Secondary Picketing in Railway Labor Disputes: A Right Preserved Under the Norris-LaGuardia Act

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NOTES

SECONDARY PICKETING IN RAILWAY LABOR disputes: A RIGHT PRESERVED UNDER THE NORRIS-LAGUARDIA ACT

INTRODUCTION

The spring of 1986 found the members of the Brotherhood of Maintenance of Way Employees (BMWE) engaged in a lawful strike against the Maine Central Railroad and the Portland Terminal Company (Maine Central), subsidiaries of Guilford Transportation Industries, Inc. The railroads continued to operate in the face of the strike, however, in part because they used striker replacement crews and management substitutes, and in part because other railroads carried much of the Guilford lines' traffic under interchange agreements.

To increase pressure upon Maine Central, BMWE asked members employed by railroads interchanging traffic with Guilford lines to picket their respective employers. The Union hoped that these "secondary" pickets would drive the secondary employers to pressure Maine Central

1. The Railway Labor Act, 45 U.S.C. §§ 151-64 (1982), requires that all railway labor disputes undergo the Act's dispute resolution procedures if they "grow out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," id., at § 153(i), or involve "the meaning or the application of any agreement" arrived at using the Act's procedures. Id. at § 155.


2. See Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d 1228, 1229 (1st Cir. 1986). The Portland Terminal Company is a wholly-owned subsidiary of the Maine Central Railroad. Id. Maine Central, along with the Boston & Maine and Delaware & Hudson Railroads are subsidiaries of Guilford Transportation Industries, Inc. Id. The BMWE initially struck only Maine Central and Portland Terminal Company. Id. It extended its strike to Boston & Maine, with which Maine Central interconnects, and then to Delaware & Hudson. Id.

3. Id.


6. C. Gregory & H. Katz, Labor and the Law (3d ed. 1979) supplies the following definition of a secondary boycott:

A secondary labor boycott occurs when a group of employees refuse to remain

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to concede to union demands. The union members complied and the Union achieved its first goal: BMWE members and other employees of the interchanging railroads, though they had no complaint with their own working conditions, refused to cross the picket lines, thus shutting down much of the secondary employers' operations. The secondary employers frustrated BMWE's second goal, however, when they bypassed Guilford Transportation and turned instead to the courts for the more immediate and certain relief offered by an injunction. The six besieged interchange railroads brought separate actions against BMWE in federal district courts across five circuits.

The resulting decisions display vast confusion as to whether federal courts have jurisdiction to issue injunctions against secondary picketing in railway disputes. The district courts split on the issue: though all held that the Norris-LaGuardia Act, if applicable, denies federal courts jurisdiction to issue an injunction in railway disputes. See supra note 5.


9. Burlington, 793 F.2d at 797.


risdiction to issue injunctions in labor disputes, injunctions issued in three of the six cases.  

Half the trial courts held outright that the Norris-LaGuardia Act barred issuance of an injunction. Two courts found that although the Norris-LaGuardia Act’s broad prohibition against federal injunctive relief in labor disputes normally would bar the relief sought, the Norris-LaGuardia Act must bow to the more specific underlying goals and procedures of the Railway Labor Act. Most railway labor disputes are subject exclusively to the constraints of the Railway Labor Act, but the Act stands silent as to the availability of secondary picketing as a weapon in the laborer’s self-help arsenal. This silence further fuels the confusion. Two courts raised a similar “accommodation” argument with regard to the Interstate Commerce Act.


15. For the district court findings, as summarized by the courts of appeals, see Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 799 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986); Consolidated Rail Corp. v. Brotherhood of Maint. of Way Empls., 792 F.2d 303, 304 (2d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3303 (U.S. Sept. 2, 1986) (No. 86-353) [hereinafter Conrail].

The Conrail district court added a novel twist to its Railway Labor Act accommodation argument: it held that the secondary picketing issue must be subject to Railway Labor Act procedures and therefore the Norris-LaGuardia Act must give way. Id. See infra notes 192 and 194-208.

16. See supra note 1.


18. See Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d
Two other trial courts held that the secondary pickets involved in these cases exceeded the activities protected by the Norris-LaGuardia Act. They reasoned that the absence of "substantial alignment" between Maine Central and the secondary employers constituted an exception to the Norris-LaGuardia Act's prohibition on injunctive relief. They based their conclusions on the economic self-interest/substantial alignment test as developed by the Courts of Appeals for the Fifth and Eighth Circuits in two earlier decisions. Those courts, envisioning a

1228, 1234-35 (1st Cir. 1986) (for district court opinion as reported by 1st Circuit); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 800 (7th Cir.) (for district court opinion as reported by 7th Circuit), cert. granted, 107 S. Ct. 60 (1986). See infra notes 178 and 210-13 and accompanying text.


20. Norfolk & W. Ry. v. Brotherhood of Maint. of Way Empls., 795 F.2d 1169, 1170 (4th Cir. 1986) (district court "concluded that there was no substantial alignment between [Norfolk & Western and Maine Central] or the Guilford Rail System and no labor dispute within the meaning of the Norris-LaGuardia Act") (brackets not in original), petition for cert. filed, 55 U.S.L.W. 3165 (U.S. Aug. 1, 1986) (No. 86-175); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 799 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986); see also Perritt, supra note 4, at 1228.


It should be noted that, although purporting to apply the same test, the Fifth and Eighth circuits differ on exactly what constitutes the economic self-interest/substantial alignment exception to the Norris-LaGuardia Act, further confusing the issue.

In creating the test, the Fifth Circuit required an economic self-interest in the picketing on the part of the union as manifested by either substantial alignment between the secondary and primary employers or by an economic interest in the strike's outcome on the part of the secondary employees themselves. In the current interchange cases, the secondary employees have an interest in maintaining uniform wages, hours, and working conditions. See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 654-55 (5th Cir.), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). The Eighth Circuit acknowledged only a portion of the test: economic self-interest as manifested by substantial alignment between the primary and secondary employers. See Ashley, Drew & N. Ry. Co. v. United Transp. Union, 625 F.2d 1357, 1364 (8th Cir. 1980).

Furthermore, the district court in Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986), totally misapplied the test by defining substantial alignment as the percentage of the secondary employer's business made up of transactions with the primary employer. Id. at 799. For example, it found that "over the course of a year [Burlington] carries only 1,400 cars received from or bound to a Guilford line. This is 0.043% of the Burlington's traffic. . . . This is too little . . . to be a 'substantial alignment' of the secondary employer with the primary . . . ." Id.
need to protect neutral parties from secondary picketing, held that the Norris-LaGuardia Act protected secondary pickets only where the secondary picketing furthered the union’s economic interest in the strike’s outcome as a result of the secondary employer’s substantial alignment with the primary employer. Prior to the Maine Central dispute, the basi-

23. In Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), aff’d per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966), the legal primary strike involved the Brotherhood of Railroad Trainmen and Florida East Coast Railroad [hereinafter FEC], which owned one-quarter of the Jacksonville Terminal Company, the secondary employer. Id. at 650. Separate management ran the Terminal Company, and its employees who belonged to the Brotherhood of Railroad Trainmen, operated under a collective bargaining agreement independent of the one under which FEC employees worked. Id. at 651.

Jacksonville had contracted with FEC to provide interchange services constituting one-third of all interchanges performed at the Terminal Company, as well as track maintenance, minor equipment repairs, signal and switching services, and “car service,” as defined by 49 U.S.C. § 10102(3) (1982). Id. at 650. When FEC’s Brotherhood members threatened to strike FEC and to picket the Terminal Company, Terminal Company employees warned that they would not cross the picket lines. Id. at 651. FEC immediately sought and received an injunction ordering Terminal Company to perform its contractual obligations owed to FEC. Id. FEC employees carried out their threat to picket the Terminal Company and succeeded in keeping hundreds of Terminal Company employees from reporting to work. Id. In response, the Terminal Company filed for injunctive relief, in part, to comply with the injunction obtained by FEC and, in part, presumably to carry out its other business that included mail, passenger, and freight transit. Id.

The district court enjoined the picketing, finding that the Norris-LaGuardia Act was inapplicable and presumably finding that the picketing constituted illegal interference with the Terminal Company’s obligations under the FEC’s injunction, the Interstate Commerce Act, and its contractual obligations to other customers. Id. at 652. The Court of Appeals for the Fifth Circuit reversed, holding that the Norris-LaGuardia Act applied facially, id. at 653, but that the facts of the situation warranted injunctive protection of the picketing because it addressed the economic self-interest of both the union and the secondary employees. Id. at 654. The Supreme Court affirmed by an equally divided court. See Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966).

Although no injunction issued under these facts, the court foresaw the possibility of picketing against secondary employers lacking substantial ties to the primary employer, and took the opportunity to provide for a judicially created limitation on the Act’s prohibition on injunctive relief against secondary picketing. Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 654-55 (5th Cir.), aff’d per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). This limitation took the form of the economic self-interest/substantial alignment exception. Id. See infra notes 173-91 and 202-09 and accompanying text.

For the facts giving rise to the Eighth Circuit’s decision in Ashley, Drew and N. Ry. v. United Transp. Union, 625 F.2d 1357 (8th Cir. 1980), see infra notes 218-24 and accompanying text.

