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SECONDARY BOYCOTTS UNDER THE NEW LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

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THE new act, representing the first major overhauling of the federal labor law in twelve years,¹ was signed by the President on September 14, 1959. The major amendments to the Taft-Hartley Act are found in the new act under Title VII. This discussion will be limited to the unfair labor practice amendments of Title VII dealing with secondary boycotts.²

The secondary boycott amendatory provisions are found in section 704(a) and (b) of Title VII and represent the determination of Congress to close the so-called "loopholes"³ pointed up by Board and court decisions interpreting Section 8(b) (4) of the Taft-Hartley Act which interdicted, among others, certain types of union activity which have come to be commonly referred to as secondary boycotts. Under the old act, stated broadly, section 8(b) (4) (A), which contained the heart of the boycott provision, prohibited a union from causing or inducing strikes or concerted work stoppages by employees in the course of their employment where an object was to force any employer or person to stop doing business with another employer or person. Thus, to have a violation two factors were necessary: prohibited conduct for a proscribed object.

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¹ The Taft-Hartley Act was signed into law in 1947.

² Section 707 of Title VII provides that its amendments shall take effect 60 days after enactment of the act. 14 U.S. CODE CONG. & AD. NEWS 2988 (1959). The General Counsel of the NLRB has, accordingly, concluded that the provisions in question became effective on Nov. 13, 1959, however, allowing that the question of whether the foregoing date is correct may possibly be challenged in some future proceeding. *News and Background*, 45 LAB. REL. REP. 29, 30 (1959).

³ H.R. REP. No. 1147, 86th Cong., 1st Sess. 38-40 (1959).

Senator Taft, in referring to section 8(b) (4) (A), stated in 1947 that it makes it "unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."⁴ Thus, secondary conduct is conduct directed against neutral employers or employers not involved in the primary dispute through their employees in order to bring pressure upon another employer.⁵

Section 8(b) (4) (A), however, had been held not to prohibit inducement of a single employee, supervisors, inducement of employers, or inducements of employees of non-statutory employers to achieve boycotts. Also, consumer picketing of neutral employers was normally not prohibited. Although "hot cargo" contracts could not be enforced by the proscribed inducement of employees, they were not regarded as unlawful and pressure to bring about their enforcement could be levied directly against a neutral employer.

SECTION 704(A)

Very briefly, before going into a more extensive analysis of the new provisions, section 704(a) amends the old Section 8(b) (4) of the Taft-Hartley Act⁶ to close these "loopholes."

⁴ 93 CONG. REC. 4323 (1947) (remarks of Senator Taft).

⁵ Wadsworth Bldg. Co., 81 N.L.R.B. 802 (1949).

⁶ Section 704. (a) Section 8(b) (4) of the National Labor Relations Act, as amended, is amended to read as follows: "(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employee unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

The "hot cargo" loophole is closed only to the extent of making such a clause an illegal object in section 704(a). (However, in section 704(b), as will be shortly noted, Congress makes such agreements an unfair labor practice on the part of both employers and unions.) Thus, section 8(b)(4), as newly amended, would now make illegal the following conduct which heretofore was generally not held to be within its prohibitive scope:

(1) inducement of a single employee of a neutral or secondary employer to refuse to work,

(2) inducement of supervisors to commit secondary boycotts,

(3) inducement of work stoppages by employees of employer neutrals who are excluded from the statutory definition of employer—such as railroads, political subdivisions, etc.,

(4) consumer picketing of neutrals,

(5) the application of pressures directly against neutral employers (both statutory and non-statutory) as distinguished from employees,

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization, or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." 14 U.S. CODE CONG. & AD. NEWS 2984 (1959).

(6) any of the foregoing activities when engaged in to force any employer, *primary* or secondary, to enter into a "hot cargo" agreement.

SECTION 704(B)

Section 704(b)⁷ closes what remained of the loophole pertaining to "hot cargo" clauses by amending Section 8 of the Taft-Hartley Act so as to add a new subsection (e) making it an unfair labor practice for both employers and unions to enter into "hot cargo" agreements. Such agreements now are also unenforceable and void.

It is widely agreed⁸ that these new boycott provisions, as so designed by Congress, have effectively closed certain loopholes existing under the Taft-Hartley Act.

Generally speaking, the various sections of the old section 8(b)(4) were not changed, although some were rearranged in a more logical fashion.

Turning to the specific amendments in language which section 704(a) effectuates, we find that the words of the old section 8(b)(4), "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted

⁷ (b) Section 8 of the National Labor Relations Act, as amended, is amended by adding at the end thereof the following new subsection: "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this section (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." 14 U.S. CODE CONG. & AD. NEWS 2984 (1959).

⁸ See, e.g., Rothman, *The New Labor Legislation and the Office of The General Counsel, News and Background*, 45 LAB. REL. REP. 29 (1959).

refusal in the course of their employment to use . . .” have been changed in the new section 8(b)(4)(i) to: “to engage in, or to induce or encourage any *individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a refusal in the course of his employment to use . . .” (Emphasis added.)

The substitution of “any individual” for “employees,” and “refusal in the course of his employment” for “concerted refusal in the course of their employment,” renders it unnecessary that a refusal to work be concerted or that more than a single employee be induced. Under prior law, a union’s inducement of one employee of a neutral to cease working individually was not an unlawful secondary boycott.⁹

It is also reasonably clear that the word “individual” would include inducement of a secondary boycott through a supervisor,¹⁰ which under prior law was not forbidden¹¹ unless the supervisor acted as the union’s agent.¹² The term “any individual” would further appear to include the inducement of other non-statutory employees as defined in section 2(3) of the act such as agricultural employees, employees of railroads, municipalities, etc.

