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Clarifying the Work Preservation/Work Acquisition Dichotomy Under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act: National Labor Relations Board v. International Longshoremen's Association

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**CLARIFYING THE WORK PRESERVATION/
WORK ACQUISITION DICHOTOMY
UNDER SECTIONS 8(b)(4)(B) AND
8(e) OF THE NATIONAL
LABOR RELATIONS ACT: *NATIONAL LABOR
RELATIONS BOARD v. INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION***

The National Labor Relations Act (NLRA or Wagner Act),¹ one of the first major federal laws governing the collective bargaining process between unions and unionized employers, is designed to promote industrial stability.²

1. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)) [hereinafter referred to as Wagner Act or NLRA].

2. Section 151 of the Act, in setting forth the statement of policy, declares that [t]he denial by [some] employers of the right of employees to organize and the refusal by [some] employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent . . . of burdening or obstructing commerce by . . . (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

29 U.S.C. § 151 (1982) (bracketed segments added to the Act by Taft-Hartley amendments of 1947).

See also W. OBERER, K. HANSLOWE & J. ANDERSON, *CASES AND MATERIALS ON LABOR LAW, COLLECTIVE BARGAINING IN A FREE SOCIETY* 110 (2d ed. 1979). The authors state that the Wagner Act was the "offspring of the economic collapse which followed the crash of 1929." Furthermore, the National Industrial Recovery Act of 1933, enacted as part of the "New Deal" legislation to tackle the economic collapse, and invalidated in *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), was the forerunner of the Wagner Act in that its administrative board promulgated decisions and established principles that "anticipated basic features" of the NLRA. *Id.* The Wagner Act contained two primary purposes: (1) it was designed to be the "constitutional hook" of a design to resolve labor disputes that inevitably interrupt the flow of commerce; and (2) it allegedly would enhance the purchasing power of workers collaterally through their increased bargaining power and thus, would deal with the effects of the Depression. *Id.*

See also Madden, *Origin and Early Years of the National Labor Relations Act*, 18 *HASTINGS L.J.* 571 (1967). Professor Madden, who was appointed by Secretary of Labor Frances Perkins to the newly-organized National Labor Relations Board (NLRB) in 1935, said, in referring to Senator Wagner, that "[t]he Senator's hope was that his law would make American working men free . . . that it would, in time, make them and their country affluent, by creating a great mass purchasing power for the products of American industry. He was right on both counts." *Id.* at 573. *See generally* H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 49-53 (1968).

Contra Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 *GEO. WASH. L. REV.* 199, 201-02 (1961). Keyserling was Senator Wagner's administrative assistant who worked with him on the project. He stated in his article that organized industry and the press

The declared policy of the NLRA is to eliminate substantial obstructions to the free flow of commerce "by encouraging the practice and procedure of collective bargaining."³ Subsequently, the framers of the Labor Management Relations Act (LMRA) recognized that certain union practices also tended to obstruct commerce, and amended the NLRA to prohibit certain union unfair labor practices.⁴

One type of unfair labor practice engaged in by unions is the secondary boycott, in which a union exerts economic pressure against an employer who deals with the union's employer but is not a direct party to the labor dispute.⁵ As opposed to primary activity, where a union attempts to exert pressure against an employer with which it has a labor dispute,⁶ secondary boycotts are attempts by a union to influence a third-party neutral, not directly involved in the controversy,⁷ with the "objective of forcing the third party to bring pressure on the employer to agree to the union's demands."⁸ The two principal factors determining whether primary or secondary activity is present are whether the employer against whom the union is exerting pressure is a truly neutral party, and whether the union is attempting to affect its relations with its employer or is instead attempting to achieve

were vehemently opposed to the legislation, and that it was even condemned by Walter Lippman who stated that, even if the bill passed, it would not work because "[i]t is preposterous to put such a burden on mortal men." *Id.* (citing Lippmann, *The Wagner Labor Bill*, N.Y. Herald Tribune, Mar. 28, 1935, at 21, col. 1).

3. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

4. Labor-Management Relations (Taft-Hartley) Act § 151, 29 U.S.C. § 141 (1947). *See generally* S. REP. NO. 105, 80th Cong., 1st Sess. 7-8, 22-23, reprinted in 1 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 413-14, 428-29 (1947) [hereinafter cited as 1 LMRA LEGISLATIVE HISTORY, 1947]. The Senate Report recounts public hearings given in which testimony was given relating to union activity that had "unduly impinged upon the rights of individual employees, employers, and the public." *Id.* at 7, 1 LMRA LEGISLATIVE HISTORY, 1947, at 413. The testimony revealed that "proposals designed to define and correct" many unfair union practices, such as secondary boycotts, had been presented to the committee. *Id.*

5. A secondary boycott is a "boycott of one who is not a direct party to the principal dispute and as a combination to influence a principal by exerting some sort of economic or social pressure against persons who deal with the principal." S. REP. NO. 1139, 86th Cong., 2d Sess. 2 (1960). The report also states that certain judicial determinations revealed the secondary boycott as being "in the nature of conspiracies in restraint of trade," and several states had outlawed the activity. *Id.*

6. *NLRB v. Local 825, Operating Eng'rs*, 400 U.S. 297 (1971). *See also* F. BARTOSIC & R. HARTLEY, *LABOR RELATIONS LAW IN THE PRIVATE SECTOR* 126 (1977).

7. Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KAN. L. REV. 651, 653 (1971).

8. *Local 825*, 400 U.S. at 303. *See* H.R. No. 510, 80th Cong., 1st Sess. 43, reprinted in 1 LMRA LEGISLATIVE HISTORY, 1947, *supra* note 4, at 547.

“union objectives elsewhere.”⁹

Despite the purpose and spirit enunciated in the Wagner Act, it failed to prohibit the proliferation of secondary union activity.¹⁰ Through enactment of the Taft-Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959, section 8(b)(4)(B) of the Act (NLRA) now imposes restrictions on secondary boycott activity by labor unions.¹¹ In addition, section 8(e)¹² prohibits “hot cargo” agreements whereby a union and an employer

9. F. BARTOSIC & R. HARTLEY, *supra* note 6, at 126. See also Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

10. See R. DERESHINSKY, *THE NLRB AND SECONDARY BOYCOTTS* 3, 4 (1972). Because of an intrinsic “Catch-22” effectuated by the conflicting policies of the Wagner Act and the Norris LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1970), (which was not repealed by Congress), unions were removed from antitrust proscriptions and at the same time, the injunction was limited as a tool in curbing secondary boycotts. R. DERESHINSKY, *supra* at 2. Consequently, an employer could neither legally accede to union demands nor look to the courts for injunctive relief. *Id.* at 3. “Strong unions were able to utilize the boycott as a means of exerting pressure in order to gain recognition or to gain economic benefits for their members.” *Id.* Dereshinsky states that the *laissez faire* philosophy perpetuated by the passage of Norris LaGuardia defined “labor dispute” broadly, and “Congress insured labor’s right to engage in sympathy strikes, secondary boycotts . . . and other activities,” a policy that was not eradicated, but rather accommodated, by the passage of the Wagner Act. *Id.* at 2.

11. Section 8(b)(4)(B), as amended in 1959, states in relevant portion:

It shall be an unfair labor practice for a labor organization or its agents—

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person

Provided, [T]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

61 Stat. 141, as amended, 73 Stat. 542, 29 U.S.C. § 158(b)(4)(B).

When Congress passed the LMRA in 1947 (Taft-Hartley), restrictions on secondary boycotts were incorporated into the Act. The language of § 8(b)(4)(B), enacted in 1947 and amended in 1959, was the successor clause of § 8(b)(4)(A). See *infra* note 48 and accompanying text. Professors Bartosic and Hartley succinctly summarize the essence of the secondary boycott proscriptions encompassed in § 8(b)(4)(B):

The words *secondary boycott* appear nowhere in the statute. Instead Section 8(b)(4)(B) proscribes specific unlawful means and objectives. To violate the section, a union must be found to have used an unlawful means to accomplish an unlawful object. The proscribed means, set forth in the introductory clause to Section 8(b)(4), are essentially strikes, refusals to handle goods or perform services, or inducement or encouragement of these activities, as well as restraint of any person. The forbidden object, set forth in Subsection B, essentially proscribes forcing or requiring any person to cease using or handling the products of another producer or to cease doing business with any other person. A proviso to Section 8(b)(4)(B) states ‘[t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.’