24. According to the Fifth Circuit, the Brotherhood of Railroad Trainmen, involved in a labor dispute with FEC, possessed an economic self-interest in picketing a secondary employer substantially aligned with the FEC because the secondary employer could affect positively the outcome of the labor dispute. See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), aff’d per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). The maintenance of wage, hour, and working condition standards constituted an interest on the part of the secondary employees as well. Id. at 655. The test, however, does not require this second prong of self-interest. See id. at 654-55. See also Perritt, supra note 4, at 1228.
ally consistent decisions of the Fifth and Eighth Circuits were the only appellate level cases on the issue.25

The Courts of Appeals for the First, Second, Fourth, Seventh, and District of Columbia Circuits broadened the controversy by denying injunctive relief in each of the Guilford strike appeals.26 For the most part, the courts ruled that the Norris-LaGuardia Act's broad language constituted an absolute bar on the federal courts' power to enjoin secondary picketing.27 These six decisions directly conflicted with the precedent established by the Fifth and Eighth Circuits. The Circuit courts also divided over whether, and to what extent, the Railway Labor Act and the Interstate Commerce Act affect the applicability of the Norris-LaGuardia Act.28

Thus, the question presented by these cases and discussed in this Note is whether the Norris-LaGuardia Act denies federal courts jurisdiction to enjoin secondary picketing by participants in railway labor disputes.29

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28. The disputes in Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966), and the recent interchange cases, see supra note 10, represent most, but not all, of the recent cases involving secondary railway picketing. A strike in 1978 produced another rash of cases that are not discussed in this Note because they add nothing new, raise different issues, and with one exception, never proceeded beyond the district court level. For a discussion of these cases, see Perritt, supra note 4, at 1193-94 & nn.15-19.
The answer to this question is yes. Although a sense of fairness\textsuperscript{30} might argue for the availability of injunctive relief where secondary pickets effectively shut down the secondary employer's railyard, the plain language of the Norris-LaGuardia Act\textsuperscript{31} in conjunction with its legislative history,\textsuperscript{32} the judicial interpretations which have followed,\textsuperscript{33} and the language and purpose of the Railway Labor Act,\textsuperscript{34} mandate the opposite result.

Part I of this Note examines the plain meaning of the Norris-LaGuardia Act. It concludes that the Act's broad, unambiguous language forbids federal courts to issue injunctions against secondary activity initiated in response to labor disputes. Part II analyzes the Act’s legislative history and finds that Congress intended the Act to prohibit injunctive relief against secondary as well as primary activity involving or arising out of labor disputes, including railway labor disputes. Part III considers and rejects arguments that the Norris-LaGuardia Act must accommodate the Railway Labor Act, the Interstate Commerce Act, or both, in cases involving railway labor disputes. Section V examines policy reasons for and against allowing secondary picketing in railway disputes. This Note concludes that no jurisdiction exists for federal court issuance of injunctions against secondary railway pickets.

I. THE PLAIN MEANING OF THE NORRIS-LA GUARDIA ACT

Whenever the interpretation of a statute plays a part in a law suit, the rules of statutory construction require that the court first look to the language of the statute.\textsuperscript{35} If its wording is unequivocal, then its meaning is plain and the courts must apply the law as such without any further inquiry.\textsuperscript{36} The applicable sections of the Norris-LaGuardia Act plainly prohibit injunctions against both primary and secondary pickets arising out of labor disputes.\textsuperscript{37} Therefore, federal courts lack jurisdiction to grant the injunctive relief sought by the interchange employers.

Two sections of the Norris-LaGuardia Act govern the issue raised by the interchange pickets: sections 104\textsuperscript{38} and 113.\textsuperscript{39} Section 104(e) prohib-
its federal courts from granting injunctive relief in cases "involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute... from... giving publicity to the existence of, or the facts involved in, any labor dispute... by advertising, speaking, patrolling, or by any other method not involving fraud or violence." Section 113 defines a case which grows out of or involves a labor dispute as one which:

involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein... or who are members of the same or an affiliated organization of... employees. The term "labor dispute" includes any controversy concerning terms or conditions of employment... regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Application of this broad, unambiguous language to the facts of the interchange cases brings them within the purview of the statute. The Norris-LaGuardia Act protects the union's peaceful picketing, regardless

out of any labor dispute to prohibit any person or persons participating or interested in such dispute... from doing, whether singly or in concert, any of the following acts:

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

Id.


When used in this chapter, and for the purposes of this chapter -

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Id.


41. 29 U.S.C. § 113(a), (c) (1982).
of the lack of privity between the secondary employers and primary employees.\textsuperscript{42} BMWE secondary picketing qualifies as a labor dispute under several definitions contained in the Norris-LaGuardia Act: it involves "persons who are engaged in the same industry;"\textsuperscript{43} parties who are both "members of the same or an affiliated organization of . . . employees;"\textsuperscript{44} and parties who are directly or indirectly interested in the outcome of the dispute "between one or more employers . . . and one or more . . . associations of employees."\textsuperscript{45}

The BMWE cases all involve railway employers and employees.\textsuperscript{46} Some of the secondary employees belong to the same union as the primary employees on whose behalf they are striking.\textsuperscript{47} This relationship gives them an interest in maintaining uniform employment standards and thus an interest in the outcome of the dispute.\textsuperscript{48} In addition, the motivation for the secondary picketing "concern[s] terms or conditions of employment."\textsuperscript{49} Maine Central's collective bargaining agreement with BMWE expired in 1984.\textsuperscript{50} Unable to agree on wages, the parties submitted their pay dispute to Railway Labor Act procedures, and BMWE

\textsuperscript{42} 29 U.S.C. § 113(c) (1982).
\textsuperscript{43} 29 U.S.C. § 113(a) (1982).
\textsuperscript{44} Id.
\textsuperscript{45} Id.

These cases all arise from the same underlying dispute and so share the same basic fact pattern: railroad employees stage an unsuccessful strike against their primary employer, then extend it to other railroads or yards that interchange with the primary employer.

\textsuperscript{47} In at least one of the cases discussed in this Note, the striking primary employees actually picketed the secondary employer themselves. See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 650-51 (5th Cir.), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). In others, the union asked members from another local to erect the pickets. See Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 797 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986). In either event, the union intended the secondary picketing to deter the secondary employees—union and non-union members alike—from reporting for work. E.g., Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 651 (5th Cir.), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966).

\textsuperscript{49} 29 U.S.C. § 113(c) (1982).
members continued to work under the old agreement pending Railway Labor Act exhaustion.\textsuperscript{51} When the Railway Labor Act procedures failed to resolve the dispute, the BMWE went on strike.\textsuperscript{52} Thus, the parties' inability to agree on contract terms falls squarely within the statute's definition of a labor dispute.\textsuperscript{53}

Further, the Norris-LaGuardia Act contains no exceptions for secondary pickets or any other labor tactic.\textsuperscript{54} The language is broad and taken as a whole indicates that the prohibition is equally broad.\textsuperscript{55} To insure broad application, Congress included a "purpose" clause for use by courts as a guide to construction.\textsuperscript{56} This purpose clause communicates Congress' concern with abusive employment practices, the role of judi-

\footnotesize{\textsuperscript{51} See id. \textsuperscript{52} See id. \textsuperscript{53} See supra notes 38-39. \textsuperscript{54} See Ashley, Drew & N. Ry. v. United Transp. Union, 625 F.2d 1357, 1370 n.25 (8th Cir. 1980) (citing Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 391 (1969)); supra note 17 and accompanying text. Sections 104(f) and 104(i) limit the Act's protections to acts not involving fraud or violence. See 29 U.S.C. § 104(f), (i) (1982). \textsuperscript{55} Another rule of statutory construction allows courts to read the sections as an integrated document. See Richards v. United States, 369 U.S. 1, 11 (1962); NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 257-59 (1953); Juvenile Prods. Mfrs. Ass'n v. Edmisten, 568 F. Supp. 714, 718 (E.D.N.C. 1983); N. Singer, supra note 35, § 46.05, at 90. Any one section may be interpreted to make it consistent with the statute's entirety. Richards v. United States, 369 U.S. 1, 11 (1962); NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); Juvenile Prods. Mfrs. Ass'n v. Edmisten, 568 F. Supp. 714, 718 (E.D.N.C. 1983); N. Singer, supra note 35, § 46.05, at 90-92. Some courts in reading the Norris-LaGuardia Act have concluded that the integrated whole does not support secondary activity. See Ashley, Drew & N. Ry. v. United Transp. Union, 625 F.2d 1357, 1365-66 (8th Cir. 1980); Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 657 (5th Cir.) (Choate, J., dissenting), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). \textsuperscript{56} 29 U.S.C. § 102 (1982) states: In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows: Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he 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; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Id. See H.R. Rep. No. 669, 72d Cong., 1st Sess. 6 (1932); S. Rep. No. 163, 72d Cong., 1st Sess. 11 (1932); 75 Cong. Rec. 4503 (1932).}
cial activists in the growth of these abusive practices, and its belief that the unfeathered organization of labor could eliminate such employment abuses. The purpose clause instructs courts to construe the newly imposed limitation on injunctive power in labor disputes with these purposes firmly in mind.

Accordingly, on numerous occasions the Supreme Court has held that the Act stands as a clear and broad bar against federal judicial interference in labor disputes. For example, in *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, the Court held that management's refusal to arbitrate changes to a collective bargaining agreement constituted a labor dispute for Norris-LaGuardia Act purposes. The Court stated that the broad language of the Act, reinforced by its purpose clause, allowed for only one possible result: classification of the facts in issue as a labor dispute for Norris-LaGuardia Act purposes.

