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Work preservation agreements (in which an employer agrees not to use materials which have been prefabricated and thus displace union labor) are common in the construction industry. In practice, these agreements are sometimes difficult to enforce because the employer who has signed the collective bargaining agreement is not always the one who specifies which materials will be used at the jobsite. In NLRB v. Enterprise *the Supreme Court held that work preservation agreements between a union and an employer may not be used to coerce a nonunion company to discontinue using prefabricated materials which violate the work preservation agreement, although the nonunion company has hired a union employer to install the prefabricated materials. The author examines the Court's decision and concludes that legal and economic considerations mandated the Court's holding.*

Austin Company, Inc. (Austin) was the general contractor and engineer on the Norwegian Home for the Aged construction project. As part of the project, Austin subcontracted to Hudik-Ross Company, Inc. (Hudik) the heating, ventilation, and air conditioning work. The subcontract specified that Austin would purchase certain climate control units manufactured by Slant/Fin Corporation (Slant/Fin) and that the internal piping in these units would be performed at the factory by Slant/Fin.

At the time Hudik accepted the subcontract with Austin, he was party to a collective bargaining agreement with Enterprise Association (Enterprise), a plumbing and pipefitting union. The collective bargaining agreement provided that the internal piping work on heating and air conditioning units (work traditionally performed by the union) was work to be done by union members on the jobsite. Hudik was aware that its employees would be called on to install the Slant/Fin units but would not do the internal piping on these units even though this work was covered by the work preservation clause in the collective bargaining agreement. When the units arrived, the union steamfitters refused to install them stating that the piping was steamfitter's work and that the factory units violated their contract. Austin filed a complaint with the National Labor Relations Board[1] (the Board) alleging that Enterprise had committed an unfair labor practice under section 8(b)(4)(B) of the National Labor Relations Act[2] (NLRA) by encouraging Hudik's employees to

1. Enterprise Ass'n of Steam Pipefitters, 204 N.L.R.B. 760, 762 (1973).
2. Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970) provides:

refuse to install the units. The Board found that the union's action was based on a valid work preservation clause and was for the purpose of preserving work traditionally performed by the union. Nevertheless, the Board held the union had violated section 8(b)(4)(B) in seeking to enforce its collective bargaining agreement. The Board concluded that since Hudik lacked control over the assignment of the disputed work, the union's purpose in refusing to install the pipe must be either to force a change in Austin's manner of doing business or to force Hudik to terminate its subcontract with Austin.[3] This was illegal secondary pressure.

The Court of Appeals for the District of Columbia set aside the Board's order.[4] The union's refusal to install the prefabricated units was primary activity if taken for the sole purpose of preserving work the employees had traditionally performed.[5] As primary activity, it was not within the scope of section 8(b)(4)(B). Citing *National Woodwork Manufacturers Association v. NLRB*,[6] the court held that the Board's continued reliance on its "right-to-control" test was invalid. Recognizing an apparent conflict between the circuits,[7]

(b) It shall be an unfair labor practice for a labor organization or its agents . . .
(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, wherein either case an object thereof is—

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

3. 204 N.L.R.B. at 760.

4. Enterprise Ass'n of Steam Pipefitters v. NLRB, 521 F.2d 885 (D.C. Cir. 1975).

5. *Id.* at 904. The determination as to whether the sole purpose is work preservation must be made by inquiring into all the circumstances. Because there was substantial evidence, apart from rationalization by the Board, that the union also had the purpose of achieving objectives elsewhere, the court remanded to the Board for reconsideration of the question of the union's purpose in refusing to handle the Slant/Fin units. The court emphasized, however, that the struck employer's legal control over assignment of the work sought to be preserved could be considered only as one of many factors indicating a possible forbidden objective. Those other factors are found in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 611, 644 n.38, 646 (1967): remoteness of the threat of displacement by banned products or services, history of relations between the union and boycotted employers, economic personality of the industry, and whether or not boycotted goods were themselves union goods. These factors were summarized by the court as "the substance, history, and motivation of the particular dispute . . . with particular emphasis on identifying the employer whose *labor relations* are being affected." 521 F.2d 885, 904-05 & n.47. (original emphasis).

6. 386 U.S. 612 (1967). See note 19 *infra* and accompanying text.

7. Six circuits had addressed the control issue after the Court's decision in *National*

the Supreme Court granted certiorari[8] and *held*, reversed: A work preservation agreement valid under section 8(e) may not be enforced by means that would violate section 8(b)(4)(B) in absence of the agreement. The Board's right-to-control test takes account of "all the surrounding circumstances" as required by *National Woodwork* and the Board's conclusion that the union exerted secondary pressure in seeking to enforce a work preservation agreement against an employer without control over the work was supported by substantial evidence on the record as whole. *NLRB v. Enterprise Association*, 429 U.S. 507 (1977).

In recent years, the introduction of prefabricated materials into the construction industry has threatened the job security of many craft unions. In response, unions have sought to protect the job opportunities of their members by insisting on clauses in collective bargaining agreements that preserve to the unit employees all work that has been traditionally performed by them. Typically, the clause will either prohibit a subcontractor from accepting contracts that use materials manufactured off the jobsite or it will prohibit a general contractor from subcontracting work relating to certain specified jobs (those traditionally performed by the union). Major labor disputes have arisen over enforcement of these clauses with employers claiming union enforcement violates section 8(b)(4)(B) of the NLRA and the unions defending by arguing, that work preservation demands are primary and therefore outside the reach of that section. The dispute has been particularly heated in the "right-to-control" cases where the union is seeking to enforce a work preservation agreement against an employer who does not have the power to give the union the work it claims. In these cases, the Board and circuit courts have been faced with the nearly impossible task of reconciling the union's demand for preservation of bargaining unit work with an employer's right to freely contract for the kinds of materials he desires. *Enterprise* illustrates the inability to agree on how the conflict should be resolved. The difficulty arises from the consequence of allowing the union to use economic pressure to preserve work in the situation where its immediate employer does not control the choice of materials. A second employer, usually a general contractor or architect, not a party to the work preservation clause,

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Woodwork. The Third, Eighth, and District of Columbia expressly rejected the Board's control test. The Fourth Circuit sustained the test in George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973). The Ninth Circuit appears to have done the same. *See* Associated Gen. Contractors v. NLRB, 404 F.2d 433 (9th Cir. 1975). *But see* Western Monoliths Concrete Prod. Inc. v. NLRB, 446 F.2d 522 (9th Cir. 1971).

8. 424 U.S. 908 (1976).

is confronted with the union's refusal to handle the prefabricated materials. Oftentimes, he will decide to forego the use of these materials. This in turn has resulted in the foreclosure of the manufacturers of prefabricated materials from the construction industry.

The Board resolves the conflict by limiting the union's ability to keep prefabricated materials off the jobsite to the situation where the immediate employer has control over the decision to use prefabricated materials. Since the Supreme Court had held that work preservation is a primary objective and that work preservation agreements are primary also, the District of Columbia Circuit rejected the Board's control test as being inconsistent with the case law that has developed for determining when union conduct is unlawful secondary pressure. It is the premise of this note that although the District of Columbia Circuit was correct in its holding, the Supreme Court, in deciding *Enterprise*, was compelled to decide that the Board could continue to use the control test. To hold otherwise would have allowed labor unions to keep prefabricated materials out of a substantial portion of the construction industry; a result not only at odds with a national economic policy based on principles of competition and free access to markets, but also inconsistent with congressional intent to use the secondary boycott sections of the NLRA to prohibit union anticompetitive activities.[9] Thus, the purpose of this note is to examine the Court's decision in the context of the case law that has developed around section 8(b)(4)(B) and to show how the antitrust problems inherent in the right-to-control situation have forced the Court to reach a result inconsistent with that case law.

A union commits an unfair labor practice under section 8(b)(4)(B) of the NLRA[10] when it either induces employees to refuse to handle particular goods, or coerces any person engaged in commerce, where an object of this action is to force any person to cease doing business with any other person. This section is generally referred to as the "secondary boycott" section of the NLRA.[11] Unions

9. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 639-46 (1975).

