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"Hot Cargo" Clauses in Construction Industry Labor Contracts

COMMENTS

"HOT CARGO" CLAUSES IN CONSTRUCTION INDUSTRY LABOR CONTRACTS

I. INTRODUCTION.

A. *In General*

A "hot cargo" clause means a provision in a labor contract whereby an employer agrees that his employees will not handle the products or materials of another employer, or that he himself will not deal with the other employer, whom the bargaining union considers "unfair" to organized labor.[1] The result of such a provision is the boycott of another employer by the contracting employer, as, for example, where no work will be subcontracted to the boycotted party, or where no materials of the boycotted party will be used or transported by covered employees. Provisions of this type were "standard in contracts entered into by the Teamsters Union,"[2] the members of which refused to handle the "hot cargo" of another employer. Similar provisions appeared in labor contracts of many industries, and were the subject of numerous lower court cases.[3] The Supreme Court, however, did not deal with such clauses until its decision in *Local 1976, United Brotherhood of Carpenters v. NLRB* (hereinafter referred to as *Sand Door*),[4] wherein the Court held that the Taft-Hartley Act[5] did not prohibit hot cargo clauses or voluntary compliance therewith by employers, but did ban enforcement of such clauses by means of strikes, picketing or other coercive union activities.

Fearing that employers who did not comply with hot cargo clauses would be faced with a rash of breach of contract suits and that subtle union pressures would be exerted upon employers to "voluntarily" accept such clauses,[6] Congress responded to *Sand Door* by including in the Landrum-Griffin Act[7] amendments banning almost all hot cargo agreements.[8] Section 8(e) specifically bans such

1. See S. Rep. No. 1139, 86th Cong., 2d Sess. 3 (1960). See generally CCH Lab. L. Rep. [¶ 5222].

2. S. Rep. No. 187, 86th Cong., 1st Sess. 79 (1959); 1 Legislative History of the Labor-Management Reporting And Disclosure Act of 1959 (G.P.O. 1959) at 475.

3. See Burstein, A Decisional History of the "Hot Cargo" Clause, 26 ICC Prac. J. 292 (1958). See also St. Antoine, Secondary Boycotts and Hot Cargo: A Study in the Balance of Power, 40 U. Det. L.J. 189 (1962).

4. 357 U.S. 93 (1958).

5. Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 141 (1947), 29 U.S.C. § 158 (1964) [hereinafter referred to as Taft-Hartley].

6. See Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 272-73 (1959).

7. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), tit. VII, § 704, 73 Stat. 542 (1959), 29 U.S.C. § 158 (Supp. V 1964), amending Taft-Hartley [hereinafter referred to as Landrum-Griffin].

8. These amendments renumbered the former § 8(b)(4)(A) to § 8(b)(4)(B) (only

clauses in all industries except the garment industry, which was completely exempted from the statute,[9] and the construction industry, which was granted a limited exemption for on site work.[10] Section 8(b)(4)(A) prohibits strikes, picketing or other coercive union activity to procure a hot cargo clause from an employer. Section 8(b)(4)(B) continued the *Sand Door* prohibition against strikes, picketing or other coercive activity by unions to force employers to boycott other employers, with or without benefit of hot cargo clauses. These three sections were intended to ban all but exempted union-instigated boycotts of secondary parties by employers, no matter what means the unions used.[11]

Unions have attempted to use a large variety of clauses to circumscribe the proscription of section 8(e),[12] and some of these clauses have been upheld.[13]

minor changes, irrelevant here, were made), and added §§ 8(e) and the new 8(b)(4)(A). The statute insofar as relevant reads as follows: "8(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(4) . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—(A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by subsection (e) of this section; (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

. . . .

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . Provided further, That . . . this subsection and subsection (b) . . . [shall not apply to] 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: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

9. See In re California Sportswear & Dress Ass'n, Inc., 54 F.T.C. 835 (1957), for an excellent description of conditions in the garment industry which are the reason for the total exemption in § 8(e).

10. The limited construction industry exemption is discussed at p. 102, infra.

11. See Gruenberg, The Nature and Impact of the Secondary Boycott and Hot-Goods Limitations of LMRDA, in Symposium on the LMRDA of 1959, at 858 (Slovenko ed. 1961).

12. For some examples of the variety of clauses attempted, see NLRB v. Amalgamated Lithographers, 309 F.2d 31 (9th Cir. 1962), aff'g in part and rev'g in part, 130 N.L.R.B. 985 (1961); Employing Lithographers v. NLRB, 301 F.2d 20 (5th Cir. 1962). See generally Victor, "Hot Cargo" Clauses, 15 Lab. L.J. 269 (1964); 62 Mich. L. Rev. 1176 (1964); CCH Lab. L. Rep. [¶ 5222].