F. BARTOSIC & R. HARTLEY, *supra* note 6, at 123-24.

12. Section 8(e), enacted in 1959, provides that:

It shall be an unfair labor practice for any labor organization and any employer to

agree that the union will not be required to handle goods manufactured or transferred by another employer with which the union has a dispute or whom the union considers to be unfair to organized labor.¹³

The distinction between primary and secondary activity has become critical in the consideration of collectively-bargained contract provisions known as "work preservation clauses."¹⁴ When the object of such an agreement is to benefit members of the bargaining unit,¹⁵ or to maintain work that traditionally has been performed by bargaining unit employees,¹⁶ courts consider negotiation and enforcement of work preservation clauses to be primary activity falling outside the scope of sections 8(b)(4)(B) and 8(e) proscriptions.¹⁷ By contrast, if the agreement tends to secure for the bargaining unit any work that has never been performed by the union workers,¹⁸ or tends to benefit union members in a general sense,¹⁹ it constitutes what is termed

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, any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

Pub. L. No. 86-257, 73 Stat. 543 (1959) (codified as amended at 29 U.S.C. § 158(e) (1982)).

13. A "hot cargo" clause is one which "requires an employer, a neutral party, to refrain from handling products of another or to cease doing business with another person with whom the union has a dispute." *Western Washington Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc.*, 26 Wash. App. 224, 230-31, 612 P.2d 436, 440 (1980).

The McClellan Report stated that "[e]ssentially the 'hot cargo' clause is an agreement between a union and a unionized employer that his employees shall not be required to work on or handle 'hot goods' or 'hot cargo' being manufactured or transferred by another employer with whom the union has a labor dispute or whom the union considers and labels as being unfair to organized labor." S. REP. NO. 1139, *supra* note 5, at 3 (1960). See also F. BARTOSIC & R. HARTLEY, *supra* note 6, at 138. Hot cargo clauses, also called "hot goods" clauses, were often generated as a result of the collective bargaining process, and negotiation of these agreements maximized union economic pressure. *Id.*

14. See *A. Duie Pyle, Inc. v. NLRB*, 383 F.2d 772, 775-76 (3d Cir. 1967); see *infra* note 96 and accompanying text.

15. See *A. Duie Pyle*, 383 F.2d at 776.

16. *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547 (8th Cir.), *cert. denied*, 398 U.S. 960 (1968) (union conduct not violative where collective bargaining agreement seeks to preserve "traditional work," and such work extenuates to that "which unit employees have performed and are still performing at the time they negotiated a work preservation clause"). *Id.* at 552. In *American Boiler Mfrs. Ass'n*, the court did not rule on "whether . . . [a work preservation clause] can be enforced if the objective is to acquire work which unit employees had never performed . . ." *Id.*

17. See *infra* note 102 and accompanying text.

18. See, e.g., *Sheet Metal Workers, Local 216 (Associated Pipe & Fitting Mfrs.)*, 172 N.L.R.B. 35 (1968) (restriction on purchase of prefabricated materials from manufacturers who did not pay prevailing wage rate illegal).

19. See *Meat & Highway Drivers v. NLRB*, 335 F.2d 709, 716 (D.C. Cir. 1964); *Orange*

“work acquisition,”²⁰ and falls within the secondary boycott proscriptions of the LMRA.

The distinction between lawful work preservation agreements and unlawful work acquisition agreements has been examined in several recent United States Supreme Court decisions.²¹ At issue have been collectively-bargained rules that reserve to longshoremen particular loading and unloading of containers that is done within a fifty-mile radius of the port.²² The Supreme Court first addressed the propriety of these agreements in *International Longshoremen's Association v. National Labor Relations Board (ILA-I)*.²³ It held that a lawful work preservation agreement requires two elements: first, the agreement must be designed to preserve work for union members of the bargaining unit, rather than to achieve some secondary goal; and second, the employer must be in a position to allocate the work covered by the agreement.²⁴ In *ILA-I*, the Court held that the Board had erroneously defined the work in dispute, and it remanded the case to the NLRB with instructions that it reevaluate the rules.²⁵

It was not until *National Labor Relations Board v. International Longshoremen's Association (ILA-II)*²⁶ that the Supreme Court finally put to rest the ambiguity of the work preservation/work acquisition dichotomy by approving the two-step analysis formulated in *ILA-I*. Affirming the United States Court of Appeals for the Fourth Circuit, the Supreme Court reviewed the criteria for work preservation and overruled the NLRB's decision that the rules on containers were unlawful work acquisition in violation of sections 8(b)(4)(B) and 8(e).²⁷ On remand from *ILA-I*, the Board held that the rules constituted an unfair labor practice under the Act because of their ef-

Belt Dist. Council of Painters v. NLRB, 328 F.2d 534 (D.C. Cir. 1964); Truck Drivers Union, Local No. 413 v. NLRB, 334 F.2d 539, 548 (D.C. Cir. 1964).