10. For text of § 8(b)(4)(B) see note 2 *supra*. The original section 8(b)(4)(B) appeared as section 8(b)(4)(A) in the Taft-Hartley Act. Labor Management Relations Act (Taft-Hartley), 29 U.S.C. § 158(19) (1970). In the 1959 amendments, the sections were renumbered and a proviso was added to section 8(b)(4)(B) making explicit that the statute was aimed only at secondary pressures. The Board and courts in their interpretation of section 8(b)(4)(A) had limited the section to secondary conduct. The proviso merely codified this construction. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

11. Although the section does not specifically mention the secondary boycott, the legislative history surrounding the enactment of the section as well as its judicial construction demonstrate that the purpose of the statute was to prohibit that type of activity. *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 7, 8, 22, 54 (1947), *reprinted in* I NLRB, LEGISLATIVE

engage in secondary boycotts when, in order to impair the business of an employer with whom they are in dispute (the primary employer), they use economic pressure against a neutral or "secondary" employer doing business with the primary employer. The union's goal is to force the secondary employer to cease doing business with the primary employer in the hope that this loss of business will "persuade" the employer to accept the union's demands.[12]

While it is well understood that the purpose of the provision is to prohibit secondary pressures, the wording of section 8(b)(4)(B) fails to distinguish between such activities and other forms of union pressure protected by sections 7 and 13 of the Act.[13] In construing the section, both the Board and the courts have recognized that nearly all concerted activity will produce some secondary consequences affecting neutral parties. To ensure the union's right to take concerted action against the primary party in a labor dispute, the Board and the courts were called upon to determine when union activity ceased to be protected primary pressure and became pro-

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HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 413, 414, 428, 460 (1948) [hereinafter cited LEG. HIST.]; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 43 (1947), *reprinted in* I LEG. HIST. 547; 93 CONG. REC. 4131, 4138, 4837-38, 4843-44, 4958-59, 4865, 5005, 5011, 5014, 6445-46, 7537 (1947) *reprinted in* II LEG. HIST. 1055, 1068, 1354-55, 1364-65, 1370-73, 1383, 1479, 1491, 1497, 1544, 1654.

For an extensive discussion of the congressional treatment of secondary boycotts *see*, National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620-33 (1967). *See also*, Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086 (1960); Cox, *The Landrum-Griffin Amendments to the NLRA*, 44 MINN. L. REV. 257 (1959); Cushman, *Secondary Boycotts and Taft-Hartley Law*, 6 SYRACUSE L. REV. 109 (1954); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965); Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727 (1951).

12. The most widely accepted definition of a secondary boycott is probably that of Judge Learned Hand:

> The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop doing business with the employer in the hope that this will induce the employer to give into his employees' demands.

International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951).

13. Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157 (1970). Section 13 provides:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or affect the limitations or qualifications on that right.

29 U.S.C. § 163 (1970).

hibited pressure with a secondary, illegal object.

The earliest cases under section 8(b)(4)(B) gave the statute a nearly literal reading. Under this approach, if the union's activity had the object of forcing an employer to cease doing business with another, such an object was illegal and violative of the section regardless of whether the union's ultimate goal was permissible. *NLRB v. Denver Building & Construction Trades Council*[14] (*Denver Building Trades*) exemplifies this approach. In that case, a general contractor awarded a subcontract for electrical work to a nonunion firm, Gould & Preisner. These employees were the only nonunion men on the job. The employees of the general contractor, members of a construction trades union, protested the presence of the nonunion men and picketed the jobsite. The only persons who reported for work were the nonunion workers of Gould & Preisner. In response, the general contractor ordered Gould & Preisner off the job. The union resumed work. Gould & Preisner filed charges with the Board claiming the union had violated section 8(b)(4)(A). The Supreme Court accepted the Board's finding that an object of the strike was to force the contractor to terminate his subcontract with Gould & Preisner. A strike with such an object violated the section even though the ultimate purpose of the union was lawful (organization of the jobsite).

Subsequent cases, however, moved away from the illegal-object analysis of *Denver Building Trades,* recognizing that a too literal reading of the statute would render the union's right to take concerted action meaningless since nearly all strikes result in the cessation of business for those who deal with the employer involved in the labor dispute. What emerged was a primary/secondary dichotomy that focused on the objective of the union's activity. Where the purpose of the union's conduct was primary, there was no violation; the fact that the immediate employer might have to cease doing business with another party to satisfy the union's demands was regarded as an ancillary effect of the union's primary activity.

In theory this approach to the problem appears simple; in practice, however, it is difficult to apply. Separating permitted primary activity from conduct prohibited by section 8(b)(4)(B) has been particularly difficult in the construction industry where unions have sought to preserve jobsite work through enforcement of work preservation clauses in their collective bargaining agreements. In the typical work preservation case, the union representing employees of a construction subcontractor will negotiate a work preservation agree-

14. 341 U.S. 675 (1951).

ment with that employer guaranteeing to the employees that all work traditionally performed by them will be given to them. Subsequently, the subcontractor either orders prefabricated materials in violation of his work preservation agreement or accepts a contract with another that specifies the use of such materials. When the prefabricated materials are delivered to the jobsite, the union refuses to handle the goods. The work stoppage usually results in a complaint being issued against the union alleging violation of section 8(b)(4)(B).

To determine the legality of the refusal to handle prefabricated goods, the Board has developed a "right-to-control" test. This test determines the legality of the union's conduct by focusing on the party upon whom the union's pressure is brought to bear.[15] If the contractor with whom the union has a work preservation agreement is the party with control over the assignment of the disputed work, the work stoppage is presumptively legal. If, however, that employer has no control over the assignment of the work, the strike is presumed to have been engaged in for an illegal purpose: forcing a cessation of business with the party having the power to assign the work. The subcontractor is viewed by the Board as the neutral party in a dispute between the union and the employer who has the power to award the work.[16]

The courts of appeals[17] unanimously approved of the use of the control test. Thus, in the work preservation cases, the Board and the

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15. It does not matter whether the subcontractor knew when he placed his bid that the contract called for the use of prefabricated materials. The Board's entire focus is on the employer's control over the assignment of the work. Thus, the subcontractor can bid on a project that specifies prefabricated materials and violate his work preservation agreement with the union. If the decision to use the prefabricated materials was not the subcontractor's, the union cannot take economic action to enforce the work preservation agreement without violating § 8(b)(4)(B).

16. *See, e.g.*, Local 1066, Longshoremen's Ass'n (Wiggins Terminals), 137 N.L.R.B. 45 (1962); Local 1694, International Longshoremen's Ass'n (Board of Harbour Commissioners) 137 N.L.R.B. 1178 (1962); Clifton Deangelo, 121 N.L.R.B. 676 (1958). The Board's control doctrine has been described as follows:

> That direct action against an immediate employer for the purpose of preserving bargaining unit work constitutes an illegal secondary boycott when another person, with whom the immediate employer is in a contractual relation, has the exclusive right to control the work.

Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, n.2 (1976).