13. See, e.g., Drivers, Salesmen Local 695 v. NLRB, 361 F.2d 547 (D.C. Cir. 1966), involv-

Clauses forbidding all subcontracting have been permitted to stand,[14] while clauses which have attempted to restrict the employer's choice of subcontractors, as, for example, by permitting the employer to hire only union subcontractors or even requiring merely preferential treatment for union subcontractors, have been struck down under section 8(e).[15] Other clauses designed to preserve the work normally performed by bargaining unit employees have also been upheld,[16] but clauses using work preservation as a mere facade for other objectives have been struck down.[17] Those clauses which were permitted to stand were found to involve either protection of the work of bargaining unit employees

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ing a "Primary Picket Line Clause," prohibiting the employer from penalizing employees who refuse to cross legitimate, primary picket lines; Truck Drivers Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir. 1964), concerning a "Union Standards Clause," requiring that only subcontractors whose employees, whether union or not, enjoy the same standards as members of the bargaining unit, be hired; Orange Belt Dist. Council v. NLRB, 328 F.2d 534 (D.C. Cir. 1964) involving a "Primary Subcontracting Clause," which prohibits any subcontracting at all by the employer, or which requires maximum utilization of bargaining unit employees prior to any subcontracting; NLRB v. Amalgamated Lithographers, 309 F.2d 31 (9th Cir. 1962), where a "Struck Work Clause" prohibited the employer from requiring his employees to do work that should be done by another employer's striking employees.

A Struck Work Clause will be upheld only insofar as it embodies the "ally" doctrine, whereby an employer who takes over the work of, and keeps up the output of, another struck employer is the latter's "ally" and is subject to the same pressures that the striking union may exert upon the struck employer. The reason for permitting the same pressures to be exerted upon the ally is that he is no longer neutral, but is directly involved in the affairs of the striking union and struck employer. See Douds v. Metropolitan Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948); see also Meyer, "Ally" or "Neutral"—The Secondary Boycott Dilemma, 34 Tul. L. Rev. 343 (1960); 38 N.Y.U.L. Rev. 97, 113 (1963).

In practice, the interpretation of these clauses is far from settled, as the presentation here may seem to indicate. Compare the decisions of the Board with those of the Courts of Appeals in cases cited note 12 supra.

14. See, e.g., Meat & Highway Drivers Union v. NLRB, 335 F.2d 709 (D.C. Cir. 1964), and cases cited therein. These cases attempted to answer the question left unanswered by the Supreme Court in Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574 (1960), as to whether subcontracting was a subject for collective bargaining. The Court finally resolved the question in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) [hereinafter referred to as Fibreboard], stating that subcontracting of work formerly done by bargaining unit employees in order to cut costs is a mandatory bargaining subject. Therefore, subcontracting is a proper subject of collective bargaining, and may be a mandatory bargaining subject depending on the circumstances of the case before the court.

15. See, e.g., Falstaff Brewing Corp., 144 N.L.R.B. 100 (1963); Pure Milk Ass'n, 141 N.L.R.B. 1237 (1963); Greater St. Louis Automotive Ass'n, 134 N.L.R.B. 1354 (1961).

16. E.g., Todd Shipyards Corp. v. Industrial Union of Marine & Shipbldg. Workers, 344 F.2d 107 (2d Cir. 1965), aff'g 232 F. Supp. 589 (E.D.N.Y. 1964); Holmes Trucking Corp., 155 N.L.R.B. 973 (1965); Superior Souvenir Book Co., 148 N.L.R.B. 1033 (1964); Sealtest Foods, 146 N.L.R.B. 716 (1964); Drive-Thru Dairy, Inc., 145 N.L.R.B. 445 (1963)

17. E.g., NLRB v. Milk Drivers & Dairy Employees, 341 F.2d 29 (2d Cir. 1965); Alco-Gravure, 160 N.L.R.B. 1204 (1966); Retail Clerks Union, 155 N.L.R.B. 656 (1965). See also Lesnick, Job Security and Secondary Boycotts: The Reach of N.L.R.A. §§ 8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000, 1022 (1965).

or to relate solely to the employer and his own employees, although in either case *incidental* secondary[18] effects may in fact result.[19] Even some of these clauses were held to violate 8(e) because of their excessive scope[20] or because a proscribed means of enforcement of the provision was included therein.[21]

B. *The Construction Industry*

The construction industry proviso of section 8(e) permits hot cargo agreements relating only to the contracting or subcontracting of work to be done on the jobsite, and most problems arising in the interpretation of 8(e) have centered on this limit to the exemption.

The first problem was whether the jobsite requirement meant only the work actually to be done on the jobsite, or whether it extended to work that could be, or may previously have been, done thereon. The courts have unanimously given the construction proviso a strict interpretation,[22] so that, while in non-exempted industries only primary and work preservation clauses are legal, in the construction industry some secondary clauses are permitted, if restricted to actual on site work.[23] Thus, hot cargo clauses are legal and permitted in this industry even though they limit the employer to unionized subcontractors, or to subcontractors having contracts with specific unions,[24] or even when they impose work standards and conditions upon other employers.[25]

18. "Secondary" as used herein means affecting other than the agreeing employer and his own employees, i.e., the effect is elsewhere on neutral parties.

19. As long as neutral, secondary employers are only incidentally affected, i.e., as long as the secondary effects are not the objective of the union, these secondary effects do not make the clause, or the strike causing them, illegal secondary activities. Local 761, Elec. Workers v. NLRB, 366 U.S. 667 (1961) (incidental secondary effect irrelevant where union has primary, legitimate objective only. Id. at 673-74).

20. E.g., Retail Clerks Union, 155 N.L.R.B. 656 (1965) (attempt to include non-bargaining unit employees under unit contract); Drivers Local 695, 152 N.L.R.B. 577 (1965) (unlimited picket line clause, prohibiting the disciplining of employees who refuse to cross even secondary picket lines); Brown Transport Co., 140 N.L.R.B. 1436 (1963) (struck work clause exceeds "ally" doctrine); Cardinal Indus., Inc., 136 N.L.R.B. 977 (1962) (attempt to impose conditions outside the bargaining unit); cases cited supra note 15 (limited subcontracting bans—here the limitation of possible subcontractors makes the clause illegal and excessive in binding the employer not to deal with certain other employers).

