstances in which they found themselves. Those circumstances led to the New Deal, including the National Industrial Recovery Act of 1933 (NIRA), which, for the first time, featured labor provisions offering statutory protection safeguarding the right to organize and bargain collectively.

After NIRA failed to sustain constitutional challenge, the NLRA was passed in 1935, containing essentially the same safeguards as those set forth in NIRA’s section 7(a), and subsequently became the first piece of New Deal legislation to pass constitutional muster. This expansion of rights, albeit against the backdrop of deteriorating wages and job loss, culminated with the Court’s decisions in Apex Hosiery Co. v. Leader, and United States v. Hutcheson, which conclusively held federal anti-trust principles inapplicable to the activities of organized labor.

Thus, for the next four years, unions enjoyed a relatively unfettered legal right to engage in secondary activities. However, in 1945, the

33. See STEIN ET AL., supra note 30, at 10 (describing the effects of the Great Depression on labor).
35. Section 7(a) of NIRA, the precursor to section 7 of the NLRA, set forth in pertinent part:

[employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id. at 198.
37. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The decision in Jones & Laughlin Steel, issued on April 12, 1937, is still marked and remembered at Board offices throughout the country as "Constitutionality Day." Ironically, eight years to the day the NLRA was declared Constitutional, President Franklin Delano Roosevelt died peacefully in Warm Springs, Georgia, on April 12, 1945.
38. 310 U.S. 469 (1940). In Apex, the American Federation of Full Fashioned Hosiery Workers struck numerous Philadelphia area factories in an effort to organize Apex Hosiery and in furtherance of its demand that the non-union contractor agree to be a closed shop. Id. at 481. The Court held that the Sherman Act did not cover the kind of activities in which the union engaged. Id. at 512–13.
39. 312 U.S. 219 (1941). In Hutcheson, a union struck Anheuser-Busch, and induced other union members to boycott the company’s products. Id. at 238–39. The Court found the Sherman Act inapplicable to such activity by virtue of the safeguards provided by the Norris LaGuardia and Clayton Acts. Id. at 233–34.
40. Id. at 235–36.
Supreme Court issued its decision in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,* a secondary boycott case, in which the Court carved out the genesis of what is popularly known today as the non-statutory exemption to antitrust law. However, the Court still found Local 3 liable in antitrust based upon its role in an effort to close off out-of-state contractors from the New York electrical market.

Shortly thereafter, in 1947, Congress passed the Taft Hartley Amendments to the NLRA, which for the first time, included union unfair labor practices, among them section 8(b)(4)(A), the precursor to today's non-statutory exemption to antitrust law for anticompetitive measures negotiated through the collective bargaining process. A complement to the statutory exemption contained in the Norris-LaGuardia Act, this judicial creation was reaffirmed in at least three subsequent cases: United Mine Workers v. Pennington, 381 U.S. 657 (1965); Local 189, Amalgated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); and Connell Constr. Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616 (1975), the latter of which is discussed in greater length supra at notes 365-368 and accompanying text. Thirteen years after deciding *Allen Bradley,* the Court found a work stoppage to enforce a collectively bargained for agreement, which essentially compelled the employer to do business only with union contractors, to run afoul of section 158(b)(4)(A), the precursor to today's section 158(b)(4)(B). The Court ruled that way despite finding the agreement itself lawful. Local 1976, United Bhd. of Carpenters & Joiners v. NLRB, 357 U.S. 93, 111 (1958).

Section 158(b)(4)(A) provided as follows:

> It shall be an unfair labor practice for a labor organization or its agents—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 their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services ... where in either case an object thereof is—forcing or requiring any employer or self-employed person to join any labor or employer organization ... [or] 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.

*Id.*
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section 8(b)(4)(B). The enactment of section 8(b)(4)(A) represented a congressional effort to return to the common law, which prohibited secondary boycotts. Included therein was the availability of injunctive relief through mandatory pursuit thereof by regional offices of the National Labor Relations Board, upon evidence of reasonable cause of a violation, and where injunctive relief would be just and proper. However, the section did not outlaw all secondary boycotts. Rather, it provided for a bifurcated approach to such activities, proscribing only certain kinds of labor organization actions and inducements or encouragements that were undertaken with a "secondary object." The Board routinely rejected early constitutional challenges to this legislation, with the issue being firmly put to rest by the Supreme Court in the 1950 Samuel Langer case.

However, several problems, or loopholes, in section 8(b)(4)(A) became apparent. First, the proscribed inducements set forth in that section were limited to those directed against the employees of statutory employers. The statutory terms "employee" and "employer," defined in the Act's section 2(3) and 2(2) respectively, maintained definitions

46. Section 10(1) states that

[whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B) or (C) of section 158(b), or section 158(e) or 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law...]

29 U.S.C. § 160(l) (2000). With regard to the "reasonable cause" prong, it is not the function of the court to decide the merits of the unfair labor practice. McLeod v. Local 25, IBEW, 344 F.2d 634 (2d Cir. 1965); Douds v. Milk Drivers & Dairy Employees Union, Local 584, 248 F.2d 534 (2d Cir. 1957). In determining whether injunctive relief is just and proper within the meaning of Section 10(l), federal courts are guided by traditional equitable principals. See Danielson v. Local 275, Int'l Union, 479 F.2d 1033, 1037 (2d Cir. 1973).

47. See, e.g., In re Wine, Liquor & Distillery Workers Union, Local 1 (Schenley Distillers Corp.), 78 N.L.R.B. 504 (1948) (noting that the Board explicitly rejected the assertion that section 158(b)(4)(A) was unconstitutional), enforced, 178 F.2d 584 (2d Cir. 1949). Notably, Schenley was the first Board case interpreting section 158(b)(4)(A).

48. See IBEW v. NLRB, 341 U.S. 694, 705 (1951) (declaring that section 158(b)(4) carries with it no constitutional abridgement of free speech).

excluding various groups from the Act's coverage. Limit of the law by virtue of those statutory definitions thereby left the excluded groups unprotected from the secondary boycott.

Second, the inducements proscribed in the Act were limited to those of concerted refusals, leaving open the possibility of unions either appealing to single employees or working on a one-by-one basis.

Third, section 8(b)(4)(A) made no mention of activity undertaken directly against neutral employers, leaving unions free to engage in threatening or coercive conduct targeted at those employers, via direct appeals to management or their supervisory personnel.

Finally, nothing in section 8(b)(4)(A) made it unlawful for a union and an ostensibly neutral employer to voluntarily enter into an agreement obligating the employer not to handle the goods of, or do business with, other employers who either did not have a contract with the union, or whom the union deemed unfair. Indeed, the Court's earlier decision in Allen Bradley, in effect, held that such agreements, where limited, would not violate antitrust laws. Further sanction for such agreements is found in the Court's 1958 decision in Sand Door Plywood, in which it found that strikes to enforce such clauses were unlawful under section 8(b)(4)(A) but did not find the clauses themselves illegal.

Thus, Congress set out to close these loopholes when it drafted sections 8(b)(4)(B) and 8(e). Section 8(b)(4)(B), while endeavoring to close some of those loopholes, maintained the analytical bifurcation of section 8(b)(4)(A), again requiring an action element as well as a secondary object component. Section 8(b)(4)(B) made it an unfair labor practice for

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50. 29 U.S.C. § 152 (2000); 29 U.S.C. § 153 (2000). Section 2(3), which defines the term employee, distinctly excludes supervisors and independent contractors from that definition, while section 2(2), which defines employer, excludes agricultural employers, those subject to the Railway Labor Act, and federal and state governments. In addition, at the time section 8(b)(4)(A) was enacted, the Board did not exercise jurisdiction over healthcare institutions.

51. DERESHINSKY, supra note 9, at 4–5; St. Antoine, supra note 7, at 196–97.

52. See NLRB v. Int'l Rice Milling Co., 341 U.S. 665, 673 (1951) (observing the need for an appeal for concerted action, rather than a simple request to individual employees to honor a picket line). This case is far more significant for serving as the genesis of the distinction between primary and secondary appeals, discussed infra notes 189–201 and accompanying text.

53. See DERESHINSKY, supra note 9, at 5.

54. See, e.g., In re Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 294 (Conway's Express), 87 N.L.R.B. 972, 976–77 (1949) (implicitly sanctioning closed shop agreement and strike in furtherance of complying therewith), enforced sub nom. Rabouni v. NLRB, 195 F.2d 906 (2d Cir. 1952).


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a labor organization or its agents:

(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, manufacturer, or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Two additional provisos followed. The first carved out refusals by persons to enter the premises of employers whose employees are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the Act.\(^{57}\) The second, and the source of far more litigation, providing that nothing in subparagraph (4) "be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . ."\(^{58}\)

Section 8(e) makes it an unfair labor practice for:

[A]ny labor organization and any employer to enter into any

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158(b)(4)(B), a union must be found to have engaged in conduct which either induces or encourages individuals to refuse to perform services, or which threatens, coerces or restrains, and must also be found to have an object of forcing one person to cease dealing with or doing business with another person), enforced, 103 F.3d 139 (9th Cir. 1996).

57. See, e.g., United Food & Commercial Workers, Local 1996 (Visiting Nurse Health Sys., Inc.), 336 N.L.R.B. 421 (2001) (holding that, despite having possessed a secondary object by directly targeting a neutral entity, the union did not violate section 158(b)(4)(B) inasmuch as its actions were in protest against an employer's refusal to honor a Certification of Representative issued by the Board pursuant to section 9 of the NLRA.

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 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.\(^{59}\)

Two provisos followed this section as well. The first made the provision inapplicable to agreements between a labor organization and employer in the construction industry, relating to the contracting or subcontracting of work at a construction site.\(^{60}\) The second carved out an exception in the garment industry by providing that the persons referred to in sections 8(b)(4)(B) and 8(e) did “not include those in the relation of a jobber, manufacturer, contractor or subcontractor working on the goods or premises of the jobber or manufacturer . . . .”\(^{61}\) Additionally, today’s section 8(b)(4)(A), enacted with the 1959 Landrum Griffin Amendments, makes it an unfair labor practice to engage in section 8(b)(4)(i) or (ii) conduct referenced above, where an object thereof is “forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by subsection 8(e).”\(^{62}\)

Substitution of the word “person” for “employer” eliminated the first loophole identified. Elimination of the word “concerted” alleviated the problem identified in the second loophole, while the addition of section 8(b)(4)(ii) dealt with the third loophole. Section 8(e) was a response to the fourth loophole, as manifest in the earlier referenced Sand Door Plywood decision, with exceptions carved out for the construction industry and garment industry.

It is against this backdrop that a discussion leading to an understanding of the entire area can begin.

\(^{60}\) Specifically, the proviso states, “[t]hat 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.” 29 U.S.C. § 158(e).
\(^{61}\) The garment industry proviso states, “[t]hat for the purposes of this subsection and subsection (b)(4)(B) of the section, the terms ‘any employer,’ ‘any person engaged in commerce or 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 process of production in the apparel and clothing industry.” Id.
II. UNDERSTANDING THE LAW

As set forth above, albeit in language that would make even the most experienced lawyer cringe, section 8(b)(4)(B) prohibits certain conduct which enmeshes parties neutral to the dispute between the union and its more direct target. The legislative purpose is to shield the unoffending party from pressure imposed due to controversies not its own.63

Despite the presence of its six verbs, section 8(b)(4)(i) breaks down into essentially two components: first, engaging in a strike or other form of work stoppage; and second, inducing or encouraging certain individuals to do the same thing. Indeed, to refuse to use, manufacture, process, transport, handle, or work, is effectively to strike.64 Section 8(b)(4)(ii) is more succinct, proscribing threats, coercion, and restraint. Significantly, each type of conduct set forth in subsection (i) and in subsection (ii) by itself does not constitute an unfair labor practice under section 8(b)(4)(B). The conduct must have a subsection (B), or secondary object, to be unlawful under the section.65

As with section 8(b)(4)(i), subsection (B)’s inclusion of five gerunds makes it appear ominous. However, despite the wordiness, it is fair to say that to force or require a person to cease using, selling, handling, transporting, or dealing with another is effectively to force that person to cease doing business with that other. Thus, this Article, as with the large majority of section 8(b)(4)(B) cases, focuses the secondary discussion to the so-called “cease doing business” object.

Although compartmentalized thinking generally leads to poor analysis, written discussion of this entire area compels separate discussions, the first focusing on the area of union conduct under section 8(b)(4)(i) and (ii), and the second focusing on secondary object issues attached to that conduct.

Union conduct takes on various forms, the most common of which are the strike and picket, which may or may not rise to the level of section 8(b)(4)(i) or (ii), depending on the circumstances of any given case.

63. See NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 692 (1951) (illustrating that a party will be shielded by the NLRB where it was not legally responsible for the controversy).

64. See infra notes 68–80 and accompanying text for a definition of the term “strike.”

Secondary object issues on the other hand—whether a person or employer is in fact neutral to the dispute—often pose more confusing problems. The large majority of these fall into six, general areas as follows: the locus of the conduct; whether that locus is shared by more than one entity, or so-called common situs cases; ambulatory or mobile sites; activity targeting products; issues involving struck work, single employers, related corporate entities; and those involving contractual relationships, which may forfeit neutral status. Additionally, “cease doing business” agreements, which compel a party not to do business with certain others, occupy their own sphere of secondary object law, explored infra notes 118–32 and accompanying text.

A. Section 8(b)(4)(i) and (ii) Conduct

Certainly, by virtue of the clear wording of the statute, strikes automatically fall into the section 8(b)(4)(i) category. Additionally, they typically have been held to constitute (b)(4)(ii) conduct as well. Picketing raises more complicated issues. Before assessing whether any particular strike or picket constitutes either section 8(b)(4)(i) or (ii) conduct, definition of those terms through explanation of evolving caselaw will enable a better understanding of the area.

1. Strikes, Partial Strikes and Refusals to Volunteer

Although section 13 of the Act safeguards the right to strike, the term itself is not defined in section 2. Section 501 of the Labor Management Relations Act defines strike as “any strike or other concerted

66. See Local 761, Int'l Union of Elec., Radio & Mach. Workers, 366 U.S. at 674 (characterizing the task of distinguishing between primary and secondary activity as “drawing lines more nice than obvious”).

67. See notes 149–50 and accompanying text.

68. “Nothing in this subchapter, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” 29 U.S.C. § 163 (2000).

69. Section 2, the NLRA’s definitional section, defines the following terms: person; employer; employee; representatives; labor organization; commerce; affecting commerce; unfair labor practice; labor dispute; National Labor Relations Board; supervisor; professional employee; and healthcare institution. 29 U.S.C. §§ 152(1)–(14) (2000). Although section 2(13) makes reference to the term agent, it does not set forth a definition. Instead, it merely guides the reader in dictating that the lack of authorization or ratification by the liable party not be controlling. 29 U.S.C. § 152(13) (2000). A number of Board decisions address that topic and reiterate the concept. See, e.g., Met. Dist. Council of Phila. & Vicinity, United Bhd. of Carpenters & Joiners (E. Allan Reeves, Inc.), 281 N.L.R.B. 493, 497 (1986); In re Int'l Longshoremen’s & Warehousemen’s Union, Local 6 (Sunset Line & Twine Co.) 79 N.L.R.B. 1487, 1509 (1948) (applying traditional principles of agency law to the conduct of union stewards or delegates).
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stoppage of work by employees (including stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.70 Black's Law Dictionary defines a strike as "[t]he act of quitting work by a body of workers for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."71 However, use of the term "work" in that definition may pose confusion.

Initially, any strike may be characterized in terms of its purpose—for instance, an economic strike to protest working conditions, as opposed to an unfair labor practice strike undertaken in response to the commission of such unlawful practices.72 The conduct itself, however, is either total or partial—in other words, a full walkout, or a refusal to perform only certain functions. As a general proposition, partial strikes are not protected by the Act.73 The Board has held that protecting such conduct would essentially serve as a sanction for the strikers' unilateral determination as to what work to perform or not to perform.74 Of course, it is well settled that unilateral action is ordinarily prohibited by the Act, and, at the very least, should always be viewed with a suspicious eye.75

However, not all "work" is mandatory. In certain situations, the Board has held that refusals to perform voluntary assignment are not really strikes at all, and thus, not within the partial strike concept and therefore protected.76 However, it is not so much the voluntary nature of the assignment as it is the union's purpose underlying the action that dictates

71. BLACK'S LAW DICTIONARY 1423 (6th ed. 1990). The definition proceeds to identify and define various forms of strike, including recognitional, jurisdictional, secondary and others.
72. This distinction becomes significant in a variety of contexts, the most common being the applicability of a no strike clause to the stoppage in question. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (holding that there were no contractual or statutory provisions preventing the employees' strike against unfair labor practices, so striking employees did not lose their status as employees and were entitled to both reinstatement and back pay, despite the presence of no strike clause in the contract covering the strikers).
73. Local 13-B, Graphic Arts Int'l Union (W. Publishing Co.), 252 N.L.R.B. 936 (1980), enforced, 682 F.2d 304 (2d Cir. 1982).
75. NLRB v. Katz, 369 U.S. 736 (1962). Unilateral action is permitted in only certain limited situations, i.e., where parties engaged in negotiations have reached a good faith impasse, or where economic exigencies may justify the kind of inherently essential maneuvers not subject to a bargaining obligation. Id. at 741–42.
76. See Local 742, Int'l Union of Elec. Radio & Mach. Workers (Randall Bearings, Inc.), 213 N.L.R.B. 824 (1974) (emphasizing the significance, in this 158(d) case, the union's admission that its purpose in refusing to perform voluntary overtime was to pressure the employer to accede to its demands at the bargaining table), enforced, 519 F.2d 815 (6th Cir. 1975).
whether it is a strike. For instance, in Local P-575 Meat Cutters (Iowa Beef Packers, Inc.), the parties’ contract set forth that overtime be voluntary, yet when employees refused to perform the extra hours, the Board held the action no less a strike than if overtime were mandatory. The Board looked past the contract, instead focusing on the fact that the action itself was designed to cause the employer to capitulate to union demands, or at least produce a response in view of the fact that the parties’ practice found the unit volunteering on a regular basis for long periods of time.

2. Picketing and Handbilling

In the context of secondary boycott cases, the terms picket and handbill are often the source of litigation and argument. While charged unions characterize their conduct as handbilling, affected employers argue that the conduct constitutes picketing. The distinction is significant as explained further below in this section.