17. American Boiler Mfrs. Ass'n v. NLRB, 366 F.2d 815, 822 (8th Cir. 1966); National Woodwork Mfrs. Ass'n v. NLRB, 354 F.2d 594, 597 (7th Cir. 1965), *rev'd on other grounds*, 386 U.S. 612 (1967); NLRB v. International Longshoremen's Ass'n, 331 F.2d 712, 717 (3d Cir. 1964); Ohio Valley Carpenters Dist. Council v. NLRB, 339 F.2d 142, 145 (6th Cir. 1964); Local 5, Plumbers v. NLRB, 321 F.2d 366, 369 (D.C. Cir.), *cert. denied*, 375 U.S. 721 (1963); NLRB v. Enterprise Ass'n, Local 638, 285 F.2d 642, 645 (2d Cir. 1960).

courts refused to consider a work preservation demand as being primary activity if it were made on an employer who could not assign the claimed work. Even though the stated purpose of the union's action was to pressure the employer into giving the union the work it demanded, the Board and courts looked beyond this and focused on the party against whom the union was bringing the pressure to bear. This approach to section 8(b)(4)(B) was at odds with the primary/secondary dichotomy that was emerging elsewhere in secondary boycott law. The primary/secondary dichotomy was based on the proposition that in enacting section 8(b)(4), Congress had not intended to prevent the union from using economic pressure to pursue primary goals. Consequently, unions could lawfully bring such pressure and any secondary effects were regarded as incidental and therefore lawful as long as the ultimate goal was permissible.[18] Liability hinged on whether the purpose of the union's exertion of pressure was lawful, not on the identity of the party against whom the pressure was brought to bear. With the announcement in *National Woodwork* of what appeared to be a new test for identifying unlawful secondary pressures,[19] a majority of the circuits reexamined the Board's control test and rejected it as failing to take account of "all the surrounding circumstances" of the labor dispute.[20]

In *National Woodwork,* Frouge, a general contractor, was party to a collective bargaining agreement which provided that the union would not handle prefitted doors. Frouge, nonetheless, ordered premachined doors from a manufacturer. When the union refused to hang the doors, Frouge cancelled his contract with the manufacturer and ordered blank doors be delivered to the jobsite. An association

18. Note, *Secondary Boycotts in the Construction Industry: Work Preservation and the Right-to-Control,* 7 SETON HALL L. REV. 659, 668 (1976). For an analysis of the primary/secondary dichotomy in the context of picketing see Lesnick, *The Gravamen of the Secondary Boycott,* 62 COLUM. L. REV. 1363 (1962).

19. The Supreme Court stated that the determination whether there had been a violation of either sections 8(e) or 8(b)(4)(B) could not be made

> without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere . . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees.

386 U.S. at 644-45 (footnotes omitted).

20. Western Monolithics Concrete Prod., Inc. v. NLRB, 446 F.2d 522, 526 (9th Cir. 1971); Local 742, United Bhd. of Carpenters v. NLRB, 444 F.2d 895, 903 (D.C. Cir. 1971); Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188, 192 n.10 (1st Cir. 1969) (dictum); NLRB v. Local 164, IBEW, 388 F.2d 105, 109-10 (3d Cir. 1968); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556, 561-62 (8th Cir. 1968).

of prefabricated door manufacturers filed charges with the Board alleging that the union's actions in enforcing the work preservation agreement had violated sections 8(e) and 8(b)(4)(B) of the Act.[21] The Supreme Court, in a five to four decision, held that section 8(e) did not ban the work preservation agreement and that its enforcement by the union had not violated section 8(b)(4)(B).[22]

Had the Court followed the illegal-object approach of *Denver Building Trades,*[23] there would have been an unfair labor practice since the union's activities necessarily involved forcing Frouge to cease doing business with the manufacturer of the prefitted doors.[24] Instead, the Court focused on the goal of the union and asked: "[W]hether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere."[25] In reviewing the record, the

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21. Section 8(e) provides:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void; *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

29 U.S.C. § 158(e) (1970). Section 8(e) was added to the 1959 Landrum-Griffin amendments. The legislative history surrounding its enactment indicates the section was intended to close a loophole perceived to have been created by Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958). Under the Court's construction of section 8(b)(4)(A), contractual agreements having secondary objectives were not unlawful although efforts to enforce such agreements by secondary pressure constituted a violation. Congress responded with section 8(e) and made it an unfair labor practice for an employer and labor organization to agree to cease to handle the goods of another. The construction given to section 8(e) by the Court in *National Woodwork* limited its prohibition to secondary boycott agreements. The section did not prohibit agreements with primary objectives; work preservation was held a primary objective.

22. 386 U.S. at 646.

The Court observed that the union had not sought review of the three cases in which the Board had found unfair labor practices where the owners of the construction projects had specified that the contractors should furnish and install prefabricated doors. Thus, the Board's right-to-control test was not an issue before the Court. 386 U.S. at 615 n.3.

23. 341 U.S. 675 (1951).

24. The dissent would have found a violation of the Act based on *Denver Building Trades.* Justice Stewart criticized the Court's conclusion that the union's conduct was outside section 8(b)(4)(B) because its ultimate purpose was primary. Since "an object" of the work stoppage was to prevent Frouge from using prefabricated doors, thereby forcing him to cease doing business with the manufacturer of those doors, the union violated section 8(b)(4)(B). 386 U.S. at 650-52.

25. *Id.* at 644-45 (footnote omitted).

Court concluded there was substantial evidence to support the Board's finding that the union's goal was preservation of work for Frouge's employees and was not "tactically calculated to satisfy union objectives elsewhere." The fact that the union's success would force Frouge to cease doing business with the manufacturer of the prefitted doors was an ancillary effect of the union's work stoppage and not a violation of section 8(b)(4)(B).

Although right-to-control was not an issue in *National Woodwork*,[26] the circuits began to reject the control test (and the *Denver Building Trades* illegal-object analysis on which it was premised) and focused instead on the union's ultimate purpose.[27] These circuits concluded that where the union had negotiated a valid work preservation agreement with an employer and the sole objective of the union's action was to enforce that agreement, the union's activity was primary. The fact that the employer lacked the power to assign the work did not transform such activity into prohibited secondary action.

Despite its rejection by a majority of the circuits, the Board continued to adhere to the control test. In *Local 438, Plumbers* (George Koch Sons, Inc.),[28] the Board distinguished the right-to-control cases from *National Woodwork* and explained its continued reliance on the test to determine secondary pressure. Koch, a general contractor, had agreed to furnish to the General Electric Company machinery to be used in that company's manufacturing process. Koch's contract required that a portion of the piping to be used in the system be pretested. This portion of the piping work was performed by Koch's employees at his factory.[29] The rest of the work of installing the pipes was subcontracted to Phillips Co., who was party to a work preservation agreement with Local 438, a pipefitter's union.[30] Koch delivered both the pipe he had fabricated for the tests and the nonfabricated pipe to the jobsite. The union refused to install the fabricated pipe claiming that the pipe violated its work preservation clause.[31]

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26. Note 22 *supra*.

27. A more basic failing of the "right to control" test under *National Woodwork* is that it focuses on entirely the wrong set of circumstances. It is concerned solely with which party presently has the power to satisfy the union's objective, rather than focusing on the substance of the objective itself. Thus it misses the point of the primary-secondary dichotomy as set forth in *National Woodwork*.

444 F.2d 895, 900-01 (1971)(footnote omitted).

28. 201 N.L.R.B. 59, *enforced*, 490 F.2d 323 (4th Cir. 1973).

29. *Id.* at 59-60.

30. *Id.*

31. *Id.* at 60.

The Board found the work preservation clause was valid under section 8(e) but that union pressure brought to enforce it violated section 8(b)(4)(B). In reaching this decision the Board distinguished *National Woodwork* on the basis that Frouge had been the party who had made the decision to use prefabricated materials and thus had the power to resolve the dispute by assigning the work to the union. This was a "crucial factual difference" and therefore "rendered *National Woodwork* not dispositive of the situation" where the subcontractor lacked the power to assign the work.[32] Because of the Board's continued insistence on use of the control test, and the split within the circuits as to whether that test was valid, the Supreme Court in *Enterprise* was faced squarely with the issue it had not been called upon to decide in *National Woodwork*: whether a union violates section 8(b)(4)(B) when it seeks to enforce a valid work preservation agreement against an employer who does not have control over the assignment of work sought by the union.[33]

THE MAJORITY OPINION

A majority of the Court resolved the issue in favor of the Board's continued use of its control test. The Court did so by treating the Board's conclusion that union activity is secondary where brought to bear on an employer without power to assign the work as a factual finding supported by substantial evidence rather than as a legal standard for determining secondary pressure.