The change from “any employer” to “person engaged in commerce or in an industry affecting commerce” is clearly intended to overcome the limitations of statutory definition of the word “employer” when used in the act. Section 2(2) of the Taft-Hartley Act excluded railroads, wholly owned government corporations, non-profit hospitals, etc., from the definition of “employer.” Moreover, as observed above, under section 2(3), employees of these excluded “employers”

⁹ Glaziers’ Union, 30 L.R.R.M. 1174, 1176 (1952). See also Gould & Preisner, 82 N.L.R.B. 1195 (1949), to the effect that a union did not engage in a strike within the meaning of §8(b)(4) by causing one employee to stop work. Cf. Direct Transit Lines, Inc., 92 N.L.R.B. 1715 (1951); Amalgamated Meat Cutters, 113 N.L.R.B. 275 (1955), *enforced*, 237 F.2d 20 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1015 (1957); General Millwork Corp., 113 N.L.R.B. 1084 (1955), *enforced*, 242 F.2d 932 (6th Cir. 1957), *cert. denied*, 352 U.S. 1015 (1957), where single employees of several employers were induced or the inducement of a single employee may be reasonably expected to be transmitted to others.

¹⁰ See, e.g., 105 CONG. REC. 16397 (daily ed. Sept. 3, 1959).

¹¹ Conway’s Express, 87 N.L.R.B. 972 (1949), *enforced*, 195 F.2d 906 (2d Cir. 1952).

¹² Sand Door and Plywood Co., 113 N.L.R.B. 1210 (1955), *enforcement denied*, 241 F.2d 147 (9th Cir. 1957), *aff’d*, 357 U.S. 93 (1958).

were not defined as employees within the meaning of the act. Under the prior law, inducement of railroad employees¹³ or municipal employees¹⁴ was held not prohibited by the Board. However, the Fifth Circuit Court of Appeals reversed the Board's view in two cases involving secondary boycott pressure through employees of a railroad.¹⁵ The new language, consonant with the Fifth Circuit's views, obviously overrules the Board's holdings in the foregoing cases.

The newly added requirement that a person be "engaged in commerce or an industry affecting commerce" may possibly give rise to litigation particularly where a political subdivision is the "person" involved. The argument may also be made that the "person" involved must independently meet the Board's jurisdictional standards and that the Board may not as in the past measure both the business of the primary and secondary employers. However, to achieve a result harmonious with the general intent of Congress, the language undoubtedly will be and should be broadly construed so as to permit the NLRB to exercise jurisdiction here in accord with its previous standards in secondary boycott cases,¹⁶ and in accord with the NLRB's general jurisdiction in other unfair labor practices which "affect commerce."¹⁷

¹³ *W. T. Smith*, 116 N.L.R.B. 1756 (1956), *rev'd*, 246 F.2d 129 (5th Cir. 1957); *International Rice Milling*, 84 N.L.R.B. 360 (1949), *rev'd*, 183 F.2d 21 (5th Cir. 1950), *cert. on other issues*, 341 U.S. 665 (1951).

¹⁴ *Papermakers Importing Co.*, 116 N.L.R.B. 267 (1956).

¹⁵ See note 13 *supra*.

¹⁶ *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769 (1954).

¹⁷ Sections 2(6) and (7) of the Taft-Hartley Act broadly define the terms "commerce" and "affecting commerce" respectively. Section 10(a) of the Taft-Hartley Act empowers the Board to prevent any person from engaging in unfair labor practices "affecting commerce." The only definition of "industry affecting commerce" is found in § 3(c) under "Definitions" in the new act but this phrase, while even more broadly defined than the definition of the term "affecting commerce" under the Taft-Hartley Act, is made applicable only to Titles I through VI and not VII. Indeed, § 505 of V, a Taft-Hartley amendment, is specifically excluded from its applicability. On the other hand, §§ 203(a) and (b) of the Taft-Hartley Act under Title II which created the Federal Mediation and Conciliation Service refer to "labor disputes in industries affecting commerce" and "labor disputes in any industry affecting commerce" respectively. See 23 L.R.R.M. 39 (1949). Similarly, § 301(a) of Title III of the Taft-Hartley Act, concerning suits by and against labor organizations, refers to "an industry affecting commerce as defined in this Act," necessarily adverting merely to §§ 2(6) and (7) of the Taft-Hartley Act defining "commerce" and "affecting commerce." More importantly, § 303(a) of Title III providing, *inter alia*, for a damage suit by whomever is injured by reason of a secondary boycott, uses the phrase "in an industry or activity affecting com-

Whereas under the old language of section 8(b)(4) the only proscribed activity was inducement of neutral employees to engage in work stoppages which became illegal when for a proscribed object, the new section 8(b)(4) is divided into and contains two categories of proscribed conduct, namely section 8(b)(4)(i) just discussed, and section 8(b)(4)(ii) which reads as follows: "to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce. . . ."

Leaving aside for the moment the proscribed objects which follow and will be later discussed, the above additional language of section 8(b)(4)(ii) prevents pressures brought to bear directly upon the neutral employer, as distinguished from his employees, which conduct was not banned under previous law.¹⁸

The question of what constitutes threats, coercion or restraint will be up to the Board and ultimately the courts, which certainly will draw upon their experience in interpreting the terms "restraint" and "coercion" as used in Section 8(a)(1) and Section 8(b)(1)(A) of the Taft-Hartley Act with respect to employees' exercise of their rights under the act. However, difficult problems are bound to arise under the new provision. Whether the Board and courts will construe the words "restraint" and "coerce" narrowly or broadly as in section 8(a)(1) and in section 8(b)(1)(A), as illustrated by the *Curtis* doctrine, remains to be seen.¹⁹ One issue certain to arise is where there is a refusal by a union to refer employees to a neutral employer in a secondary boycott situation. In *Joliet Contractors Ass'n.*,²⁰ the Board, under the

merce." Section 704(e) of the new act amends § 303(a) of the Taft-Hartley Act to be coextensive with the new boycott amendment. Thus, since the various provisions above have been generally interpreted as having the same scope, it would appear incongruous for a narrow interpretation to be made of the newly added "commerce" language modifying "person" in § 704(b).

¹⁸ Samuel Langer, 82 N.L.R.B. 1028 (1949). See also *Sand Door and Plywood Co.*, 113 N.L.R.B. 1210 (1955), *enforcement denied*, 241 F.2d 147 (9th Cir. 1957), *aff'd*, 357 U.S. 93 (1958); *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769 (1954).