Once again, the term “picketing” is not defined in the Act, despite specific references to it in sections 8(b)(4) and 8(b)(7). Although the

77. See Local P-575, Amalgamated Meat Cutters & Butcher Workmen, 188 N.L.R.B. 5, 6 (1971).
78. Id. Iowa Beef is cited with approval by the Board in New York State Nurses Ass’n (Mt. Sinai Hosp.), 334 N.L.R.B. 798 (2001) (holding that the union violated section 158(g) by failing to give the statutory ten days notice to the employer and Federal Mediation and Conciliation Service before refusing to perform voluntary overtime).
79. Id.
80. Id.
81. As noted supra note 45, section 158(b)(4) contains several provisos, the second of which sets forth that:

[f]or the purposes of this paragraph 4 only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. §158(b)(4)(B) (2000). Section 158(b)(7) specifically makes it an unfair labor practice for a labor organization to picket, threaten to picket, or cause to be picketed, any employer where an object thereof is to force or require the employer to recognize or bargain with a labor organization in three contexts set forth in subsections (A), (B) and (C) of that section. 29 U.S.C. § 158(b)(7)(A)(B)(C) (2000).
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traditional definition anticipates signs and an elliptical march,\textsuperscript{82} the Board has long held that neither the presence of picket signs nor the element of a patrol is necessary to establish a finding that picketing has occurred.\textsuperscript{83} Rather, the Board’s traditional test merely requires the posting of individuals, by a labor organization, at the approach to a place of business to accomplish a purpose which advances the cause of the union,\textsuperscript{84} and the concomitant presence of a confrontational element.\textsuperscript{85} The Board has also

\textsuperscript{82} See \textit{BLACK’S LAW DICTIONARY} 1147 (6th ed. 1990) (noting that picketing is usually accompanied by patrolling with signs).


\textsuperscript{85} Chi. Typographical Union No. 16 (Alden Press, Inc.), 151 N.L.R.B. 1666, 1669 (1965). There is a significant history which led to the Board’s requirement of the element of confrontation as a predicate for finding picketing. In February 1962, the Board held that the act of placing signs in snow banks constituted picketing. Local 182, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Woodward Motors, Inc.), 135 N.L.R.B. 851 (1962). In January 1963, the United States Court of Appeals for the Second Circuit affirmed the Board’s Order in \textit{Woodward}, commenting that at the very least, the Board had not acted unreasonably in determining such activity to constitute picketing. NLRB v. Local 182, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 314 F.2d 53, 57-58 (2d Cir. 1963). In September 1963, the Board held that general parading through a shopping district with signs constituted picketing, albeit without a recognitional object. Alton Wood River & Constr. Trades Council (Jerseyville Retail Merchs. Ass’n), 144 N.L.R.B. 526, 528 (1963). In March 1964, the Board adopted the Administrative Law Judge’s decision citing the Second Circuit’s decision in \textit{Woodward} that, where union agents placed signs on trees and poles in front of an employer’s facility, the conduct constituted picketing. United Furniture Workers (Jamestown Sterling Corp.), 146 N.L.R.B. 474, 478 (1964). However, when the case got to the United States Court of Appeals for the Second Circuit in October 1964, Judge Kaufman remanded the matter back to the Board, finding an insufficient basis upon which to conclude that the conduct in question was picketing. NLRB v. United Furniture Workers, 337 F.2d 936 (2d Cir. 1964). The court found that a necessary condition of picketing is the presence of a confrontation of some form between union members and those seeking to enter the premises at issue and was unsure of the extent to which the Board considered the level of confrontation necessary to constitute picketing. \textit{Id.} at 939. When the Board decided \textit{Alden Press} in 1965, and found, contrary to the decision in \textit{Jerseyville Retail Merchs. Ass’n}, that general parading through a mall did not constitute picketing, it specifically referenced the Second Circuit’s \textit{Jamestown Sterling} decision in observing that the confrontational element is necessary to show the presence of picketing. Chi. Typographical Union No. 16 (\textit{Alden Press, Inc.}), 151 N.L.R.B. at 1669. Nevertheless, the
included in the definition of picketing a concept known as signal picketing, most commonly found where the stationing of union agents, signs, or both at the entrance to a business acts as a signal to others to induce action by them. The number of individuals engaged in the conduct is not the controlling factor. Thus, where employees, regardless of number, gather around a sign or are milling around, such has been found to constitute picketing. The Board has found the confrontational element where signs are placed on safety cones, barricades, fenceposts and pickup trucks. The dispositive component is whether the evidence shows that the union’s appeal is aimed at inducing a response, as distinguished from merely communicating an idea. The latter concept is most commonly seen in the form of union handbilling.

Section 8(b)(4)(B)’s second proviso creates an apparent carve-out for certain conduct deemed “publicity other than picketing” for the purpose of truthfully advising the public, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. Until 1988, the Board viewed the second proviso as excepting from proscription of the statute otherwise coercive conduct, which did not rise to the level of a picket. The Supreme Court’s kind of “confrontation” anticipated need not involve aggressive or assertive behavior. See, e.g., Local 1827, United Bhd. of Carpenters and Joiners, No. 29-CC-933, 2003 WL 21206515, at 47 (May 9, 2003) (involving use of banners); see also 40-41 Realty Assocs., Inc., 288 N.L.R.B. 200, 204 n.17 (1988) (declaring that picketing, which took place away from the main entrance of a facility, was not deprived of its confrontational element).


87. See, e.g., Lawrence Typographical Union No. 570 (Kan. Color Press, Inc.), 169 N.L.R.B. 279, 283 (1968) (describing an activity involving four individuals), enforced, 402 F.2d 452 (10th Cir. 1968); Teamsters Local 688 (Levitz Furniture), 205 N.L.R.B. at 1132 (discussing an activity involving two persons).


90. See, e.g., Hosp. & Serv. Employees Int’l Union, Local 399 (Delta Air Lines, Inc.), 263 N.L.R.B. 996, 996 (1982) (finding certain handbilling constituted (ii) conduct but did not fall within the protection of the proviso because it was not for the purpose of truthfully advising the public), vacated, 743 F.2d 1417, 1417 (9th Cir. 1984), and remanded, 293 N.L.R.B. 602 (1989).
landmark decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*\(^9\) changed that approach. In *DeBartolo*, a union distributed handbills at a shopping mall to protest the fact that one of the mall’s tenants, Wilson, had retained a non-union contractor, High, to perform certain work.\(^9\) The Board at first held that the handbilling was protected by the publicity proviso, not persuaded by the lack of a producer-distributor relationship between the parties.\(^9\) When the issue reached the Supreme Court in the first *DeBartolo* case,\(^9\) the Court was not persuaded by the Board’s distinction. Instead, the Court was more concerned with whether the conduct at issue rose to the level of that proscribed in section 8(b)(4)(ii) in the first place.\(^9\) Thus, the case was remanded to the Board to rule on that issue, where the Board reached the conclusion that handbilling, in fact, met the section 8(b)(4)(ii) definition.\(^9\) It is that conclusion with which the Court disagreed on appeal, when it pronounced that the second proviso did not serve to except coercive conduct from proscription of section 8(b)(4)(ii).\(^9\) Instead, the Court held that the second proviso was merely a clarifying section, and that peaceful handbilling does not rise to the level of section 8(b)(4)(ii) conduct.\(^9\)

It is against the backdrop of this area of law that parties often clash as to whether activity is more akin to handbilling, warranting First Amendment protection, or rises to the level of a picket, which ordinarily is deemed restraining or coercive. One concept which *DeBartolo* does not change, however, is that handbilling continues to constitute either (i) or (ii) conduct or both where it is linked to picketing, which runs afoul of either subsection.\(^9\) In *Goold Electric*, for instance, the Board found that where secondary picketing and handbilling took place concurrently, both were

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92. Id. at 570.
94. 463 U.S. at 147.
95. See id. at 157–58 (noting that the Board had not reached the constitutional issue implicated by a prohibited peaceful handbilling).
97. *DeBartolo*, 485 U.S. at 582.
98. Id.
unlawful, notwithstanding the union’s protestations that it ceased its picketing at one point, thereafter only engaging in handbilling. The Board adopted the judge’s decision in finding the subsequent handbilling unprotected, concluding that the union could not divorce itself from the totality of its conduct. In Santa Fe Railway, the Board adopted the Judge’s finding of a violation, and his conclusion that the union’s handbilling was merely part of an illegal picket, in which picketers distributed handbills.

Recently, the Board’s General Counsel has taken the position that a union’s use of an inflatable rat is in effect no different from a picket and therefore constitutes section 8(b)(4)(i) and (ii) conduct. As of this writing, the Board has yet to rule on the issue.

3. Meeting the Definition of Section 8(b)(4)(i)- Inducement and Encouragement

Section 8(b)(4)(i) and its precursor, section 8(b)(4)(A) prohibit labor organizations from “engaging in,” as well as “inducing or encouraging.”

100. Goold Elec., 297 N.L.R.B. at 1056.
101. Id.
103. See, e.g., Laborers’ Eastern Reg’l Organizing Fund (Concrete Structures, Inc.), JD(NY)-22-05 (June 14, 2005) (holding, inter alia, that a union’s use of inflatable rats accompanied by individuals distributing leaflets at several construction sites constituted picketing); Sheet Metal Workers Int’l Ass’n, Local 15 (Brandon Reg’l Med. Ctr.), 2004 WL 2843187 (Dec. 7, 2004) (referencing an administrative law judge’s agreement, inter alia, that use of an inflatable rat at a hospital, in tandem with the misleading nature of handbills distributed at that site, constituted picketing). At present, the Board has yet to rule on either of these decisions. See also UNITE (Sterling Laundry, Inc.), No. 5-CC-1278, 2004 WL 1418146, at 5 (N.L.R.B.G.C. Apr. 1, 2004) (alluding to an advice memorandum advocating the General Counsel’s position that the inflatable rat constitutes a picket); Timothy F. Ryan and Kathryn M. Davis, Banners, Rats, and Other Inflatable Toys: Do They Constitute Picket Activity? Do They Violate Section 8(b)(4)?, 20 LAB. LAW. 137 (2004). Although it has not squarely faced the issue, the Board has alluded to the fact that such action violates 158(b)(4)(i) and (ii). See Sheet Metal Workers Int’l Ass’n, Local 19 (Delcard Assocs. Inc.), 316 N.L.R.B. 426, 437–38 (individual in rat costume), enforcement denied on other grounds, 154 F.3d 137 (3d Cir. 1998). Additionally, a number of cases regarding whether the use of large banners constitutes picketing have led to mixed results from NLRB administrative law judges, and the Board has not yet ruled on the issue. See Local 1827, United Bhd. of Carpenters & Joiners, No. 28-CC-933, 2003 WL 21206515 (May 9, 2003) (holding that banner constituted picketing); Southwest Regional Council of Carpenters, No. 31-CC-2115, 2004 WL 762435 (Apr. 2, 2004) (holding that banner constituted picketing). But see Southwest Regional Council of Carpenters, No. 31-CC-2113, 2004 WL 350975 (Feb. 18, 2004) (holding that no picketing occurred); United Bhd. of Carpenters & Joiners, Local 184 & 1498, No. 28-CC-973, 2005 WL 195115 (Jan. 13, 2005) (holding no picketing occurred); Southwest Regional Council of Carpenters, No. 27-CC-877, 2004 WL 2671638 (Nov. 12, 2004) (holding no picketing occurred); Carpenters Local Union No. 1506, No. 31-CC-2121, 2005 WL 77044 (Jan. 6, 2005) (holding no picketing occurred).
certain work stoppages. Whether a union engages in a work stoppage is discussed supra Part II. With regard to inducements and encouragements, union conduct takes various forms, most often either picketing or a host of verbal and other appeals.

Analysis of the inducement/encouragement area may be broken down into essentially two categories. The first involves what kind of statements or actions constitute inducements or encouragement, while the second addresses who is being induced to engage in the conduct at issue.

a. What Constitutes Inducement and Encouragement

The United States Supreme Court has held the words "induce or encourage" broad enough to include all forms of influence or persuasion. The Board has refined that definition, repeatedly holding that, even assuming it is directed at neutral employees, whether a union's conduct constitutes inducement or encouragement depends upon whether that conduct would reasonably be understood by targeted employees as a signal or request that they engage in a work stoppage against their own employer. The concept is essentially in harmony with Board law.

104. See supra notes 69–81 and accompanying text.
105. See IBEW v. NLRB, 341 U.S. 694, 701–02 (1951) (holding that peaceful picketing that induces a secondary boycott is nonetheless unlawful); Robert F. Koretz, Federal Regulation of Secondary Strikes and Boycotts—Another Chapter, 1959 Colum. L. Rev. 125, 146 (1959) (discussing Samuel Langer).
106. See, e.g., Teamsters Local 122 (August A. Busch & Co.), 334 N.L.R.B. 1190, 1192 (2001) (holding that picketers shouting "boycott Busch" to employees of a radio station entering a local pub for a promotion did not constitute (i) conduct), enforced, Teamsters Local 122 v. NLRB, No. 01-1513, 2003 WL 880990, at 1 (D.C. Cir. Feb. 14, 2003); IBEW, Local 98 (The Tel. Man, Inc.), 327 N.L.R.B. 593, 595–97 (1999) (holding that a union agent's statement to neutral employees, "[G]et the fuck out of my building. This is my building. Everybody get the fuck out of here," constituted (i) conduct); Iron Workers Union Local 378 (N.E. Carlson Constr., Inc.), 302 N.L.R.B. 200, 210 (1991) (holding that asking neutral employees why they were crossing the picket lines constituted (i) conduct), enforced, 996 F.2d 1226 (9th Cir. 1993); Ironworkers Dist. Council (Hoffman Constr. Co.), 292 N.L.R.B. 562, 584–85 (1989) (finding (i) conduct when the union told neutral employees that their union supported the striking union and asked them why they were working while a strike was in progress), enforced, 913 F.2d 1470 (9th Cir. 1990); Int'l Longshoremen's & Warehousemen's Union Local 19 (W. Coast Container Serv., Inc.), 266 N.L.R.B. 193, 195 (1983) (finding (i) conduct where union agent asked neutral employee if he knew he was scabbing off the longshoremen and could get in some trouble); Plumbers & Steamfitters Local 398 (Robbins Plumbing & Heating Contractors, Inc.), 261 N.L.R.B. 482, 484 (1982) (holding that an employee's statement, on an unlawful picket line, in union agent's presence, "You're not going to cross this gate, are you," constituted (i) conduct); Los Angeles Bldg. & Constr. Trades Council (Independent Const. Contractors), 215 N.L.R.B. 288, 290 (1974) (finding (i) conduct where union agent told neutral employees that picket line was authorized and sanctioned by their union); Local 3, IBEW (N.Y. Tele. Co.), 197 N.L.R.B. 328, 331–32 (1972) (holding (i) conduct found where union's general manager told a membership meeting that employees act as strikebreakers, contrary to trade
concerning threatening or coercive statements attributed to union agents, and which requires consideration of whether the comments could reasonably be construed as coercive or restraintful. An express inducement to strike is not a predicate to finding the presence of section 8(b)(4)(i) conduct. Rather, where a work stoppage or refusal to handle goods is the foreseeable consequence of the conduct in question, the section 8(b)(4)(i) element will be met. The success or failure of an inducement to achieve its desired end is irrelevant to a determination of whether the conduct at issue rises to the level of section 8(b)(4)(i). Instead, the Board takes a case-by-case approach, assessing conduct on the merits and in the context of each particular case. Thus, where a union agent merely informs neutral employees that they have a right to choose not to handle goods produced by an employer with which the union has a primary dispute, the Board will not find such a statement, alone, to

union principles, by handling materials delivered by a struck employer whose contract was with a different union, enforced, 477 F.2d 260 (2d Cir. 1973).

107. See United Paperworkers Int'l Union, Local 710 (Stone Container Corp.), 308 N.L.R.B. 95 (1992) (emphasizing that the test for threatening and coercive statements is whether the union's statements reasonably tend to have a coercive effect and does not depend on its actual effect on listeners); Retail Clerks Union, Local 770 (Save-On-Drugs, Inc.), 227 N.L.R.B. 1638 (1977) (finding that statements made by the union were unlawful because they reasonably tended to restrain or coerce employees from exercising their statutory right to refrain from joining or supporting the union); Janler Plastic Mold Corp., 186 N.L.R.B. 540 (1970) (using the reasonableness test to find union statements lawful); Amalgamated Clothing Workers, Local 990 (Troy Textiles, Inc.), 174 N.L.R.B. 1148, 1148 n.1 (1969) (restating that the test for coerciveness is not the actual effect but the reasonably intended effect).


109. Id; Sheet Metal Workers Int'l Ass'n, Local 104 (Losli Int'l Inc.), 297 N.L.R.B. 1078, 1085 (1990) (citing Int'l Longshoremen's & Warehousemen's Union Local 119 (W. Coast Container Serv. Inc.), 266 N.L.R.B. 193, 196 (1983)).

110. See Millmen & Cabinet Makers Union, Local 550 (Steiner Lumber Co.), 153 N.L.R.B. 1285, 1289 (1965) (holding that "induce and encourage" includes attempts which do not necessarily have to succeed) (citing NLRB v. Dallas Gen. Drivers, 264 F.2d 642 (5th Cir. 1959)); NLRB v. Laundry Linen Supply & Dry Cleaning Drivers Local 298 (S. Serv.), 262 F.2d 617 (9th Cir. 1958); NLRB v. United Steelworkers (Barry Controls, Inc.), 250 F.2d 184, 187 (1st Cir. 1957). Significantly, however, where a union successfully induces or encourages employees to cease working for their employer, the Board has repeatedly held that the union also violates section 158(b)(4)(ii) inasmuch as it necessarily acts to restrain or coerce the employer. See United Food & Commercial Workers Union Local 1776, 334 N.L.R.B. 507, 509 n.8 (2001) (finding evidence of unlawful coercion when union successfully induced or encouraged employees to withhold services); Gen. Teamster, Warehouse & Dairy Employees Union Local 126 (Ready Mixed Concrete), 200 N.L.R.B. 253, 254 n.6 (1972) (noting that successful inducement or encouragement of workmen to cease performing services necessarily restrains or coerces their employer). Similarly, where a union induces primary employees to cease work, but in the presence of a secondary, neutral party, it also violates section 158(b)(4)(ii)(B).
constitute an unlawful inducement. Consideration will also be given to evidence of a union agent’s efforts to avoid running afoul of the law. On the other hand, the absence of direct evidence of an inducement is not necessarily dispositive of the case. Reliance on mere circumstantial evidence to establish a union’s responsibility for section 8(b)(4)(i) inducements is entirely permissible under Board law.