The Court dealt first with the proposition that since work preservation agreements are primary, action undertaken to enforce such an agreement is also primary and therefore an adequate defense to a section 8(b)(4)(B) charge. This argument was rejected as inconsistent with the Court's holding in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door).*[34] The issue before the Court in *Sand Door* was whether a clause in a collective bargaining agreement which provided that employees would not be required to handle nonunion material could be a defense to a section 8(b)(4)(B) charge. The Court held that even though that section did not prohibit agreements between an employer and union to boycott the

32. *Id.* at 61. The Fourth Circuit affirmed the Board's order. George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973). The court agreed with the Board that *National Woodwork* was distinguishable on the basis of the employer's control over the work. By focusing on the union's pressure rather than its objective, the court concluded that if "a result" of the pressure was to force the subcontractor to cease doing business with the general contractor, then enforcement of the work preservation agreement violated section 8(b)(4)(B). 490 F.2d at 328.

33. 429 U.S. 507 (1977).

34. 357 U.S. 93 (1958).

products of another, the agreement could not be enforced by secondary pressure without violating section 8(b)(4)(B).[35] In *Enterprise,* the majority used the reasoning of *Sand Door* to hold that "[s]ection 8(e) does not prohibit agreements made for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them."[36] The fact that the agreement is for a primary purpose, however, does not make action to enforce the agreement also primary.[37]

In reaching this result the majority appears to have returned to the illegal-object analysis of *Denver Building Trades* and that decision's emphasis on the target of the union's pressure rather than the union's purpose for using economic pressure against an employer. Thus, the fact that the union's purpose in refusing to handle prefabricated materials is primary (enforcement of a valid work preservation agreement), does not exempt its actions from section 8(b)(4)(B). Instead, the Court looks to the parties affected by the union's refusal to work. In *Enterprise,* the Court concluded that since the union could not obtain the work by exerting pressure on Hudik alone, its actions necessarily were directed at exerting pressure on Austin as well. The inclusion of Austin as a target of the union's pressure violated section 8(b)(4)(B).[38]

The Court also rejected the court of appeals' claim that the Board's control test "is invalid as a matter of law because it fails to comply with the *National Woodwork* standard that the union's conduct be judged in light of all the relevant circumstances."[39] The court of appeals had erroneously interpreted the holding in *National Woodwork.* The Court had not announced a new legal standard for identifying secondary pressure[40] but had simply sustained the Board's findings as supported by substantial evidence. Moreover, the record in *Enterprise* contained no evidence that the

35. *Id.* at 108.

36. 429 U.S. at 517.

37. The dissent would hold otherwise: "[I]f a contract clause is intended to preserve work, its objective, and the objective of pressure to enforce it, is primary, and therefore legitimate." *Id.* at 536.

38. The majority in sustaining the Board's finding of an unfair labor practice concluded:

> That the union may also have been seeking to enforce its contract and to convince Hudik that it should bid on no more jobs where prepiped units were specified does not alter the fact that the union refused to install the Slant/Fin units and asserted that the piping work on the Norwegian Home job belonged to its members . . . . [T]he union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by section 8(b)(4)(B).

Id. at 530-31.

39. *Id.* at 521.

40. *Id.* at 522.

Board, in using its control test, failed to consider all of the relevant circumstances surrounding the union's refusal to handle the prefabricated pipe. The fact that the Board distinguished between two cases on the basis of an employer's control over the disputed work demonstrated to the Court that the Board was following the *National Woodwork* test.[41]

The Court further noted that since 1958, the Board has consistently interpreted and applied section 8(b)(4)(B) to find an unfair labor practice "where the union employs a product boycott to claim work that the immediate employer is not in a position to award, and it has declined to find a violation where the employer has such power."[42] Thus the Board's interpretation of the statute having been long established and undisturbed by Congress, is entitled to deference by the Court. As the majority read the record, there was substantial evidence to support the Board's finding that "the union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by section 8(b)(4)(B)."[43]

THE DISSENT

The dissenters would have held the union's conduct to be lawful primary activity based on their understanding of the Court's decision in *National Woodwork*. In their opinion, that decision held that work preservation was a primary objective; consequently, union action undertaken for that purpose was necessarily primary. Thus, the Board's finding that the union's refusal "was based on a valid work-preservation clause in the agreement with Hudik . . . and was for the purpose of preserving work [the union's members] had traditionally performed,"[44] required the conclusion that its conduct was primary activity.

The dissent sharply criticized the Court's treatment of the right-to-control test as a factual finding by the Board to be treated with deference.[45] They viewed the union's action if taken for the

41. Justice White stated: "[T]he Board may assign to the presence or absence of control much more weight than would the Court of Appeals, but this far from demonstrates a departure from the totality-of-the-circumstances test recognized in *National Woodwork*." *Id.* at 524.

42. *Id.* at 576 (footnotes omitted).

43. *Id.* at 531.

44. *Id.* at 533.

45. [O]nce the Board determined that the Union's object was preservation of work its members had traditionally performed for Hudik, its factfinding task was completed. The Board concluded that despite this finding, Austin's "right to control" the disputed work required the conclusion that Austin was the Union's

purpose of enforcing a valid work preservation clause as necessarily primary and hence not a violation of section 8(b)(4)(B). The Board erred as a matter of law when, having found as a fact that the union's action was for work preservation, it went on to hold that Austin's control over the work required the conclusion that Austin was the real object of the union's pressure.

The dissent rejected the Court's assertion that *Enterprise* was distinguishable from *National Woodwork* on the basis of the employer's control. They regarded the dispute in both cases to be over the application of a work preservation clause to the use of prefabricated materials in the construction industry. The fact that Austin, and not Hudik, had "control" over assignment of the work did not alter the nature of the dispute or the union's claim.

The majority's characterization of Hudik as a neutral party warranting protection was called erroneous. Hudik had accepted the subcontract in violation of his work preservation agreement and should, therefore, have to deal with the union's pressure to enforce it. The dissent refused to accept the majority's contention that Hudik was powerless to deal with the union's demands:

> As the Court of Appeals pointed out, if the Union's purpose is truly work preservation for the benefit of its own members, it presumably would be willing to negotiate some substitute for full compliance . . . . Nothing in this record indicates that Hudik made any attempt to reach that or any other compromise solution, and there is no reason to think that the Union would not have been satisfied with such result.[46]

Since the union's grievance was over the preservation of work traditionally performed by the bargaining unit, their dispute was with Hudik and no one else. The dissent would only have considered Austin as a target if there was evidence that the union represented employees of Austin or was engaged in a general effort to prevent Austin from using prefabricated pipes. Absent such evidence, it was error to conclude that Austin was the target of the union's pressure simply because he had control over assignment of the work.

There was also disagreement with the majority's reliance on *Sand Door*. In the dissent's view, *Sand Door* was precedent only for the holding that pressure to enforce a *secondary* boycott clause remains secondary despite the fact that at the time the pressure was taken the agreement itself was lawful. The disputed clause in *Sand*

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target. This was an error of law, not a factual finding.

Id. at 540.

46. *Id.* at 538-39.

Door provided that "workmen shall not be required to handle non-union material."[47] Although the Court found nothing in the Act that would prohibit this kind of hot cargo clause, the fact that the agreement was not prohibited did not render secondary pressure to enforce it lawful.[48]

The contract in *Sand Door* was an agreement to engage in a secondary boycott. The agreement itself would be unlawful today under section 8(e). The clause at issue in *Enterprise* was primary, not secondary. Consequently, the latter case stands only for the principle that secondary pressure cannot be transformed into primary pressure simply because an employer's agreement to support the boycott is not unlawful. Work preservation cases present an entirely different situation. *National Woodwork* held that work preservation is a primary objective and that work preservation clauses are valid primary agreements under section 8(e). The dissent concluded that any action to enforce a work preservation agreement is presumed to have as its objective work preservation and is, therefore, primary pressure and not a violation of section 8(b)(4)(B). It is apparent that the dissent's emphasis is on the purpose of the union's pressure. Where that purpose is primary there is no violation of section 8(b)(4)(B) and the employer's lack of control over the assignment of the work does not change this result.