¹⁹ *Curtis Brothers, Inc.*, 119 N.L.R.B. 232 (1957), now pending before the U.S. Supreme Court, where the Board for the first time under § 8(b)(1)(A) held that peaceful recognition picketing by a minority union after a lost election "restrains" and "coerces" employees in the exercise of their rights under the act.

²⁰ 30 L.R.R.M. 1174 (1952).

Taft-Hartley Act, rejected a contention by the NLRB General Counsel that the words "engage in a strike" encompassed a refusal by a union to furnish workers, in the first instance. The Board stated that "the broadest definition of a strike includes 'quitting work' or 'a stoppage of work.' Men cannot quit before they are hired; they cannot stop work before they start." This view was upheld by the Court of Appeals for the Seventh Circuit.²¹ In a subsequent recent decision, however, the Board held a refusal to furnish workers amounted to a strike or concerted stoppage of work where the employer had an exclusive hiring contract with the union and the contract contained fringe benefits in which the union members shared.²² *Query*: Under the above new provision, would such a refusal to refer workers, even absent an exclusive hiring contract, constitute coercion and restraint of an employer? Senator McClellan, in referring to this provision, stated as follows:

. . . fourth, the amendment covers the withholding of prospective employees from a secondary employer. I refer to a case in which I may be handling the products of a given company or manufacturer, and I have an arrangement with a union whereby it furnishes employees to me when I call upon the union to furnish them. I refer to a case where I may be under a contract and under an obligation to use the facilities of a hiring hall to get my employees from the hiring hall. The union would say to me, "We will not furnish you any more men, so long as you handle the products of that company." That is another form of a secondary boycott which would be prohibited.²³

However, Senator McClellan appears to be adverting to the situation existing in the *Detroit Edison* ²⁴ case where the refusal to furnish occurred under an exclusive hiring arrangement. Thus, the net result of such a refusal would constitute proscribed conduct not only under section 8(b) (4) (i) but section 8(b) (4) (ii) as well. Nevertheless, even where no exclusive hiring arrangement exists, where an employer depends in fact upon a union for its labor supply, the with-

²¹ Joliet Contractors Ass'n v. NLRB, 202 F.2d 606 (7th Cir. 1953).

²² Detroit Edison Co., 43 L.R.R.M. 1404 (1959).

²³ 105 CONG. REC. 5971 (daily ed. April 24, 1959).

²⁴ 43 L.R.R.M. 1404 (1959).

holding of workers would certainly restrain and coerce an employer. Whether a withholding in such a context will be construed as legal restraint and coercion in terms of section 8(b)(4)(ii) must await adjudication. The factual circumstances of a refusal to furnish men, of course, will vary all the way from the absence of any contract or arrangement of any kind, *e.g.*, an employer coming into a new jurisdiction and seeking men for the first time, to a situation where an employer and union enjoy contractual relations. The contract could be silent with regard to hiring or it may contain provisions merely requiring notification of a union of employment opportunities and giving a union an opportunity to supply men, such as is referred to in section 705(a) of the new act with regard to pre-hire contracts.

Consumer picketing of a neutral store to urge its customers not to buy or use the products of another employer with which the union was disputing was generally not held to be violative of the Taft-Hartley Act.²⁵ Section 8(b)(4)(ii) clearly was intended to prohibit this type of activity. This is made clear not only by the legislative history²⁶ but also when read together with a proviso to section 8(b)(4) permitting "publicity, *other than picketing*" (Emphasis added.) directed to the public, advising them that products of a primary employer with whom the union is disputing are being distributed by another employer.

The prohibition of consumer picketing of a neutral reflects the view now generally accepted that all picketing, although containing ingredients of communication and persuasion, is inherently coercive and as such can be regulated to accord with the reasonable demands of public policy. Whether the prohibition of picketing in accord with a given

²⁵ Crowley's Milk Co., 102 N.L.R.B. 996 (1953); Capital Service, Inc. v. NLRB, 204 F.2d 848 (9th Cir. 1953). However, alleged consumer picketing of stores at common entrances used by both customers and employees was held illegal in NLRB v. Dallas General Drivers, 264 F.2d 642 (5th Cir. 1959).

²⁶ 105 CONG. REC. 14183 (daily ed. Aug. 11, 1959). See 105 CONG. REC. (daily ed. Oct. 2, 1959), Analysis of the Labor-Management Reporting and Disclosure Act of 1959. See also Addresses by General Counsel Rothman, *Some Aspects of the Legislative Process and the Administration of the New Labor Law*, p. 13, Nov. 12, 1959, before the N.Y. Chamber of Commerce, and *News and Background*, 45 LAB. REL. REP. 63 (1959), before the New York City Bar Ass'n.

public policy (here the insulation of a secondary employer and his employees from the economic coercion of a picket line generated by a labor dispute between a union and another employer), when balanced against the countervailing consideration of freedom of speech or, as it is often put, the right to publicize a labor dispute, is reasonable, ultimately remains for the courts to decide.

With regard to the prohibition of consumer picketing, it would apparently follow that a threat thereof would similarly be interdicted. Again, as to what is a threat, a mere request to a neutral employer to voluntarily cease doing business with another would not appear to run afoul of section 8(b)(4)(ii) as falling short of a threat. However, under certain circumstances, such a request may possibly result in other difficulties both for the union and employer, should the employer accede to the union's request in view of section 704(b) which adds a new section 8(e) making it an unfair labor practice for any labor organization and any employer to enter into any "hot cargo" agreement express or implied. Another example of the type of thing which might require resolution as to whether it constituted a threat or restraint would be a request by a union to stop dealing coupled with a reminder to the employer that new negotiations are in the offing. Indeed, the latter may well be typical of one class of charges which will be filed. During hard bargaining, or an economic strike, a charge might be provoked by the feeling on the part of an employer that the union is actually retaliating for what it views as a past or current transgression by the employer in the area under discussion.

The use of the term "person engaged in commerce or an industry affecting commerce" in section 8(b)(4)(ii) is subject, of course, to the same comment made above concerning its use in section 8(b)(4)(i).