The analytical, case-by-case approach to the issue is very much the same, even where a union goes beyond the traditional oral appeal. For example, the Board has found a union agent’s beckoning motion to neutral employees, who heeded the call and stopped working, to constitute section 8(b)(4)(i) conduct. Written manifestations, such as provisions of union bylaws, have also been found to meet the test. Internal union discipline,

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111. See Bldg. & Constr. Trades Council (Tampa Sand & Material Co.), 132 N.L.R.B. 1564, 1565–66 (1961) (holding that union is not required to refrain from making the law known to its members); see also Gould Inc., Switchgear Div., 238 N.L.R.B. 618, 622 (1978) (extending protection to spontaneous walkout where union only told workers that whatever action they took would be their own choice), enforced, 638 F.2d 159 (10th Cir. 1980).

112. See, e.g., Carpenters Local 316 (E&E Development Co.), 247 N.L.R.B. 1247, 1248–49 (1980) (finding that non-responsive and equivocal comments manifested an effort not to engage in conversation about whether an employee should cross a picket line or not). As consistently circumspect as the Board has been, assessment of a union’s conduct can pose difficulties. Often the Board is placed in the position of having to determine whether a union is giving the proverbial “nod, wink and a smile” to neutral employees, thereby engaging in section 8(b)(4)(i) conduct, or whether it is merely communicating in a lawful way. See, e.g., Ironworkers Local 386 (Warshawsky & Co.), 325 N.L.R.B. 748 (1998) (Gould, C., concurring) (refusing to find handbilling unlawful, based significantly on a lack of evidence that union agents made comments to neutral employees), enforcement denied, 182 F.3d 948 (D.C. Cir. 1999); cf. Sheet Metal Workers Int’l Ass’n Local 299 (S.M. Kisner & Sons), 134 N.L.R.B. 1202 (1961) (finding unlawful a union steward’s statement to neutrals that he was “leaving it up to them” as to whether to honor a work stoppage).

113. See Local 456, Int’l Bhd. of Teamsters (Peckham Materials Corp.), 307 N.L.R.B. 612, 617 (1992) (finding no direct evidence that union ordered employees not to load trucks, but holding nonetheless that circumstantial evidence may establish that union was responsible for the work stoppage).

114. See, e.g., Int’l Union of Operating Eng’rs (Associated Eng’rs), 270 N.L.R.B. 1172, 1175 (1984) (explaining a situation in which a union agent motioned with his arms to neutral employees after which they stopped working).

115. See, e.g., Local 3, IBEW (N. Telecom, Inc.), 265 N.L.R.B. 213, 213 n.2 (1982) (holding union’s bylaws, which required members to prevent their respective employers from assigning work within the union’s jurisdiction to other tradesmen, constituted section 8(b)(4)(i) conduct), enforced, 730 F.2d 870 (2d Cir. 1984); Int’l Union of Operating Eng’rs, Local 150, 313 N.L.R.B. 659, 670–71 (1994) (finding bylaws unlawful because they prohibited work on a job where a strike was called and required members to leave when notified by the union), enforced, 47 F.3d 218 (7th Cir. 1995); Great Falls Bldg. & Constr. Trades Council (Purvis-Fedco, Inc.), 154 N.L.R.B. 1637, 1644 (1965) (finding that the written communication, which advised neutral employees of picketing and urged their neutral shop steward to advise members that they were working on an unfair job, in tandem with informing neutral employees that the picket was sanctioned by their local, was unlawful).
ordinarily protected by the proviso to section 8(b)(1)(A), if imposed with a secondary object, has been construed as inducing or encouraging employees not to work. The theory here is that the discipline induces employees not to work, and that the natural result thereof would be to force a neutral employer to cease doing business with the primary. In fact, even the mere threat of internal union sanctions against members rises to the level of section 8(b)(4)(i).

While section 8(b)(4)(i) includes strikes, it does not specifically mention picketing. The Board has generally regarded picketing as a signal to neutral workers to cease performing services. However, the facts may dictate that the mere presence of a picket is insufficient to prove unlawful inducement. Thus, picketing is not per se section 8(b)(4)(i) conduct because it is not necessarily always understood by neutral employees as a signal that they should cease work, nor is such always foreseeable.

116. 29 U.S.C § 158(b)(1)(A) (2000) (stating that, "[i]t is hereby declared to be the policy of the United States to encourage the practice and procedure of collective bargaining and other voluntary union activities."); see also Scofield v. NLRB, 394 U.S. 423 (1969) (regarding lawful imposition of internal union discipline).

117. See Int'l Union of Operating Eng'rs, 313 N.L.R.B. at 669–70 (finding unlawful internal union charges against union employees who crossed picket line during strike) (citing Local 153, IBEW (Belleville Elec. & Heating Inc.), 221 N.L.R.B. 345 (1975); Local 252, Sheet Metal Workers Int'l Ass'n, 166 N.L.R.B. 262 (1967); United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (T.S. Hanson Plumbing), 277 N.L.R.B. 1231 (1985), enforced, 827 F.2d 579 (9th Cir. 1987); Local 388, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (Daily Heating & Air Conditioning, Inc.), 280 N.L.R.B. 1260 (1986)).


119. See Local 80, Sheet Metal Workers Int'l Ass'n (Limbach Co.), 305 N.L.R.B. 312, 316–17 (1991) (finding that a refusal to renew collective bargaining agreement also constituted section 8(b)(4)(ii) conduct), enforcement denied on other grounds, 989 F.2d 515 (D.C. Cir. 1993).

120. See United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 290 (Hoffman Constr. Co.), 323 N.L.R.B. 1101, 1110 n.47 (1997) (holding that picketing is presumed to be "inducement" to strike and unlawful "threat" that strike will occur); Gen. Teamster, Warehouse & Dairy Employees Union, Local 126 (Ready Mixed Concrete, Inc.), 200 N.L.R.B. 253, 254 n.6 (1972) (noting that picketing that appeals to employees of secondary employers violates section 8(b)(4)(i) and (ii)(B) of the NLRA).

121. See Local 3, IBEW (Atlas Reid, Inc.), 170 N.L.R.B. 584, 588 (1968) (finding that picketing which coerces and restrains does not necessarily induce or encourage employees within the meaning of section 8(b)(4)(i); Journeymen Plasterer's Protective & Benevolent Soc'y, 158 N.L.R.B. 1608, 1615–16 (1966) (requiring a determination of whether there was actual inducement or encouragement of any person that exceeded permissible bounds) (citing Upholsterer's Frame & Bedding Workers (Minn. House Furnishing Co.), 132 N.L.R.B. 40 (1961)).

122. In each of the following cases, the Board found that picketing need not always rise to the level of section 8(b)(4)(i) conduct: Teamsters Local 122 (August A. Busch & Co.), 334 N.L.R.B. 1190 (2001), enforced, 2003 WL 880990 (D.C. Cir. 2003); United Food &
August A. Busch, for instance, picketers confronted radio station employees entering a local pub at which Busch’s Budweiser brand was conducting a promotion. The picketers, inter alia, urged those employees not to enter the tavern, asked them why they wanted to go in, and told them to “boycott Bud.” The Board concluded that while such conduct met the definition of section (ii) conduct, it did not constitute section (i) action, inasmuch as the picketers’ statements could not be reasonably understood by the employees to whom they were directed as requests that they engage in a work stoppage against the radio station. Similarly, picketing and hand-billing at a college and hospital, without evidence of an intention to induce or encourage neutral employees to cease working for their own employer, was held not to meet the definition of section (i) conduct. The evidentiary burden is no different for handbilling, where, regardless of whether the conduct rises to the level of section (ii) behavior, assessment of the section (i) issue will depend on the presence of evidence that the union’s conduct could reasonably be interpreted as a signal to employees to stop working.

b. Who is Being Induced—The Servette Doctrine

Section 8(b)(4)(i) prohibits the inducement or encouragement of individuals, rather than merely employees. In view of the broader coverage, it is often necessary to assess whether a statutory supervisor may be unlawfully induced or encouraged. The Supreme Court confronted


123. 334 N.L.R.B. at 1191.
124. Id.
125. Id. at 1191–92.
126. Local 254, Serv. Employees Int’l Union (Women & Infants Hosp.), 324 N.L.R.B. at 743.
127. See Iron Workers Local 386 (Warshawsky & Co.), 325 N.L.R.B. 748 (1998) (finding that the respondent union did not violate section 8(b)(4)(i) and (ii)(B) of the NLRA by handbilling a construction site), enforcement denied, 182 F.2d 948 (D.C. Cir. 1999).
128. The NLRA defines the term supervisor in section 2(11) as follows: “[t]he term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152 (11) (2000).
this issue in *NLRB v. Servette, Inc.*129 There, the Court overruled the Board’s earlier approach, which differentiated between low level and upper level supervisors.130 Instead the Court drew a distinction based upon what the supervisor in question was being induced to do, rather than upon his level of supervision. Specifically, the Court held that a union may lawfully appeal to a supervisor to exercise her managerial discretion by making a business judgment to cease doing business with another person,131 but may not induce the supervisor to cease working for her own employer in order to pressure the employer to cease doing business with another person.132 The Court’s reasoning, in part, is based upon the presence of section 8(b)(4)(ii), which prohibits threats, restraints and coercion of persons engaged in commerce, as opposed to those employed by such persons. Implicit in the applicability of the more severe level of conduct to statutory persons, including supervisors, is that the less extreme actions, inducement or encouragement be permitted on some level.

Notwithstanding the low-level/upper-level supervisory dichotomy in *Carolina Lumber* having been overruled in *Servette*, application of the Court’s rule nevertheless compels a factual inquiry into the degree or breadth of a supervisor’s authority in order to assess whether the union’s inducement is lawful. For instance, where a union agent appears at a construction site and merely induces or encourages a supervisor employed by general contractor to change suppliers or subcontractors, the union does not violate the Act.133 However, the Board has held that where statutory supervisors do not possess the discretion to refuse to handle materials which have already been delivered, and where those supervisors spend a good degree of time using such materials, a union’s inducement to them to refrain from working with those products takes on a different appearance and runs afoul of section 8(b)(4)(i)(B).134

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130. *Id.* at 49 n.4 overruling *Local 505, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Carolina Lumber Co.),* 130 N.L.R.B. 1438 (1961).
131. *Id.* at 54; see also *Butcher’s Union Local 506 (Adolph Coors Co.),* 268 N.L.R.B. 475, 478 (1983) (reiterating this concept against the backdrop of a case involving the boycott of Coors Beer at a festival), enforced, 753 F.2d 1083 (9th Cir. 1985); *San Francisco Labor Council (Arden-Mayfair, Inc.),* 191 N.L.R.B. 261, 265–66 (1971) (explaining the distinction, this time finding a violation of section 8(b)(4)(ii) where a union agent made threats to picket without restriction), enforced, 475 F.2d 1125 (9th Cir. 1973); *Truck Drivers & Helpers Local 592 (Estes Express Lines, Inc.),* 181 N.L.R.B. 790, 791 (1970) (describing a situation where a request was made in the form of a letter).
133. See *Local 12, Int’l Union of Operating Eng’rs (Cal Tram Rebuilders, Inc.),* 267 N.L.R.B. 272, 274 (1983) (finding the threat of a future work stoppage to be speculation when union merely encouraged that employer change suppliers without making threats of any kind).
134. See *Sheet Metal Workers Int’l Ass’n, Local 99 (Associated Pipe & Fittings Mfrs.),*
4. Meeting the Definition of Section 8(b)(4)(ii) Conduct—Threats, Restraint, and Coercion

Section 8(b)(4)(ii) makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce.¹³⁵

In Section A, supra note 45, the inducement/encouragement area included an array of conduct, including oral appeals as well as certain picketing. The wording of the statute in section 8(b)(4)(ii), however, refers to threats, restraint or coercion. This compels separate analytical inquiry into statements typically falling into the “threats” category, and actions routinely assessed in the “restraint or coercion” category. Again, even assuming the presence of a secondary object to the activities, it is necessary to determine whether the conduct or action at issue rises to the level of either section (i) or (ii) conduct.¹³⁶

a. Threats Within the Meaning of Section 8(b)(4)(ii)

Most common in this area are threats to picket, shutdown or strike. The Board has routinely held that unqualified threats of this nature directed at a secondary or neutral party violate section 8(b)(4)(ii)(B).¹³⁷ Failure to

¹³⁶ See Serv. Employees Int’l Union Local 87 (Trinity Bldg. Maint. Co.), 312 N.L.R.B. 715, 742–43 (1993) (reiterating the requirement that both the (i) and/or (ii), as well as the (B) object components be met in order to find a violation). The Board often does not focus on this critical distinction, at times simply finding the lack of a threat based upon what is, in essence, the lack of a secondary object. See, e.g., Shopmen’s Local 455 (Stokvis Multi-Ton Corp.), 243 N.L.R.B. 340 (1979) (finding various threats to be lawful as not having a secondary object within the meaning of the NLRA).
carry through the threat does not provide a defense to the assertion that the threat, itself, rises to the level of section 8(b)(4)(ii). Even the threat of a partial strike has been found to meet the definition. Accordingly, where a union threatens a picket, it has an affirmative obligation to notify the target of the threat that the picket will be conducted legally, especially where it has reason to believe that neutral persons will be at the targeted site. The union must identify the primary disputant in the context of its threatened action. Even where a threat to picket is made outside of the presence of a neutral party, if directed toward neutrals, it must contain the aforementioned safeguards.

The Board has also held that threats of economic pressure against neutral persons constitute section 8(b)(4)(ii) conduct. In this regard, even unspecified threats of “trouble” have been found to be violative. Again, as in other areas of Board law, subjective interpretations of the listener are irrelevant to the analysis; instead, the focal point for consideration is the specific language used. The Board assesses those words on a case-by-case basis, taking into account the entire nature of the conversation at issue.

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919 (1991) (finding a threat to handbill lawful publicity).
93. See Ready Mixed Concrete, Inc., 200 N.L.R.B. at 253 (finding a threat to picket constituted (ii) despite no picket having occurred).
93. See Int'l Longshoremen's & Warehousemen's Local 13 (Egg City), 295 N.L.R.B. 704, 712 (1989) (finding the threat to engage in a complete or partial strike was action within the contemplation of section 8(b)(4)(ii)).
95. See, e.g., Local 247, Int'l Bhd. of Teamsters (Rymco, Inc.), 332 N.L.R.B. 1230, 1233 (2000) (describing union threats to primary Rymco that it would shutdown the job of a neutral general contractor for which it was working unless Rymco employees were union members); Local 3, IBEW (Teknion, Inc.), 329 N.L.R.B. 337, 339 (1999) (finding that threat directed at third party who had contracted with employer fell within the ambit of the NLRA); Operating Eng'rs Local 3 (Westar Marine Serv.), 340 N.L.R.B. No. 127 (2003) (finding that threat of a coming "storm" constituted threat of closure or work stoppage).
96. See Local 174, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (V.G. Scalf.), 172 N.L.R.B. 1217, 1217 (1968) (holding that a threat to use "economic pressure" was tantamount to threat to take unrestricted, unlimited economic action of an unspecified nature against secondary employer and therefore violated section 8(b)(4)(ii)(B)).
98. See Furniture & Piano Moving, Furniture Store Drivers, Helpers & Warehousemen & Packers, Local 82 (Champion Exposition Servs., Inc.), 292 N.L.R.B. 794, 795 (1989) (noting that a threat of a "problem" was, in context, actually a threat of a jurisdictional problem and not a threat to strike).
99. See e.g., IBEW, Local 38 (Cleveland Electro Metals Co.), 221 N.L.R.B. 1073, 1074 (1975) (emphasizing the importance of a conversation's context in understanding a
b. Restraint and Coercion Within the Meaning of Section 8(b)(4)(ii)

While the area of threats is fairly clear and succinct, restraint and coercion occupy a wider, more complex sphere. The Board has defined coercion as those "non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute."147

Certainly, strikes are ordinarily included in that coverage.148 Again, generally speaking, picketing also constitutes section (ii) conduct.149 The Board examines the nature of the conduct, rather than any one, single aspect thereof when analyzing the issue.150 However, as in the section 8(b)(4)(i) area, picketing is not per se section 8(b)(4)(ii) conduct. The Board has held that, where picketing is not intended to, and does not induce a work stoppage, the conduct is not necessarily coercive. In Carpenters Health Fund,151 the United Food and Commercial Workers Local 1776 had organized the employees of a benefit fund, jointly administered by the Metropolitan Regional Council of Carpenters (a labor organization) and the multiemployer group with which the carpenters union maintained a collective bargaining agreement.152 Dissatisfied with the fund's movement
at the bargaining table, the UFCW Local picketed at a Metropolitan Regional Council of Carpenters meeting, at which the co-chairman of the fund was present. In finding that the picketing did not run afoul of section 8(b)(4)(ii), the Board rejected the idea that picketing at a secondary site is per se coercive, and was persuaded that the picket did not induce neutral employees to cease working. In effect, the decision in Carpenter’s Health Fund stands for the proposition that if no secondary object can be shown, nor is there evidence of unlawful section 8(b)(4)(i) conduct, the activity may not necessarily rise to the level of section 8(b)(4)(ii) conduct. As noted earlier, had the union’s conduct actually succeeded in inducing employees of the neutral not to work, then by definition, the conduct would have constituted both section 8(b)(4)(i) and (ii) conduct. On the other hand, where conduct meets the definition of inducement or encouragement under section 8(b)(4)(i), but is unsuccessful in causing its desired result, the Board, absent more, may not find section 8(b)(4)(ii) conduct.