Thus, the plain meaning of the Norris-LaGuardia Act prohibits federal courts from enjoining secondary pickets erected in a railway dispute. Despite the clear language of the Act and Supreme Court rulings upholding this conclusion, courts have gone beyond the "four corners" of the Act to determine its scope.

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57. In presenting the bill to the Senate for debate, Senator Blaine said by way of introduction of section 2:

[T]he declaration of public policy section [102] . . . presents, at the same time, a rule of interpretation and a statement of the underlying thought of Congress . . . of the necessity for labor organizations and the right of workingmen to freely associate and to be represented in negotiations concerning the terms and conditions of employment by representatives of their own choice. 75 Cong. Rec. 4626 (1932).

58. See supra notes 56-57.


60. 362 U.S. 330, 335-36 (1960).

61. Id. at 331-35.

62. The Court's language leaves no room for doubt regarding its position on interpreting the Norris-LaGuardia Act:

Unless the literal language of this definition [section 113(e)] is to be ignored, it squarely covers this controversy. Congress made the definition broad because it wanted it to be broad. . . . Section 2 of this Act specifies the public policy to be taken into consideration in interpreting the Act's language and in determining the jurisdiction and authority of federal courts; it is one of freedom of association, organization, representation and negotiation on the part of workers.

Id. at 335-36 (footnote omitted) (brackets not in original).

II. STATUTORY INTERPRETATION

A finding by a court that the statute is not clear on its face, or that adherence to the plain meaning would lead to either absurd results or the frustration of congressional purpose frees a court from the constraints of the plain meaning rule. During the last twenty years, some courts addressing the issue of Norris-LaGuardia Act applicability to secondary picketing in railway labor disputes have found the language to be vague, absurd, or at odds with congressional intent, and have come


69. Though not stated explicitly, some of these courts found the Norris-LaGuardia Act vague or to lead to results which were absurd or in conflict with congressional intent. For example, adherence to the substantial alignment exception assumes a limitation unstated in the Act's text but which the courts have held to comport with congressional intent or to be necessary to avoid absurd results achieved by literal application of the statutory language. See, e.g., Ashley, Drew & N. Ry. Co. v. United Transp. Union, 625 F.2d 1357, 1365-66 (8th Cir. 1980) (court went beyond facial applicability of the statutory language to interpret it in the light of its history); Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 658 (5th Cir.) (Choate, J., dissenting) (court found facts fell within the statute's literal language but proceeded to create an exception), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966).

Similarly, the courts ruling that the general purposes of the Railway Labor Act required the Norris-LaGuardia Act to give way to it also implicitly concluded that any finding would contravene congressional intent by yielding an absurd result. Although the Norris-LaGuardia Act contains no Railway Labor Act exemption, these courts have interpreted the Norris-LaGuardia Act as implicitly excepting the Railway Labor Act from its coverage. See, e.g., Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 796 (7th Cir.) (Seventh Circuit reversed district court's issuance of injunction, finding that failure to do so would result in interference with the
up with a number of alternatives.\textsuperscript{70}

Some of these courts found that Congress did not intend the Norris-LaGuardia Act to cover secondary pickets.\textsuperscript{71} One dissenting judge asserted that Congress intended to exclude railway labor cases from Norris-LaGuardia Act protection.\textsuperscript{72} Still other courts developed a third, hybrid argument: if the Norris-LaGuardia Act applies to disputes covered by the Railway Labor Act, it must yield to the superior aims of the more specific Railway Labor Act.\textsuperscript{73} A few courts found a need to accommodate the Norris-LaGuardia Act to the purposes underlying the Inter-


These same absurdity or contrary-to-congressional-intent arguments arise in reference to Interstate Commerce Act exemption arguments as well. See supra note 18 and infra notes 209-14.

70. See supra notes 17-27.


In a variation of the above argument, some courts have interpreted the Act as inapplicable to secondary picketing of neutral third parties. See Norfolk & W. Ry. v. Brotherhood of Maint. of Way Empls., 795 F.2d 1169, 1170 (4th Cir. 1986) (Fourth Circuit reversed district court holding that "no labor dispute within the meaning of the Norris-LaGuardia Act... which would justify the union's secondary picketing"), petition for cert. filed, 55 U.S.L.W. 3165 (U.S. Aug. 1, 1986) (No. 86-175); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 799 (7th Cir.) (Seventh Circuit reversed district court finding that Norris-LaGuardia Act adhered to secondary picketing only when the secondary employer had aligned himself substantially with the primary employer), cert. granted, 107 S. Ct. 60 (1986); Ashley, Drew & N. Ry. Co. v. United Transp. Union, 625 F.2d 1357, 1364 (8th Cir. 1980) (court ruled that Norris-LaGuardia provisions apply to a secondary employer only when it substantially aligns itself with the primary employer); Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 654-55 (5th Cir.) (Norris-LaGuardia provisions apply to a secondary employer who has aligned himself substantially with the primary employer), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). See generally infra notes 173-91 and accompanying text.

Another related argument involves a reading that Congress intended to require privity between the parties, thus entirely removing secondary activity from the realm of the Norris-LaGuardia Act. See infra notes 158-66 and accompanying text.


73. See infra note 192 and accompanying text.
state Commerce Act, which aspires to maintain the free and continuous flow of goods in interstate traffic.

Part II discusses the first of these contentions—that Congress did not intend for the Norris-LaGuardia Act to cover secondary pickets—in light of legislative history and the arguments presented by courts on each side of the issue.

A. Historical Background to the Passage of the Norris-LaGuardia Act

Much of America’s labor law developed rapidly, stimulated by its industrial revolution. Congress often targeted legislation to address a particular problem without necessarily giving much thought to how individual laws interacted, or failed to interact, with each other. In addition, some laws have remained on the books unamended although they appear to conflict with others or to have outlived their usefulness. The piecemeal evolution of labor legislation sometimes has led to what are, or might appear to be, anomalous results.

The stories of the development of the Railway Labor Act and the Norris-LaGuardia Act are tales of railroads, robber barons, and free-wheel-

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74. See infra note 193 and accompanying text.
75. Section 10101(a) of the Interstate Commerce Act, 49 U.S.C. § 10101(a) (1982), provides in relevant part:

> Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States . . . it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle . . . .

Id.

76. For discussion of the remaining contentions, see infra notes 167-72, 192-214 and accompanying text.
77. See C. Gregory & H. Katz, Labor and the Law 15-16 (3d ed. 1979). See generally, F. Frankfurter & N. Green, Labor Injunction (1930) (detailing the history of the labor injunction and laws developed to defeat it); R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 1-6 (1976) (giving a brief history of the the interaction between the developing labor movement and labor law).
78. See, e.g., Boys Mkts. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250-51 (1970) (discussing the evolution of labor law and the seeming inability of the Norris-LaGuardia Act and the Taft-Hartley Act (also known as the Labor-Management Relations Act) to interact); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 800-01 (7th Cir.) (stating that statutes often fail to interact with each other), cert. granted, 107 S. Ct. 60 (1986).
79. See, e.g., Boys Mkts. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250-51 (1970) (stating that as labor policy shifted over time, Congress passed new laws to meet these new needs but often did not amend earlier acts still on the books); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 800-01 (7th Cir.) (old and new statutes often conflict), cert. granted, 107 S. Ct. 60 (1986).
80. See e.g., Boys Mkts. v. Retail Clerks Union, Local 77, 398 U.S. 235, 250-51 (1970) (Norris-LaGuardia passed to combat the dominance of management over labor, a situation which "is totally different from that which exists today").
81. See id. (courts must accommodate statutes which have their origins in conflicting policies).
ing justice, and of statutory language, ambiguity, and silence. The tales start with passage of the Clayton Act in 1914.\(^82\)

During the early part of the twentieth century, employers utilized the "yellow-dog" contract to keep wages low, hours long, and costs down.\(^83\) These employers, interested in maintaining their power to dictate working conditions, found willing collaborators in the personae of federal judges who granted injunctions, often outrageous in their coverage,\(^84\) against workers involved in labor disputes. These disputes often included breaches by employees of covenants not to organize or to strike. The continued assistance of a sympathetic judiciary thus allowed employers to frustrate employees' attempts to improve working conditions.

Congress sought to alleviate the plight of the individual worker with passage of the Clayton Act,\(^85\) primarily by allowing for unionization un-

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83. The Senate report on the Norris-LaGuardia Act summarized the "yellow-dog" contract as follows:

This contract is one which requires the employee, as a condition of obtaining employment, to agree that he will not join a union while he is in such employment, or, that if he is then a member of a union, he will disassociate himself from it; that he recognizes the right of the employer to discharge him without notice; that he will not quite [sic] without giving to his employer notice sufficient to enable the employer to hire some one to take his place. Such contracts frequently require the employee to agree in advance to accept such conditions of labor, hours of labor, etc., as may from time to time be decided upon by his employer. . . . In all of them the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment. In other words, he surrenders his actual liberty of contract and to a great extent he enters into involuntary servitude.


84. Courts granted injunctions that forbade the payment of strike benefits created by employee contributions, the giving of any economic assistance to strikers, and permitted short-notice ejectment from company housing of striking workers and the denial of any food or fuel assistance to any such tenant. See 75 Cong. Rec. 4506, 4624-25 (1932).