The disagreement between the majority and dissent is fundamental. The dissent would treat union activity with a work preservation objective as primary as a matter of law. If the record demonstrates that the sole purpose of the union is enforcement of a valid work preservation agreement, then its actions are beyond the reach of section 8(b)(4)(B) regardless of their effect on other employers who deal with the immediate employer. Although the majority would agree that work preservation agreements are primary (not prohibited by section 8(e)), they do not reach the dissent's conclusion that union activity with a work preservation objective is therefore primary. Instead, the majority's focus is on the target of the union's pressure in pursuing its work preservation goals. Where that pressure is directed at a party other than the union's immediate employer, the pressure is secondary and prohibited by section 8(b)(4)(B). Thus, in the situation where the decision to assign the work lies with a person other than the employer who is party to the

47. 357 U.S. at 95.

48. 429 U.S. at 541-42. In the 1958 amendments to the NLRA, Congress responded to the holding in *Sand Door* by outlawing "hot cargo" agreements: section 8(e) makes it an unfair labor practice for a union and an employer to enter an agreement to boycott the products of another employer.

work preservation agreement, the inference can be made that the union's activity is directed at influencing the party with control over the work. The result is the union cannot engage in strike action to enforce a work preservation agreement against an employer who lacks control over the work.

Enterprise AND THE PRIMARY/SECONDARY DICHOTOMY

The *Enterprise* decision cannot be fitted into the primary/secondary framework that the Court has developed for identifying unlawful secondary activity. That analysis typically involved the Board and Court in a labeling process. Who was the party against whom the pressure was being directed? Where that party was the primary party in the labor dispute, the union's conduct was protected since the purpose of section 8(b)(4)(B) is to protect neutral parties in labor disputes.[49] In the right-to-control cases the Board considers the subcontractor to be a neutral when he is struck by his employees to obtain work over which he has no control. The union's real dispute is with the employer who can assign the work. Does this make the employer with control the primary employer? The Board in *Bricklayers' & Stone Masons' Union, Local 8 (California Concrete Systems)*[50] answered this question in the affirmative and held that the union did not commit an unfair labor practice when it threatened to picket the general contractor in a work preservation dispute. A brief discussion of *California Concrete Systems* will illustrate the confusion that is created when there is an attempt to label the employers in a right-to-control strike as either neutral or primary.

West Valley and Nesbit were two masonry subcontractors who had negotiated a contract with Local 8 which stated that construction of fireplaces was unit work. The agreement would allow the union to refuse to permit bricklayers to handle prefabricated masonry fireplaces. West Valley and Nesbit accepted a contract with Besco that specified the use of prefabricated fireplaces. The use of these fireplaces violated the work preservation agreement with Local 8. Local 8 then instituted charges against union members who were employees of West Valley and Nesbit for installing the prefabricated fireplaces after being told not to by the union. The employees were each fined $500. The union also informed Besco that if he did not cease using prefabricated fireplaces then the union

49. The Supreme Court has defined the central concept of section 8(b)(4) as a prohibition of "union pressure directed at a neutral employer the object of which [is] to induce or coerce him to cease doing business with an employer (the primary) with whom the union [is] engaged in a labor dispute." 386 U.S. at 622.

50. 180 N.L.R.B. No. 3, 72 L.R.R.M. 1612 (1969).

would picket the entire project and bring construction to a halt. These actions by the union resulted in charges of unfair labor practices against Local 8 by California Concrete, the manufacturer of the prefabricated fireplaces. The Board found that the union's actions in fining the employees of West Valley and Nesbit violated sections 8(B)(4)(i) and (ii)(B). However, the Board found that there had been no violation of the section with regard to the threat against Besco. The Board held that the union had a right to coerce Besco to stop doing business with California Concrete because its goal of work preservation was primary and Besco was the employer with control over the work. Thus, the employers who were parties to the work preservation agreement and their employees were neutral parties in the labor dispute and action directed against them would violate section 8(b)(4)(B). Yet an employer outside the collective bargaining relationship was treated by the Board as the primary employer because he had control over the claimed work and union action directed at him was protected by the Act.

The Ninth Circuit refused to accept the Board's decision and set aside the portion of the Board's decision which held that the union did not commit an unfair labor practice when it threatened to picket Besco.[51] This decision points to the confusion inherent in attempts to label the employers in the right-to-control cases. The Ninth Circuit observed that:

> The union's complaint here was clearly with West Valley and Nesbit who agreed to the work preservation clause. Its attempts to force them to stop doing business with Besco were lawful primary activity aimed at work preservation. However, when it expanded its attack to a threat to Besco it extended the controversy to a protected neutral . . . .[52]

Finding that Besco was a protected neutral and therefore the union's actions directed at him were secondary, the Ninth Circuit rejected the Board's decision that there had been no unfair labor practice. It further indicated that West Valley and Nesbit were primary employers and that the union's action against the subcontractors' employees was primary. Yet the Board had held that West Valley and Nesbit's lack of control over the work made them neutral employers and that the union had violated section 8(b)(4)(B) when it fined their employees. The court bypassed these inconsistencies, observing that since the "remainder of the Board's findings are not on review [they] . . . remain undisturbed."[53] What is apparent

51. Western Monolithics Concrete Prod., Inc. v. NLRB, 446 F.2d 522 (9th Cir. 1971).
52. *Id.* at 527.
53. *Id.*

from these two opinions is that the traditional labels of primary and secondary employer do not fit the right-to-control cases. It is difficult to accept as neutral an employer who has negotiated a work preservation agreement with a union representing his employees. The fact that he has accepted work from a contractor that causes him to breach his collective bargaining agreement with the union does not mean that he is "uninvolved" in the union's demand that it not lose work it has traditionally performed. Moreover, the general contractor, outside the collective bargaining relationship, has not promised the union that its work will be preserved. Yet he is the employer who has the decision whether or not to assign the work to the union. Does this control make him a primary employer? If so, could the union bring pressure against him alone? The Ninth Circuit in *California Concrete Systems* said no. The Court in *Enterprise* avoided the issue by declining to label Austin as a primary employer although the administrative law judge had found that both Austin and Slant/Fin were primary employers.[54]

WORK PRESERVATION AGREEMENTS OUTSIDE COLLECTIVE BARGAINING AND THE ANTITRUST LAWS

In light of the Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*,[55] it is doubtful that the union could use economic pressure against an employer outside the collective bargaining relationship without risking liability under the antitrust laws. In that decision, the Court held that an agreement which was outside the context of a collective bargaining relationship was neither authorized by section 8(e) nor entitled to the nonstatutory exemption recognized in *Meat Cutters v. Jewel Tea Co.*[56] The

54. 429 U.S. at 513-14. The administrative law judge had concluded that Austin and Slant/Fin were primary employers. The Board did not adopt this part of his report. 204 N.L.R.B. at 764.

55. 421 U.S. 616 (1974).

56. 381 U.S. 676 (1965). The Court described the development of the nonstatutory exemption as follows:

> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-La Guardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. *See* United States v. Hutcheson, 312 U.S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. United Mine Workers v. Pennington, 381 U.S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements

agreement could, therefore, be the basis for an antitrust suit.

The union in *Connell* sought to organize mechanical subcontractors (a primary objective) by exerting economic pressure against the general contractor to secure an agreement from him to subcontract mechanical work only to firms with a collective bargaining agreement with the union (Local 100). Local 100 did not represent any of the employees of Connell nor was it seeking to organize them. Connell, the general contractor, signed the agreement under protest. Subsequently, he brought suit against the union alleging that the agreement violated sections 1 and 2 of the Sherman Act.[57]

Local 100 argued that the construction proviso to section 8(e) authorized the contract since it was an "agreement between a labor organization and an employer relating to contracting or subcontracting work to be done at the jobsite."[58] Despite the broad language of the proviso, the Court rejected this argument and held that Congress intended only to allow subcontracting agreements within the context of a collective bargaining relationship. Such a relationship was wholly lacking since Local 100 did not represent any of Connell's employees and had disclaimed all interest in organizing them. Because the agreement was not authorized by section 8(e), it did not have the protection of the NLRA. The Court further determined that the agreement involved direct restraints[59] on the business market to a degree not justified by the union's interest in organizing the mechanical subcontractors. Consequently, the agreement was not entitled to the nonstatutory exemption from antitrust sanctions.

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be accorded a limited nonstatutory exemption from antitrust sanctions. Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

421 U.S. at 621-22.

57. 15 U.S.C. §§ 1 & 2.