Turning now from a discussion of the prohibited conduct (broadly stated, inducement of employees and pressures against employers) to the proscribed objectives of such conduct (as stated above, both elements are needed to establish a violation) the first object prohibited under section 8(b)(4)(i) or (ii) is in clause (A):

forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e)

The part of clause (A) relating to the objects of forcing any employer or self-employed person to join a labor organization is taken verbatim from Section 8(b)(4)(A) of the Taft-Hartley Act. The additional object of a forbidden agreement concerns a "hot cargo" contract. All objects covered in clause (A) are prohibited in both primary and secondary situations. Thus, a primary strike or pressure by a union directly against a primary employer to obtain a "hot cargo" provision is prohibited just as is such conduct when applied through a neutral for such objective. The same would apply to the other proscribed objectives retained without change from the Taft-Hartley Act under clause (A).

Clause (B) under section 8(b)(4)(i) or (ii) now reads as follows:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

The first part of the new clause (B), down to "cease doing business with any other person," is the heart of the secondary boycott provisions and is taken from the former section 8(b)(4)(A) with a minor change in language to substitute "any person" for "any employer or other person" apparently for simplification and to make the language in the proscribed object section consonant with the prior use of the term "any person" in the proscribed conduct section. The language speaks for itself and, in short, makes an object illegal when that object is to force one person to cease doing business with another person.

The second part of clause (B), which follows up to the proviso, literally constituted the whole of the old section

8(b)(4)(B) and allows secondary pressures against neutrals and their employees by a certified union in order to force a primary employer to recognize its status. No secondary pressure for recognition is permitted unless the union in question is certified.

The proviso in clause (B) to the effect that nothing in that clause "shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ." was put in so as:

to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB v. Denver Building and Construction Trades Council, et al.* (341 U.S. 675 [1951]); *Brotherhood of Painters, Decorators, and Paper Hangers, etc., and Pittsburgh Plate Glass Co.* (110 NLRB 455 [1954]); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 [1953]).²⁷

The foregoing cases cited by the Conference Committee on the new bill clearly indicate that the tests developed and applied by the Board and courts in determining the legality of common or ambulatory picketing remain undisturbed. In the *Denver* case cited, the United States Supreme Court rejected the contention that all contractors at a construction site were "allies" and should, in effect, be regarded as a single employer so that picketing the whole site would be regarded as primary or lawful picketing even if the labor dispute involved only a single subcontractor on the job. The Supreme Court found that a general contractor and his subcontractors were separate employers for the purposes of the secondary boycott provisions.²⁸ Accordingly, the Court, upholding the

²⁷ H.R. REP. No. 1147, 86th Cong., 1st Sess. 38 (1959).

²⁸ A proposal to permit on-the-site picketing and exempt such picketing from the secondary boycott provisions, thus upsetting the *Denver* rule, confronted the conferees. Such a provision to permit union activity against all contractors on a common construction site was contained in the Labor Bill proposed by the Administration. Labor Secretary Mitchell, while the conferees were in session, made a statement reiterating the Administration's support of the on-the-site picketing amendment. However, the amendment did not succeed in passing, in part due to the fact that such a provision was neither in the Landrum-Griffin or Kennedy-Irwin Bills and thus technically not properly

Board's finding that the union's picketing and strike had as one of its objects forcing the general contractor on the job to terminate its contract with a non-union subcontractor on the site, found such conduct in violation of the act's secondary boycott provisions.²⁹ However, with respect to picketing at such common sites, the Board, with court approval, has developed certain minimum criteria for permissible picketing of such sites. Thus, in the *Moore Dry Dock Co.*³⁰ case, the Board states as follows:

When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. All these conditions were met in the present case.

Although the *Moore Dry Dock* case involved picketing a ship at another company's dock, the criteria of that case have been applied to truck trailing and other ambulatory or common sites.

Subsequently, the Board in *Washington Coca Cola Bottling Works, Inc.*,³¹ held that the secondary boycott provisions of the Taft-Hartley Act are violated even where all the criteria of *Moore Dry Dock* are met, if the primary employer has a regular place of business where the union could adequately publicize its dispute. This case was enforced by

before the conferees. See *News and Background*, 44 LAB. REL. REP. 457 (1959); *News and Background*, 43 LAB. REL. REP. 315; BNA DAILY LABOR REP. No. 168, p. AA-1.

²⁹ NLRB v. Denver Bldg. & Constr. Trades Council, 340 U.S. 902 (1951).

³⁰ 92 N.L.R.B. 547 (1950). The citation in the legislative history clearly, by inadvertence, refers to a *Moore Dry Dock* case involving a jurisdictional dispute.

³¹ 33 L.R.R.M. 1122 (1953).

the Court of Appeals for the District of Columbia.³² In a later case when the Board applied the foregoing rationale, however, the same Court of Appeals set aside the Board's order and remanded the case for further consideration, stating that the Board mistakenly was attempting to add a fifth rigid rule to the four *Moore Dry Dock* tests and that the Board mistook the significance of the court's prior affirmance of the Board's *Washington Coca Cola* decision.³³ The court cited with approval the *Otis Massey* case where the Fifth Circuit, in denying enforcement of a Board order, similarly rejected the application of an "adequate publicity" test, stating that, in every case, there must be shown substantial evidence of an illegal objective, apart from the mechanical application of criteria to determine lawfulness.

The above cases were cited by Congress as merely an example to point up their intent not to disturb existing law in this area and were not intended to be all inclusive.³⁴ Presumably, particularly when the existence of conflict between certain decisions of the Board and the courts is considered,³⁵ Board and court law is free to develop in this subtle area of controversy as before, always of course within the frame of reference of the new provisions.

In concluding our discussion of the new clause (B), it is also to be noted that, while no mention is made of exemption of the secondary boycott provisions to activities directed at secondary employers performing farmed out or so-called "struck-work" for the primary employer, the legislative history makes it clear that:

no language has been included with reference to struck work because the committee of conference did not wish to change the existing law as illustrated by such decisions as *Douds v. Metropolitan Federation of Architects* (75 Fed. Supp. 672 [S.D.N.Y. 1948]) and *NLRB v.*

³² 35 L.R.R.M. 2576 (1955).