85. Section 20 of the Clayton Act states:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees. or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law . . . . And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any
interrupted by interference from the federal courts. Section 20 of the Clayton Act prohibits federal courts from issuing injunctions in cases "involving, or growing out of, a dispute concerning terms or conditions of employment." Protected activities include strikes, peaceful dissemination of information, picketing, and activities that would be lawful in the absence of a dispute.

The Supreme Court, however, emasculated the legislation by construing its language narrowly, thereby allowing district courts to continue granting injunctions against labor strikes. In *Duplex Printing Press Co. v. Deering*, the Supreme Court reversed the Second Circuit, which, applying the Clayton Act, ruled that the district court lacked jurisdiction to enjoin a secondary boycott engineered by the International Association of Machinists to force Duplex to adopt union wages, an eight hour work day, and a closed shop. The Court based jurisdiction to issue the injunction on a construction of the Clayton Act that limited the Act's prescriptions on injunctive relief to cases where privity existed between the act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.


88. 29 U.S.C. § 52 (1982). The statute's jurisdictional limitation applies to "any case between an employer and employees . . . or between persons employed and persons seeking employment." *Id.*

89. The House report and Senate debates on the Norris-LaGuardia Act describe the destruction wrought upon the Clayton Act by the Supreme Court in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and other cases. *See* H.R. Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932); 75 Cong. Rec. 4619 (1932).

90. The courts' restrictive interpretations of the Clayton Act preserved the imbalance in bargaining power between the individual laborer and capital, which resulted in employment contracts of adhesion. *See* H.R. Rep. No. 669, 72d Cong., 1st Sess. 6-7 (1932); S. Rep. No. 163, 72d Cong., 1st Sess. 9, 15 (1932); 75 Cong. Rec. 4504 (1932). These contracts generally required the employee to promise not to join a union or to resign any present affiliation. *See supra* note 83. In addition, the laborer surrendered to the employer the right to fix wages and hours (including wage reductions) and the right to terminate the employee at any time. *See id.* The Court's unsympathetic view of outside union stimulation of labor disputes compounded the problem. *See infra* notes 91-94 and accompanying text.

91. 252 F. 722 (2d Cir. 1918), *rev'd*, 254 U.S. 443 (1921).

92. Duplex manufactured huge printing presses that required on-site assembly. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 462 (1921). When a conventional strike against the primary employer proved ineffective, the union turned to the secondary boycott. *Id.* at 463-64. Hoping to force Duplex to concede to their demands, the union, whose rank and file included repairmen and assemblers employed by Duplex customers, forbade its members to work on Duplex presses. *Id.* In addition, it communicated this policy to owners and potential purchasers of Duplex equipment. *Id.* Duplex sought to enjoin the local union officials, who were not Duplex employees, from continuing the
picketers and the employer.  

Two years later, in Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association of North America, another case involving an attempt by a union to obtain closed shops, the Court again reversed a lower court's refusal to issue an injunction against a union-organized secondary boycott. In the protective shadow of Duplex and Bedford, abuses mounted as employers discovered that they still could take advantage of sympathetic federal judges to receive injunctive relief against breaches of the anti-unionization clauses contained in "yellow-dog" contracts as well as against secondary boycotts. This prevented union organizers from attempting to close open shops.

In 1926, Congress passed the Railway Labor Act. Railroads, due to their role as movers and deliverers of goods to the Nation, received individualized legislation designed to derail potentially disastrous strikes. The Railway Labor Act imposed rigorous dispute resolution procedures that prevented strikes, at least until those procedures had been exhausted. Although perhaps not motivated by notions of justice, the Railway Labor Act seemed to address the needs of everyone fairly: it kept the industrialists and the general public happy by endeavoring to keep the trains moving, yet recognized the needs of the railway workers

boycott. Id. at 460-61. The lower courts, applying the Clayton Act, denied the petition. Id. at 461.

Boycotts involve pressure not to consume a particular product or to engage in a particular act. See C. Gregory & H. Katz, supra note 77, at 120-21. Pickets, on the other hand, encourage employees not to report to work.

93. See supra notes 41-45 and accompanying text and infra notes 117-26, 163-66 and accompanying text.

94. 274 U.S. 37 (1927).

95. See id. at 42-43. The Court stated: "[w]ith a few changes in respect of the product involved, dates, names and incidents . . . the opinion in Duplex Co. v. Deering . . . might serve as an opinion in this case." Id. at 49. This time the employers were operators of stone quarries that refused to employ union members. The union declared any stone rough-cut in the quarries in question "unfair" and ordered its membership, which included almost all the stone masons in the nation, not to work on the quarries' product. Id. at 41-46.

96. See Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 9 F.2d 40 (7th Cir. 1925), rev'd, 274 U.S. 37 (1927).


98. Id.


102. See supra note 1.
by instituting a dispute-resolution system that imposed a bargain-in-good-faith burden on both sides of a dispute, but left the employees with the recourse to strike if bargaining failed to result in a settlement.

Not all workers, however, were as fortunate as railroad employees. As late as the 1930's, employers were making free use of the "yellow-dog" contract and courts continued to grant injunctions against secondary boycotts. By this time, however, public opinion had coalesced against capital and its perceived servant, the judiciary. Change in favor of the worker became a major public goal. In response, Congress passed the Norris-LaGuardia Act in 1932. In doing so, it voiced two concerns: first, the need for parity in bargaining power between labor and capital in order to improve the plight of the worker, and second, the need to rein

103. Section 2 of the Railway Labor Act, ch. 347, § 2, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. § 152 (1982)), requires both employees and management subject to the Act to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Id.

104. See supra note 1.

105. See 75 Cong. Rec. 4627 (1932).

106. See supra note 97.

107. Public outrage against labor injunctions issued by an activist federal judiciary reached such proportions that both major parties included planks promising to remedy the situation in their party platforms. See H.R. Rep. No. 669, 72d Cong., 1st Sess. 2-3 (1932); S. Rep. No. 163, 72d Cong., 1st Sess. 7-8 (1932); 75 Cong. Rec. 4502 (1932).

Concern for the judiciary's public image and the implications a tarnished image had upon its continued efficacy also moved Congress. In introducing the proposed legislation to the Senate, Senator Norris said:

Is it any wonder that there has grown up a feeling of resentment against some of the actions of some Federal judges? Is it any wonder that there has gradually grown up in the minds of ordinary people a feeling of prejudice against Federal courts? Is it surprising that there should develop a sentiment against life tenure for Federal trial judges? Can anyone doubt that such action on the part of the Federal judiciary has gradually developed in the minds of ordinary people a fear that where a system of jurisprudence prevails which enables one man, endowed with a life tenure of office, to write a law and then order its enforcement, and then, refusing a jury, to try alleged offenders and punish them at his own sweet will, it will eventually lead us to the common knowledge and belief that where such things exist, as Blackstone says, "There can be no public liberty."

75 Cong. Rec. 4507 (1932).


109. Congress found that only through collective representation could the individual laborer defeat the "involuntary servitude" imposed upon him by the unchecked power of management. See S. Rep. No. 163, 72d Cong., 1st Sess. 9, 14 (1932). Improvement of the working conditions and wages of the common laborer required virtual bargaining parity between labor and management. See 79 Cong. Rec. 2371 (1935) (in presenting the National Labor Relations Act, Senator Wagner stated that "equality of bargaining power" between labor and management constituted a major labor policy goal); see, e.g., Boys Mkts. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250-51 (1970) (discussing congressional interest in creating and maintaining balance of bargaining power between labor and management). See supra notes 56-57 and accompanying text.
in the activist and increasingly unpopular judiciary.\footnote{110}

Congress patterned the Norris-LaGuardia Act after section 20 of the Clayton Act\footnote{111} but crafted the newer legislation of stronger linguistic cloth to avoid the rending suffered by the Clayton Act at the hands of the courts.\footnote{112} The result was a broad prohibition on the power of federal courts to issue injunctions in labor disputes.

**B. The Legislative History of the Norris-LaGuardia Act Supports the Conclusion that Congress Intended the Act to Apply to Secondary Pickets**

An examination of the House and Senate reports and floor debate transcripts leading up to passage of the Norris-LaGuardia Act indicates that Congress intended the Act's ban on injunctive relief to encompass secondary picketing.\footnote{113} According to the House report on the bill, the drafters created the law "to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act"\footnote{114} —a goal the Supreme Court frustrated by its decision in *Duplex*.\footnote{115} To ensure this protection, the drafters of the Norris-LaGuardia Act sought to distinguish it from the Clayton Act in several important respects.