58. 421 U.S. at 626.

59. There were three aspects of the union's activities that the Court emphasized in characterizing them as "direct restraints on the business market." First, the agreement with Connell and other general contractors would exclude nonunion subcontractors from the market even though they might have competitive advantages based on more efficient operating methods unrelated to wages and employees' working conditions. Secondly, Local 100 and an association of mechanical subcontractors had entered into a collective bargaining agreement that contained a "most-favored nation clause." This clause gave members of the association the contractual right to insist on terms as favorable as those given any competitor and guaranteed that the union would not make an agreement with an unaffiliated contractor that put members at a competitive disadvantage. The Court perceived that the effect of the clause was to shelter association members from outside competition in that portion of the market covered by a subcontracting agreement between the general contractor and Local 100. Lastly, the agreement with the general contractor did not simply prohibit subcontracting work to nonunion mechanical contractors but also prohibited subcontracting to firms who were not represented by Local 100. This in effect would give Local 100 monopolistic control over mechanical subcontracting work in its geographical jurisdiction. 421 U.S. at 624.

This nonstatutory exemption had evolved from the Court's decision in *United States v. Hutcheson*[60] that unions are exempt from antitrust prosecution only so long as they are acting only in their self-interest. The Court recognized that this holding seriously threatened the existence of collective bargaining. Consequently, the Court has exempted collective bargaining agreements from the antitrust laws where those agreements are concerned with eliminating competition over wages, hours and like terms of employment, despite the anticompetitive effects of these agreements. In *Jewel Tea,* a nonstatutory exemption was announced that attempts to effectuate labor policies favoring the elimination of competition over wages, hours and other conditions of employment, without allowing these agreements to severely restrain product market competition.

At issue in *Jewel Tea* was the legality of a provision in the collective bargaining agreement that barred retail stores in the Chicago area from selling fresh meat at night or on Sundays. Jewel Tea Company, a large retail food store, challenged the provision under the Sherman Act alleging that the restriction on marketing hours was an illegal restraint prohibited by section 1. Jewel Tea argued that one group of employers, the independent store owners, had favored this provision in the contract negotiations and had thereby conspired with the union to obtain the provision. The Supreme Court held that the restriction on marketing hours was intimately related to the union's interests in protecting the working conditions of its members. Although the limitation on marketing hours might adversely affect the competitive positions between retail food stores and the independent stores, these effects were ancillary to the union's interest in securing uniform working conditions for its members.[61] The problem is thus one of distinguishing between labor agreements properly concerned with wages, hours and like terms of employment and those in which collective bargaining is used to achieve forbidden restraints in the product market.[62]

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60. 312 U.S. 219 (1941).

61. The marketing restriction in *Jewel Tea* denied Jewel Tea Company the competitive advantage it otherwise would have had since it was prevented from using its meat packaging system to sell meat in the evening hours and on Sundays. *See* 381 U.S. at 681-82.

62. UMW v. Pennington, 381 U.S. 657 (1965) is an example of the latter. When Phillips Brothers Coal Co., a small mining partnership, was sued by trustees of the UMW for royalties due under the terms of a collective bargaining agreement, Phillips counterclaimed alleging that the UMW and its trustees had conspired with several large mine operators in violation of sections 1 and 2 of the Sherman Act. Although the Supreme Court reversed the judgment against UMW, it did so on the basis of improper admission of evidence. The Court rejected the union's argument that it was wholly exempt from the antitrust laws and held that where allegations had been made that the union had conspired with large coal miners to drive small operators out of the market, "any claim to exemption from antitrust liability is frivolous at best." *Id.* at 633.

The Court has used a balancing test to determine whether the agreement is entitled to the exemption: the union's interest in securing uniform working conditions through collective bargaining agreements is weighed against the agreement's relative impact on the product market. In *Jewel Tea,* the Court struck the balance in the union's favor and held that the clause restricting marketing hours was "intimately related" to legitimate union concerns. Thus, the impact on the product market was outweighed by the employees' interest in their own labor standards. In *Connell,* however, the balance was struck against the union and the agreement was held not to be within the nonstatutory exemption. Of particular concern to the Court was the fact that the agreements with Connell indiscriminately excluded nonunion subcontractors from a portion of the market even though their competitive advantage might be derived from more efficient operating methods and not from substandard wages or working conditions.[63] The effect of the agreement was to impose direct restraints on the business market that the Court felt would not follow naturally from the elimination of competition over wages and working conditions. The agreement "contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws."[64]

The Court's holding in *National Woodwork* that work preservation agreements are primary and not violative of section 8(e) has allowed unions to secure these agreements with subcontractors free from antitrust liability. However, were the union to enter into a work preservation agreement with an employer outside the collective bargaining relationship (the general contractor in the right-to-control situation), it is probable that under *Connell* such an agreement would not be authorized by section 8(e) and the union would be potentially liable for treble damages under the antitrust laws. The Court would have to decide whether work preservation agreements not authorized by section 8(e) are entitled to the nonstatutory exemption.[65] The Court in *National Woodwork* took note of the

63. 421 U.S. at 623.

64. *Id.* at 625. Since neither the district court nor the court of appeals had decided whether the agreement between Local 100 and Connell, if subject to the antitrust laws, would constitute an agreement that restrains trade within the meaning of the Sherman Act, the case was remanded to the district court for consideration whether the agreement violated the antitrust laws. *Id.* at 637.

65. Section 8(e) only prohibits actual agreements between the union and employer. Thus, union action to secure or enforce boycott agreements must be judged under section 8(b)(4)(B). Union action directed against a primary employer has always been primary. Had the Court found Austin to be a primary employer, it would have meant that unions could use economic pressure to obtain work preservation agreements from an employer outside the

threat posed to union job security by the introduction of prefabricated materials onto the jobsite. The Court concluded that, absent clear evidence of congressional intent to the contrary, section 8(e) should not be construed to remove from the collective bargaining process the task of adjusting job security to technological progress.[66] The role of collective bargaining as a means for resolving work preservation disputes would be drastically undercut if the Court were forced to decide whether work preservation agreements are entitled to the nonstatutory exemption. A decison that the agreements are not entitled to an exemption would in effect prohibit these agreements since the unions would not risk the costs of treble damage antitrust suits.[67] Yet, given the substantial impact that work preservation agreements have in foreclosing prefabricated materials from the contruction industry, there is a strong countervailing argument that this restraint cannot be justified where the work preservation agreement is outside the collective bargaining relationship. The basis for the nonstatutory exemption is a recognition by the Court that the labor laws reflect a national policy that favors elimination of competition over wages through collective bargaining. Absent a collective bargaining relationship the nonstatutory exemption should not be allowed. Consequently, a work preservation agreement between a union and an employer who is not organized by the union (the general contractor in the right-to-control dispute) would be subject to antitrust liability.

This antitrust problem raised by an attempt to label the general contractor a primary employer in a right-to-control dispute perhaps explains the Court's refusal to label Austin as the primary employer. In so refusing, the Court departed from the primary/secondary analysis developed in previous cases. This analysis required identification of two parties: the primary employer, with whom the union has its dispute and the secondary employer, not involved in the labor dispute but brought into the conflict in order to damage the primary employer through a loss of business. *Enterprise* cannot be fit into this analysis; the subcontractor who is

collective bargaining relationship but with control over the claimed work. Once the agreement was obtained, however, there would be potential antitrust liability since the agreement would not be authorized by section 8(e) in the absence of a collective bargaining relationship between the union and the employer with control.

66. 386 U.S. at 640-42.

67. Once it is determined the agreement is not exempt, the Court then must answer the question whether the agreement has in fact acted as a restraint on the product market. There is ample evidence that the effect of a work preservation agreement is to foreclose prefabricated materials from competing for use in jobsite construction. *See, e.g.*, 429 U.S. at 524 n.12. This would be a violation of sections 1 and 2 of the Sherman Act.

party to a work preservation agreement with the union ceases to be a primary employer when he loses control over assignment of the claimed work and becomes a neutral party in a dispute not his own.