21. E.g., Ets-Hokin Corp., 154 N.L.R.B. 839 (1965) (right to terminate contract in event of employer breach of otherwise legal hot cargo clause is right to enforce by unlawful economic pressure, and makes clause violate 8(e)).

22. See Drivers, Salesmen Local 695 v. NLRB, 361 F.2d 547 (D.C. Cir. 1966) and cases cited therein on this point.

23. E.g., NLRB v. Teamsters Local 295, 342 F.2d 18 (2d Cir. 1965) (drivers of ready-mix concrete trucks cannot be subject of construction industry hot cargo clause because, although they do spend time on the jobsite, their work is not jobsite work).

24. Los Angeles Bldg. & Constr. Trades Council, 151 N.L.R.B. 770 (1965) (all jobsite workers must be members of the Trade Council).

25. Construction, Prod. & Maint. Laborers Union v. NLRB, 323 F.2d 422 (9th Cir. 1963), involving in effect, a union standards clause, though more extensive in that subcontractors are made subject to the collective bargaining agreement itself, as opposed to being subject merely to its terms and conditions, before they may be hired.

Another major problem arising within the construction proviso of 8(e) was that of how unions could secure and enforce permitted hot cargo clauses. Unlike the garment industry,[26] the construction industry received an exemption *only* from section 8(e), and was *not* exempted from section 8(b)(4)(B).[27] The applicability of 8(b)(4)(A) to the construction industry was left for the courts and the NLRB to decide.[28] The NLRB responded in *Colson & Stevens Construction Co.*[29] by holding that strikes and picketing could *not* be utilized to obtain a construction industry clause permitted only by 8(e), and that the construction proviso only permitted those clauses to which employers voluntarily agreed. The courts, however, disagreed, reasoning that to hold 8(b)(4)-(A) applicable would be to make the construction industry exemption practically worthless to unions, a result not within Congress' intent in granting the exemption.[30] The Board finally capitulated, holding that 8(e) and 8(b)(4)(A) were to be read *pari materia*, with the result that strikes and picketing *are* permitted in order to obtain hot cargo clauses in construction industry labor contracts.[31] However, since 8(b)(4)(B) remains applicable to the construction industry, such clauses may not be enforced by strikes, picketing or other forms of economic coercion; judicial enforcement is the only remedy permitted when an employer breaches such a clause.[32]

II. Recent Developments.

In *National Woodwork Manufacturers Association v. NLRB*,[33] a carpenter's union had a collective bargaining agreement with the General Building Contractors Association, Inc., which contained a rule[34] that none of the union's members

26. § 8(e) exempts the garment industry from §§ 8(b)(4)(A), 8(b)(4)(B) and 8(e). See note 8 supra.

27. See note 8 supra.

28. See Goldwater, The Legislative History and Purposes of LMRDA, in Symposium on the LMRDA of 1959, at 32, 72-76 (Slovenko ed. 1961), wherein the Senator stated that Congress intended that the Sand Door rule remain applicable to the construction industry, while the question of the applicability of 8(b)(4)(A) was intentionally left for the courts and the Board to decide.

29. 137 N.L.R.B. 1650 (1962). This holding was followed in Fiesta Pools, Inc., 145 N.L.R.B. 911 (1964); Building Contractors Ass'n of N.J., 145 N.L.R.B. 952 (1964).

30. Essex County Dist. Council v. NLRB, 332 F.2d 636 (3d Cir. 1964); Orange Belt Dist. Council v. NLRB, 328 F.2d 534 (D.C. Cir. 1964).

31. Centlivre Village Apts., 148 N.L.R.B. 854 (1964), upheld, Muskegon Bricklayers Local 5, 152 N.L.R.B. 360 (1965), overruling, cases cited supra note 29.

32. See cases cited supra note 30; 115 U. Pa. L. Rev. 116 (1966); cf. Local 48, Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964), where the court held that 8(b)(4)(A) did not preclude judicial enforcement of a construction industry hot cargo clause.

It is to be remembered that these rules apply only to those clauses in the construction industry that are legal only by virtue of 8(e). All other clauses held valid by the courts, see text supra at 101, may be enforced either by judicial means or by economic pressure, since they are not hot cargo clauses and therefore are without the scope of § 8(e).

33. 386 U.S. 612 (1967).

34. The relevant portion of this rule is as follows: "No member of this District Council

would handle prefitted doors. Three contractor members of the Association and Frouge Corporation, an outside contractor subject to the provisions of the above agreement by a separate contract with the union, ordered prefitted doors to be installed on their four separate projects. When these doors arrived from the manufacturers, who were members of the National Woodwork Manufacturers Association (hereinafter "NWMA"), the union ordered its members to refuse to install them. NWMA then filed charges of unfair labor practices in violation of 8(b)(4)(B) and 8(e) against the union. The NLRB dismissed the charges in the Frouge incident on the grounds that the rule was a primary work preservation agreement, and that its enforcement by strike was therefore legal.[35] The Court of Appeals for the Seventh Circuit affirmed the dismissal of the 8(b)(4)(B) charges, but reversed the Board as to the 8(e) charges, holding this "will not handle" rule a product-boycott agreement violative of 8(e), whether the union's objective was primary or not.[36] The Supreme Court upheld the NLRB as to both charges, holding that since the work stoppage and the rule were directed only at the primary employer and not aimed at achieving an effect elsewhere, and since the objective of the union was the preservation of work traditionally done at the jobsite by its members, the *incidental* effect on NWMA's members did not make the union's actions secondary activity violative of 8(b)(4)(B) and 8(e).[37]