First, Congress conveyed its parity concern in wording far more sweeping than that used in the earlier statute.\footnote{116} According to the House

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\item \footnote{110. See H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932); S. Rep. No. 163, 72d Cong., 1st Sess. 25 (1932). See supra note 107 and accompanying text.}
\item \footnote{111. See supra notes 38-39 and 85 for the text of both acts.}
\item \footnote{The House report and Senate debates also confirm this. See H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932); 75 Cong. Rec. 4625-26 (1932).}
\item \footnote{112. See United States v. Hutcheson, 312 U.S. 219, 231 (1941) (Congress "still further narrow[ed] the circumstances under which the federal courts could grant injunctions in labor disputes.").}
\item \footnote{113. See infra notes 114-66 and accompanying text.}
\item \footnote{114. H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932).}
\item \footnote{115. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), effectively prevented the unionization of open shops by enabling employers to seek two forms of injunctive relief: against union organizers not employed at the facility and against employees whose union affiliations violated the anti-unionization clauses of their employment contracts. See supra note 97. See also Recent Developments, *Railroad Secondary Boycotts: Railway Labor Act Versus Norris-LaGuardia*, 42 Wash. L. Rev. 935, 938 (1967) [hereinafter *Secondary Boycotts*].}
\item \footnote{116. A comparison of the language of the two statutes clearly demonstrates this point. See supra notes 38-39 and 85. For example, section 113 of the Norris-LaGuardia Act defines a much broader array of labor-management relationships than does the Clayton Act. Section 113(a) of the Norris-LaGuardia Act includes "persons participating or interested" in the dispute. See 29 U.S.C. § 113(a) (1982). In addition, in section 113(c), the Norris-LaGuardia Act states that no employer-employee relationship need exist between the labor and management disputants. See id. at § 113(c). The Clayton Act speaks in more specific relationships such as employer-employee, and "dispute[s] concerning terms or conditions of employment." See 29 U.S.C. § 52 (1982). More importantly, the Clay-}
\end{itemize}
report, "[s]ection 13 contains. . . . a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants." The report also expressly declared that the committee drafted the Act to correct the Supreme Court's *Duplex* interpretation of the Clayton Act which limited the Clayton Act's purview to cases involving a primary employer-employee relationship. Perhaps to emphasize Congressional disapproval of *Duplex*, the Senate report contains language reminiscent of the Justice Brandeis' analogy, in his *Duplex* dissent, of labor-management relations to warfare on an industrial level. This "no-holds-barred" approach to unionization indicates that Congress meant to include secondary pickets within the Act's domain.

Second, congressional citation to the Supreme Court's decisions in *Duplex* and *Bedford* as stimuli for the new Act provides concrete support for the position that Congress intended the Act to cover secondary activity. In *Duplex*, the union turned to secondary boycotting when conventional striking proved ineffective. In *Bedford*, the union resorted to the secondary boycott to combat the quarries' refusal to employ union members. In both cases, hardship to the secondary employer constituted a key element of the secondary boycott. The union testified in *Bedford* that such activity would harm local purchasers of the stone, but that the union intended to utilize secondary pressure to achieve unionization regardless of whether it damaged neutral parties. In both cases, the Supreme Court held that the Clayton Act permitted federal courts to enjoin secondary picketing. Disapproving citations to these decisions

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118. The House report reads:

   In the case of Duplex Printing Press Co. v. Deering... the court held so far as pertinent to this particular discussion that this section of the Clayton Act provided a restriction upon the use of the injunctions in favor only of the immediate disputants and that other members of the union not standing in the proximate relation of employer and employee could be enjoined. Of course, it is fundamental that a strike is generally an idle gesture if confined only to the immediate disputants.


121. 75 Cong. Rec. 4625 (1932).
124. See id. at 45-46; see, e.g., *Duplex*, 254 U.S. at 462-63 (outline of facts detailing measures designed to cause hardship to secondary employers).
126. See supra notes 92-96 and accompanying text.
found in congressional debates and reports clearly indicate that Congress approved of the use of secondary boycotts and pickets, and sought to remedy this judicial misinterpretation.

C. The Norris-LaGuardia Act in Light of the National Labor Relations and Taft-Hartley Acts

The subsequent passage of the Taft-Hartley Act\textsuperscript{127} amendments to the National Labor Relations Act\textsuperscript{128} also indicate that Congress originally intended the Norris-LaGuardia Act to protect secondary picketing. The National Labor Relations Act governs most labor disputes,\textsuperscript{129} and, as amended by the Taft-Hartley Act, makes secondary pickets and boycotts illegal in most labor disputes.\textsuperscript{130} Congress, however, exempted disputes covered by the Railway Labor Act from the National Labor Relations Act's purview.\textsuperscript{131} This subsequent prohibition against secondary activity supports two important conclusions: first, the Norris-LaGuardia Act must cover secondary picketing,\textsuperscript{132} otherwise subsequent legislation


\textsuperscript{132.} Between passage of the Norris-LaGuardia and Taft-Hartley Acts, courts held that the Norris-LaGuardia Act protected secondary picketing. See Milk Wagon Drivers’ Union, Local No. 753 v. Lake Valley Farm Prods., 311 U.S. 83, 102-03 (1940); East Texas Motor Freight Lines v. International Bhd. of Teamsters, 163 F.2d 10, 10-11 (5th Cir. 1947); Lee Way Motor Freight v. Keystone Freight Lines, 126 F.2d 931, 932 (10th Cir. 1942); Taxi-Cab Drivers Local Union No. 889 v. Yellow Cab Operating Co., 123 F.2d 262, 264-65 (10th Cir. 1941).

With passage of the Norris-LaGuardia Act, Congress hoped to achieve bargaining parity between labor and management. See supra note 109 and accompanying text.


Furthermore, the Act concerns itself with the elimination of the "yellow-dog" contract. See id. at 7570. Finally, Sen. Wagner justified the bill by saying that though Congress had protected the same policies in previous legislation, the working man required substantive law to make him feel secure. See id. at 7570-71. Thus, with the National
would not have been necessary; and, second, since Congress specifically exempted railway labor cases from the amendments' coverage, secondary picketing remains available to striking railway workers.  

Some proponents of the availability of injunctive relief against secondary pickets in railway disputes argue that the railway exemption from the National Labor Relations Act represents a congressional oversight. They argue that since Congress banned secondary picketing for

Labor Relations Act, Congress made substantively legal what it had made practically legal under the Norris-LaGuardia Act.


Although in United Steelworkers v. National Labor Relations Bd., 376 U.S. 492 (1964), the Supreme Court found that when Congress revised section 158(b) (often referred to by its sessions law section number—8(b)) in 1959, it intended to extend the provision to cover railroad workers by expanding the definition of employee, id. at 500-01, the Court later reversed on this point, holding that the new definition of employee did not bring railway workers within § 158(b)(4). See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 376-77 n. 10 (1969). But see Perritt, supra note 4, at 1221-23. Continued availability of secondary boycotts in cases covered by the Norris-LaGuardia Act is consistent with this history.

133. In Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d 1228 (1st Cir. 1986), the court noted first that the Norris-LaGuardia Act prohibited injunctions against secondary picketing, see id. at 1232-33, then outlined subsequent congressional action redefining the kind of labor activities available. See id. at 1233-34. The court observed that Congress eliminated the secondary boycott from labor's self-help arsenal with the passage of the Taft-Hartley Act in 1947, see id. at 1234, but exempted railroads therefrom. See id. See also Act of June 23, 1947, ch. 120, title II, § 212, 61 Stat. 156 (1947) (codified at 29 U.S.C. § 182 (1982)). Congress then plugged "loopholes" with the Landum-Griffin Act in 1959, Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.). See Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d 1228, 1234 (1st Cir. 1986). From this, the court concluded that Congress could alter the status quo to eliminate secondary picketing in railway disputes if it wanted to, but had not done so, and the court could not step in to make the change. See id.

134. For example, in Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986), the railroads contended that "Congress could not have meant railroads, alone among America's principal industries, to be exposed to secondary picketing." Id. at 796. This court turned this argument against its proponents. It suggested that a finding that secondary picketing was prohibited in railway labor disputes must be based on a finding that the Railway Labor Act prohibited them. If that were so, the court reasoned, then railroads would have been
every other major American industry,135 its failure to do so for the railway industry must constitute an inadvertent omission.136 A number of courts have considered this unintentional exception rationale137 and concluded that no support exists for this position.

First, since Congress passed the Railway Labor Act exemption together with the Taft-Hartley amendments,138 it seems unlikely that any oversight occurred. Second, a blanket exemption from the National Labor Relations Act of disputes covered by the Railway Labor Act makes sense: without it, the National Labor Relations Act would undermine the Railway Labor Act by nullifying its specific dispute resolution procedures.139 Third, Congress exempted other groups from National Labor Relations Act coverage, including crucial service organizations like the Postal Service.140 Last, Congress has amended the Railway Labor Act protected from secondary picketing when no other industry was. See id. at 801. See also Perritt, supra note 4, at 1204; Secondary Boycotts, supra note 115, at 944.


136. See id. at 796.

137. In Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), the Supreme Court sua sponte raised this issue of National Labor Relations Act/Norris-LaGuardia Act interaction. It held that while the National Labor Relations Act provisions may be used very generally as guidelines to determine what self-help techniques remain available to parties to disputes subject to the Railway Labor Act, they may not be read to outlaw secondary picketing in railway disputes. Id. at 391-93. See also Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d 1228, 1232-34 (1st Cir. 1986) (language of Norris-LaGuardia clearly allows secondary picketing, and Congress has not passed any limitation similar to Taft-Hartley restriction on secondary picketing for Railway Labor Act cases); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 796, 801 (7th Cir.) (court rejected railroad's oversight argument), cert. granted, 107 S. Ct. 60 (1986); Ashley, Drew & N. Ry. v. United Transp. Union, 625 F.2d 1357, 1365 & n.10 (8th Cir. 1980) (court found that National Labor Relations Act, as amended, could serve only as a guidepost to federal labor policy, but could not be imported wholesale into the Norris-LaGuardia Act).