ANTITRUST PROBLEMS INHERENT IN WORK PRESERVATION DISPUTES

Who is the primary employer is left unanswered. The implication is that in a right-to-control case there is no primary employer. Had the Court adopted the dissent's position, *Enterprise* would fit neatly into the primary/secondary framework. Hudik-Ross, the subcontractor, would be the primary employer and the union's action to enforce its work preservation agreement with Hudik-Ross would have been primary, lawful activity. Instead, the majority accepted the Board's finding that the union's dispute was not with Hudik-Ross despite the fact that Hudik-Ross was the employer who was a party to the work preservation agreement and the union's refusal to work was taken for the purpose of enforcing that agreement. Although the majority decision is inconsistent with the secondary boycott law that has developed, there is justification for this inconsistency in the serious antitrust problems that would have been generated by a decision that would allow union enforcement of work preservation agreements against an employer lacking control over the disputed work. In order to understand the nature of these antitrust problems it is necessary to consider the factual context of the union's refusal to handle the Slant/Fin units.

The Court in a footnote to its opinion observed that the Board had adopted the administrative law judge's discussion of the economic context in which the dispute arose. The administrative law judge was of the opinion that union pressure on Austin and other contractors who preferred factory piped units could effectively foreclose Slant/Fin and similar producers from the market:

> It is an appropriate subject of official notice that in New York City and probably in all or most of the major cities in this country, the building and construction industry is unionized, certainly with respect to major industrial, commercial and public construction. Unionized in this context means that . . . the unions are the source of labor supply and furnish employees to the employer-contractors . . . . In the construction industry it is the unions that control the labor supply and if the union steamfitter employees of Hudik on the Norwegian job refuse to work, other steamfitters will not be available to Hudik or to anyone else to perform on the job . . . . If prepaid units cannot be installed in the large commercial, public and industrial buildings in the New York area and other areas effectively organized by the Union, and other building trade unions, the manufacturer will be materially

> affected and Austin and other engineers and general contractors will not specify their purchase and use in buildings.[68]

What the Court has described is the way in which work preservation agreements are used by labor unions to keep prefabricated materials off the jobsite. Even though these observations are confined to a footnote, it is apparent that the Court was disturbed by the effectiveness of these agreements in keeping prefabricated materials from competing in the construction industry. Significantly, the Court reached a decision that makes it an unfair labor practice to attempt enforcement of the agreement against an employer who lacks control over the claimed work. The remainder of this note will analyze the Court's decision in light of its observations on the structure of the construction industry. It will explain why the Court departed from the established primary/secondary analysis to reach its holding that a secondary intent can properly be inferred when unions attempt enforcement of work preservation agreements against employers without control over the work.

In the usual work preservation situation, the union and employer can be expected to bargain for their respective interests: automation versus job security. But in the construction industry, a general contractor usually subcontracts out the majority of the work to subcontractors. It is the subcontractor that is organized by the craft unions. Consequently, the subcontractor is the party with whom the union negotiates the work preservation agreement. However, in the right-to-control case, the general contractor is the party who has specified use of materials that eliminate union work. It will be recalled that in *National Woodwork* the Court placed particular emphasis on the importance of resolving the conflict between technological progress and job security through collective bargaining.[69] In *National Woodwork*, the general contractor was party to the work preservation agreement with the carpenter's union. When Frouge ordered premachined doors, he violated the collective bargaining agreement. The union refused to handle the doors and Frouge was faced with the choice of continuing to use the premachined doors and thereby incurring the costs imposed by the work stoppage, or complying with the union's demand, thus foregoing the benefits to be gained from use of the premachined doors. Obviously, the choice depended largely on the union's ability to withhold the supply of labor until its demands were met.

In the right-to-control situation, the collective bargaining pro-

68. 429 U.S. at 524.

69. *See* text accompanying notes 17-27 *supra*.

cess cannot function properly. The lack of a collective bargaining relationship between the general contractor and the union means that the union's original demand for preservation of work has not been agreed to by the general contractor, nor can their present differences over use of prefabricated materials be resolved through the collective bargaining process. Hence, there is less support in national labor policy for the work preservation agreement in a right-to-control dispute. Moreover, the anticompetitive effects of the work preservation agreement are substantial, particularly where the union has organized all of the subcontractors in a geographic area and as a result has a monopoly over the supply of labor. In this situation, the union has in effect put together a cartel of subcontractors and is using the work preservation agreement as a means of policing the cartel. The facts as given in the Court's footnote in *Enterprise* describe just this situation. The union's success in preserving work for its members will be directly dependent on its ability to effectively maintain its cartel of subcontractors:

> If a pipefitter's union can secure the agreement of all plumbing subcontractors in a relevant geographic market to refuse to bid on construction subcontracts that fail to bestow upon the subcontractors all the pipefitter's traditional work, then any general contractor wishing to do business in that market must either grant the plumbing subcontractor the demanded jobsite work or face the prospect of having no craftsmen to do skilled plumbing work that cannot be prefabricated.[70]

In order to be successful, the union must have the cooperation of all of the subcontractors in the area since prefabricated materials are generally lower cost materials than those fabricated on the jobsite. A subcontractor who bid on a contract that did not preserve work would have a competitive advantage over the other subcontractors since his bid would be at a lower absolute price. This would seriously threaten the cohesiveness of the cartel. Work preservation agreements have afforded the union the means of securing the subcontractors' compliance. The subcontractor who bids on a project that does not preserve union work breaches his work preservation agreement and is faced with a union work stoppage. Where the union controls the labor supply, the subcontractor will not be able to find substitutes to do the work. If the subcontractor knows that the union can enforce the work preservation agreement, and thereby force him off the project, he will be reluctant to bid on those pro-

70. Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904, 908 (1976).

jects. The right-to-control strike is the union's means of enforcing its cartel.

> In the right-to-control situation, general contractors' forebearance from using prefabricated goods is not merely the inevitable byproduct of the union's success in its dispute with the subcontractor. The very purpose of the work stoppage is to police a cartel which in turn will coerce general contractors, as a class, to give up prefabricated goods. Moreover, the coercion of the general contractor is essential to the causal chain whereby the union attains its ultimate end of work preservation; the union will succeed only if the general contractors are compelled by the threat of a collective refusal to supply jobsite services, to exercise their discretion by foregoing prefabricated materials.[71]

The Court in *Enterprise* has broken this causal chain. The union cannot use its work preservation agreement with the subcontractor as a means of coercing the general contractor to forego the use of prefabricated materials. The Court reached this result by treating the Board's control test as a factual finding supported by substantial evidence. In the right-to-control situation, it would be fair to assume that the Board will always be able to infer from the union's pressure on an employer unable to satisfy its demands that the union has the illegal object of coercing the employer who does have control over the work. Where this employer is not party to the collective bargaining agreement preserving the union work, there will be a violation of section 8(b)(4)(B). Thus the Court has significantly limited the union's ability to keep prefabricated materials out of the building trades market through the use of a product boycott.

WORK PRESERVATION AGREEMENTS AND OTHER MEANS OF ENFORCEMENT

The Court did not decide whether the union can bring an action against the subcontractor under section 301 of the Labor Management Relations Act[72] for breach of the work preservation agreement. If the preceding analysis is correct in maintaining that the objective of a right-to-control strike is to influence the conduct of the general contractor by means of a cartel of subcontractors, the union should not be able to recover damages from a subcontractor who breaches

71. *Id.* at 916.

72. Section 301 states in part: "(a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 U.S.C. § 185 (1970).

a work preservation agreement. The cartel can be policed nearly as effectively through the use of damage suits or penalties assessed under grievance provisions as by the use of strikes. The subcontractor will be equally deterred from bidding on projects that specify prefabricated materials if he knows that he will have to pay damages to the union for breaching his work preservation agreement.

At present there does not appear to be a consensus as to whether unions have a remedy either through an action under section 301 or by invoking the procedures set forth in the collective bargaining agreement for contract breaches.