Other areas of coercion also compel the same circumspect approach. Such other forms of conduct which have been found to constitute coercion include: resort to arbitration; filing of a lawsuit; photographing or videotaping; affinity group shopping trips; imposition of internal union

153. Id. at 508.
154. Id.
155. Id. at 509.
156. Id. at 509 n.8 (and cases cited therein). See Latherers Local 252 (I.C. Minium), 159 N.L.R.B. 550, 551 n.1 (1966) (finding violation of section 8(b)(4)(i) for inducing employees to leave, and violation of section 8(b)(4)(ii) for inducing work stoppage against neutral employers).
157. See IBEW, Local 441 (O’Brien Elec.), 158 N.L.R.B. 549, 553–54 (1966) (finding no violation of section 8(b)(4)(ii) without evidence that inducement resulted in work stoppages or otherwise coerced or restrained a “person” engaged on the project).
158. See, e.g., Newspaper & Mail Deliverers’ Union (NYP Holdings, Inc.), 337 N.L.R.B. 608, 608 (2002) (“[T]he union violated Section 8(b)(4)(ii)(A) by resorting to arbitration with an object of forcing or requiring Holdings to enter into an agreement prohibited by Section 8(e).”); Local 32B-32J, Serv. Employees Int’l Union (Nevins Realty Corp.), 313 N.L.R.B. 392, 392 (1993) (finding a secondary object in the resort to arbitration), enforcement denied in part on other grounds, 68 F.3d 490 (D.C. Cir. 1995).
159. See Iron Workers Local 433 (Otis Elevator Co.), 309 N.L.R.B. 273, 273 (1992) (concerning a suit filed to enforce arbitral award, which conflicted with an earlier 10(k) award).
160. See, e.g., Metro. Reg’l Council (Soc’y Hill Towers Owners’ Ass’n), 335 N.L.R.B. 814, 814–15 (2001) (finding that photography or videotaping employees by union pickets will violate their statutory rights when “in conjunction with other actions indicating a union might react adversely to employees who cross a picket line.”).
161. See, e.g., Pye v. Teamsters Local 122, 61 F.3d 1013, 1021 (1st Cir. 1995) (describing affinity group shopping, which refers to the union intentionally disrupting an employer’s place of business through its agents making bogus inquiries of its customer service representatives, with no intention of making a bona fide purchase, or making only
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discipline;\textsuperscript{162} imposition of monetary penalties;\textsuperscript{163} refusals to refer employees for work;\textsuperscript{164} disclaimers of interest;\textsuperscript{165} and even refusing to execute a collective bargaining agreement.\textsuperscript{166}

B. Secondary Object—Subsection (B)

To this point, the discussion has focused on the doctrinal principles governing whether and what kinds of conduct rise to the level of that proscribed in sections 8(b)(4)(i) and (ii). However, even assuming the presence of such union conduct, courts will not find a violation unless a secondary object is present. There must be both a primary dispute and an enmeshed neutral party in order for a violation to be found.\textsuperscript{167} With regard to the degree to which an alleged neutral party must be enmeshed, the statutory phrase contained in subsection (B)—“cease doing business”—involves more than mere literal construction. It does not require a total termination of business between the two parties, or even the presence of a direct relationship between the two.\textsuperscript{168} Rather, it anticipates all such

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\textsuperscript{162} See, e.g., Sheet Metal Workers Int'l Ass'n, Local 104 (G&B Installations, Inc.), 297 N.L.R.B. 1078, 1078 (1990) (involving a case where the union filed disciplinary charges and fined a neutral employer who also was a union member); Ventura County Dist. Council of Carpenters (Commercial Indus. Contractors, Inc.), 259 N.L.R.B. 541, 544–45 (1981) (finding both section 8(b)(4)(i) and (ii) conduct).

\textsuperscript{163} See, e.g., Int'l Union of Operating Eng'rs, Local 12 (Acco Constr. Equip., Inc.), 204 N.L.R.B. 742, 756–57 (1973) (involving a union’s assessment of penalties for failure to abide by a hot cargo clause), enforced, 511 F.2d 848 (9th Cir. 1975).


\textsuperscript{165} See, e.g., Local 80, Sheet Metal Workers Int’l Ass’n (Limbach Co.), 305 N.L.R.B. 312, 312–13 (1991) (concerning a case in which the union disclaimed interest in 158(f) relationship), enforced in part, denied in part on other grounds, 989 F.2d 515 (D.C. Cir. 1993).

\textsuperscript{166} See Sheet Metal Workers Int’l Ass’n (Schebler Co.), 294 N.L.R.B. 766, 775 (1989) (citing Local 418, Sheet Metal Workers Int’l Ass’n, 235 N.L.R.B. 144, 146 (1978)) (defining “coercion” as encompassing “non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute.”).

\textsuperscript{167} See Teamsters Local 70 (U.S. Dep’t of Defense), 288 N.L.R.B. 1224, 1225 (1988) (finding no violation of section 158(b)(4)(ii) because threats of picketing were in furtherance of a primary dispute); Prod. Workers Union Local 707 (Checker Taxi Co.), 283 N.L.R.B. 340, 341 (1987) (finding that the picketed companies were not neutral and so the conduct was not proscribed by section 158(b)(4)), rev’d 273 N.L.R.B. 1178 (1984).

proscribed conduct undertaken with a design to pressure a neutral party to intercede in the Union’s dispute with its more direct target.\textsuperscript{169} That more direct target is the entity with immediate control over the employment terms and conditions about which the Union is protesting.\textsuperscript{170}

Thus, there is great significance placed on whether, and what factors dictate a party to be afforded neutral status. It has long been held that the claimed neutral must be “wholly unconcerned” with the dispute between the union and its more direct target.\textsuperscript{171} Although the “wholly unconcerned” concept arises in the related corporate entities and struck work areas,\textsuperscript{172} its genesis is rooted in the Supreme Court’s 1951 decision in \textit{NLRB v. Denver Building & Construction Trades Council},\textsuperscript{173} a companion case to the Court’s \textit{International Rice Milling} decision, discussed below.

The \textit{Denver Building} case stands for, inter alia, two crucial concepts predicate to an understanding of secondary object law. In \textit{Denver}, a union picketed the presence of a non-union subcontractor, Gould & Priesner, at that jobsite, causing a strike of an entire construction project.\textsuperscript{174} The union defended its shutdown of the entire jobsite by arguing that its dispute was not merely with Gould & Priesner, but also with the general contractor, Doose & Lintner, which had retained Gould, and that its lawful object was economic.\textsuperscript{175} The Court, however, disagreed. The first concept it pronounced was that the subcontract between the two afforded Doose & Lintner neutral status, and that evidence of some supervision by a general contractor over its subcontractor’s work does not eliminate the status of each as an independent contractor.\textsuperscript{176} Secondly, the Court adopted the Board’s reasoning that, regardless of the presence of other admirable or lawful objects, if an object of the union’s (i) or (ii) conduct is secondary, then the conduct is unlawful.\textsuperscript{177} Thus, the Court set some important boundaries. To the union advocate who understandably believes his organization’s dispute is with whoever hired the objectionable non-union

\textsuperscript{169} Id. (citing Local 732, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Servair Maint., Inc.), 229 N.L.R.B. 392, 400 (1977); Local 272, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers (Miller & Solomon Constr. Corp.) 195 N.L.R.B. 1063 (1972)).

\textsuperscript{170} See Leslie Homes, Inc., 316 N.L.R.B. 123, 130 n.21 (1995) (classifying the employer as primary because the union’s actions “were directed at the [employer’s] own hiring practices and employment conditions”), \textit{enforced sub nom.} Metro. Dist. Council v. NLRB, 68 F.3d 71 (3d Cir. 1995).

\textsuperscript{171} See \textit{Derehinsky}, supra note 9, at 122 (citing the comments of Senator Taft, 93 \textit{Cong. Rec.} 4198 (1947)).

\textsuperscript{172} \textit{See infra} notes 297-319 and accompanying text.

\textsuperscript{173} 341 U.S. 675 (1951).

\textsuperscript{174} Id. at 677-79.

\textsuperscript{175} Id. at 688.

\textsuperscript{176} Id. at 689.

\textsuperscript{177} Id. at 688.
subcontractor or supplier, Board law turns a deaf ear, consistently holding that the union’s primary legal dispute is with the subcontractor and that the decisionmaker cannot be the target of section 8(b)(4)(i) or (ii) activity. It similarly does not give consideration to other lofty goals and objects if a secondary object is also present.

This primary-secondary dichotomy serves as the basis of secondary object law. As mentioned, supra note 170 and accompanying text, the primary is the entity with the most direct control over the terms and conditions of employment the union is protesting. For instance, an electrical union’s legal primary dispute is with a non-union electrical subcontractor, rather than with the general contractor responsible for retaining the services of that subcontractor.

Out of Denver Building & Trades and International Rice Milling, grow the rest of secondary object law beginning with some basic principles. Where a union either induces employees of a neutral party, or threatens the neutral, no other evidence of secondary object is necessary. Indeed, enmeshing the neutral party through the proscribed conduct is precisely that which the statute prohibits. Similarly, no actual impact on the neutral’s operation need be proven. Even where the union’s inducement has targeted only employees of the primary employer, those inducements may still violate the Act if there is evidence that shows the

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178. See, e.g., NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688 (1951) (finding that a strike was an unfair labor practice because it was against the contractor instead of the subcontractor); Dist. Council 9, Int’l Bhd. of Painters & Allied Trades (We’re Assocs., Inc.), 329 N.L.R.B. 140, 142 (1999) (citing Serv. Employees Int’l Union, Local 87 (Trinity Bldg. Maint. Co.), 312 N.L.R.B. 715, 743 (1993) (noting that it is a violation to “disrupt the business of an unoffending neutral employer”), enforced, 103 F.2d 139 (9th Cir. 1966)); Omaha Bldg. & Constr. Trades Council (Crossroads Joint Venture), 284 N.L.R.B. 328, 334 (1987) (noting that the union’s right to picket on the premises of a secondary employer is not absolute), enforced, 856 F.2d 47 (8th Cir. 1988); Cedar Rapids Bldg. & Constr. Trades Council (Siebke-Hoyt & Co.), 283 N.L.R.B. 1155, 1157 (1987) (noting that the union did not have a primary dispute with an employer because it did business with non-union contractors). Board Member Liebman has criticized this prevailing concept of neutrality as dated, in view of the proliferation of contractors performing work traditionally done in-house. Teamsters Local 557 (General Motors), 338 N.L.R.B. No. 133, 897 (2003); Serv. Employees Int’l Union, Local 525 (Gen. Maint. Serv. Co.), 329 N.L.R.B. 638, 643 (1999), enforced, 52 Fed. Appx. 357 (9th Cir. 2002).

179. See Int’l Union, United Mine Workers (New Beckley Mining Corp.), 304 N.L.R.B. 71, 73 (1991) (holding that a violation is found where picketing has an object of exerting improper influence on a neutral party), enforced, 977 F.2d 1470 (D.C. Cir. 1992); see, e.g., IBEW, Local 98 (The Tel. Man, Inc.), 327 N.L.R.B. 593, 598 (1999) (observing that “the effective inducement or encouragement of a neutral’s employees... necessarily restrains and coerces the neutral employer”).

180. We’re Assocs., Inc., 329 N.L.R.B. at 143 (citing Local 150, Int’l Union of Operating Eng’rs (Harmstra Builders, Inc.), 304 N.L.R.B. 482, 484 (1991); Carpenters Local 33 v. NLRB, 873 F.2d 316, 322 (D.C. Cir. 1989)).
union also possesses a secondary object. As mentioned, supra, even where a union’s comments are made to the primary disputant, if their gist is to enmesh a neutral party, they are routinely found to have a secondary object and are unlawful.

Outside of the common situs context, discussed infra Part III(B)(2), evidence of object is often clear by virtue of the communication directed at the targeted neutral. One issue that repeatedly arises is a union’s assertion of an “area-standard” object. Typically, a union will bargain to obtain a wage scale for its members covering a certain geographic area. That union has a First Amendment right to picket to protest an employer’s failure to pay that wage, notwithstanding that said employer has no collective bargaining relationship with the union.

However, the Board will examine the surrounding circumstances to determine whether the assertion of an “area standard object” is genuine or merely a pretext for an unlawful object, i.e., one that is recognition or secondary. Thus, a union claiming to protest non-payment of the area standard wage scale ordinarily has an obligation to make a bona fide attempt to determine whether, in fact, the targeted employer is paying wages that fall below that scale.

Failure to make such an attempt, manifest for instance by evidence of inquiries irrelevant to the issue of wages, affords an inference that the picketing has an unlawful object. On the other hand, the Board will not find an inference of an unlawful object if a union makes a bona fide attempt to determine whether an employer is paying wages consistent with the area standard and is met with a refusal to divulge relevant information. In that situation, a union may assume that the employer is not meeting the area

181. See, e.g., Local 294, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Rexford Sand & Gravel Co.), 195 N.L.R.B. 378, 382 (1972) (finding that the union induced employees of primary truck drivers, yet manifested a secondary object in its threats made to a neutral employer).

182. See supra note 142 and accompanying text.

183. See Local Union 741, United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. (Keith Riggs Plumbing & Heating Contractor), 137 N.L.R.B. 1125, 1126 (1962) (noting that unions have a legitimate interest in maintaining area pay standards even in the absence of organization or collective bargaining agreement).

184. See Hoisting & Portable Local 101, Int’l Union of Operating Eng’rs (St. Louis Bridge Constr. Co.), 297 N.L.R.B. 485, 491 (1989) (noting that a picketing union is obligated to investigate whether the employer’s practices are substandard; see also Local 88, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (W. Coast Cycle Supply Co.), 208 N.L.R.B. 679, 680 (1974) (stating that area standards picketing can only be justified when the employers practices can be shown to be substandard).

185. See W. Coast Cycle Supply Co., 208 N.L.R.B. at 680 (noting that the union’s failure to make inquiries resulted in an inference that the union was merely trying to evade the NLRA). Although this often arises in the context of recognition object cases, if there is independent evidence of a secondary object, the assertion of area standards motives should be treated no differently.
SECONDARY BOYCOTTS

The more difficult issues concerning the secondary object area fall into the following categories: the locus of the conduct; common situs and ambulatory situs issues; product picketing; and related corporate entities and struck work doctrine.

1. Locus of the Action Being Induced — The Primary-Secondary Distinction

The secondary object language of the statute—an object of forcing one person to cease doing business with another—contains a proviso carving out as lawful any primary strike or picketing.187 Without the proviso, taken literally, the language of the statute would prohibit statements made to neutral employees by picketers on a wholly primary picket line.188 For example, the union has a dispute with company A and has placed a lawful picket in front of A's place of business. Employees of persons neutral to the dispute, approach the facility intending to deliver goods to A. As they approach, picketers induce and encourage them not to enter. Certainly, the picketers are inducing those neutral employees not to work. However, this is not the kind of conduct for which section 8(b)(4)(B) was enacted.

The Supreme Court faced this issue in NLRB v. International Rice Milling Co., in a case litigated under section 8(b)(4)(A), prior to enactment of the Landrum Griffin Amendments.189 Although the Court relied heavily on the lack of evidence that the union attempted to induce concerted action, today, the case stands for the proposition made clear in the proviso to subsection (B) to which it led—namely, that primary picketing does not run afoul of the Act, regardless of any resultant secondary effect it may have.190

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186. See Orange County Dist. Council of Carpenters (Gordon Builders, Inc.), 227 N.L.R.B. 832, 841 (1977) (finding that the union was reasonable in interpreting the employer's failure to cooperate with the union's inquiries as an admission of its failure to meet area standards); Target Stores, Div. of Dayton-Hudson Corp. (Painters Dist. Council 2 of the Int'l Bhd. of Painters & Allied Trades), 292 N.L.R.B. 933, 939 (1989) (finding that union's repeated attempts to get information concerning wages and benefits from the employer was as extensive as circumstances would permit).

187. 29 U.S.C. § 158(b)(4)(B) (2000). The proviso reads, "Provided, [t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

188. See DERESHINSKY, supra note 9, at 6 (citing ROBERT GORMAN, BASIC TEXT ON LABOR LAW 241 (1978) for the observation that the literal language of the statute is too vague to draw the boundary between illegal secondary, as opposed to lawful primary activity).


190. Id. at 670–71 (observing that the picketing was directed at neutral employees "in a manner traditional in labor disputes," something it refused to find prohibited by §
Rice Milling, of course, presented the case of neutral employees making their approach to a primary picket line, upon which they were induced not to cross or work. The doctrine, however, is not limited to that set of facts. The Board has held that, regardless of where a union has gone to extend the invitation, if it is merely inviting action at the struck or picketed primary premises (the so-called "hot site"), its conduct is protected and does not violate section 8(b)(4)(B). On the other hand, picketing or other proscribed conduct, which invites action at a neutral site would take on a different appearance and constitute a violation. Thus, this so-called "hot site doctrine" distinguishes between a union visiting neutral employees at a neutral employer's place of business, where it merely encourages them not to cross a primary picket line elsewhere, versus inducing those neutral employees to not even load up their own trucks or to leave their own neutral employer's premises. The former invites action at the primary site and is protected, while the latter invites action at the neutral site and is an unlawful secondary inducement within the meaning of section 8(b)(4)(i)(B). Where the primary disputant has sent a truck to a neutral site for loading and the truck itself becomes the "hot site," the inducement to neutral employees not to load the truck may be entirely lawful, provided the union is lawfully picketing the truck.

It is significant to note that applicability of the "hot site doctrine" presupposes the presence of a struck or picketed primary site. Such should be implicit in the language of the proviso to subsection (B), which specifies the carve-out for a "primary strike" or "primary picketing." The Board has repeatedly held that, in the absence of a lawful primary strike or picket line, where a union induces its members to refuse to handle goods, or work for their employers in furtherance of a sister local's primary dispute with

158(b)(4)).
191. Id. at 669–70.
193. See Oil Workers Int'l Union, Local 346 (Pure Oil Co.), 84 N.L.R.B. 315, 319 (1949) (noting explicitly that, in furtherance of a primary dispute with Standard Oil, the union had been clear that cargo of neutral Pure Oil, bound for a primary Standard dock, was not "hot" upon leaving the Pure refinery).
194. Id.
195. Such a case would be governed by the well-known Moore Dry Dock standards, discussed infra. Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950). See also Teamsters Local 612, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (AAA Motor Lines, Inc.), 211 N.L.R.B. 608, 610 (1974) (discussing the concept of "picketing between the headlights").
another company, the inducing union violates section 8(b)(4)(i)(B). Only if the primary union notifies the neutral employees and their neutral employer that the dispute is between it and the primary disputant would such inducements not violate the Act.