³³ *Teamsters Union, Local 859 v. NLRB*, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956).

³⁴ Among some other cases in this area are *Truck Drivers and Helpers Union, Local 728*, 119 N.L.R.B. 399 (1957); *Interborough News Co.*, 90 N.L.R.B. 2135 (1950); *International Rice Milling*, 84 N.L.R.B. 360 (1949), *rev'd*, 183 F.2d 21 (5th Cir. 1950), *cert. on other issues*, 341 U.S. 665 (1951).

³⁵ An example would be *Incorporated Oil Co.*, 116 N.L.R.B. 1844, *enforcement denied*, 249 F.2d 332 (8th Cir. 1957).

Business Machine and Office Appliance Mechanics Board (228 Fed. 2d 533).

In the *Douds* case adverted to in the foregoing quote, Judge Rifkind, shortly after the passage of the Taft-Hartley Act, held that a subcontractor, whose work for the struck company substantially increased by reason of the strike, was not "an innocent bystander nor a neutral" but an "ally" of the struck company and as such the subcontractor was not "doing business" with the struck company within the meaning of section 8(b)(4).³⁶

The Second Circuit later confirmed this view in the *Royal Typewriter* case where the court held that independent repair companies were not within the protection of section 8(b)(4)(A) of the act when they "knowingly" performed struck work or work which would otherwise be done by the striking employees of the primary employer and were paid directly or indirectly by the struck company for this work.³⁷

It will be noted that the forbidden objects set forth above in clause (A) and clause (B) are now perhaps more logically arranged than under the Taft-Hartley Act. All proscribed secondary objectives, as such, are now found in clause (B), whereas under the Taft-Hartley Act both 8(b)(4)(A) and (B) contained forbidden secondary objectives. Clause (A) would, as stated above, interdict primary activity (and, consequently secondary activity) directed towards achieving its forbidden objectives.

The remaining two clauses of the new 8(b)(4) are (C) and (D), pertaining to recognition strikes where another union is certified and strikes in furtherance of a jurisdictional dispute, are identical to their Taft-Hartley counterparts until the new second proviso in clause (D). Thus, clause (C), as did 8(b)(4)(e) in Taft-Hartley, outlaws all strikes and picketing, both primary and secondary, for recognition whether by a majority or minority union where another union has been certified by the Board. Clause (D)

³⁶ *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y. 1948).

³⁷ *Royal Typewriter Co.*, 228 F.2d 533 (1955), *cert. denied*, 351 U.S. 962 (1956). For a similar view of the Board, see *General Metal Corp.*, 120 N.L.R.B. 1227 (1958); *Oliver Whyte Co.*, 120 N.L.R.B. 856 (1958).

similarly interdicts primary or secondary activity by a union to compel an assignment of work except under certain circumstances.

A new second proviso has been added, however, at the end of clause (D) as follows:

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

This proviso raises many problems merely at first glance. First we note that the proviso pertains "only" to section 8(b)(4). This will raise a question as to the impact of the proviso on the *Curtis* doctrine under section 8(b)(1)(A) of the act insofar as the proviso permits truthful publicity concerning a labor dispute. As illustrated by the Supreme Court's decision in *AFL v. Swing*,³⁸ the term "labor dispute" is an extremely broad concept and does not necessarily depend on a proximate relationship of employer and employee. In that case the labor dispute involved stranger picketing. *Query*: Would the proviso in question permit truthful publicity notifying the public that products of an employer with whom the union has a primary labor dispute (involving a demand for recognition by a minority union) are being distributed by a neutral employer? As is well known, the Fourth Circuit in the *O'Sullivan* case³⁹ held that the use of a consumer boycott (*i.e.*, appeals to the public in widespread publications not to purchase the products of the employer, in order to force the employer to recognize the union after it had been rejected by the employees in a Board election) violated section 8(b)(1)(A) of the act in that it re-

³⁸ 312 U.S. 715 (1941).

³⁹ *NLRB v. United Rubber, Cork, Linoleum and Plastic Workers of America*, AFL-CIO, 23 LAB. REL. REP. (44 L.R.R.M.) 2465 (4th Cir. 1959).

strained and coerced employees in the exercise of their rights under the act. Assuming, for the purposes of discussion, that the ruling in *O'Sullivan* ultimately prevails,⁴⁰ it would seem that a strong argument could be made that, since the *O'Sullivan* ruling held such conduct illegal solely under section 8(b)(1)(A), such conduct whether in a primary or secondary context⁴¹ remains illegal under section 8(b)(1)(A) since the new proviso adverted to relates "only" to section 8(b)(4).⁴² The proviso merely assures that there was no intention under section 8(b)(4) to outlaw such publicity to affect consumer boycotts through a neutral.

Thus, should the Board and courts accept such an argument, while under the proviso an appeal to consumers, *e.g.*, to refrain from buying non-union goods of a primary employer with whom the union has a dispute, and naming neutral distributors of such products, would not constitute a section 8(b)(4) violation, in order to avoid having the very same conduct run afoul of another section of the act, the nature of the labor dispute must be such that, generally speaking, any economic pressure or other coercion by a union to effect its resolution would not independently violate these other sections of the act.

The proviso goes on to state that "nothing contained in such paragraph shall be construed to prohibit publicity,

⁴⁰ The Ninth Circuit in the *Alloy* case held contra to *O'Sullivan* that a minority union did not violate § 8(b)(1)(A) by placing an employer on the union's "we do not patronize" list for the purpose of forcing recognition by the employer. The court viewed the union's conduct as protected by the First Amendment.

⁴¹ In *Ruffalo's Trucking Service, Inc.*, 119 N.L.R.B. 1268 (1958), the Board held that secondary picketing to pressure the primary employer to recognize a minority union was violative of both the secondary boycott provisions of the law as well as § 8(b)(1)(A). Thus, a product boycott achieved through appeals to customers or distributors of the primary employer's products would similarly appear to run afoul of § 8(b)(1)(A) notwithstanding the proviso. The proviso would merely render such conduct nonviolative of § 8(b)(4).