The principal issue is the meaning to be given "coercion" as it is used in section 8(b)(4)(B). Does coercion include union actions other than those involved in work stoppages? Can it include actions brought under section 301 for breaches of the work preservation agreement? Is resort to grievance procedures under the collective bargaining agreement coercion within the meaning of section 8(b)(4)(ii)(B)? The cases appear to draw a distinction between judicial enforcement of work preservation agreements which are permissible and unilateral action by the union that involves use of economic sanctions.

In *NLRB v. IBEW, Local 769*,[73] Ets-Hokin, a general contractor, was party to a collective bargaining agreement that contained a clause prohibiting subcontracting work to any employer not represented by the International Brotherhood of Electrical Workers (IBEW). The clause provided that subcontracting to a non-IBEW employer would be "sufficient cause for cancellation of the agreement."[74] When Ets-Hokin subcontracted work to Rose, an employer represented by a rival union and paying subminimum wages, Local 769 threatened to terminate the collective bargaining agreement unless Ets-Hokin took Rose off the project. The Ninth Circuit held that unilateral rescission of the contract was a form of prohibited economic coercion.[75]

In *ACCO Construction Equipment, Inc. v. NLRB*,[76] union assessment of penalties under the grievance provisions of a collective bargaining agreement was held to constitute an unlawful assertion of economic pressure in violation of section 8(b)(4)(ii)(B). The record contained evidence that the union had allowed general contractors to use nonunion equipment dealers to repair heavy, on-site construction equipment despite a clause in the collective bargaining agreement prohibiting employment of nonunion repairmen. Coin-

73. 405 F.2d 159 (9th Cir. 1968).
74. *Id.* at 161.
75. *Id.* at 163.
76. 511 F.2d 848 (9th Cir. 1975).

cident with a union drive to organize equipment dealers, the union began to enforce the no-subcontracting clause by assessing fines against the general contractor under the grievance provision of the contract. The Ninth Circuit affirmed the Board's finding that the union's purpose in resorting to the fining mechanism was to pressure the general contractor to cease using the services of secondary employers, the dealers.[77]

There was disagreement, however, in *Carrier Air Conditioning Co. v. NLRB*[78] between the Board and the Second Circuit on whether the union's invocation of the contractual grievance procedure was prohibited by section 8(b)(4)(ii)(B). Contrary to its position in *ACCO*, the Board argued that section 8(b)(4)(ii)(B) did not prohibit enforcement of work preservation clauses through peaceful means provided by the agreement.

The Board asserted that section 8(b)(4)(B) only proscribed economic sanctions; what was involved in this case was not economic retaliation by the union but resort to an agreed-upon arbitral procedure for compensation for breach of contract. Because of the similarities between arbitration and court proceedings, the Board argued that the court should treat the former as the equivalent of a court proceeding for purposes of section 8(b)(4)(B). The court declined to decide the question "whether resort to bona fide arbitration procedures would constitute unlawful coercion," on the ground that the contract before the court was not the equivalent of bona fide arbitration.[79]

The contractual procedures under which the general contractor was forced to pay a fine were implemented by a Joint Adjustment Board of twenty-four members, half from the union and half from the subcontractor's association. Thus the proceeding lacked the presence of a neutral factfinder, not involved in the dispute. The Court considered this factor as crucial in distinguishing between the contract grievance procedure and bona fide arbitration. The fines as authorized by the agreement "were applied in a way that gave the union economic leverage over the subcontractor" and that leverage "had the desired effect of pressuring [subcontractors] to pressure others to change their business practices."[80]

In each of these cases, the courts stated that section 8(b)(4)(ii)(B) limits the enforcement of agreements valid under sec-

77. *Id.* at 850.

78. 547 F.2d 1178 (2d Cir. 1976).

79. *Id.* at 1192.

80. *Id.* at 1193 (quoting from Associated Gen. Contr. v. NLRB, 514 F.2d 433, 439 (9th Cir. 1975)(assessment of fines against a subcontractor is coercion within section 8(b)(4)(B)).

tion 8(e) to judicial means.[81] The Fifth Circuit in *Local 48, Sheet Metal Workers v. Hardy Corp.*,[82] expressly held that prohibited coercion in section 8(b)(4)(ii)(B) does not preclude judicial enforcement of a hot cargo clause left valid under section 8(e). Hardy, a general contractor, had subcontracted work to a subcontractor without requiring him to comply with conditions of employment set out in Hardy's agreement with the union. This conduct violated the "no-subcontracting" clause of the collective bargaining agreement and the union processed the breach as a grievance under the contract. The union then filed an action under section 301(a) for enforcement of the arbitration award and for damages for breach of the agreement. Hardy counterclaimed for damages alleging that the suit was prohibited coercion under section 8(b)(4)(ii)(B). The district court held the clause was valid but denied enforcement and dismissed the complaint. The Fifth Circuit reversed and remanded for a new trial. The court held that Congress, in exempting hot cargo and no-subcontracting clauses from the prohibition of section 8(e), intended to preserve judicial enforcement of those requirements. Therefore, an action under section 301(a) for breach of the agreement was not prohibited by section 8(b)(4)(ii)(B).[83]

While resort to the courts under section 301 should probably not be coercion in the sense of being a violation of section 8(b)(4)(B), this is not to say that unions should be able to recover damages from a subcontractor who breached a work preservation agreement in the right-to-control context. Recovery of damages from the subcontractor in cases where the decision to use prefabricated materials has been made by another would have the same coercive effect as would strike action or assessment of penalties under a collective bargaining clause. The cases discussed above did not involve enforcement of work preservation clauses against an employer lacking the ability to resolve the dispute with the union. Thus, in an action by a union under section 301 for breach of a work preservation agreement, if the court finds that the employer who is party to the agreement was not the party ordering use of the prefabricated materials, it can properly find that there was no violation of the agreement. Since the subcontractor never had control over the claimed work, it could not assign

81. *See* Carrier Air Cond. Co. v. NLRB, 547 F.2d 1178, 1192 (2d Cir. 1976); ACCO Constr. Equip., Inc. v. NLRB, 511 F.2d 848, 852 (9th Cir. 1975); NLRB v. IBEW, Local 769, 405 F.2d 159, 163 (9th Cir. 1968); *See also* NLRB v. Local 445, 473 F.2d 249, 253 (2d Cir. 1973); Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534, 537 (D.C. Cir. 1964); Local 5, United Ass'n of Journeymen v. NLRB, 321 F.2d 366, 369-70 (D.C. Cir. 1963) (dicta that section 8(e) agreements are enforceable only through court proceedings).

82. 332 F.2d 682 (5th Cir. 1964).

83. *Id.* at 687-88.

the work to the union. In this situation, the union's demand is not for preservation of work but for work it never had. Consequently, the union has no claim that the subcontractor has breached his agreement to give to the union all work preserved by the bargaining agreement.

CONCLUSION

When work preservation agreements are enforced, prefabricated materials are kept off the jobsite. Manufacturers of these materials are foreclosed from competing in the construction industry. It is the elimination of competition between skilled labor and manufacturers of prefabricated materials that is the vice of work preservation agreements. Enforcement of such agreements in "right-to-control" cases deprives the general contractor of the freedom to choose between use of prefabricated materials and employment of skilled labor. It is this freedom of choice that *Enterprise* protects. Work preservation agreements remain valid; the preservation of bargaining unit work is a primary goal, but neither the agreement nor activities in pursuit of work preservation are protected when the union seeks to influence by economic pressure the business decisions of one outside the collective bargaining agreement.

DIANE AUSTIN

Carey, Kids and Contraceptives: Privacy's Problem Child

In Carey v. Population Services International *the Supreme Court held that a New York state statute restricting access to nonprescription contraceptives violated the right to privacy of both adults and minors. In order to include access to contraceptives within the protection of the privacy right and maintain consistency with the constitutionality of state laws prohibiting adultery, fornication and sodomy, the Court found it necessary to reformulate the rationale of its decisions in* Griswold v. Connecticut *and subsequent privacy cases. The author of this note first considers the validity of the Court's new interpretation of* Griswold *as creating a right to privacy which protects activities related to the decision whether or not to bear or beget children. He then assesses the possible results of applying this newly-defined privacy right to those private consensual activities traditionally forbidden by state laws.*