2. Common Situs/Ambulatory Situs Issues

Where primary and secondary employers occupy one premises, the premises is referred to as a common situs. Where the site itself is mobile, it is referred to as an ambulatory situs. The requisite "occupation" by the primary, which is necessary for a common situs to be found, compels a case-by-case analysis, with the inquiry focusing on whether there is a sufficient presence of the primary at the alleged common situs.

Common situs cases often present the most complex issues in secondary boycott law. The problem of featuring both primary and secondary parties in one place compels the Board to balance the union's right to target the primary disputant, as in International Rice Milling, while at the same time, preserving the right of the secondary party to be free from a dispute not its own. The Board undertook just that task in In re Sailors' Union (Moore Dry Dock Co.).

Moore Dry Dock actually involved the more unusual ambulatory

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197. Gen. Drivers & Dairy Employees Local 563 (Oshkosh Ready-Mix Co.), 186 N.L.R.B. 219, 227 (1970); Grain Elevator, Flour & Mill Workers (Continental Grain Co.), 155 N.L.R.B. 402, 410-11 (1965), enforced, 376 F.2d 774 (D.C. Cir. 1967); see Teamsters Local 584, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Fairway Farms, Inc.), 141 N.L.R.B. 638, 643 (1963) (holding that, even though the union failed to picket, it still violated section 158(b)(4)(i)(b) because it had induced employees of neutral employer not to load up the truck of the primary disputant at the neutral site. The analysis should not substantially change where the primary union is doing the inducing.).


199. See Oil, Chem. & Atomic Workers Int'l Union, Local 1-591 (Burlington N. R.R.), 325 N.L.R.B. 324, 327 (1998); see also DERESHINSKY, supra note 9, at 9 (stating that the common situs involves both the secondary and primary employers sharing, in some manner, the physical premises being picketed); see also United Mine Workers, Dist. 2 (Jeddo Coal Co.), 334 N.L.R.B. 677, 687 (2001) (observing that "[t]wo or more employers performing separate tasks on a common premises constitute a common situs.")


201. See United Steelworkers of America, Local 6991 (Minute Maid Co.), 177 N.L.R.B. 791, 792 (1969), supplemented by 191 NLRB 1 (1971) (considering "whether the evidence is sufficient to establish ... that direct and immediate relationship between the picketing and the object picketed necessary to a finding of purely primary picketing") (alterations in original).

202. DERESHINSKY, supra note 9, at 9.


204. 92 N.L.R.B. 547 (1950).
situs—the union’s primary dispute was with the owner of a ship, which had come to rest at a neutral dry dock owned by Moore. 205 Certainly, the union has a right to target the primary disputant, namely the ship. However, Moore as a neutral party has the right to have its dock free from a dispute between the union and another party with which it has an arm’s-length relationship. Thus, the Board developed four evidentiary criteria/guidelines to help determine whether a union’s picketing at a common or ambulatory site is primary, rather than secondary. 206 As a predicate matter, a union has an affirmative obligation to attempt to minimize the impact of its picket on neutral employers at such sites, without substantial impairment to the effectiveness of the picket itself. 207 In furtherance of that obligation, a union’s picketing at a common site is presumptively primary, or lawful, if:

[First,] the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer’s premises; [second,] at the time of the picketing the primary employer is engaged in its normal business at the situs; [third,] the picketting is limited to places reasonably close to the location of the situs; and [fourth,] the picketing discloses clearly that the dispute is with the primary employer. 208

Where a union meets these four conditions, it is afforded a rebuttable presumption that its picketing is primary, and thus protected. 209 A union’s failure to comply with any one of the four aforementioned criteria may result in a rebuttable presumption that the picketing is secondary, or unlawful. 210 The union bears the evidentiary burden of proving compliance with the four conditions. 211 In either case, the Board has long held that the Moore Dry Dock guidelines are not to be applied mechanically, nor does

205. Id. at 548–59.
206. Id. at 549.
211. Carlson S.W. Corp., 293 N.L.R.B. at 622.
the breach of one of the four criteria establish a per se violation.\textsuperscript{212} Where a union complies with all four criteria, the presumption of legality may be rebutted upon evidence of a secondary object.\textsuperscript{213} However, in order to rebut that primary presumption, the evidence must show a secondary object concurrent with the section 8(b)(4)(i) or (ii) conduct.\textsuperscript{214} It has been observed that lawful, secondary handbilling, either followed or preceded by an otherwise lawful, primary picket line does not convert that picket line into one with a secondary object.\textsuperscript{215} Similarly, no presumption of a continuing unlawful object will be found where there is a hiatus in the activity.\textsuperscript{216} On the other hand, where the clarity of a secondary object is so obvious by virtue of repeated statements made to a neutral, application of the Moore Dry Dock guidelines is not necessary, and even picketing which conforms to those guidelines may be proscribed.\textsuperscript{217} Once again, the

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\item \textsuperscript{212} Jeddo Coal Co., 334 N.L.R.B. at 687 n.5; IBEW, Local 332 (W.S.B. Elec., Inc.), 269 N.L.R.B. 417, 421 (1984); IBEW, Local 861 (Plauche Elec., Inc.), 135 N.L.R.B. 250, 255 (1962).
\item \textsuperscript{213} See, e.g., Orange County Dist. Council of Carpenters, Local 2361 (John C. Wabbel and J.A. Stewart Constr.), 242 N.L.R.B. 585, 587 (1979) (describing how the union complied with all four criteria, including picketing at the proper gate but it also took disciplinary action against employees of neutral contractors who crossed the picket line in violation of section 158(b)(1)(A)), enforced, 639 F.2d 789 (9th Cir. 1980); Local 369, IBEW (Garst-Receveur Constr. Co.), 229 N.L.R.B. 68 (1977) (describing how union picketed in conformance with all four Moore Dry Dock criteria, but told neutral general contractor that a picket line at any gate constituted an invisible picket line around the entire project and that all would be cleared up if the job were 100 percent union and the primary disputant was off the site), enforced, 609 F.2d 266 (6th Cir. 1979); Local 441, IBEW (Rollins Communications, Inc.), 222 N.L.R.B. 99, 100–01 (1976) (describing remarks made by union agent to neutral general contractor regarding conditioning the removal of pickets upon termination of a subcontract with primary disputant Rollins), enforced, 569 F.2d 160 (D.C. Cir. 1977); IBEW, Local 11 (L.G. Elec. Contractors, Inc.), 154 N.L.R.B. 766, 766 (1965) (noting that upon asking a union representative how he could rid himself of pickets, the agent of a neutral general contractor is told he must terminate the primary disputant and sign a contract with a union affiliated with the AFL-CIO).
\item \textsuperscript{214} See IBEW, Local 11 (Jones & Jones, Inc.), 154 N.L.R.B. 766, 766 (1965) (noting that the statement was made while the picketing was ongoing).
\item \textsuperscript{216} See, e.g., United Bd. of Carpenters & Joiners, Local 1245, 229 N.L.R.B. 236, 241 (1977) (rejecting the presumption of a continued unlawful object after a hiatus). But see San Francisco Bldg. & Constr. Trades Council (Goold Elec., Inc.), 297 N.L.R.B. 1050 (1991) (describing how concurrent unlawful picketing tainted the legality of subsequent handbilling).
\item \textsuperscript{217} Chevron, U.S.A., Inc. (Int'l Bd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers), 244 N.L.R.B. 1081, 1086 (1979) (noting how the Board found a picket line unprotected based upon, \textit{inter alia}, evidence of repeated conversations between a union agent and neutral, in which the union conditioned resolution of the dispute upon the neutral agreeing to terminate its relationship with the primary), enforcement denied on other grounds, 842 F.2d 1141 (9th Cir. 1988).
presence of a lawful object, such as an area standards object, as discussed, supra, does not mitigate a union's unlawful, secondary object. Accordingly, the Moore Dry Dock standards have been applied to picketing which failed to conform to them but which also was undertaken with an otherwise lawful area standards object.218

The Moore Dry Dock criteria have themselves been the subject of a variety of issues and cases over the years. Perhaps the simplest of the four is the last one, requiring the union to identify the primary disputant. Certainly, where a union fails to identify the primary at all, either with signs or in some other way, it is in breach of Moore Dry Dock 4.219 Mere reference to the neutral employer, on either a picket sign or leaflet, does not alone, alter or mitigate the union's otherwise clear identification of the primary.220 Additionally, where a union promptly corrects a defect in its picket signs, perhaps having identified the neutral instead of the primary, the use of the incorrect sign does not support the finding of a violation.221

More complicated issues arise under Moore Dry Dock 1 and 2, specifically related to the concept of whether the primary is present at the site being picketed. Moore Dry Dock 1 and 2 are related concepts, with the presence of the primary at the core of both issues. Certainly, if the primary is not present at the location in question, then that location is not the situs of the dispute and picketing would be in breach of Moore Dry Dock 1, although one does not need the aid of evidentiary guidelines, or application of Moore Dry Dock, to find that kind of picketing secondary.222

218. Millwrights, Local 1102 (Dobson Heavy Haul, Inc.), 155 N.L.R.B. 1305, 1309 (1965).
221. See Local 3, IBEW (Surf Hunter Elec. Co.), 172 N.L.R.B. 1101 (1968) (finding that an incorrect sign was not a violation).
222. See, e.g., United Mine, Workers Dist. 2 (Jeddo Coal Co.), 334 N.L.R.B. 677, 687–88 (2001) (observing that if the primary is not present, then the picketing at the secondary location is purely secondary) (citing Carpenters Dist. Council (Gulf Coast Constr. Co.), 248 N.L.R.B. 802 (1980)); Los Angeles Bldg. & Constr. Trades Council (Silver View Assocs.), 216 N.L.R.B. 307, 308 (1975) ("Respondent . . . failed to conform to the Board's Moore Dry Dock criteria since the picketing did not occur when the primary employer was engaged in its normal business at the situs of the dispute.")., enforced, 530 F.2d 1093 (D.C. Cir. 1976); United Steelworkers, Local 6991 (Auburndale Freezer Corp.), 177 N.L.R.B. 791, 792 (1969) (concluding that the primary was present at the picketing location), supplemented by 191 N.L.R.B. 1 (1971). See also Seafarers Int'l Union (Am. Commercial
Additionally, if the primary is deemed not present, it clearly cannot be engaged in its normal operations at the site. Thus, attaching a definition to the term "presence" becomes significant.

Often the issue presented is the lack of primary employees at work at the time of the picketing. It is well established, however, that the absence of those primary employees, alone, does not necessarily lead to the conclusion that the primary has no presence, or that as a result, the union may not picket the site. A variety of factors are considered, including but not limited to: whether the absence of primary employees is due to the picketing; visits to the site by supervisors of the primary; the intermittent resumption of the primary’s work at the site; the primary’s efforts to recruit new employees to work at the site in question; cessation of the picketing upon completion of the primary’s contractual obligations; the duration and/or permanence of the primary’s absence; and whether the primary continued to store tools at the site.

While none of these indicia is, in and of itself, dispositive of the issue, they are often considered in tandem with the level of knowledge (actual or constructive) the union has regarding both the presence of the primary, and regularity of its schedule. The Board has held that where the union has either actual or constructive knowledge of the primary’s regular schedule, and the primary employer is absent from a common site for extensive other periods of time for reasons not associated with the picketing itself, a union’s continued picketing in such circumstances runs afoul of both Moore Dry Dock 1 and 2. On the other hand, where a union has no

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223. See IBEW, Local 595 (Hayward Elec. Co.), 261 N.L.R.B. 707, 709 (1982) (determining that in some instances the absence of the primary employer employee’s are not determinative of an illegal object); Carpenters Dist. Council of S. Colo. (S. Colo. Prestress Co.), 222 N.L.R.B. 613, 617 (1976), enforced, 560 F.2d 1015 (10th Cir. 1977) (“But, absence of the primary disputant during picketing is not conclusive of the issue. Rather, the totality of circumstances must be evaluated.”); Local 3, IBEW (New Power Wire & Elec. Corp.), 144 N.L.R.B. 1089, 1093 (1963) (finding no violation of section 158(b)(4) where union otherwise complied with Moore Dry Dock guidelines for permissible picketing), enforced, 340 F.2d 71 (2d Cir. 1965).


226. Id.

227. Id.

228. Id.


230. Id.

231. See Dist. Council 9, Int’l Bhd. of Painters & Allied Trades (We’re Assocs., Inc.), 329 N.L.R.B. 140, 142 (1999) (noting that the union was aware that primary painting
knowledge that a primary’s employees are not scheduled to work on a particular day, or is unaware of the work schedule, its picket may not run afoul of Moore Dry Dock 1 and 2. As a corollary concept, where an employer either intentionally or inadvertently misleads a picketing union as to when primary employees will be working at the site, such behavior undercuts the very standards developed to balance the competing interests. Picketing in conformance with the deception, notwithstanding the actual lack of presence, is deemed primary and presumptively lawful.

Moore Dry Dock 3 issues are perhaps the most confusing of the group. Two separate areas are ripe for discussion here: the first involves a concept known as “picketing between the headlights,” while the other concerns the use of so called “reserved gates.”

The picketing between the headlights concept most often arises in construction site cases. Where a union has a primary dispute with a subcontractor at a common site construction project, its Moore Dry Dock 3 obligation to limit its picketing reasonably close to the situs of the dispute requires that it ask the neutral landowner, construction manager, general contractor or its agent, permission to picket in and around the portion of the site occupied by the primary subcontractor—in other words, in between the headlights of the trucks of that primary employer. In AAA Motor Lines, the union picketed a number of facilities, and did so “between the

contractors had not been engaged in any activities at a common situs for over a month); Serv. Employees Int’l Union, Local 525 (Gen. Maint. Serv. Co.), 329 N.L.R.B. 638, 678–79 (1999) (also discussing an ally relationship with the primary employer), enforced, 52 Fed. Appx. 357 (9th Cir. 2002); Carpenters’ Dist. Council (Farmers & Merchs. Bank), 196 N.L.R.B. 487, 490 (1972); IBEW, Local 861 (Brownfield Elec., Inc.), 145 N.L.R.B. 1163, 1166 (1964) (finding no violation of the Moore Dry Dock criteria where primary employees’ absence was temporary and due to the picketing); see also Painters Dist. Council 38 (Edgewood Contracting Co.), 153 N.L.R.B. 797, 800 (1965) (describing that the union picketed seven days a week all day, but where primary employees only worked Saturdays and Sundays). But see IBEW, Local 302 (ICR Elec.), 272 N.L.R.B. 920, 920 n.2 (1984) (finding no violation, despite the union having been informed that the primary would not be working or receiving supplies on a particular day in question, because such arrangement was only fleeting rather than representing a regular and permanent schedule; only ten percent of the primary’s work was completed, thereby manifesting a clear intention to return; and the picketers arrived at the site only after neutral employees had already gone to work such that they could not be approached and departing before neutral employees left for the day).


233. See IBEW, Local 640 (Timber Bldgs., Inc.), 176 N.L.R.B. 150, 151 (1969) (setting forth the criteria as to when the picketing of a primary employer at a common situs is in violation of section 158(b)(4)(B)).

headlights" only when given the invitation.\textsuperscript{235} The Board adopted the judge’s conclusion that, in order to satisfy Moore Dry Dock 3, the initiative lies with the picketing union to ask permission to picket between the headlights.\textsuperscript{236} Of course, where access to the site is denied, the union is free to place its picket at the front entrance.\textsuperscript{237}

However, where the common site is not a construction project, and instead is the primary’s normal place of business, which is also occupied by other neutral parties, the Board has held that the union need not ask to picket between the headlights.\textsuperscript{238} Additionally, even where a neutral employer at such a site invites the union to picket closer to the primary disputant, if the invitation seriously impairs the union’s right to effectively picket, refusal to respond to the initiative will not support an inference of secondary object.\textsuperscript{239} Certainly, whether a union will be obligated to ask to picket between the headlights should be considered on a case-by-case basis, and compels a “rule of reason” approach rather than a mechanistic application of AAA Motor Lines.\textsuperscript{240}

Reserved gates present a different group and wider array of issues. Most often, reserved gates are seen at construction sites, though their use is obviously not limited to the construction industry. Simply put, an employer may confine the permissible area of picketing by erecting separate entrances or gates, one for use by the primary disputant, its employees, and all those seeking to deliver to it, and the other for the employees and suppliers of parties neutral to that dispute. Reserved gates may be established wherever convenient, provided that they are not intentionally hidden from public view, or such that they otherwise substantially impair the effectiveness of the picketing.\textsuperscript{241} Where a union

\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} See Wire Serv. Guild, Local 222 (Miami Herald Publ’g Co.), 218 N.L.R.B. 1234, 1235 (1975) (picketing in front of entrances fully met Moore Dry Dock standards), enforced, 532 F.2d 184 (5th Cir. 1976); see also 40-41 Realty Assocs., Inc., 288 N.L.R.B. 200, 205 (1988) (holding that a union’s obligation to minimize the effects of picketing on neutrals does not compel an employer to grant access to private property).

\textsuperscript{238} See Miami Herald Publ’g Co., 218 N.L.R.B. at 1235.
\textsuperscript{239} Id. at 1235–36.
\textsuperscript{240} For instance, the United States Court of Appeals for the Ninth Circuit reasonably concluded that a union’s compliance with a valid reserved gate system offered it the kind of alternative such that it could dispense with asking to picket between the headlights. See Allied Concrete, Inc. v. NLRB, 607 F.2d 827, 831 (9th Cir. 1979) (holding that where union picketed between the headlights by following the trucks onto premises, but could have limited its picket to one gate at the construction project, reserved solely for the struck employer, its employees and suppliers, constituted a violation). See Carpenters Local 33 (CB Constr. Co.), 289 N.L.R.B. 528, 529 (1988) (noting that the reserved gate is so hidden and remotely located that the restriction of picketing there would severely impair the picketing effectiveness), enforced, 873 F.2d 316 (D.C. Cir. 1989); IBEW, Local 323 (Renel Constr., Inc.), 264 N.L.R.B. 623, 624 (1982); see also Local 501,
fails to confine its picket to the gate reserved for the primary, it breaches

*Moore Dry Dock* 3.