In *Houston Insulation Contractors Association v. NLRB*,[38] the Houston Association had a contract with Local 22, International Association of Heat and Frost Insulators and Asbestos Workers of America, AFL-CIO, containing a clause that prohibited the employer from contracting out any work relating to the preparation and fitting of insulation materials. A sister union, Local 113, had an identical clause in its contracts with contractors in its jurisdiction. Some members of Local 113 were employed by a member of the Houston Association on a job within Local 113's jurisdiction, but the employer had no contract with Local 113. To enforce its subcontracting bar, Local 22 ordered its members not to install pre-cut materials. Local 113 also ordered its members not to install prefitted materials because they had not been fitted in the employer's Houston shop by members of Local 22, a violation of the contract *between the employer*

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will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted." The first sentence of this rule stated that no union member would handle doors without a union label. The Board held this sentence clearly violative of 8(e), but the union did not appeal this holding since the sentence had not been enforced for years. 386 U.S. at 615 n.2.

35. 149 N.L.R.B. 646 (1964). However, the Board found 8(b)(4)(B) violations as to the other three contractors through the application of its "control" doctrine, and the court of appeals affirmed. See discussion of the "control" doctrine infra p. 109.

36. 354 F.2d 594 (7th Cir. 1965); cf. Brief for Appellant [NLRB] at 25, NWMA v. NLRB, 386 U.S. 612 (1967).

37. 386 U.S. at 645-46.

38. 386 U.S. 664 (1967).

and Local 22. The Houston Association charged both locals with violations of 8(b)(4)(B) in enforcing the absolute subcontracting ban in Local 22's contract by striking. The Board dismissed the charges as to both locals, holding the strikes to be primary enforcement of the work preservation clause.[39] The Court of Appeals for the Fifth Circuit affirmed the dismissal of charges against Local 22, but held that Local 113 had violated 8(b)(4)(B) because its strike was not to protect its *own* members' interests since it had no contract with the employer and therefore no interest in the contract it sought to enforce.[40] The court, relying on the decision in *Fibreboard*,[41] also ruled that the subcontracting ban in Local 22's contract was a legal, primary clause and did not violate 8(e).[42] The Supreme Court again upheld the Board as to the conduct of both locals, holding that their actions were *primary* since they were directed at their single employer for the benefit of *his own* employees, the incidental effect upon the Houston Association's members again not making the locals' activities violative of 8(b)(4)(B).[43]

A. *The Rationale of National Woodwork*

With the statement, "That Congress meant §§ 8(e) and 8(b)(4)(B) to prohibit only 'secondary' objectives clearly appears from an examination of the history of congressional action on the subject,"[44] the Supreme Court reviews the judicial application of the Sherman Act,[45] the Clayton Act,[46] and the Norris-LaGuardia Act[47] to labor activities.[48] Norris-LaGuardia immunized all of labor's weapons from the proscriptions of Sherman and Clayton which had greatly restricted the activities in which unions could engage, and was interpreted as permitting both primary and secondary activity, and even jurisdictional strikes.[49]

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39. 148 N.L.R.B. 866 (1964).

40. 357 F.2d 182 (5th Cir. 1966).

41. See supra note 14.

42. 357 F.2d at 188-89. No charges of an 8(e) violation were filed in this case, so the court was not required to make this ruling. In doing so, however, the court stated that 8(e) applies only to clauses which on their face require the employer to boycott another employer. Contra, e.g., NLRB v. Teamsters Union, 342 F.2d 18 (2d Cir. 1965), aff'g 145 N.L.R.B. 484 (1963) (clause legal on face held to violate 8(e) on basis of union's interpretation of clause in verbal statements).

43. 386 U.S. at 667-68.

44. Id. at 620.

45. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1964) [hereinafter referred to as Sherman].

46. 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1964) [hereinafter referred to as Clayton].

47. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1964) [hereinafter referred to as Norris-LaGuardia].

48. The judicial application of these statutes to labor activities is traced in 1966 A.B.A. Sect. Lab. Rel. Law 3, 6. See also In re California Sportswear & Dress Ass'n, Inc., 54 F.T.C. 835, 846 (1957).

49. United States v. Hutcheson, 312 U.S. 219 (1941), where the Court held that all of Labor's activities are immune from the proscriptions of Sherman so long as the union acts in its own self interest and not in combination with non-labor groups.

The many abuses of this broad immunity by organized labor resulted in the passage of Taft-Hartley.[50]

Section 8(b)(4)(A) of Taft-Hartley prohibited secondary activities theretofore not proscribed. The Court reasoned that since "the basic thrust of the accommodation there effected by Congress was not expanded by the Landrum-Griffin amendments,"[51] the prohibited types of conduct were not expanded. The present Section 8(b)(4)(B), therefore, is to be interpreted just as its 1947 predecessor, 8(b)(4)(A),[52] as Landrum-Griffin merely closed loopholes in the prior law. Section 8(e) filled a gap in the law by prohibiting employer-union agreements to boycott other employers.[53]

The Court concluded that only those clauses with *secondary* objectives are prohibited by 8(e), and that primary agreements with work preservation objectives are not banned by the statute. The Court also decided that 8(e) does not ban product boycotts for the purpose of work preservation such as those here involved.[54] On the basis of these findings, the Court held that since the union's objective was the preservation of work for its members, the union's rule was not violative of 8(e). Thus, its enforcement by coercive action also was perfectly legal, since no proscribed secondary objectives were involved.