139. Each act provides procedural steps for the handling of labor-management interaction. These procedural schemes must be independent to be effective. In Jacksonville Terminal Co., 394 U.S. 369, the Supreme Court observed that the National Labor Relations Act originated in the shadow of the Railway Labor Act and that Congress never intended for the two to interact. See id. at 376-77. The Court also stated that if it were to find that "major" and "minor" railway disputes were subject to National Labor Relations Board jurisdiction where not all employees participating in the dispute were subject to the Railway Labor Act, then Railway Labor Act procedures would become subordinate to the National Labor Relations Board unless the Board found it lacked jurisdiction. Id. at 375-76.

numerous times since it enacted the Taft-Hartley amendments, and these Railway Labor Act alterations have never included a ban on secondary pickets to remedy the alleged oversight. Some of these amendments even postdate the 1966 Fifth Circuit decision that propounded the substantial alignment/economic self-interest test. While congressional silence may not be interpreted as assent to judicial constructions given the Norris-LaGuardia Act, it is fair to assume that Congress, which often must settle railroad strikes through legislation, is aware that the secondary picketing issue arises in the railway context but has not chosen to amend either the Railway Labor Act or the National Labor Relations Act to prohibit secondary railroad pickets.

D. The Scope of the Norris-LaGuardia Act is Not Limited by the Legislative History of the Clayton Act

Some have claimed that since the Norris-LaGuardia Act was meant to reassert the purpose of the Clayton Act, it should be limited by the intent underlying the original legislation. Advocates of this theory first pointed to congressional reports stating that in passing the Norris-LaGuardia Act, Congress adopted the same methods to protect labor that it had used in the Clayton Act. They offered these statements as an entree to investigate Clayton Act legislative history and then


144. See Boys Mkts. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970) ("[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law") (quoting Girouard v. United States, 328 U.S. 61, 69 (1946)).


147. See supra note 114.


149. See cases cited supra note 148.

150. Id. The court in Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 654 (5th Cir.), aff'd per curiam by an equally divided Court sub nom. Atlantic
pointed to House debates during which the committee spokesman opined that the Clayton Act did not legalize secondary boycotts. The Court in Duplex, holding that an injunction would issue under the Clayton Act unless privity existed, itself cited to indirect negative references to secondary boycotts contained in House and Senate committee reports. This entire theory, however, rests on the incorrect assumption that congressional intent to reassert its judicially emasculated purpose in passing the Clayton Act necessarily precluded other purposes in the Norris-LaGuardia Act.

Indeed, the Supreme Court concluded early on that the Norris-LaGuardia Act represents a congressional redefinition of Clayton Act purposes. In United States v. Hutcheson, decided in 1941, the Court stated that in passing the Norris-LaGuardia Act, Congress had rejected the Duplex and Bedford readings of the Clayton Act, and had “now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act.”

Opponents of a broad interpretation of the Norris-LaGuardia Act have also pointed to remarks made by Representative LaGuardia during Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966), relied on this notion that the Norris-LaGuardia Act derived from the Duplex dissent to support the economic self-interest/substantial alignment exception that excepted neutral secondary employers from Norris-LaGuardia coverage.


152. See supra notes 90-93 and accompanying text.

153. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), cites to the identical House and Senate reports that contain a series of quoted passages on labor organization, some of which include statements condemning secondary activity. See id. at 475 (citing H.R. Rep. No. 627, 63d Cong., 2d Sess. 33-36 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 29-31 (1914)). Although the Court itself deemed the statements inconclusive, id., it found the condemnation of secondary boycotts it was seeking in the floor debate remarks of Mr. Webb, the House committee spokesman. Id. at 475, n.1 (quoting 51 Cong. Rec. 9652 (1914)).

154. Indeed, the Norris-LaGuardia Act includes a section aimed at contempt charges against newspaper publishers—a section without parallel in the Clayton Act. 29 U.S.C. § 112 (repealed 1948). For discussion of this section’s goals, see 75 Cong. Rec. 4509, 4758-59 (1932); see also Secondary Boycotts, supra note 115, at 937 (although Congress may have passed Norris-LaGuardia in part to protect economic self-interest, “it does not necessarily follow that [the interest] was intended to determine the scope of the act”).

155. 312 U.S. 219 (1941).

156. Id. at 236. Hutcheson involved an allegation that picketing resulted in a criminal antitrust violation. The Court held that the Clayton Act definition of a labor dispute was to be redefined according to Norris-LaGuardia standards. Id. at 233-34. It then ruled the activity protected. Id.

157. Id. at 236 (emphasis added). The Senate debates also support the view that the Norris-LaGuardia Act affords broader protection than does the Clayton Act. For example, Sen. Blaine, who, along with Sen. Norris, presented the bill before the Senate, stated that the proposed bill “does not repeal the labor sections of the Clayton Act but merely supplements these provisions and clarifies the intent of Congress.” 75 Cong. Rec. 4626 (1932) (emphasis added).
the House debates where he stated that the Norris-LaGuardia Act was limited in application to employer-employee relationships.\textsuperscript{158} When seeking legislative intent, however, conflicts between committee reports and comments made by the committee representative on the floor during debate must be resolved in favor of the committee report.\textsuperscript{159} As previously noted, the committee reports for the Norris-LaGuardia Act clearly indicate that the committee meant for the Act to apply to labor disputes where no employer-employee privity exists.\textsuperscript{160} Representative LaGuardia’s comments do not appear in the House reports,\textsuperscript{161} the authoritative statement of Congressional intent.\textsuperscript{162}

The \textit{Brotherhood of Railroad Trainmen v. Atlantic Coastline Railroad Co.} dissent asserted that the Norris-LaGuardia Act protects non-employees as well as employees, but only if they direct their activities against the primary employer.\textsuperscript{163} According to this view, Congress included the lack of privity language in the Norris-LaGuardia Act only to prevent the recurrence of \textit{Duplex},\textsuperscript{164} which, in part, kept union members who were not employed by the primary employer from picketing that employer.\textsuperscript{165} As already noted, however, \textit{Duplex}, as well as \textit{Bedford}, also entailed pressure against secondary employers.\textsuperscript{166} The committee reports’ unequivocal rejection of both cases demonstrates that Congress approved of

\begin{footnotesize}
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\item \textsuperscript{160} See supra notes 117-18.
\item \textsuperscript{161} See H.R. Rep. No. 669, 72d Cong., 1st Sess. (1932).
\item \textsuperscript{162} See supra note 159 and accompanying text.
\item \textsuperscript{163} In Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), aff’d per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966), Judge Choate, in his dissent, contended that Congress included this lack of privity clause in the Norris-LaGuardia Act solely to cover situations like \textit{Duplex}, where the Court construed the Clayton Act to ban injunctive relief only where an employer-employee relationship existed, thus placing labor action organized by unions outside the Clayton Act protections. \textit{See id.} at 656-57.
\item Two courts dealing with the current interchange cases raised this idea sua sponte and rejected it. See Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d 1228, 1232-33 (1st Cir. 1986); Central Vermont Ry. v. Brotherhood of Maint. of Way Empls., 793 F.2d 1298, 1301 (D.C. Cir. 1986).
\item \textsuperscript{164} See supra note 163.
\item \textsuperscript{165} Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471-74 (1921).
\item \textsuperscript{166} See supra notes 91-96 and 107-08 and accompanying text.
\end{enumerate}
\end{footnotesize}
pressure applied to "neutral" parties, not simply to the primary employer by activities of non-employee union members.

E. Congress Intended the Norris-LaGuardia Act to Cover Railway Labor Disputes

To avoid Norris-LaGuardia Act applicability to secondary railroad pickets, the dissent in Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Co. asserted that Congress never intended for the Norris-LaGuardia Act to apply to railway disputes. In his dissent, Judge Choate cited to Representative LaGuardia's floor debate comments that the Act, if passed, would not apply to railroad disputes. The committee reports are silent on this matter, but Representative LaGuardia himself later cast doubt upon the accuracy of this assertion by stating that railroads strongly supported passage of the bill. In addition, during the Senate floor debate, Senators Norris and Blaine cited employment practices utilized by railroads to demonstrate the need for passage of the Norris-LaGuardia Act. Last, neither the statutory text nor the congressional reports expressly or impliedly exempt any particular industry from coverage.

F. No Support Exists for an "Economic Self-Interest/Substantial Alignment" Exception to the Norris-LaGuardia Act

Unlike the arguments that deny that the Norris-LaGuardia Act applies to secondary picketing or boycotts of any kind, the Fifth Circuit acknowledged that the statute applied to secondary picketing but created an exception to it in the form of an "economic self-interest/substantial alignment" test. Support for this test, however, cannot be found in the

171. See 75 Cong. Rec. 4626, 4629 (1932).
174. See supra notes 21-24 and accompanying text.
legislative history of the Norris-LaGuardia Act, the policies underlying the Act, or the dissenting opinion in Duplex, from which it allegedly sprang.

In its decision in Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Co., the Fifth Circuit cited Justice Brandeis’ dissent in Duplex as both a moving force behind the Norris-LaGuardia Act and as the origin of the economic self-interest test. Justice Brandeis noted that there existed a common law justification of self-interest in the context of secondary boycotts, warranting injury to the secondary employer on a self-defense theory. The economic self-interest/substantial alignment test, derived from this self-defense theory, requires that the secondary employer interfere with the union’s interests. According to the Fifth Circuit, the test is satisfied when the secondary employer “align[s] himself with the primary employer in some substantial manner,” thus threatening the union’s economic interest by influencing the outcome of the labor dispute.