Once again, where a picket is placed at a lawfully maintained neutral
gate, that picket is both coercive and secondary, regardless of whether it
causes a work stoppage or not. 243 Where the gate system is ignored, by
either the primary or neutrals, a union is just as free to disregard it. 244
However, there must be evidence of a pattern of destruction of the gate
system; mere isolated breaches do not serve as sanction for the union to
simply ignore an otherwise valid reserved gate system. 245 Similarly, a
union’s isolated or *de minimus* breach of a valid reserved gate system is
not, alone, sufficient to show a secondary object. 246 Additionally, even
where a reserved gate system becomes so tainted as to free a union to

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242. See *IBEW v. NLRB*, 756 F.2d 888, 897 (D.C. Cir. 1985) (citing *United Bhd. of Carpenters &
Joiners, Local 354 (Sharp & Tatro Dev. Co.),* 268 N.L.R.B. 382 (1983), *enforced*, 767 F.2d
934 (9th Cir. 1985); Local 453, *IBEW (S. Sun Elec. Co.),* 237 N.L.R.B. 829, 830 (1978)
(holding that a union need not confine its picket to a primary gate which unreasonably
denies it the opportunity to convey its message to the public and can picket a neutral gate in
such circumstances, unless another location, separate from the neutral gate but close to the
site would afford the union a locale from which it could reasonably convey its message), *enforced*,
620 F.2d 170 (8th Cir. 1980)). Nevertheless, the picketing gate need not be
located so as to maximize the picket’s effectiveness. See *Int’l Ass’n of Bridge, Structural &
Ornamental Iron Workers, Local 433, 303 N.L.R.B. 287, 291 (1991); IBEW, Local 970, 306

243. See Dist. Council 9, *Int’l Bhd. of Painters & Allied Trades (We’re Assocs., Inc.),*
329 N.L.R.B. 140, 143 (1999); *Oil, Chem. & Atomic Workers Int’l Union, Local I-591
(Burlington N. R.R.),* 325 N.L.R.B. 324 (1998); Int’l Ass’n of Bridge, Structural &
Ornamental Iron Workers, Local 433 (Oltmans Constr. Co.), 272 N.L.R.B. 1182, 1186

244. See, e.g., *Sheet Metal Workers Int’l Ass’n, Local 19 (Delcard Assocs., Inc.),* 316
N.L.R.B. 426, 437 (1995) (noting that the union stationed at least one individual in a “rat”
costume at a neutral gate), *enforcement denied on other grounds,* 154 F.3d 137 (3d Cir.
1998).

245. See *W.S.B. Elec., Inc.,* 269 N.L.R.B. at 421 (holding that frequent breach of the
neutrality of reserved gate justifies picketing of neutral gate) (citing Local 323, IBEW (J.F.

246. See *W.S.B. Elec., Inc.,* 269 N.L.R.B. at 421 (holding that “isolated occurrences”
which do not establish “pattern of destruction” of reserved gate do not justify picketing at
neutral gate) (citing United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting
Indus., Local 48 (Calvert Gen. Contractors), 249 N.L.R.B. 1183, 1183 n.2 (1980)); Local
369, *IBEW (Kelley Elec. Co.),* 216 N.L.R.B. 141, 144 (1975) (stating that isolated violation
of “reserve” status of gate did not grant union the right to picket it); see also United Ass’n of
Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus., Local 388 (Metz &
Cir. 1982); Local 32B-32J, Serv. Employees Int’l Union (N.Y. Ass’n for the Blind), 250
N.L.R.B. 240 (1980) (both holding that minor, isolated breaches or defects in a reserved
gate system do not, alone, defeat its vitality).

247. See, e.g., Metro. Reg’l Council (Soc’y Hill Towers Owners’ Ass’n), 335 N.L.R.B.
814, 814 n.1 (2001) (refusing to find secondary object based upon five seconds of isolated
picketing at a neutral gate).
disregard its dictates, it may be reestablished and must be honored provided
the union is given notice thereof.\(^2\) Finally, in order to enable a union to
ensure the integrity of the gate system it is bound to honor, the Board has
long approved of the use of union "observers," stationed at or near the
neutral gate, regardless of whether the union possesses any evidence of a
taint of that gate.\(^3\) Those observers, however, must limit their activity to
observing, and nothing more; otherwise the conduct may constitute
picketing and be deemed secondary.\(^4\)

The United States Supreme Court first approved the concept of
reserved gates in *Local 761, International Union of Electrical, Radio &
Machine Workers v. NLRB.*\(^5\) In that case, General Electric initially
erected separate gates for the use of its subcontractors in an effort to
insulate GE employees from frequent labor disputes between the
subcontractors and unions.\(^6\) Those subcontractors performed a variety of
tasks, ranging from repair and maintenance work to construction. GE
employees often lacked the necessary skills to perform these tasks, or
simply commanded too much money for the company to pay them.\(^7\)

The complication arose when the union with which GE had a
collective bargaining relationship struck to protest a series of unsettled
grievances.\(^8\) Striking employees picketed at all gates, including those
specifically reserved for the subcontractors. GE argued that the picketing
unlawfully enmeshed the employees of the neutral subcontractors—in other
words, the picketing had an object of forcing or requiring the
subcontractors to cease doing business with GE. Although it cited the

\(^{247}\) *W.S.B. Elec., Inc.*, 269 N.L.R.B. at 421 (citing Local 470, United Bhd. of
564 F.2d 1360 (9th Cir. 1977)). See *Int'l Ass'n of Bridge, Structural & Ornamental
Ironworkers, Local 433 (R.F. Erection), 233 N.L.R.B. 283 (1977) (holding that notice of
either the resurrection of an earlier tainted reserved gate system, or the initial installation of
such a system, is effective upon receipt), *enforcement denied*, 598 F.2d 1154 (9th Cir.
1979).

\(^{248}\) See *IBEW, Local 98 (The Tel. Man, Inc.), 327 N.L.R.B. 593 (1999)*
(acknowledging the possibility of a union observer at a neutral gate, but holding nonetheless
that the observer had engaged in impermissible conduct); Local 12, *Int'l Union of Operating
Eng'rs (Cal Tram Rebuilders, Inc.), 267 N.L.R.B. 272, 274 (1983) (noting the presence of
Teamsters' observers at neutral gate).

\(^{249}\) See, e.g., *The Tel. Man, Inc., 327 N.L.R.B. at 593* (finding a violation where the
union's neutral gate observer wore an "observer" sign, the other side of which revealed a
message identical to the one used by picketers at the primary gate); *Delcard Assocs., Inc.,
316 N.L.R.B. at 437* (noting that union observers at neutral gates carried observer signs, the
reverse side of which featured messages identical to those on conventional signs, and one of
the alleged observers even wore a "rat" costume).


\(^{251}\) *Id. at 668.*

\(^{252}\) *Id. at 669.*

\(^{253}\) *Id.*
Moore Dry Dock guidelines with approval, the Court formulated a new test for the situation with which it was presented, one which compelled concern over whether GE was merely trying to insulate aspects of its operation from a lawful, primary picket. The Court held that the gate must be separate, marked and set apart from other gates, and that the work done by those who use the gate must be unrelated to the normal operations of the employer—i.e., that it must be of a kind that would not, if done when the plant as engaged in its regular operations, necessitate curtailing those operations. If unrelated, then the union would be precluded from targeting such a neutral subcontractor. If related, then the subcontractor would be nothing more than an extension of the primary's operation and necessarily would curtail the operation if not performed, making such a subcontractor a lawful, primary target.

Three years after the General Electric decision, the Court applied the same test again in a similar case. In Carrier, the union struck the Carrier Corporation by picketing several entrances to the Carrier plant, including a railroad right of way used by railroad personnel to make deliveries to the company. Holding that the location of the picketing was important but not decisive, the Court articulated that ownership of the railroad right-of-way by a different company did not limit applicability of the same test formulated in the General Electric decision.

The presence of two distinct legal tests—from Moore Dry Dock and General Electric—has caused confusion regarding which test is to be applied to any given set of facts. The General Electric test, reiterated in Carrier, is limited to the set of facts present in those cases; namely, an otherwise primary premises becomes a common situs by virtue of subcontractors or others working at the site, causing concern that the nature of the work is so related to the primary's operation that those others should not be afforded neutral status.

The Board has repeatedly held that where the common situs at issue is not that of the primary's—in other words, where the premises is owned or operated by a neutral—the General Electric test is inapplicable, and the Moore Dry Dock guidelines are applied exclusively. The decision in

254. Id. at 677-78.
255. Id. at 681.
256. See, e.g., Local 557, Int'l Chem. Workers Union (Crest, Inc.), 179 N.L.R.B. 168, 174 (1969) (noting that the question is whether the work is of a character which is necessary to the employer's own regular operations).
257. United Steelworkers v. NLRB (Carrier Corp.), 376 U.S. 492 (1964) [hereinafter Carrier].
258. Id. at 494.
259. Id. at 499.
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Carrier in no way alters that conclusion. Carrier merely held that General Electric continued to apply where the common site was that of the primary’s, notwithstanding the fact that a railroad not owned by the primary was used to access its facility for purposes of making deliveries to the struck employer.\textsuperscript{261} Nor does the General Electric test ever apply to any case in the construction industry.\textsuperscript{262} Even where the primary disputant in a construction case is the general contractor, as opposed to a subcontractor, whether the picketing is primary will be governed entirely by the application of the Moore Dry Dock standards rather than the General Electric test.\textsuperscript{263}

A separate doctrine, though at first glance similar to the test set forth in General Electric, also warrants mention. Initially, whether at a common site or a primary one, section 8(b)(4)(B) does not seek to interfere with a union’s ability to reach lawful, primary targets. Thus, as per International Rice Milling, where a union seeks to interfere with a person delivering supplies to the primary at its own place of business, section 8(b)(4)(B) does not prohibit such conduct.\textsuperscript{264} Although the same concept applies at common situs, it is necessarily curtailed to some degree, particularly at construction sites, where supplies are used by more than one

\textsuperscript{261.} See Burlington N. R.R., 325 N.L.R.B. at 328 (refusing to apply Carrier where the neutral employer owned the picketed premises).

\textsuperscript{262.} See Bldg. & Constr. Trades Council (Markwell & Hartz, Inc.), 155 N.L.R.B. 319 (1965) (distinguishing the manufacturing premises in General Electric from the construction premises in the case at bar, and therefore rejecting the General Electric test), enforced, 387 F.2d 79 (5th Cir. 1967); Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers Local 433 (Chris Crane Co.), 294 N.L.R.B. 182, 182 (1989) (upholding the courts’ refusal to apply the General Electric test in the construction setting), enforced, 883 F.2d 79 (5th Cir. 1989) (citing Ironworkers Local 433 (Oltmans Constr. Co.), 272 N.L.R.B. 1182, 1186 (1984)). Such application would run contrary to the holding of NLRB v. Denver Bldg. & Trades Council, 341 U.S. 675, 692 (1951), which conclusively preserved the separate and independent status of general and subcontractors at a construction site. Simply put, as a matter of law there is no subcontractor whose work is so related to the general that the general could not continue without its work.

\textsuperscript{263.} See, e.g., Local 470, United Bhd. of Carpenters & Joiners (Mueller-Anderson, Inc.), 224 N.L.R.B. 315, 317 (1976) (noting that union’s dispute with general contractor took place on land actually owned by that general contractor), enforced, 564 F.2d 1360 (9th Cir. 1977).

contractor. This clouds the picture as to precisely which supplies constitute a lawful, primary target for the picketing union. Accordingly, the Board has developed a doctrine which appears to mirror the one set forth in *General Electric*, holding that a union picketing at a common site may target only those suppliers that provide materials essential to, or solely for use in, the primary employer’s normal operations. Although this doctrine developed in reserved gate cases, the author submits that it is equally applicable to situations where no gates have been erected. Indeed, at a common site, where the union’s conduct is governed by *Moore Dry Dock*, the company union is nevertheless prohibited from interfering with those persons making deliveries to neutral entities. Accordingly, a union picketing at a common site with no reserved gate system may not induce employees of neutral persons to cross its picket line, regardless of whether it has conformed to the *Moore Dry Dock* guidelines.

3. Picketing the Product: The *Tree Fruits* Decision

In 1964, the United States Supreme Court’s decision in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, held certain picketing targeted against a particular product, albeit one sold at an establishment wholly neutral to the dispute, to be lawful and not running afoul of section 8(b)(4)(ii)(B). In *Tree Fruits*, a union of fruit and

265. *See Chris Crane Co.*, 294 N.L.R.B. at 183 (rejecting union’s argument that it had a right to picket a neutral gate through which electrical, sanitation, telephone, food and trash collection services contractors entered for purposes of serving all subcontractors at the site, including the primary), enforced, 883 F.2d 1024 (9th Cir. 1989); Local 323, IBEW (J.F. Hoff Elec. Co.), 241 N.L.R.B. 694 (1979) (finding unlawful union picketing of neutral gate), enforced, 642 F.2d 1266 (D.C. Cir. 1980); Int’l Union of Operating Eng’rs, Local 450 (Linbeck Constr. Corp.), 219 N.L.R.B. 997 (1975) (noting that general contractor tainted an otherwise valid reserved gate by delivering certain supplies to the primary subcontractor through that neutral gate), enforced, 550 F.2d 311 (5th Cir. 1977). The Board has recently referred to this rule as the “supplier exception,” stating that it occupies a middle ground in section 8(b)(4) as a corollary of both the *General Electric* and *Moore Dry Dock* tests. *See Burlington N. R.R.*, 325 N.L.R.B. at 328 (rejecting union’s application of “supplier exception” test but recognizing the existence and validity of the test). The author, however, finds it more analytically palatable to view the doctrine as nothing more than a truism—that a union’s picket at a common site is permitted to target those individuals delivering materials to the primary, as opposed to those bound for neutral parties at the site, a concept already enunciated in *International Rice Milling Co.*

266. *See, e.g.*, Local 379, Bldg. Material & Excavators (Catalano Bros.), 175 N.L.R.B. 459, 460 (1969) (describing the situation where union sought to induce employees of neutral secondary employers to refuse performance of services for their employer at a common site shared by the primary and other neutrals).

267. *Id.*

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vegetable packers struck Washington state fruit packing companies that sold Washington state apples to Safeway supermarkets.\footnote{Tree Fruits, 377 U.S. at 59–60.} In furtherance of its strike, the union instituted a consumer boycott against the apples, and, \textit{inter alia}, placed pickets at a number of Safeway stores in the area, including the apples on store shelves.\footnote{Id. at 60.}

The Board originally found that the picketing at the stores violated section 8(b)(4)(ii)(B), based on application of the "publicity proviso" to that section, viewed at that time as insulation for otherwise coercive conduct but which constituted "publicity other than picketing."\footnote{Id. at 60.} Based upon its reading of the proviso, essentially that if the conduct was deemed to be picketing, it automatically was, as a matter of law, coercive and could not be saved by the proviso, the Board concluded that all picketing at a secondary site like the Safeway stores rose to the level of section 8(b)(4)(ii).\footnote{Tree & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits Labor Relations Comm.), 132 N.L.R.B. 1172, 1177 (1961). As discussed \textit{supra}, the publicity proviso is now viewed as nothing more than a clarification rather than a section that insulates otherwise coercive conduct. \textit{See supra} notes 90–98 and accompanying text.}

The Board's reasoning, which inherently raised constitutional concerns, compelled the Court to address the issue of whether all picketing at a secondary site is necessarily coercive within the meaning of section 8(b)(4)(ii).\footnote{Id. at 1177.} The Court provided a lengthy analysis of the legislative history before holding that not all picketing at a secondary site rises to the level of section 8(b)(4)(ii) and finding that the picketing of Washington state apples at the Safeway stores was lawful.\footnote{Tree Fruits, 377 U.S. at 62.} Notably the Court pronounced that, "\[i\]t does not follow from the fact that some coercive conduct was protected by the proviso, that the exception ‘other than picketing’ indicates the Congress had determined that all consumer picketing was coercive."\footnote{Id. at 72–73.} The second \textit{Debartolo} decision issued by the Court in 1984, of course, holds that the publicity proviso to section 8(b)(4) protects nothing, and is merely a clarification of a truism—that non-coercive conduct, such as peaceful handbilling, does not rise to the level of section 8(b)(4)(ii) conduct. Accordingly, the author submits that, to the extent it holds otherwise, this narrow portion of \textit{Tree Fruits} has been overruled \textit{sub silentio} by \textit{DeBartolo II}.

Much of the Court's \textit{Tree Fruits} decision is based on the particular facts of the case—namely that the apples were one of numerous products in
the store, that the picket was limited to the apples and did not interfere with store employees' ability to handle them, that the pickets only appeared after the stores opened and then departed before they closed, and that the union lived up to its promise to store managers not to seek to cause store employees to strike. Indeed, in at least four places, the Court mentions the "isolated evil" section 8(b)(4)(B) was designed to prevent, namely picketing designed to shut off all trade with the secondary employer, as opposed to that which only persuades its customers not to purchase a struck product.

Implicit in the Court's reasoning is its understanding that the narrowly-tailored picketing at issue was primary, rather than secondary, activity. The Court essentially holds that picketing, which is narrowly targeted at the struck product, does not rise to the level of section 8(b)(4)(ii) conduct. However, even assuming arguendo that product picketing rises to the level of section 8(b)(4)(ii) conduct, without a secondary object, it does not run afoul of subsection (B), thereby making the section (ii) component of the analysis largely irrelevant.

It is far more analytically palatable to view this kind of product picketing through the secondary object facet, rather than deciding whether it rises to the level of section 8(b)(4)(ii). The Board and Court in *Tree Fruits* presupposed that the Safeway stores were secondary sites. However, inasmuch as the apples occupied those sites, those stores are not much different than any other common site. Certainly, *a la Moore Dry Dock*, the *Tree Fruits* Court required the union to minimize the impact of its picket on the stores, and clearly the apples were present in the stores at the time the union picketed. The only *Moore Dry Dock* requirement not imposed was that the union ask to picket in the apple aisle of the store.

Today, the Board adheres to the reasoning of *Tree Fruits*, having recently relied on the decision when holding that picketing does not per se
constitute section 8(b)(4)(ii) conduct.\textsuperscript{283} When picketing a product at a site it occupies, regardless of whether it is characterized as a common site or a secondary one, a union’s picket signs must clearly identify the struck product, and the union must inform consumers that the labor dispute is between the union and the primary employer (as opposed to the secondary employer).\textsuperscript{284} Similarly, where threatening to picket a product, the scope of the union’s statements is limited purely to statement providing notice of its intention to engage in lawful activity.\textsuperscript{285}

\textit{a. The Merged Product Doctrine – Safeco and Its Genesis}

Despite the logic of permitting a union to target its picket at a primary product located on the premises of a neutral entity, not all such otherwise primary product picketing is insulated from section 8(b)(4)(B) liability under \textit{Tree Fruits}.