NWMA relied heavily upon *Allen Bradley Co. v. Local 3, Electrical Workers*,[55] but the Court readily distinguished that case from the facts before it

50. See 386 U.S. at 623-24.

51. Id.

52. The former § 8(b)(4)(A) was interpreted to have as its central theme the protection of the neutral employer against being involved in disputes not his own, not the banning of primary strikes and picketing, even where some incidental effect is felt by a neutral employer. See cases cited in 386 U.S. at 626 n.16.

53. Such agreements would have been legal under Sand Door, see text supra at 99, unless they violated the antitrust statutes in that the parties thereby agreed to engage in conduct in restraint of trade. See note 55 infra.

54. See 386 U.S. at 619 n.4, where the Court states that product boycotts, such as that here for work preservation purposes, "might" not be banned by the statute. Contra, authorities cited in Brief for Respondent [NWMA] at 25-26, NWMA v. NLRB, 386 U.S. 612 (1967).

55. 325 U.S. 797 (1945) [hereinafter referred to as Allen Bradley], an antitrust suit in which the union was found to have violated Sherman because it acted in concert with non-labor groups. Otherwise, the union's unilateral actions might have been protected by the broad immunity given by Norris-LaGuardia, since Taft-Hartley had not yet been enacted to prohibit secondary activities.

The Supreme Court in Allen Bradley did not rule on another objective of Local 3—reacquisition of jobs lost to its members due to the Depression. Preservation of existing jobs is a legal objective, while securing or creating new jobs is not. The Board seems to have settled this issue as to reacquisition of jobs in two recent decisions, holding that reacquisition of jobs lost years previously due to prefabricated products was a legitimate work preservation objective, legal under National Woodwork. Local 455, Plumbers & Pipe Fitters Union, 167 N.L.R.B. No. 79, 66 L.R.R.M. 1098 (1967); Local 539, Plumbers & Pipe Fitters Union, 167 N.L.R.B. No. 80, 66 L.R.R.M. 1102 (1967). These cases had been decided by the Board previously, 154 N.L.R.B. 285 (1965) and 154 N.L.R.B. 314 (1965), respectively, where the work reacquisition clauses were held legal via the 8(e) construction proviso. On

on the ground that there the objectives of the union were secondary. In *Allen Bradley,* Local 3 sought to exclude all electrical manufacturers outside of New York City from that city's market, so as to create jobs for its members by securing work for City manufacturers. Thus, the union used its boycott as a sword to *obtain* job opportunities; whereas in *National Woodwork* the work protection clause and its enforcement by boycott were used as shields against the removal of jobs traditionally performed by members of the union.[56]

Mr. Justice Stewart, in his dissenting opinion,[57] stated that the activity of the union and the rule[58] here in question clearly fell within the proscription of the statute. He reasoned that the union did not have work preservation as its *sole* objective, but also had an objective proscribed by the statute[59]—the boycott and exclusion of the products of the prefabricated door manufacturers. The dissenters seem to have taken a general legitimate goal of all unions[60] and combined this with the inevitable result[61] of the union's pursuit of its work preservation objective[62] to arrive at the conclusion that *an* objective of the union in carrying out this particular strike was a proscribed product boycott.

An examination of the facts of the product boycott cases cited in the dissenting opinion shows that in each of them some proscribed objective instead of, or in addition to, work preservation was actually present in the *conduct of the particular activity* found to violate the statute.[63] The entire treatment of *Allen Bradley* in the dissenting opinion of Justice Stewart is based on the premise that the boycott in *Allen Bradley* and that in *National Woodwork* were identically for work preservation purposes. That the *Allen Bradley* boycott was for work procurement, not preservation, and was accomplished via a combination of labor and non-labor groups, is clear from an examination of the facts of

remand, the Board, following the reasoning of the National Woodwork decision, found these clauses legal work preservation clauses which were primary and outside the scope of Taft-Hartley, so 8(e) need not be reached.

56. 386 U.S. at 628-31.

57. Id. at 650. Clark, Black and Douglas, JJ., concurred therein.

58. Supra note 34.

59. One proscribed "objective" has always been sufficient for finding a violation of the statute, and it need not be the sole or main objective of the union. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

60. This goal is preventing the introduction of prefabricated products and materials for as long as possible in order to prevent the encroachment upon or elimination of the jobs of union members. Such a goal is quite proper and in keeping with the very basic role of unions—protection of the interests of members.

61. An illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified. See Local 761, Elec. Workers v. NLRB, 366 U.S. 667, 672 (1961).