⁴² Concerning the effect of the new legislation on the *Curtis* doctrine, § 8(b)(7) added by the new act, which restricts recognition and organizational picketing, contains the following language at the end: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)." The conferees in commenting on this clause stated: "Section 8(b)(7) overrules the *Curtis* and *Alloy* cases to the extent that those decisions are inconsistent with section 8(b)(7)." H.R. REP. No. 1147, 86th Cong., 1st Sess. 41 (1959).

other than picketing.”⁴³ Publicity, other than picketing, would apparently embrace the use of all known media of communication such as video, radio, newspapers, telephone, publications, leaflets, including personal notification and solicitation as long as it was short of picketing.

This publicity must be

for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . .⁴⁴

The requirement of truth may well become a difficult problem. Something can be substantially true, honestly believed to be true, or partly true. A mere statement that a labor dispute exists, however, would appear safest, as the term is sufficiently broad so as to be all embracing and would seem to meet the requirement so long as the truth is also stated with regard to the distribution by the neutral employer of the primary employer's products.

Permitting publicity directed to members of a labor organization may conflict with such cases as *Genuine Parts Co.*, 119 N.L.R.B. 399 (1957), and *Humko Co.*, 121 N.L.R.B. No. 125 (1958), where the Board has found oral inducement at union meetings to be proscribed under section 8(b)(4). Inducement under section 8(b)(4) can take many forms including oral appeals, unfair lists, etc., as in *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951), and *Wadsworth Building Co.*, 81 N.L.R.B. 802 (1949).

The language of the proviso refers only to “products” and their distribution by another employer and apparently contemplates the classical situation of a retail store selling the products of a manufacturer with whom the union has a dispute. Nothing is said about service establishments or other forms of business relationships. All considered, it seems that the proviso generally is a narrow one when read strictly according to its terms. The legislative history does

⁴³ As stated earlier, the phrase “other than picketing” makes it clear that “consumer picketing” as permitted under Taft-Hartley is no longer legal.

⁴⁴ Apparently here only statutory employers are contemplated.

not indicate any desire, certainly, to liberalize the existing law under section 8(b)(4) with respect, *e.g.*, to the unfair listing of a secondary employer which has been held violative of the secondary boycott provisions.⁴⁵ The same is true of the existing law regarding secondary inducement, *e.g.*, illegal inducement of secondary employees at a union meeting.⁴⁶

Thus, it would appear that the proviso must essentially be read against the broad interdictory scope of the new section 8(b)(4)(ii) relating to coercion and restraint of any person. It would appear that the intention is to allow some restraint against a neutral distributor of products produced by a primary employer with whom the union has a dispute. This restraint of neutrals is permitted only through publicity directed to the public telling them that the neutral is distributing products of the primary employer.⁴⁷ No general boycott of the neutral distributor could be sought, albeit this might be an incidental result in some instances, but only a boycott limited to the "unfair" products.⁴⁸

Finally this publicity is permitted only

as long as such publicity does not have an effect of inducing any individual employed by any person⁴⁹ other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

We observe that once the publicity affects deliveries, etc., by other than primary employees at the neutral's establishment, the privilege is lost. This is so apparently regardless of a good faith or an intent not to affect deliveries. A question may arise as to whether such effect must be intended. The

⁴⁵ Wadsworth Bldg. Co., 81 N.L.R.B. 802 (1949).

⁴⁶ Truck Drivers and Helpers Union, Local 728, 119 N.L.R.B. 399 (1957).

⁴⁷ It must be remembered that consumer appeals naming only the primary employer, just as in the case of primary picketing, are not prohibited in any event by the secondary boycott provisions of §8(b)(4). Here we are discussing consumer boycotts affected at least in part through economic pressure on the neutral distributor by way of appeal to his customers.

⁴⁸ Address by General Counsel Rothman, *News and Background*, 45 LAB. REL. REP. 63 (1959), given before New York City Bar Ass'n.

⁴⁹ The use of the terms "individual" and "person" show no intent to limit the application to statutory employees only but would include supervisors and municipal employees, for example.

statute clearly does not read that way. However, if delivery stoppage at the neutral's establishment is a reasonably foreseeable consequence of publicity in a given situation, there may be a possibility that one will be held to have intended, as a matter of law, such foreseeable consequences.⁵⁰ The use of the phrase "at the establishment of the employer" supports the argument that the proviso only privileges publicity directed at a neutral employer who sells products as distinguished from a service establishment.

SECTION 704(B)

As we have seen, section 704(a) amends the secondary boycott provisions of the Taft-Hartley Act to close existing loopholes. Section 704(b) attempts, except with respect to two specific industries, to eradicate completely any vestiges that remain of the "hot cargo" loophole. It reads as follows:

(b) Section 8 of the National Labor Relations Act, as amended, is amended by adding at the end thereof the following new subsection:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts

⁵⁰ See *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

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

Importantly, it makes it an unfair labor practice on the part of both unions and employers to enter into "hot cargo" agreements. As discussed above, under clause (A) of the newly amended section 8(b)(4), a union violates the law by inducing work stoppages or by pressuring any employer to enter into a "hot cargo" agreement. If an employer and union, absent any work stoppage or pressure, but rather voluntarily, enter into such an agreement, while the union would not violate clause (A) of section 8(b)(4), both the union and employer would violate the new section 8(e). Moreover, any such agreements, including existing agreements, are void and unenforceable with respect to any "hot cargo" provision. While a "hot cargo" clause takes many forms,⁵¹ a typical clause, stated generally, reserves to employees the right to refuse to handle or perform services in connection with goods declared "unfair" by the union or manufactured at a plant involved in a labor dispute. The contract normally further provides that such a refusal to handle shall not be regarded as a breach of the bargaining contract or a cause for discharge.

Since such agreements are banned either when "express or implied," the prohibitory scope of section 8(e) is rendered very broad. Thus, a problem certain to arise is the legality of a common type of clause in labor agreements providing that it is not a violation of the agreement or a no-strike clause if an employee refuses to cross a picket line at another employer's establishment.