Unlike the typical common site situations, in which the Board is merely guided by the presence of the primary at an otherwise neutral site, in product situations, the degree to which the primary’s presence becomes merged with the neutral’s business is of paramount importance. Specifically, where the goods or services produced by the primary employer being targeted have lost their identity and have become so merged into the secondary employer’s product or service, primary product picketing at the neutral’s site cannot avoid necessarily having an object of enmeshing that neutral party past the bounds of lawfulness.\textsuperscript{286} For instance,

\begin{itemize}
\item \textsuperscript{283} See United Food & Commercial Workers Union Local 1776 (Carpenters Health & Welfare Fund), 334 N.L.R.B. 507 (2001) (finding that the purpose of picketing was to influence the primary employer to improve the relationship with the Union).
\item \textsuperscript{284} Barbara E. Snyder, Comment, Consumer Picketing and the Single-Product Secondary Employer, 47 U. CHI. L. REV. 112, 117 n.43 (1979).
\item \textsuperscript{285} See, e.g., Butchers Union Local 506 (Adolph Coors Co.), 268 N.L.R.B. 475, 478 (1983) (holding that the union impermissibly threatened organizers of a local festival when it picketed in furtherance of its dispute with Coors Beer because festival organizers had already granted Coors permission to sell its products).
\item \textsuperscript{286} See United Paperworkers Int’l Union, Local 832 (Duro Paper Bag Mfg. Co.), 236 N.L.R.B. 1525 (1978) (describing a picket of a store because of the paper bags it used), vacated and remanded, 647 F.2d 634 (6th Cir. 1981), reversed on other grounds, 258 N.L.R.B. 67 (1981); Int’l Union of Operating Eng’rs, Local 139 (Oak Constr., Inc.), 226 N.L.R.B. 759, 759 (1976) (finding a section 8(b)(4)(ii)(B) violation when the union picketed and handbilled at a neutral location in order to cause a company to cease business with another); Retail Store Employees Union Local 1001 (Safeeco Title Ins. Co.), 226 N.L.R.B. 754, 757 (1976) (finding picketing in furtherance of a dispute with Safeeco was an unfair labor practice), enforcement denied, 627 F.2d 1133 (D.C. Cir. 1979), rev’d, 447 U.S. 607 (1980); Teamsters, Chauffeurs, Helpers & Taxicab Drivers, Local 327 (Am. Bread Co.), 170 N.L.R.B. 91, 92 (1968) (describing a union picket that remained in front of the entrance to this restaurant until the employer’s bread was removed from the premises), enforced, 411 F.2d 147 (6th Cir. 1969).
\end{itemize}
in *American Bread*, a union picketed a number of restaurants in furtherance of its primary dispute with a bread manufacturer, which supplied product to those restaurants for use in sandwiches, toast and bread crumbs.\(^{287}\) The Board was persuaded that bread used by a restaurant lost its identity when served, and essentially became part of the restaurant’s product, rendering customers without a true choice to boycott the bread without necessarily having to boycott the restaurant.\(^{288}\) Such circumstances make primary picketing impossible.

Similarly, in *Duro Bag*, the Board applied the same doctrine in holding that paper bags used in a supermarket did not, in fact, lose their identity or merge into the store such that those bags could, in fact, be targeted with a picket.\(^{289}\) Although the United States Court of Appeals for the Sixth Circuit disagreed with the Board’s conclusion, it did not disagree with the test it applied,\(^{290}\) which the Board adopted as law of the case on remand when it merely reversed its conclusion, rather than the test itself.\(^{291}\)

The merged product doctrine culminated with the Supreme Court’s decision in *Safeco Title Insurance*.\(^{292}\) In that case, Safeco, an underwriter of title insurance had arm’s-length relationships with five local title insurance companies in the state of Washington, whose sale of Safeco insurance accounted for over ninety percent of their gross revenues.\(^{293}\) The Court cited the Board’s merged product doctrine with approval,\(^{294}\) distinguished *Tree Fruits* where the apples were but one of many products available, and held that picketing the local title insurance companies left consumers with no other option but not to do business with those local title insurance companies at all.\(^{295}\)

Clearly there is a wide spectrum between picketing one item in a grocery store and picketing the only product the neutral person sells. Acknowledging that problem, the Court in *Safeco* observed that neither its decision nor the one in *Tree Fruits* would be controlling; rather, the critical question being whether the secondary appeal would be reasonably likely to threaten the neutral party with ruin or substantial loss, and leaving such a

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288. *Id.*
290. Kroger Co. v. NLRB, 647 F.2d 634, 637 (6th Cir. 1980) (noting the exception to the *Tree Fruits* doctrine for products “so merged with the secondary employer’s total offering to the public that for all practical purposes, a boycott of the struck product is not separable from a boycott of the secondary employer.”).
293. *Id.* at 609.
294. *Id.* at 613 n.7.
295. *Id.* at 613.
question up to the Board to resolve in future cases. 296

4. The Ally Doctrine—Struck Work, Single and Joint Employers, and Related Corporate Entities

Whether an entity is neutral can pose difficult analytical issues, as discussed above in the context of products on shelves, common site problems and location issues. However, assuming neutral status is otherwise clear, there are also circumstances in which it can be lost or forfeited; specifically, when neutrals are deemed so allied with the primary disputant that they are no longer entitled to neutral status. The Board has long held that the burden a union has to demonstrate a loss of neutrality by virtue of such an alliance with the primary is a heavy one, limited to two general areas: one, where the entity has performed struck work; or two, where the entity may be deemed either a single or joint employer with the primary. 297

This “ally doctrine” is derived from the comments of Senator Taft, one set of which was made during the legislative discussions which led to the Taft-Hartley Amendments, and the other set of which was made in reflection sometime thereafter. 298 Senator Taft first said that the purpose of section 8(b)(4)(A) was to “[m]ake it unlawful to resort to a secondary boycott to injure the business of a third person who is ‘wholly unconcerned’ in the disagreement between an employer and his employees.” 299 Later, he added that “the secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike. [I]t is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer.” 300

Out of these comments grew two separate and distinct branches of what is known today as the “ally doctrine.” 301 The first involves situations in which a party’s neutrality is lost by virtue of its performance of struck


297. See Local 557 (General Motors), 338 N.L.R.B. No. 133 n.3 (2003) (Member Liebman concurrence); United Mine Workers (Boich Mining Co.), 301 N.L.R.B. 872, 873 (1991) (referencing the two general areas), rev’d, 955 F.2d 431 (6th Cir. 1992), and supplemented, 308 N.L.R.B. 953 (1992); Newspaper & Mail Deliverers’ Union (Gannett Co.), 271 N.L.R.B. 60, 67 (1984) (discussing the “ally” doctrine).


300. Id. at 8709.

301. The ally doctrine is discussed in depth and at length in a number of scholarly articles. See, e.g., Dereshinsky, supra note 9, at 121 n.1.
work, *viz*, the very work the primary employer's employees are not performing in strike against that primary employer.\textsuperscript{302} The second branch involves cases in which the alleged neutral entity constitutes either a single employer or joint employer with the primary.\textsuperscript{303} Into this second category also falls a line of cases involving the neutrality of subsidiaries of larger corporate entities.\textsuperscript{304} Cases implicating one branch of the ally doctrine often do not involve the other branch, and thus, each has developed independently, compelling separate discussions.\textsuperscript{305} Although the ultimate issue is the same, analysis of whether a party is a single or joint employer with the primary requires application of criteria not associated with whether that party is performing struck work.

\textit{a. Performance of Struck Work}

Struck work is that which, but for the strike, would be done by striking employees.\textsuperscript{306} Where an otherwise neutral secondary employer performs such work, and where such performance is on behalf of, and assists the primary disputant in its effort to avoid the economic consequences of the strike, the secondary entity loses its neutral status.\textsuperscript{307} However, where the

\begin{itemize}
  \item \textsuperscript{302} See NLRB v. Bus. Mach. & Office Appliance Mech's., Local 459 (Royal Typewriter), 228 F.2d 553, 557 (2d Cir. 1955) (holding that the independent repair companies were so allied with the employer that section 158(b)(4) did not afford protection to the employee performing the work); Douds v. Metro. Fed'n of Architects, Eng'rs, Chemists, & Technicians, Local 231, 75 F. Supp. 672 (S.D.N.Y. 1948) (denying petition by the employer because the employees did not participate in a secondary boycott); Missoula White Pine Sash Co., 301 N.L.R.B. at 415.
  \item \textsuperscript{303} Serv. Employees Int'l Union, Local 525 (Gen. Maint. Serv. Co.), 329 N.L.R.B. 638, 640 (1999), enforced, 52 Fed. Appx. 357 (9th Cir. 2002).
  \item \textsuperscript{304} Local 235, Lithographers & Photoengravers Int'l Union (Henry Wurst, Inc.), 187 N.L.R.B. 490 (1970); Los Angeles Newspaper Guild, Local 69 (San Francisco Examiner, Div. of Hearst Corp.), 185 N.L.R.B. 303 (1970), enforced, 443 F.2d 1173 (9th Cir. 1971), cert. denied, 404 U.S. 1018 (1972).
  \item \textsuperscript{305} See Missoula White Pine Sash Co., 301 N.L.R.B. at 415 (describing the independence of the two branches of the "ally" doctrine) (citing Teamsters, Chauffeurs, Warehousemen & Helpers, Local 560 (Curtin Matheson Scientific, Inc.), 248 N.L.R.B. 1212 (1980)).
  \item \textsuperscript{306} See Int'l Union, United Mine Workers (Boich Mining Co.), 301 N.L.R.B. 872, 873 n.10 (1991), rev'd, 955 F.2d 431 (6th Cir. 1992); Newspaper & Mail Deliverers Union (N.Y. Amsterdam News), 269 N.L.R.B. 102, 104 (1984); Gen. Drivers & Helpers Union, Local 554 (Prairie Ford Truck Sales), 253 N.L.R.B. 1, 3 (1980); Oil, Chem. & Atomic Workers Int'l Union, Local 1-128 (Petroleum Maint. Co.), 223 N.L.R.B. 757, 758 (1976) (showing in each case that the definition of "struck work" is the work performed by the employees had they not been striking).
  \item \textsuperscript{307} See Chevron U.S.A., Inc. (Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths,Forgers & Helpers), 244 N.L.R.B. 1081, 1085 (1979) (defining the circumstances in which a union may boycott a secondary employer); W. States Reg'l Council No. 3 (Priest Logging, Inc.), 137 N.L.R.B. 352, 353–54 (1962) (concluding that the secondary and primary employers were allies since the secondary employer had never been
secondary entity’s performance of the struck work has come only by virtue of contact from the primary’s customer and without any intervention from the primary, no ally relationship is established. 308 Similarly, where the assistance rendered by the secondary entity does not constitute the actual performance of the struck work, no ally relationship is established. 309 Thus, it is clear that for neutral status to be forfeited in this area, the secondary’s performance of the work must be nothing more than an attempt by the primary to continue its operations in the face of the strike, and in which the primary must be complicit. 310

b. Single Employers, Joint Employers, and Corporate Subsidiaries

The other branch of the ally doctrine encompasses essentially two separate, but related conceptual areas: first, whether ostensibly neutral parties may be deemed to be either a single employer with the primary, or in a joint employer relationship with that primary; and second where the neutral and primary are corporate subsidiaries of a larger entity.

A single employer differs significantly from a joint employer. The Board has long held a single employer relationship to exist where two purported entities, though nominally separate, actually constitute one single, integrated enterprise. 311 The existence of a single employer relationship is a purely factual issue, based on four criteria: the interrelation of operations, the extent of common management, the

to the primary employer’s place of business and the secondary employers’ employees performed many of the union workers’ tasks), enforced, 319 F.2d 655 (9th Cir. 1963); Royal Typewriter, 228 F.2d at 557 (holding that the independent repair companies were so allied with the employer that section 158(b)(4) did not apply).

308. See Chevron U.S.A., Inc., 244 N.L.R.B. at 1086; see also Local 379, Bldg. Material & Excavators (Catalano Bros.), 175 N.L.R.B. 459, 460 (1969) (noting that neutral gypsum board company retained a different carrier in the face of a strike against the one with which it routinely did business).


310. See Dist. 65, Distributive Workers (Pinto Serv. Corp.), 211 N.L.R.B. 469, 469 n.3 (1974) (finding no ally relationship because the secondary’s actions had nothing to do with the employee’s strike), enforced, 577 F.2d 1399 (3d Cir. 1975); see also Brewery Workers Union No. 8 (Bert P. Williams, Inc.), 148 N.L.R.B. 728, 732 (1964) (finding an ally relationship when the primary subcontracted its work because of an imminent failure in negotiations).

311. See Pennsy Supply, Inc., 313 N.L.R.B. at 1164 (defining the Board’s interpretation of “single employer”) (citing NLRB v. Browning-Ferris Indus., Inc., 691 F.2d 1117 (3d Cir. 1982)).
centralized control of labor relations, and finally, common ownership or financial control. The Board places more emphasis on the third component and less on the final one. A joint employer relationship, however, presupposes the presence of two, separate entities, which share or co-determine matters governing essential terms and conditions of employment. A joint employer relationship may also be established by contract, which gives one entity control over the composition of the other’s workforce. Regardless, there must be some showing that one employer meaningfully affects the terms and conditions of the other.

The corporate subsidiary area effectively borrows from the joint employer concept, only taking it a step further. The issue, of course, is whether a union with a dispute against one subsidiary of a larger corporate entity is free to lawfully picket at a separate such subsidiary on the basis of the shared corporate parent. The Board has held that where neither the picketed subsidiary nor its parent corporation exercises actual, active and substantial control over the labor relations of the primary disputant, then the picketed subsidiary is entitled to neutral status. The seminal cases in the area, Hearst Corp. and Baltimore News American have long stood for the proposition that a corporate parent’s mere potential control over the labor relations of all its subsidiaries does not operate to waive its other subsidiaries’ neutral status. Rather, there must be a showing of actual, rather than potential control. Again, as in the single and joint employer areas, the Board’s decisions in this area are made on a case-by-case basis.

313. See Pennsy Supply, Inc., 313 N.L.R.B. at 1161 (citing Browning-Ferris Indus., Inc., 691 F.2d at 1122).
314. Both Bricklayers, Masons & Plasterers’ Union Local 29 (J.E. Hoetger & Co.), 221 N.L.R.B. 1337, 1339 (1976) and Local 363, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Roslyn Americana Corp.), 214 N.L.R.B. 868 (1974) represent an exception to the rule that general contractors in the construction industry ordinarily maintain their neutrality and separate identity from the subcontractors they retain.
318. See Gen. Drivers & Helpers Union, Local 749 (Transp., Inc.), 218 N.L.R.B. 1330, 1335 (1975) (holding that common ownership does not automatically guarantee one entity controls the other), enforced, 535 F.2d 1246 (3d Cir. 1976).
without giving emphasis to one, controlling factor.\textsuperscript{319}

C.\textit{ Hot Cargo Agreements – Sections 8(e) and 8(b)(4)(A)}\textsuperscript{320}

As discussed,\textit{ supra}, notwithstanding the initial Taft Hartley prohibition on certain kinds of secondary activity, voluntary agreements between unions and other persons, which obligated those others not to do business with certain third parties, were originally held outside the Act’s proscription.\textsuperscript{321} Indeed, the \textit{Sand Door Plywood} case led to the enactment

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\textsuperscript{319} See Teamsters, Chauffeurs, Warehousemen & Helpers, Local 560 (Curtin Matheson Scientific, Inc.), 248 N.L.R.B. 1212 (1980). For cases in which neutrality was lost and an ally relationship was established, see, e.g., S.W. Council of Indus. Workers (Missoula White Pine Sash), 301 N.L.R.B. 410, 416 (1991) (holding that neutrality was lost where corporate parent exercised actual control over subsidiary by virtue of its agent’s supervision and control over labor relations of the primary subsidiary, his presence at bargaining sessions and grievance meetings, and activity in monitoring the strike); \textit{Curtin Matheson Scientific, Inc.}, 248 N.L.R.B. at 1214 (stating neutrality was lost where corporate policy dictated a high degree of integration of warehouse operations, including one subsidiary’s performance of the struck work of another); S. Council of Indus. Workers (Duke City Lumber Co.), 253 N.L.R.B. 808, 814-15 (1980) (finding the operating partner’s neutrality lost where he exhibited control by virtue of centralized labor policy and active participation in grievances, negotiations, and work rules, as well as in the areas of sales, purchasing, clerical, accounting, employee training and other functions); Graphic Arts Int’l Union Local 262 (London Press, Inc.), 208 N.L.R.B. 37, 39-40 (1973) (holding neutrality of subsidiaries was lost where common owner, Luros, actively participated in day-to-day operations of primary, attended meetings, and utilized centralized accounting practices and employee benefit plans). For cases in which no loss of neutrality was established and thus no ally relationship, see, e.g., Local 2208, IBEW (Tyco Labs., Inc.), 285 N.L.R.B. 834 (1987) (finding no loss of neutrality despite, \textit{inter alia}, corporate parent’s having named the primary subsidiary’s board of directors, issued the payroll checks, visited the primary subsidiary during the strike, and provided advice regarding the collective bargaining agreement); United Food & Commercial Workers Int’l Union Local 1439 (Price Enters., Inc.), 271 N.L.R.B. 754, 756 (1984) (holding no loss of neutrality where corporate divisions operated autonomously in their day-to-day activities, including in the area of labor relations, and despite use of common premises, insurance and profit-sharing programs); \textit{Transport, Inc.}, 218 N.L.R.B. at 1334-35 (holding no loss of neutrality where exclusive control of all matters relating to primary subsidiary and corporate parent were shown to be separate, \textit{inter alia}, common insurance and leased hauling arrangements), \textit{enforced}, 535 F.2d 1246 (3d Cir. 1976); Local 391, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers (Vulcan Materials Co.), 208 N.L.R.B. 540, 543 (1974), \textit{enforced}, 543 F.2d 1373 (D.C. Cir. 1976) (holding no loss of neutrality despite, \textit{inter alia}, participation by parent in primary subsidiary’s collective bargaining negotiations, where subsidiary’s president retained final control thereof, and despite the fact that parent made certain insurance, pension and salary continuation programs available to subsidiary, where latter retained the right to reject them).