62. It is uncontravened that work preservation was the main objective of the union in striking.

63. E.g., NLRB v. Local 11, Carpenters, 242 F.2d 932 (6th Cir. 1957) (non-union doors specific objective of union strikes); Joliet Contractors Ass'n v. NLRB, 202 F.2d 606 (7th Cir. 1953), cert. denied, 346 U.S. 824 (1954) (specific objective of union is to exclude all preglazed sash from its jurisdiction by picketing and strikes).

that case. Also, the statement that "a product boycott for work preservation purposes has consistently been regarded by the courts, and by the Congress that passed the Taft-Hartley Act, as a proscribed 'secondary boycott,' "[64] does not seem to be supported by the decisions.[65] Finally, the statement that the majority wholly misplaced its reliance on *Fibreboard* is not supported by the majority opinion, which merely said that the legitimacy of work preservation clauses such as that in *National Woodwork* was implicitly recognized in *Fibreboard.*[66]

B. *The Rationale of Houston Insulation*

In *Houston Insulation,* the relevant circumstances as to Local 22 were identical to those in the Frouge incident in *National Woodwork,* and an identical result was reached. The real issue in the case was the legality of the actions of Local 113 in support of, and in enforcing the contract of, Local 22. Normally, primary activity is that carried on by the immediate bargaining unit employees against the employer.[67] But here, the Court ruled that one local could engage in strike activity to enforce the contract of a sister local (a separate bargaining unit), but only where both locals were employed by the same employer. Combining its reasoning in *National Woodwork* with that of the NLRB in *Local 106, United Association of Journeymen Plumbers,*[68] the Court concluded that Congress was not concerned with protecting employers from pressures exerted by disinterested unions with primary objectives. The Court reasoned that primary employees are guaranteed by section 7 of Taft-Hartley the right to take concerted action against their employer to gain " 'mutual aid and protection' . . . whether or not the resolution of the particular dispute directly affects all of them."[69] Therefore, "A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute . . . . Since that situation does not involve the employer in a dispute not his own, his employees' conduct . . . is not secondary and, therefore, not a violation of § 8(b)(4)(B)."[70] The same minority[71] dissented in *Houston Insulation,*[72] for the reasons expressed in the dissenting opinion in *National Woodwork.*

III. Unresolved Issues.

In the *National Woodwork* case, the Court was not presented with, and did not consider, the issue of whether there were any antitrust implications of work

64. 386 U.S. at 652.

65. Contra, cases cited supra note 16. The dissenting opinion probably meant cases like those cited in note 17 supra, where work preservation was a mere facade for other proscribed objectives.

66. 386 U.S. at 642.

67. See Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. Pa. L. Rev. 1000, 1025 (1965).

68. 110 N.L.R.B. 206 (1954).

69. 386 U.S. at 668.

70. Id. at 669.

71. See note 57 supra.

72. 386 U.S. at 669.

preservation agreements.[73] While this issue does not have a ready solution, the decision in *National Woodwork* may well be indicative of the decision the Supreme Court will reach when squarely faced with the problem. Since a work preservation agreement is primary, i.e., directly affects only the employer and his own bargaining unit employees (although incidental secondary effects may occur), the antitrust requirements set forth by the Court in *UMW v. Pennington*,[74] that the union by the terms of its contract with the employer not bind itself to impose those terms and conditions outside the bargaining unit,[75] are thereby met. Therefore, assuming that the other requisites laid down in prior union antitrust decisions[76] are met, a work preservation clause legal under 8(e) would seem to be exempt from the antitrust laws.

Another question that the *National Woodwork* Court did not consider is the validity of the Board's "control" doctrine—a doctrine attacked by both the NWMA and the AFL-CIO.[77] Usually, this doctrine is one of the first tools used by the Board in determining whether there has been an 8(b)(4)(B) violation. It involves an inquiry into the struck employer's "control" or legal ability to grant the union's demands. If the employer has "control," the Board will then conduct a normal inquiry into the union's objectives in order to determine whether an unfair labor practice has been committed. If the *actual* employer is found to lack "control" because of a contractual or other legal obligation, he is then deemed the "secondary" employer, and the party having "control," who is the real target of the union action, is deemed "primary." Since the employer deemed "secondary" *directly* feels the economic pressure exerted by the union, that pressure violates 8(b)(4)(B).[78]

The first case in which the Board applied this doctrine was *Wiggin Terminals, Inc.*[79] In that case, the union whose members were employed by the terminal began a strike to pressure a company using the facilities into assuring the employees a specified amount of work per ship that docked. Since the union's dispute was actually with the company using the terminal, by application of the "control" doctrine this company was deemed the "primary" employer. The

73. Id. at 631 n.19.

74. 381 U.S. 657 (1965).

75. Id. at 661-69.

76. See 34 Fordham L. Rev. 286 (1965) for a recent summary of the status of labor's exemption from the antitrust laws. See also 1966 A.B.A. Sect. Lab. Rel. Law at 24-62; 35 Fordham L. Rev. 367 (1966).

77. See Brief for Appellant [NWMA] 46-56, and Brief for AFL-CIO as Amicus Curiae, NWMA v. NLRB, 386 U.S. 612 (1967).

78. This doctrine has not been quite as rigid nor as rigidly applied as may seem to be indicated by the brief presentation here, contrary to the arguments of NWMA and of the AFL-CIO in their Briefs. Id. at 47 and at 3 respectively. The factor of "control" has not, to date, been solely determinative of any case, though control has been accorded great weight. See cases cited in notes 79-82 infra. The argument, infra p. 111, that in the instant case "control" was the sole determinative factor, applies only to the instant case, and is based on the fact that all else in the case is identical as to all four contractors, so that "control" must have been solely determinative in the case. In situations other than that presented in the instant case, the "control" rationale is still a valid and useful tool for the Board to use.