In this connection, attention is directed to the first proviso of clause (D) of section 8(b)(4) which was retained from the Taft-Hartley Act, to the effect that

⁵¹ For examples of "hot cargo" clauses, see American Iron and Machine Works Co., 115 N.L.R.B. 800 (1956), *aff'd*, 357 U.S. 93 (1958); Sand Door and Plywood Co., 113 N.L.R.B. 1210 (1955), *enforcement denied*, 241 F.2d 147 (9th Cir. 1957), *aff'd*, 357 U.S. 93 (1958); McAllister Transfer, Inc., 110 N.L.R.B. 1769 (1954); Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953); Conway's Express, 87 N.L.R.B. 72 (1949), *enforced*, 195 F.2d 906 (2d Cir. 1952). For history of "hot cargo" provisions before the Board, see 42 L.R.R.M. 2247-48 (1958).

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.

Thus, although a refusal by any person on his own to cross such a picket line is not unlawful for such person, an agreement between the employer and union covering the matter might possibly be regarded as within the broad ban on "hot cargo" agreements. Although the matter might be unilaterally covered satisfactorily by union rules, the subject is one unions normally desire to specifically cover in an agreement, among other reasons, to avoid contentions of breach of contract.

An exception to the general ban against "hot cargo" agreements is made for the building and construction industry in the first proviso "relating to contracting or subcontracting of work to be done at the site of the construction."

While this language would, at first glance, appear unambiguous, after the new bill had been passed and was before the President for signature, Senator McNamara and Representative Thompson introduced the following statement, which speaks for itself, into the Congressional Record to clarify congressional intent in this area:

Many building trade union officials advise me that there have been numerous questions submitted to them both by local union officers as well as contractors asking whether or not particular subcontracting clauses in their existing agreements are covered by the proviso to section 8(e) of the new Labor-Management Reporting and Disclosure Act of 1959. More particularly, the question has arisen by the Plumbers and Pipefitters International Union based on what is known as their fabricating clause. In the plumbing and pipefitting industry, contractors have a collective bargaining agreement with the plumbers and pipefitters local unions, recognizing the pipefitters local unions as the exclusive bargaining agent for all journeymen pipefitters engaged in fabrication and installation of pipe on a jobsite.

The collective bargaining agreement further provides that all pipe installed on the jobsite must be either fabricated on the jobsite or in a shop of the employer. By fabrication is meant the cutting,

bending, or fitting of pipe. A pipefitter is a fabricator. His job is to fabricate pipe. Fabrication of pipe can be performed either at the construction site or in a shop.

There is a further clause in the contract that provides that the contractor may subcontract out the pipe that is to be installed on the jobsite for fabrication in another shop provided that the subcontractor by whom the pipe is to be fabricated has an agreement with a local union of the pipefitters and pays the prevailing building and construction wage rate for pipefitters engaged in the fabrication.

This subcontracting clause is agreed upon in order to protect the wage rate and working conditions of the pipefitters. It is a term and condition of employment.

Section 8(e) was written in the Labor-Management Reporting and Disclosure Act of 1959, abolishing hot cargo clauses and other forms of contract boycotting activity. However, there was inserted the following proviso:

“Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.”

This proviso embraces and covers all forms of contracting or subcontracting clauses in agreements between building and construction contractors and building trades unions with respect to work to be done at the jobsite. The pipe installed on the jobsite must be cut, treated, and fabricated prior to installation. This is done at jobsite in some jobs or at the shop of the employer, or may be subcontracted by the contractor. This is all a question to be covered by the collective bargaining agreement.

The proviso permits plumbers and pipefitters local unions to bargain with their contractors relative to the contracting or subcontracting out of any fabrication of the pipe or the parties may agree that it may be done at the jobsite.

A question has arisen as to whether the plumbers and pipefitters fabrication clause falls within the proviso of section 8(e). It was the intent of the conferees that the quoted provision 8(e) applies wherever the work involved could be performed at the construction site. Fabrication can be and generally is performed at the construction site and since the fabrication clause relates to work which can be done at the jobsite, the fabrication clause contained in the national and local agreements of united association local unions is within the coverage of the construction industry proviso in section 8(e). This matter was expressly considered and discussed in the

conference on the labor reform bill. By use of the phrase "relating to work to be done at the site of the construction" it is my belief that the conferees intended to cover all work which could be done at the site of the construction. The type of building and construction clauses which are outlawed and do not fall within the proviso are clauses which restrict the use and installation of manufactured articles. The proviso, in my opinion as a conferee, was never intended to prohibit a fabrication type of clause where the work or fabrication could be done or performed at the jobsite.⁵²

Congressman Kearns at a later date introduced the following in rebuttal into the Congressional Record:

Mr. Speaker, section 8(e) of the Labor-Management Reporting and Disclosure Act makes it an unfair labor practice for a labor organization and an employer to enter into any agreement whereby the employer ceases or refrains or agrees to cease or refrain from doing business with any other person. The act makes such agreements void. The section provides, however, that the prohibition against such agreements does not apply to the construction industry relating to work to be done at the construction site. My attention has been called to a statement in the Appendix of the *CONGRESSIONAL RECORD* by Senator McNAMARA on September 14—page A8141 to the effect that, in his opinion, the prohibition on hot cargo agreements was not intended to prohibit a fabrication-type clause where the work of fabrication could be done or performed at the jobsite. This view of Senator McNAMARA does not coincide with mine. In my opinion it is contrary to the clear and literal meaning of the act and would, if accepted, open up a Pandora's box of evils in the construction industry which Congress meant to eliminate, not only in the Reporting Act but in the Taft-Hartley Act as well.

The Senate bill merely outlawed hot cargo agreements with common carriers. The House amendment interdicted agreements not to do business with another entered into by any employer. At the time of the consideration of this amendment there had been some discussion of a proposal to permit unions to picket a construction site if they had disputes with any contractor on the job. It was partly in this frame of reference that the proviso to section 8(e) was written which provides—

⁵² 105 CONG. REC. A8222-23 (daily ed. Sept. 15, 1959) (remarks of Representative Thompson); 208 CONST. LAB. REP. A-11 (Sept. 16, 1959) (remarks of Senator McNamara).

That nothing in this subsection (e) 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 construction.