\textsuperscript{320} Although the title of this Article is nominally devoted to section 158(b)(4)(B), it would be incomplete not to include discussion of section 158(e) and section 158(b)(4)(A). The bulk of this Article is devoted to section 158(b)(4)(B), inasmuch as, in the author’s experience, it is the more frequent source of litigation and dispute.

\textsuperscript{321} See Local 1976, United Bhd. of Carpenters & Joiners v. NLRB (Sand Door
of section 8(e), which, as discussed supra Part II, makes it unlawful for a union and an employer to enter into an agreement whereby the employer agrees to cease doing business with another person.\(^{322}\) In *Sand Door*, the material facts involved a dispute between carpenters' unions and the distributor of certain doors in Southern California.\(^{323}\) The doors were manufactured by a non-union outfit, and when delivered to the construction site for hanging, union carpenters refused to handle them.\(^{324}\)

The charged unions defended their action on grounds that their collective bargaining agreement with the general contractor contained a clause which permitted workmen to refuse to handle non-union material.\(^{325}\) Of course, inasmuch as there was no section 8(e) at the time, the Court understandably stated that there was "no occasion to consider the invalidity of hot cargo provisions as such."\(^{326}\) However, the Court did find a violation of the Act's secondary boycott prohibitions, observing, inter alia, that the contractual provision at issue "may well not have been the result of [free] choice,"\(^{327}\) and that the employer's "acquiescence in the boycott may be anything but free."\(^{328}\) Most significantly, the Court rejected the unions' hot cargo clause defense, and held that unions were not free to enforce such clauses through self-help proscribed by section 8(b)(4), and instead were essentially relegated to other forms of legal recourse.\(^{329}\)

Section 8(e)'s thrust is to prohibit secondary agreements—viz—agreements manifesting a union's objective to affect not merely the terms of those employees in the unit covered by the agreement, but rather to impact other bargaining units. Unlike section 8(b)(4)(B), this section proscribes agreements made between labor organizations and statutory employers, not merely persons.\(^{330}\) The Act proscribes both written as well as implied agreements.\(^{331}\) On the other hand, where an employer merely acquiesces to a union's demands that it not do business with a third party, such action does not rise to the level of an agreement within the meaning of

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\(^{322}\) Plywood, 357 U.S. 93, 99 (1958) (recounting the history of the Taft Hartley Act).


\(^{324}\) *Sand Door Plywood*, 357 U.S. at 95.

\(^{325}\) *Id.*

\(^{326}\) *Id.* at 107.

\(^{327}\) *Id.* at 106.

\(^{328}\) *Id.* at 107.

\(^{329}\) *Id.* at 108.

\(^{330}\) See Local 3, IBEW (Empire Elec. Contractors Ass'n), 244 N.L.R.B. 357, 357 (1979) ("Thus, a construction which makes the terms 'employer' and 'person' interchangeable runs contrary to the express language of Section [158(e)].").

\(^{331}\) See, e.g., Int'l Org. of Masters, Mates & Pilots (Seatrain Lines, Inc.), 220 N.L.R.B. 164, 164 n.2 (1975) (holding, inter alia, that where agreement permits employer to do business with others, but only under extremely onerous conditions, such arrangement impliedly prohibits the doing business in violation of section 158(e)).
Nine years after the Court decided *Sand Door Plywood*, its decision in the seminal work preservation doctrine case of *National Woodwork Manufacturer's Ass'n v. NLRB*, crystallized the primary-secondary distinction in the section 8(e) area. In *National Woodwork*, union carpenters refused to handle doors at a Philadelphia construction site. Much like the carpenters in *Sand Door Plywood*, the carpenters in *National Woodwork* relied on a clause in the union’s contract with a general contractor which permitted workmen to avoid handling any doors, which had been fitted prior to delivery to the jobsite. However, unlike the *Sand Door* case, the union carpenters in *National Woodwork* traditionally performed all such door-fitting work at the site, and refused to handle doors which arrived, already pre-fitted. The Court was persuaded by the distinction. Effectively undertaken to preserve bargaining unit work, the action was primary, rather than secondary. Thus, the Court held that section 8(e) clause violations and section 8(b)(4)(B) refusal to handle violations turned upon whether, "the union's objective was preservation of work... or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." The Court added that the touchstone concern is whether the agreement or its maintenance was addressed to the labor relations of the contracting employer *vis à vis* his own employees. The Court held that the action in *National Woodwork* was to preserve work, and thus, primary and lawful.

Application of such a concept may implicate aspects of representation law, depending on the nature of the industry in question. For instance, in *National Maritime Union (Vantage Steamship Corp.)*, the Board struck down a clause obligating the seller of a vessel to first obtain a written agreement from the purchaser that the latter would adopt the seller’s collective bargaining agreement with the union. Concluding that a single unit, rather than a multi-unit, was appropriate, and observing the significant role of hiring halls in the maritime industry, the Board found that the clause violated section 8(e), where, upon the sale, the hall would simply refer a
new group of seamen to the purchaser.\textsuperscript{342} In \textit{District 71, International Ass'n of Machinists and Aerospace Workers (Harris Truck & Trailer Sales, Inc.)},\textsuperscript{343} on the other hand, a similar clause was found lawful under section 8(e), inasmuch as the Board found the sale of a business was not a transaction, but rather a substitution of one entity for another. In a more recent case, the distinction between the sale or transfer of a business (not a business transaction) and a lease was found by the Board as the crucial determinant in finding section 8(e) liability, where the clause at issue obligated the employer to ensure that the terms of the agreement be binding on lessees as well as concessionaires.\textsuperscript{344}

The Court further clarified the work preservation doctrine area when it decided that not all such agreements are presumptively primary. In \textit{NLRB v. Enterprise Ass'n of Pipefitters},\textsuperscript{345} union employees refused to handle pipes that had been thread and cut before delivery to the jobsite and relied on the union's collective bargaining agreement with the subcontractor at issue, Hudik, which reserved unit employees' rights to perform the work of threading and cutting pipe.\textsuperscript{346} However, Hudik's agreement with the general contractor, Austin, and with which the union had no relationship, obligated Hudik to use certain, specifically identified, pre-thread and pre-cut pipe, effectively eliminating any choice or control Hudik could have in connection with the assignment of threading and cutting pipe for that job.\textsuperscript{347} Accordingly, the Court ultimately agreed with the Board's conclusion that, despite the presence of a collective bargaining agreement between Hudik and the union, Hudik was a neutral party to the dispute between the union and Austin, the general contractor in control of the assignment of the disputed work, and thus the strike against neutral Hudik was prohibited.\textsuperscript{348}

Thus, as with law in the reserved gate area, which effectively gives neutral and primary the right to dictate the locus of the dispute, the Court's decision in \textit{Enterprise Ass'n} affords neutral status to employers by permitting them to simply contract away their right to control the assignment of work, despite collectively-bargained-for obligations to the contrary.

\textsuperscript{342} \textit{Id.} at 1101.
\textsuperscript{343} \textit{See} 224 N.L.R.B. 100 (1976) (distinguishing \textit{Vantage Steamships} on grounds that the maritime industry and its use of hiring halls presented a unique set of circumstances).
\textsuperscript{344} \textit{See} Hotel & Restaurant Employees Int'l Union, Local 274 (Sheraton Univ. City Hotel), 326 N.L.R.B. 1058, 1059 (1998) ("Since the terms of the agreement would be binding on any lessee or concessionaire, in effect the hotel would be prohibited from doing business with such potential lessee or concessionaire who refused to be bound by that agreement.").
\textsuperscript{345} 429 U.S. 507 (1977).
\textsuperscript{347} \textit{Id.} at 512.
\textsuperscript{348} \textit{Id.} at 523.
Regardless, out of Enterprise Ass'n developed today's work preservation doctrine. In order for a lawful work preservation agreement to exist, it must pass two tests: first, it must preserve work traditionally performed by unit employees; and second, the employer must not only be bound by the agreement, but also must have the power to assign the work to the employees (the right of control test).

Primary work preservation agreements are also referred to as union standards agreements. Such agreements obligate an employer, consistent with a primary area standards object, to subcontract to entities which compensate their own workers consistent with economic terms equivalent to those negotiated within the union's contract. On the other hand, contract clauses which limit the employer's right to subcontract only to other entities with which the union has a collective bargaining relationship, or so-called union signatory clauses, are secondary and thus, inconsistent with section 8(e). Accordingly, the Board has held that where contract provisions set out to regulate the labor relations policies of other employers, they are secondary, and that typical such clauses are those which limit the right to subcontract to entities who are signatory to a union contract.

As discussed supra, section 8(e) contains two provisos—the first insulates certain kinds of cease doing business agreements related to the subcontracting of work at a construction site, while the other insulates cease doing business agreements between garment industry jobbers and their subcontractors.

349. See NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. 490 (1980) (determining that the rules on containers did not constitute a lawful work preservation agreement); see also Am. Trucking Ass'n v. NLRB, 734 F.2d 966, 974 (4th Cir. 1984) (recording an excellent summary of the law in this area). In American Trucking, the Fourth Circuit court cited the first of two ILA decisions regarding containerization rules, the latter of which upheld the Board's and court's partial invalidation of those rules. See NLRB v. Int'l Longshoremen's Ass'n, 473 U.S. 61, 71 (1985) (upholding the Board's invalidation of the rules).

350. See Painters Orange Belt Dist. Council Painters No. 48 (Maloney Specialties, Inc.), 276 N.L.R.B. 1372, 1386-87 (1985) (citing Gen. Teamsters Local 386 (Constr. Materials Trucking, Inc.), 198 N.L.R.B. 1038 (1972)) (“In short, contract clauses which, purportedly, would limit subcontracting to employers who are, themselves, signatories to union contracts, so-called ‘union signatory’ clauses, have been held statutorily proscribed.”); see also Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 657 (1982) (“There is ample evidence that Congress believed that union signatory contract clauses of the type at issue here were part of the pattern of collective bargaining in the construction industry.”).

351. See Woelke & Romero Framing, Inc., 456 U.S. at 666; Maloney Specialties, Inc., 276 N.L.R.B. at 1388.

352. See Local 277, Int'l Bhd. of Teamsters (J & J Farms Creamery Co.), 335 N.L.R.B. 1031, 1031 (2001) (citing Retail Clerks Int'l Ass'n, Local 1288 (Nickel's Pay Less Stores), 163 N.L.R.B. 817, 830 (1967) (finding that, since the demonstrator clauses were not violative of section 8(e), the strikes and picketing in furtherance of obtaining them do not have an unlawful object), enforced, 390 F.2d 858 (D.C. Cir. 1968)).
With regard to the construction industry proviso, inasmuch as those on-site agreements are lawful, the Board has held that a union is free to picket to obtain such clauses.\textsuperscript{353} However, consistent with the teachings of \textit{Sand Door Plywood}, a union is not free to picket to enforce such a clause, despite the fact that it is \textit{prima facie} lawful.\textsuperscript{354} Additionally, even where the union is merely picketing to obtain such a lawful clause, if its success in so doing would force the obligated party to cease doing business with another neutral person, the picket may still run afoul of section 8(b)(4)(B).\textsuperscript{355} Again, the proviso is limited to construction employers and to work at construction sites. While retailers acting as their own general contractors have been found to be employers in the construction industry,\textsuperscript{356} employers who merely prepare materials for use at the construction site have been found not to be in the construction industry and thus not covered by the proviso.\textsuperscript{357} Similarly, employers merely delivering building materials and supplies to a construction site are not involved in on-site work, thereby making the proviso inapplicable.\textsuperscript{358}

Unlike the construction industry proviso, the garment industry exception is more expansive, making sections 8(e), 8(b)(4)(A) and 8(b)(4)(B) wholly inapplicable to that industry. This is largely based on the unique relationship between jobbers, who design garments, and the large contractors who produce them in bulk.\textsuperscript{359} Accordingly, a union may picket

\textsuperscript{353} See N.E. Indiana Bldg. & Constr. Trades Council (Centlivre Village Apartments), 148 N.L.R.B. 854, 863 (1964) (ruling that the Bricklayers had not engaged in the unfair labor practices by nearby picketing to obtain a lawful agreement), enforcement denied in part, 352 F.2d 696 (D.C. Cir. 1965).

\textsuperscript{354} Id.; see supra notes 323–329 and accompanying text.

\textsuperscript{355} See Centlivre Village Apartments, 148 N.L.R.B. at 856–57. In Centlivre, the Board held that the union's object of forcing or requiring the termination of a non-union subcontractor already engaged at the site constituted an unlawful "cease doing business" object in violation of section 158(b)(4)(B), despite the fact that the union was lawfully picketing to obtain a construction industry proviso-protected hot cargo clause. Id. at 857. See also Los Angeles Bldg. & Constr. Trades Council (Church's Fried Chicken, Inc.), 183 N.L.R.B. 1032, 1038 (1970) (holding that the mere presence of a non-union subcontractor's employees at the site did not impute an unlawful section 158(b)(4)(B) object to picketing undertaken with the lawful object of obtaining a construction industry hot cargo, especially where the union specifically agreed to waive compliance with such clause for contractors already engaged in work at the site).

\textsuperscript{356} See Church's Fried Chicken, Inc., 183 N.L.R.B. at 1036 (finding that a company acting as its own contractor in building stores is a "contractor in the construction industry").

\textsuperscript{357} See Int'l Union Operating Eng'rs, Local 12 (Robert E. Fulton), 220 N.L.R.B. 530, 537 (1975) (finding no breach of collective-bargaining agreement for party doing business with a non-union subcontractor).


\textsuperscript{359} See Maramount Corp., 310 N.L.R.B. 508, 512 n.15 (1993) (finding that the absolute exemption from section 158(b)(4)(B) and section 158(e) is based upon the integrated
to secure or enforce these agreements, often referred to as Hazantown agreements after the Board decision in that case.\footnote{360}

Other issues are often the source of argument and confusion. For instance, most section 8(e) cases are implicated well after execution of the agreement in which the objectionable clause is contained. Nevertheless, a reaffirmation of the clause, such as through a demand for arbitration, constitutes a new “entering into” thereby removing any argument that enforcement of the clause is time-barred under the Act’s 10(b) six-month statute of limitations.\footnote{361} Additionally, the area of collective bargaining agreements which bind a contracting employer’s subsidiaries or partners in a joint venture has been the source of some litigation.\footnote{362} However, the cases in this area simply reiterate and apply the law of corporate subsidiaries under section 8(b)(4)(B), where actual, active and substantial control by the contracting entity must be shown over the other entity being bound. Accordingly, common ownership alone does not eliminate the neutrality of a subsidiary, and by extension, obligating application of one subsidiary’s contract on another runs afoul of section 8(e).\footnote{363}

Finally, what should not be forgotten in application of any of these concepts is the potential prospect of antitrust liability for certain “cease doing business” agreements. In \textit{Connell Construction Co. v. Plumbers \\& Steamfitters, Local 100},\footnote{364} the United States Supreme Court held a union’s section 8(e) construction industry proviso defense inapplicable to an allegation that its pursuit of agreements obligating construction employers throughout Texas to do business only with union subcontractors violated the Sherman Act.\footnote{365} The crucial and determinative factor dictating antitrust liability in that case was the fact that the union seeking such agreements had no collective bargaining relationship with the employer they sought to

\footnote{360} Joint Bd. of Coat, Suit \\& Allied Garment Workers’ Unions (Hazantown, Inc.), 212 N.L.R.B. 735 (1974), enforced, 494 F.2d 1230 (2d Cir. 1974).

\footnote{361} See Local 1149, United Bhd. of Carpenters \\& Joiners (Am. President Lines, Ltd.), 221 N.L.R.B. 456, 456 n.2 (1975) (“We agree with the Administrative Law Judge’s conclusion that the allegations of the complaint are not barred by Sec. 10(b) of the Act.”), aff’d, 434 F. Supp. 741 (D. Or. 1977).


\footnote{363} See \textit{Ernest Alessio Constr. Co.}, 310 N.L.R.B. at 1026 (finding that a common ownership provision is not limited to circumstances in which common control is also present).

\footnote{364} 421 U.S. 616 (1975).

\footnote{365} \textit{Id.} at 626.
bind. Thus, the Court reiterated that the non-statutory exemption to antitrust law is limited to situations in which the parties are in a collective bargaining relationship. In the garment industry, however, attempts to sue in antitrust to avoid garment industry proviso insulation from secondary boycott law have proven unsuccessful.

IV. CONCLUDING REMARKS

Although the labor and employment lawyer with an average workload will not often come in contact with a secondary boycott, when she does confront one, it can be a dramatic experience. This is not a garden-variety discrimination claim, where someone might be owed a few dollars in backpay. The stakes in these cases are often higher than others, with entire union campaigns resting in the balance, with employers in danger of losing large contracts unless the objectionable union conduct comes to a halt. The lawyer’s role as advocate in such situations necessarily takes on enhanced importance to the affected client, and she is often compelled to act quickly.

For the labor law student, the secondary boycott area is again but one topic in a larger course of study. Yet, after mastering coercion, discriminatory discharge, recognition and contract bar principles, section 8(b)(4)(B) potentially creates a tangled web of confusion.

The lawyer's job is to advocate for her client and make the best argument possible. The student’s task is to understand the law and be able to manifest that understanding in the written form, either in a scholarly paper or in an examination booklet. In either case, with regard to secondary boycotts and section 8(b)(4)(B), success cannot be achieved without an understanding of the very cases reported and discussed in foregoing Article.

While critics of secondary boycott law may deem it in need of major revision, such criticism certainly has its place in the world of scholarly work. Criticism can also work to develop a better understanding of the subject under attack. However, it is respectfully submitted that criticism without comprehensive explanation and predicate understanding falls flat and loses its meaning and significance.

Explanation and understanding of NLRB secondary boycott law is what this Article has sought to achieve. It has endeavored to place the

366. Id. at 663; see also Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 666 (1982) (holding a clause negotiated in the context of a collective bargaining relationship to be protected by the proviso).
handfuls of confusing, seemingly disparate and irreconcilable things associated with secondary boycotts into a frame. Indeed, full understanding, as opposed to blind criticism, is what leads to effective advocacy—the goal to which both law student and practitioner alike ultimately aspire.