79. 137 N.L.R.B. 45 (1962).

terminal owner was then deemed the "secondary" employer, and, since he was struck by the union, the union violated 8(b)(4)(B). Some other situations in which the "control" doctrine has been applied include a strike against one subcontractor with the objective of removing another subcontractor,[80] a strike against an employer under contract with a governmental unit intended to persuade the unit to assign more work to union members,[81] and a strike against a subcontractor with the objective of excluding prefabricated materials specified by the contractor (no hot cargo clause).[82]

The Board applied the "control" doctrine in deciding *National Woodwork* with somewhat anomalous results. The three local contractors who were members of the Association were contractually bound to install the prefitted doors. Frouge was not so obligated. The Board found that the real target of the stoppages against the three contractors was either the manufacturer of the doors or the project owners at whose option the type of doors was selected. The three contractors were therefore deemed the injured "secondary" parties in the case, and, as to them the union violated 8(b)(4)(B).[83] But, since Frouge did have "control" over the type of doors to be installed in his project, the union's stoppage as to him was merely the primary enforcement of a work preservation clause, and violated no statute. These findings were reached despite the following facts: all four contractors were subject to the same collective bargaining agreement containing the same "will not handle" rule; for all practical purposes identical work stoppages were imposed against all four; and, the same union and the same product were involved. Clearly, the only distinction among them was that the three local contractors were contractually bound to install the prefitted doors, while Frouge was not. Where, as here, all other circumstances are identical, it is questionable that different results should ensue solely because of the presence or absence of contract specifications over which the union has no control.

The consequence of this dual result is the deprivation of the union's right to use economic pressure to enforce an admittedly primary agreement as to some employers, but not to others, in identical situations. Other than being discriminatory, this result violates the union's right to primary enforcement guaranteed explicitly in the primary picketing proviso in 8(b)(4)(B).[84] Thus the union is left with only the courts as a means of enforcement as to some employers.[85] In practical terms, this limits the union to an action for breach

80. Arthur Venneri Co., 137 N.L.R.B. 828 (1962), enforced, 321 F.2d 366 (D.C. Cir. 1963).

81. Board of Harbor Comm'rs, 137 N.L.R.B. 1178 (1962), enforced, 331 F.2d 712 (3d Cir. 1964).

82. Cardinal Indus. Inc., 144 N.L.R.B. 91 (1964).

83. 149 N.L.R.B. at 658, aff'd, 354 F.2d at 597.

84. See note 8 supra.

85. That the union is limited to judicial enforcement of primary agreements is contrary to the prior law. See text p. 103 and note 32 supra. That a union may use economic pressure only against one employer, but not against others, to enforce the same agreement in the same circumstances is illogical. See NLRB v. Lion Oil Co., 352 U.S. 282 (1957), where the

of contract, offering a remedy effective much too late to accomplish the legitimate objective of the union. Also, this deprivation of the union's right is in no way compensated, as it is rather questionable that the union would be permitted any recourse to the neutral party deemed "primary" through the application of the "control" doctrine, as, for example, by a boycott of the NWMA.[86]

Because the factor of "control" was *the* determinative factor in finding different objectives on the part of the union as to the different employers, it was improperly applied in this case. The factor of "control" *is* relevant and should have been considered, but the results as to all four contractors should have been the same, since all but "control" was the same in all four work stoppages. The fact pattern of the instant case is such that the application of the "control" rationale can only lead to incongruous results, even when applied correctly. Therefore, it should not be, and should not have been, applied to this fact pattern.[87]

In *Houston Insulation*, the Supreme Court stretched the primary activity concept to extreme limits in deciding that Local 113's strike did not violate 8(b)(4)(B). The employer was the same for employee-members of Locals 113 and 22 in name only, since the project in Local 113's jurisdiction was an operation totally different from the jobs within Local 22's jurisdiction. The Court's decision seems to have been aimed at achieving justice and preventing further complications.

Local 113 did have a real stake in the enforcement of Local 22's contract provision, though its interest could not be recognized by the courts as a defense. This interest was the identical provision in its contracts which it too would want enforced when its signatory employers obtained projects without its jurisdiction. For, if the Court had decided that Local 113 could not enforce the subcontracting ban in Local 22's contract, neither could any other sister union enforce the same provision in Local 113's contract. The employers might then be free, in effect, to breach the subcontracting bans in their contracts whenever they obtained jobs without the jurisdiction of the locals with which they have contracts. The Supreme Court may well have foreseen this resulting circumvention of the contract provision, and decided the case as it did to avoid this consequence.

While justice seems to have been done in this case, this broad expansion of the primary activity concept should be restricted to cases where the so-called disinterested union does have some real stake in enforcing the sister

Court stated that construction or application of a statute leading to incongruous results is to be strictly avoided. Id. at 288.

86. It should be noted that the Board has not ruled on this question. See Lesnick, supra note 67, at 1038. See generally id. at 1036-39.

87. The Board may be receding somewhat from its use of the "control" doctrine. See Local 455, Plumbers & Pipe Fitters Union, 167 N.L.R.B. No. 79, 66 L.R.R.M. 1098 (1967), where the Board held the work preservation agreement was enforceable against the primary employer although he lacked "control," because the 8(e) construction proviso protected the union's conduct.

local's contract, as Local 113 had here. Otherwise, this decision could be interpreted as a blanket license for sympathy strikes. A situation could develop where, for instance, the assembly line employees of an employer could strike to enforce the contract of that company's janitorial employees, who belong to a different union, without violating Taft-Hartley, although they have no interest at all in the latter employees' grievances. Surely the Court did not intend such a result, and undoubtedly the decision in *Houston Insulation* will be restricted to permit strikes to enforce other union's contracts only by sister unions which have a real interest to protect thereby.