Initially, it is worth noting that in looking to the Brandeis dissent for its new test, the Fifth Circuit makes the faulty assumption that passage of the Norris-LaGuardia Act to correct the Duplex holding necessarily implies congressional adoption of the dissenting position. No histori-
cal support exists for this assertion. Therefore, even if the dissent can be read to support the economic self-interest/substantial alignment test, no foundation exists for finding Justice Brandeis' theory embraced in the passage of the Norris-LaGuardia Act.

Nevertheless, the Brandeis dissent does take exception to the Duplex majority's denial of the right to boycott secondary employers. To assert, however, that this stance supports the economic self-interest test is to miss the point entirely. The core of the Brandeis dissent lies in his objection to the issuance of an injunction at all. Justice Brandeis read the statute to deny federal courts the power to enjoin boycotts in labor disputes, without regard to whether the secondary boycott would injure neutral third parties.

Of even greater significance, Justice Brandeis recognized that while public interest might require limits on this economic "free-for-all", only the legislature and not the courts may define these limitations. Thus, the dissenting opinion that the Fifth Circuit offered as support for this new exception argued vehemently against any judge-made exceptions to the congressional ban on injunctive relief.

In passing the Clayton Act, and later the Norris-LaGuardia Act, Congress intended to take federal courts out of the "injunction granting business" in labor dispute cases. To propose any type of exception to this broad prohibition would directly contravene congressional purpose by

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183. See supra note 182.
185. But see Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 653-54 (5th Cir.) (the Duplex dissent, in conjunction with Congress' passage of the Norris-LaGuardia Act, justifies the economic self-interest/substantial alignment exception's existence), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966). Though Congress did enact the Norris-LaGuardia Act to correct the Court's interpretation of the Clayton Act, see supra notes 120-26 and accompanying text, no support exists for the notion that Congress adopted Justice Brandeis' position in his Duplex dissent. Id.
187. Justice Brandeis addressed the issue of economic self-interest because the union raised it. See id. at 480. Although he found the justification valid, he stated that the interests of the community at large limit this justification. See id. at 488. According to Justice Brandeis, the key to the Clayton Act, ignored by the majority, lay in the denial of jurisdiction to federal courts to grant such injunctions at all: Congress had reserved for itself judgment regarding the availability of union self-help activities. See id., at 485-88.
188. Justice Brandeis wrote: "By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons." Id. at 485-86.
189. See supra note 187.
placing the courts back in their post-Duplex, pre-Norris-LaGuardia Act
stance: free to weigh the relative merits of the secondary picket and to
grant or deny relief accordingly. Therefore, the much-criticized economic
self-interest/substantial alignment test finds no support for its existence
in either the Brandeis dissent or the legislative history of the Norris-La-
Guardia Act.

III. THE INTERCHANGE CASES DO NOT REQUIRE NORRIS-
LAGUARDIA ACT ACCOMMODATION TO EITHER THE
RAILWAY LABOR ACT OR THE INTERSTATE
COMMERCE ACT

Several parties have argued and several courts have held that the Nor-
riss-LaGuardia Act's prohibition against labor injunctions in cases involv-
ing secondary railway pickets should give way to accommodate the
general purposes of the Railway Labor Act, the Interstate Commerce

(5th Cir.), aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line

191. Supreme Court decisions consistently state that any type of judicial activity in
cases falling within the purview of the Norris-LaGuardia restrictions violates its purpose.
See, e.g., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457
U.S. 702, 711-12 (1982) (a political secondary boycott arising out of the Soviet Union's
invasion of Afghanistan held within Act's purview); Marine Cooks & Stewards v. Pan-
which hired non-union help at substandard wages subject to Act's controls); Order of
road's efforts to close down station houses, resulting in loss of jobs to unionized employ-
ees, and railroad's subsequent refusal to negotiate regarding the loss of jobs constituted a
labor dispute under Norris-LaGuardia Act).

Three of the circuit courts deciding the interchange issue drew on such Supreme Court
decisions to support the denial of injunctive relief. See Central Vermont Ry. v. Brother-
hood of Maint. of Way Empls., 793 F.2d 1298, 1301 (D.C. Cir. 1986) ("[t]he vice of the
economic self-interest test is that it puts the courts back in the business of second-guess-
ing a union's decisions about how best to pursue its members' welfare."); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 805-07 (7th Cir.) (Con-
gress passed Norris-LaGuardia Act to prevent courts from evaluating union needs and
the economic self-interest/substantial alignment exception requires courts to do just
that), cert. granted, 107 S. Ct. 60 (1986); Consolidated Rail Corp. v. Brotherhood of
Maint. of Way Empls., 792 F.2d 303, 304 (2d Cir. 1986) ("A contrary result would lead
to the freewheeling judicial interference that the Act was meant to prevent."); petition for

of Way Empls., 793 F.2d 795, 796, 799 (7th Cir.) (Seventh Circuit reversed district court
finding that secondary dispute constituted "major" dispute under Railway Labor Act and
must be submitted to Railway Labor Act procedures), cert. granted, 107 S. Ct. 60 (1986);
Consolidated Rail Corp. v. Brotherhood of Maint. of Way Empls., 792 F.2d 303, 304 (2d
Cir. 1986) (Second Circuit reversed district court finding that Railway Labor Act proce-
dures must be exhausted as to secondary dispute prior to invocation of Norris-LaGuardia
protections), petition for cert. filed, 55 U.S.L.W. 3303 (U.S. Sept. 2, 1986) (No. 86-353);
Ashley, Drew & N. Ry. v. United Transp. Union, 625 F.2d 1357, 1368-69 (8th Cir. 1980)
(Ashley, Drew and Northern argued secondary picketing must be submitted to Railway
Labor Act procedures and Norris-LaGuardia Act must accommodate these); see also
(4th Cir. 1986) (Widener, J., dissenting) (broad reading of Norris-LaGuardia Act does
or both. This theory of accommodation, however, contradicts the weight of authority.

When confronted with the task of harmonizing conflicting statutes, courts have distinguished between statutes with a general purpose and statutes that impose specific procedural requirements. Only the latter require accommodation. Such a distinction prevents a general statute


from undercutting specifically legislated procedural solutions.\textsuperscript{196} Accordingly, three circuits in the recent railway secondary picketing cases held that the general purposes of the Railway Labor Act prove insufficient to overcome the Norris-LaGuardia Act.\textsuperscript{197}

In \textit{Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees},\textsuperscript{198} (Conrail), one of the cases arising out of the Maine Central dispute, the district court took this failed argument one step further, holding that the secondary dispute must be subjected to Railway Labor Act procedures to accord with the Act's purposes.\textsuperscript{199} This argument simply lacks merit.

Under the facts of these cases, application of the Norris-LaGuardia Act undermines neither the general purposes nor the specific procedures of the Railway Labor Act. First, the strikes and the subsequent secondary picketing only occurred after Railway Labor Act procedures had been exhausted.\textsuperscript{200} The Railway Labor Act is silent as to what happens when its dispute resolution procedures fail,\textsuperscript{201} but courts have implied the availability of self-help without limitation.\textsuperscript{202} Second, disputes between unions and secondary employers fall outside the bounds of the Railway Labor Act. The Railway Labor Act covers "major" and "minor" disputes.\textsuperscript{203} A major dispute concerns proposed changes in terms and conditions of employment,\textsuperscript{204} while a minor dispute involves the interpretation or application of agreements.\textsuperscript{205} BMWE's picketing of the

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\textsuperscript{196} E.g., Boys Mkts. v. Retail Clerks Union, Local 770, 398 U.S. 235, 252 (1970); see Note, supra note 146, at 935; \textit{Secondary Boycotts, supra} note 115, at 941.


\textsuperscript{199} \textit{Id.} at 304.

\textsuperscript{200} BMWE and Maine Central exhausted Railway Labor Act procedures before BMWE struck. See supra note 1.

\textsuperscript{201} See supra notes 1 and 17 and accompanying text.

\textsuperscript{202} See supra note 1. See also \textit{Secondary Boycotts, supra} note 115, at 940-41.


\end{footnotesize}
secondary employers resulted from the secondary employers’ interchange agreements with the primary employer, not from any dispute between the secondary employer and its BMWE employees. Since secondary picketing fits neither definition, it is not a dispute which is arbitrable under the Railway Labor Act.

The district court’s Conrail ruling also represents bad policy. By enjoining the picketing pending arbitration, the courts remove management’s incentive to bargain in good faith since settlement of the primary dispute long before the lengthy Railway Labor Act procedures have been exhausted effectively neutralizes the secondary picket as a weapon in the railway union’s arsenal.

In addition to the Railway Labor Act accommodation argument, some litigants and courts have expressed the concern that liability could befall the secondary employer unable to meet its Interstate Commerce Act obligations due to a shutdown caused by secondary picketing. The

206. The union’s sole complaint with the secondary employer in all of the 1986 interchange cases is the same: the secondary employer continues an important business relationship with Maine Central—one that helps the Maine Central operate in the face of the BMWE walkout. E.g., Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 797 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986).

The Railway Labor Act also provides for mediation of “[a]ny other dispute . . . not adjusted in conference between the parties or where conferences are refused.” 45 U.S.C. § 155 (1982). As the Court of Appeals for the District of Columbia pointed out in Central Vermont Ry. v. Brotherhood of Maint. of Way Empls., 793 F.2d 1298 (D.C. Cir. 1986), this category also seems to require privity between the disputing parties. Therefore, it does not apply to the interchange cases.