As in the common-situs picketing problem, it was the location of the work that we had in mind and, as a reasonable compromise, we provided that the agreement must relate to work actually done at the site. Work done or products manufactured, processed, fabricated, and so forth by another employer away from the construction site could not be subject to a hot cargo agreement. It was not intended to restrict an employer's freedom to do business or purchase from any other person and to decide in what form the product or materials shall arrive on the job. Furthermore, to interpret the proviso to cover any work or product which could be done at the site would permit restrictions on the installation of many other products besides prefabricated pipe which arrive on the job in prefabricated form. This certainly was not in my mind.

The conference report supports my view. It states, at page 39, that the proviso in question relates only and exclusively to the contracting or subcontracting of work to be done at the site of construction and that it does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped to the site of construction. The legislative history in the Senate is also in accord with my view. On September 3, 1959, Senator KENNEDY, in reporting the conference agreement to the Senate, said at page 16415 of the RECORD:

It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

Senator MORSE also said, on the same day at page 16399 of the RECORD, in referring to the hot cargo amendment:

First. It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit.

The Senate Committee on Labor and Public Welfare printed a section by section analysis of the act, published September 10, 1959, and stated with respect to the section in question that the prohibition

against hot cargo agreements does not apply to the construction industry relating to work to be done at the construction site.

It seems clear to me, therefore, that an employer, even in the construction industry, retains the freedom to choose how the products or materials he utilizes shall arrive on the job—prefabricated or not—and that such freedom cannot be restricted by agreements with labor organizations.⁵³

The legislative history on this point which was contained in the Report by the Committee of Conference⁵⁴ states as follows:

It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction.

One's own conclusion can be drawn from the foregoing. The issue will undoubtedly be one of the earlier questions to be raised in a proceeding. As stated by General Counsel Rothman of the NLRB in his recent speech before the New York City Bar:⁵⁵ “. . . many of the final answers to these questions must be left to ‘litigating elucidation.’ ”⁵⁶

The exemption granted to the apparel and clothing industry by the second proviso is a complete one with relation to persons within the “integrated process” and so is much broader than the exemption given to the construction industry. Thus the former industry is exempted not only from the “hot cargo” ban in section 8(e) but, unlike the construction industry, also from the secondary boycott provision of clause (B) of section 8(b) (4).

The third and final proviso permits the enforcement of such “hot cargo” agreements in the clothing industry. Significantly, the last proviso does not apply to the construction industry exemption.

⁵³ 211 CONST. LAB. REP. A-11 (Oct. 7, 1959).

⁵⁴ H.R. REP. NO. 1147a, 86th Cong., 1st Sess. 39 (1959).

⁵⁵ Address by General Counsel Rothman, *News and Background*, 45 LAB. REL. REP. 63 (1959).

⁵⁶ *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

Beyond the exemption from the provisions of section 8(e), the construction industry proviso leaves existing law in effect. On this point the conferees stated:

The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 [1958]). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e). The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract.⁵⁷

Thus, it is made clear that while these agreements are not illegal, they may not be enforced through means proscribed by section 8(b)(4).

Accordingly, the exemption is a limited one. In the *Sand Door* case, the United States Supreme Court held that "hot cargo" agreements were not enforceable by work stoppages. By the same token, it would now appear under the new amendments to section 8(b)(4) that such agreements cannot be enforced by threats against an employer.⁵⁸ Another aspect to the illegality of enforcement of such contracts can be found in the *Associated General Contractors*⁵⁹ case.

⁵⁷ H.R. REP. No. 1147, 86th Cong., 1st Sess. 39 (1959).

⁵⁸ An interesting question is presented as to whether an action for violation of contract may be brought with respect to a breach of a legal subcontracting clause.

⁵⁹ 5 LAB. REL. REP. (44 L.R.R.M.) 2078 (D.C. Cir. May 8, 1959).

where the court, in enforcing a Board order, held that an employer violated section 8(a)(3) by causing a subcontractor to discharge its employees and that the union violated section 8(b)(2) by causing such discharges by a strike to enforce its subcontractors clause. The court, however, found no violation by the parties by reason of the employer's refusing to subcontract in the first instance except in accord with its subcontracting clause.

One of the more difficult problems is whether a union may strike to secure, as distinguished from to enforce, a legal subcontracting clause within the section 8(e) exemption to the construction industry.⁶⁰ The law with respect to the legality of a strike to obtain such a contract is not clear. If such an allowable provision is regarded as subject to mandatory, as distinguished from permissive, bargaining, it would logically follow that the union would have a right to engage in an economic strike to secure it. A possible indication that such a strike may be regarded as legal by the NLRB General Counsel can be obtained from an administrative ruling of the General Counsel on July 16, 1959.⁶¹ There the union struck for an exclusive hiring hall incorporating safeguards in conformity with the Board's *Mountain Pacific*⁶² case. The employer argued that hiring was a matter of employer prerogative and while the employer could voluntarily make the union its hiring agent, it was not compelled to do so. In short, the employer argued that the subject was basically a matter of permissive bargaining.⁶³ This contention was rejected by the General Counsel essentially on the ground that the hiring provision sought was legal on its face and thus the union could strike to secure such a hiring clause.

⁶⁰ A primary strike is, of course, referred to since a secondary work stoppage would be violative of § 8(b)(4).

⁶¹ *NLRB General Counsel Administrative Decision*, 44 L.R.R.M. 1364 (1959).

⁶² 119 N.L.R.B. No. 126, 126A.

⁶³ On a subject involving mandatory bargaining, a union may bargain to impasse and then strike. As to permissive matters, while they may be placed on the bargaining table for voluntary bargaining or agreement, a union can not bargain on such subjects to impasse. Thus, should an employer refuse to bargain about a permissive matter, the subject must be dropped or tabled. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

In conclusion, the new act has effectively closed several of the "loopholes" that had existed under the Taft-Hartley Act. Nevertheless, there are several areas of the new amendments which invite litigation. Finally, it might be observed that with respect to the status of the federal labor law regarding the exemption given to the construction industry particularly, one is impressed with the ever expanding intricacy and complexity of the law governing labor-management relations.