A further restriction should be that even a union with a stake in enforcing another union's contract cannot do so where the contracting union can, by primary activity, enforce its own contract with reasonable effectiveness. In *Houston Insulation*, Local 22 could legally have struck or picketed the employer to enforce the clause, but would have found it highly impractical to picket the job-site, and, ineffective for the immediate purpose to strike its own shop.

IV. The Core Problem.

Both the majorities and minorities in *National Woodwork* and *Houston Insulation* recognized that the core problem was that of technological change, which is giving birth to so many of today's labor-management disputes. The Justices were agreed that a solution was a task for Congress.[88]

Mr. Justice Harlan, in his Memorandum to the majority opinion in *National Woodwork*,[89] stated that Congress had nowhere addressed itself to prefabrication of materials and products, the particular aspect of the technological change issue before the Court. He reasoned, however, that Congress has a "deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process"[90] with which the Court should not tamper "until Congress has made unmistakably clear that it wishes wholly to exclude collective bargaining as one avenue of approach to solutions in this elusive aspect of our economy."[91]

The decision of the Court in *National Woodwork* is correct, as far as it went, for the clear and simple reason given by Mr. Justice Harlan in his Memorandum—this is the only solution Congress has indicated.

Mr. Justice Harlan stated that the legislative history so deeply investigated by the Court in its search for an answer to the problem before it is "essentially negative" on the technological change issue and afforded no solution.

88. 386 U.S. at 644; Id. at 663 (Stewart, J., dissenting).

89. Id. at 648.

90. Id. at 649.

91. Id. at 650. See Mandelstamm, The Effects of Unions on Efficiency in the Residential Construction Industry: A Case Study, 18 Ind. & Lab. Rel. Rev. 503, 521 (1965) for the results of a study of the effects of union restrictive work rules. See generally on the topic of technological change McConkey, The NLRB and Technological Change, 13 Lab. L.J. 43 (1962); Raskin, Problems of Collective Bargaining in a Changing Technology, id. at 930; Panel Discussion, Problems of Collective Bargaining in a Changing Technology, id. at 935.

In view of the "opaque legislative record," the best solution was to leave the resolution of the technological change issue to collective bargaining between employers and unions, until Congress declares that different means are to be used. Both the majority and minority of the Court could have, and should have, done just as Mr. Justice Harlan suggested, rather than search the "opaque legislative record" for a solution not to be found therein.

V. Conclusion

We may soon have some clear indication of what Congress intends the law to be in this area if Senator Thurmond's recent bill, aimed explicitly at the decisions in the instant cases,[92] is enacted. But similar efforts in this particular area of union restrictions upon the use of prefabricated materials have in the past been futile.[93]

Until Congress acts, the courts and the Board must continue to wrestle with the increasing diversity of problems, and attempt to formulate workable guidelines to deal with them. *National Woodwork* in deciding one issue, revealed three others: the antitrust implications of primary work preservation agreements; the validity and extent of applicability of the Board's "control" doctrine; and, the most important, the need to deal with technological change. The decision in *Houston Insulation* left open the question of the extent of its ruling.

This discussion of hot cargo clauses has shown some of the guidelines developed by the Board and the courts in dealing with these clauses, notably the primary-secondary distinction and the "control" doctrine. Both are far from perfect, but have served very useful roles in the solution of a great variety of issues in this area of the law, and have helped to fill the gap left by the "opaque legislative record" of section 8(e). They can continue to do so if their inevitable judicial refinement leaves them flexible enough to fill the need created by each new situation as it arises. In this way incongruous results such as those reached in *National Woodwork* by use of the "control" rationale will not again be reached. Also, new and more efficient guidelines may be necessary to augment those presently used and to meet the changing needs of the courts and the Board in dealing with this area of the law, unless Congress intervenes.

The future of the problems presented herein is uncertain. It is highly probable that the issues of the antitrust implications of work preservation agreements, and of the validity and extent of applicability of the "control" doctrine, will soon be before the courts. It is certain also that the entire problem of technological change will continue to plague the Board and the courts, and force

92. S. 1744, 90th Cong., 1st Sess., introduced May 10, 1967. In addition to being explicitly aimed at the decisions in the instant cases, the bill also is directed against combinations of unions in restraint of trade through pattern or industry wide bargaining. See 113 Cong. Rec. 6660 (daily ed. May 10, 1967).

93. E.g., Rep. Alger introduced a bill to ban all union attempts to limit prefabrication of building materials, but the bill was never adopted. See 105 Cong. Rec. 12136 (1959). Instead, Congress enacted Landrum-Griffin, including the 8(e) construction industry proviso, in the same year, 1959.

them to create some framework within which to deal with the problem until Congress acts. The Supreme Court in deciding the principal cases was quite aware of this problem and of the attendant problems it is creating. Here the Court divided almost evenly, with the majority in favor of permitting this type of union restriction on technological change. So the Court has, at least temporarily, left open to the process of collective bargaining, solutions to a policy question which Congress alone can properly determine.