The Burlington court noted that removal of access to picketing, including secondary picketing, undermines the Railway Labor Act by removing management’s incentive to bargain since it would not be motivated by fear of strikes. Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 802-03 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986).

209. 49 U.S.C. § 11101(a) (1982) in relevant part provides that “[a] common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request.” Id. See Note, supra note 146, at 940.

court in Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees,\textsuperscript{211} one of the recent interchange cases, effectively rejected this argument, stating that no court would punish an organization for failing to do something it would choose to do but for the strike.\textsuperscript{212} Furthermore, the court noted, it had never happened to date.\textsuperscript{213} In addition, in Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Co., the Fifth Circuit noted that "'unlawfulness under nonlabor legislation [does] not remove the restrictions of the Norris-LaGuardia Act.'"\textsuperscript{214}

IV. Policy Arguments

Courts have raised several policy arguments in favor of a narrow construction of the Norris-LaGuardia Act.\textsuperscript{215} Policies supporting a broad construction, however, outweigh those supporting a narrow one.\textsuperscript{216}

The strongest policy argument against broadly interpreting the Norris-LaGuardia Act to deny federal courts jurisdiction to grant injunctive relief in secondary picketing situations is one of fairness. In putting forth the economic self-interest/substantial alignment test, the Fifth Circuit reasoned that it might be unfair to deny a party relief in the face of secondary picketing if the complainant had contributed minimally, if at all, to the underlying dispute.\textsuperscript{217}


212. Id. at 800. Accord Guilford Transp. Indus., 803 F.2d at 1235.

213. Id.


215. These include fairness to the neutral secondary employer—the motivation underlying the economic self-interest/substantial alignment exception—see infra notes 216-25, inconvenience to the immediate and national community, see infra notes 228-36 and accompanying text, and the danger of abusive resort to secondary picketing, see infra notes 237-39 and accompanying text.

216. The issue of fairness is inextricably linked to the economic self-interest/substantial alignment exception. In Ashley, Drew & N. v. United Transp. Union, 625 F.2d 1357 (8th Cir. 1980), the court concerned itself with the hardship suffered by both the secondary employer and by the community. See id. at 1364-65. Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 658 (5th Cir.) (Choate, J., dissenting). aff'd per curiam by an equally divided Court sub nom. Atlantic Coast Line R.R. v. Brotherhood of Ry. Trainmen, 385 U.S. 20 (1966) focused on the hardship suffered by the neutral secondary employer. See id. at 658.

217. Judge Choate's Atlantic Coast Line dissent expresses his concern about the unfairness of allowing a neutral secondary employer to be picketed and possibly shut down, since the neutral secondary employer stands powerless to affect the outcome of the dis-
The facts of *Ashley, Drew & Northern Railway Co. v. United Transportation Union*\(^{218}\) demonstrate the type of situation envisioned by the Fifth Circuit. There, United Transportation Union picketing at Chicago, Rock Island & Pacific Railroad's Fordyce railyard shut down the two-man Fordyce & Princeton railroad.\(^{219}\) A wholly-owned subsidiary of Georgia Pacific, Fordyce & Princeton’s sole function consisted of servicing the parent company’s plant.\(^{220}\) In response to the strike, Ashley, Drew & Northern, another Georgia-Pacific subsidiary that shared a common management with Fordyce & Princeton, sent management personnel to operate the Fordyce & Princeton train.\(^{221}\) These management personnel performed only those interchanges necessary to move the Georgia-Pacific traffic.\(^{222}\) When the strikers learned that Ashley, Drew & Northern was responsible for Fordyce & Princeton’s continued operation, they established pickets at Ashley, Drew & Northern’s headquarters.\(^{223}\) Successful picketing of Ashley, Drew & Northern would in turn shut down the Georgia-Pacific plant, leaving three thousand people unemployed.\(^{224}\) Thus, when the secondary activity necessarily paralyzes the neutral secondary employer (as distinguished from simply pressuring the secondary employer not to aid the primary employer in any way),\(^{225}\) the secondary activity compounds the unfairness to the neutral employer and possibly to the community as well.

One justification for permitting potentially paralyzing secondary activity against neutral secondary employers exists in the unique nature of the railway industry where interchanges play a key role. As demonstrated by the Guilford strike,\(^{226}\) much of a railroad's traffic may be carried by other railroads, transferred to the primary employer's trains at railyards...
unaffected by the strike, or both, thus facilitating a railroad's continued
collection despite the strike. Thus, the lack of recourse to secondary
picketing represents a greater threat to railroad laborers than to workers
in other industries.

Proponents of the non-literal interpretation assert that the public at
large needs to be protected from the fallout from secondary railway pick-
eting made possible by a literal application of the statutory lan-
guage. Such fallout would include elimination of mail service, shortages of
food, and, as in Ashley, loss of work to thousands employed by organizations dependent upon rail service for supplies and
shipping. Although Justice Brandeis, in his dissent in Duplex, recog-
nized the possibility of overriding public policy concerns, he nevertheless stated that Congress, by removing injunctive jurisdiction from the federal courts, reserved for itself policy decisions as to the scope of per-
missible union activity. Furthermore, the Railway Labor Act allows
strikes and a primary strike at a large railroad arguably is apt to have destructive consequences similar to, if not greater than, those of a secondary boycott.

The proponents of injunctive relief also express concern that literal
application of the broad statutory language could result in abusive resort
to secondary picketing. The Burlington court effectively parried this
assertion by pointing out that unions must act with care when asking

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227. See supra note 226.
229. See Ashley, Drew & N. Ry., 625 F.2d at 1371 (8th Cir. 1980); Atlantic Coast Line R.R., 362 F.2d at 659-60 (Choate, J., dissenting).
230. See Atlantic Coast Line R.R., 362 F.2d at 659-60 (Choate, J., dissenting).
231. Id. at 659-60.
232. See Ashley, Drew & N. Ry., 625 F.2d at 1371.
233. See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting). See also supra notes 176-89 and accompanying text.
235. See supra notes 1, 17 and accompanying text.
236. Cf. Brotherhood of Maint. of Way Empls. v. Guilford Transp. Indus., 803 F.2d 1228, 1235 (1st Cir. 1986) (if injunctions against secondary picketing issues on grounds of interference with Interstate Commerce Act obligations, then injunctions must also issue against primary activity for the same reason—an absurd result).
237. See, e.g., Richmond, F. & P.R.R. v. Brotherhood of Maint. of Way Empls., 795 F.2d 1161, 1167 (4th Cir.) (Widener, J., dissenting) (attacking union's position that Norris-LaGuardia Act allows secondary picketing of "any railroad in the United States whether or not the picketed railway has any connection with the union or with the strike"), petition for cert. filed, 55 U.S.L.W. 3259 (U.S. Sept. 26, 1986) (No. 86-503); Burlington N.R.R. v. Brotherhood of Maint. of Way Empls., 793 F.2d 795, 806 (7th Cir.) (rejecting notion that denying injunctions could encourage railroad unions to resort to secondary picketing), cert. granted, 107 S. Ct. 60 (1986); Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 657 (5th Cir.) (Choate, J., dissenting) (one small railway strike could result in nation-wide railroad work stoppage), aff'd per curiam
satisfied employees to walk off their jobs in support of another local's strike. The threat to the continued well-being of the union caused by frivolous institution of secondary pickets—characterized by poor public image, congressional backlash, and rank and file dissatisfaction—would tend to discourage abuse of this technique.

Last, Congress, through its sequence of Railway Labor Act, Norris-LaGuardia Act, and National Labor Relations Act (including the Taft-Hartley amendments) legislation, already has struck the balance between labor interests and those of the neutral secondary employer on the one hand, and the community at large on the other. To the extent that Congress wished to control secondary activity, it did so through the Taft-Hartley amendments to the National Labor Relations Act that exempt Railroad Labor Act cases and provide no private causes of action. Secondary picketing represents a viable weapon for achieving parity, especially where, as in the interchange situation, circumstances make the primary strike less effective than usual.

CONCLUSION

The plain language, legislative history, and subsequent judicial interpretation of the Norris-LaGuardia Act dictate that federal courts lack jurisdiction to issue injunctions against secondary picketing in labor disputes. Congress intended this broad prohibition to apply to all industries, including the railway industry. Neither the Railway Labor Act nor the Interstate Commerce Act dictates a different result. Indeed, recourse to secondary picketing by railroad laborers fulfills one of the Norris-LaGuardia's stated purposes: to allow unions to battle effectively against management.

Although application of the Act results in occasional unfairness and inconvenience to the community, Congress balanced this harm against the primary goal to be achieved by passage of this statute: parity in bargaining power between labor and capital, and the resulting improvement in labor's quality of life. That balance tipped in favor of an unqualified prohibition against issuance of labor injunctions by the federal courts. To the extent that Congress has outlawed secondary activity, it has done


In Brotherhood of Maint. of Way Empls. v. Association of Am. R.Rs., 639 F. Supp. 220 (D.D.C.), aff'd sub nom., Central Vermont Ry. v. Brotherhood of Maint. of Way Empls., 793 F.2d 1298 (D.C. Cir. 1986), the court found that denial of injunctive relief would not result in abuse of secondary picketing in railway disputes. Although many locals responded positively to the union's order to establish secondary picket lines at other railroads, others did not. Id. at 227.


240. See supra note 131 and accompanying text.

241. See supra note 131 and accompanying text.
so through legislation that has no application to railway labor disputes, and the courts are not free to find otherwise.

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