20. See *infra* note 100 and accompanying text. The Board has continued to place primary reliance “on the determination that the work in question has never been performed by the employees.” Note, *Work Preservation and the Secondary Boycott: An Examination of the Decisional Law Since National Woodwork*, 21 SYRACUSE L. REV. 907 (1970).

21. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967). This case “established the work preservation doctrine as the main criterion for determining the legality or illegality of activity under § 8(e).” R. DERESHINSKY, *supra* note 10, at 113. See *infra* notes 23, 26, 107-08, 166, 198-99, and accompanying text.

22. See *Intercontinental Container v. New York Shipping Ass'n (NYSA)*, 426 F.2d 884 (2d Cir. 1970). This was the first case to litigate the Rules on Containers. See *infra* note 154-57 and accompanying text. Cargo loading and unloading is referred to as “stuffing and stripping” in the longshore industry. See *infra* note 160 and accompanying text.

23. 447 U.S. 490 (1980).

24. *Id.* at 504.

25. *Id.* at 511.

26. 105 S. Ct. 3045 (1985).

27. *Id.*

fect on shortstopping truckers²⁸ and traditional warehousemen,²⁹ and determined that they were illegal work acquisition because they sought to reacquire longshore work that had been eliminated by intermodal containerization.³⁰

The Supreme Court held that Congress intended sections 8(b)(4)(B) and 8(e) to reach only secondary activity,³¹ and it determined that the NLRB had erred in viewing the extra-unit effect on the shortstoppers as a dispositive indication of unlawful secondary objectives.³² In addition, the Court stated that the NLRB erred in holding that work that has been eliminated is never a proper object of work preservation agreements.³³

Justice Rehnquist, joined in dissent by two other members of the Court,³⁴ maintained that the rules violated the plain language of sections 8(b)(4)(B) and 8(e).³⁵ He chastised the majority for failing to recognize that the rules were an attempt by the union to "extend its influence beyond the unit employer and the traditional bargaining issues" to appropriate or retain jobs through impermissible means.³⁶ The dissent asserted that because the rules permitted longshore labor to obtain work that it had not traditionally performed, the "intent and effect" directly contravened lawful work preservation principles. Finally, the dissent maintained that the majority had placed undue emphasis on the work in dispute. Thus, by "refusing to allow a review of the larger economic scene," he contended that the Court managed to focus solely on the narrow issue of work preservation.³⁷

This Note will suggest that the Supreme Court's decision in *ILA-II* properly reinforced the principles applicable to work preservation agreements set forth by earlier case law. To this end, the Note will examine the enactment of sections 8(b)(4)(B) and 8(e). It will evaluate judicial determinations in the work preservation/work acquisition sphere, and the application of these

28. *Id.* at 3051. See *infra* note 186 and accompanying text.

29. 105 S. Ct. at 3051. See *infra* note 187 and accompanying text.

30. 105 S. Ct. at 3052. The United States Court of Appeals for the Fourth Circuit reversed the NLRB, stating that the "Board had failed to make any factual finding that the Rules actually operate to deprive [parties] of any work," and that an agreement that preserves duplicative work or work that has been technologically "eliminated" per se does not necessarily become "work acquisition." *Id.* See *infra* note 207 and accompanying text.

31. 105 S. Ct. at 3055.

32. *Id.* at 3056.

33. *Id.*

34. *Id.* at 3059 (Rehnquist, J., dissenting).

35. *Id.* at 3060.

36. *Id.* at 3062. Justice Rehnquist asserted that the very conduct the union was engaging in was the "secondary activity" with which Congress was concerned. *Id.*

37. *Id.* at 3063. Justice Rehnquist contended that the Court "hides the ILA's work acquisition under one shell and then forces all attention on the limited question of the union's intent in bargaining with its employer." *Id.*

principles to collectively-bargained Rules on Containers as lawful work preservation agreements. Finally, the Note will conclude that the Court in *ILA-II* reinforced a tenable formula for work preservation that comports with established principles of national labor law and industrial stability.

I. SECONDARY BOYCOTT AND HOT CARGO PROVISIONS: DELINEATING THE PRIMARY-SECONDARY FOCUS

A. Overview of Secondary Boycott Provisions: Tackling the Chameleon

Historically, "primary activity," through which a union exerts pressure against an employer with which the union is in dispute (the "primary employer") has been viewed as legitimate union conduct.³⁸ Thus, labor legislation frequently has attempted to insure that particular union weapons, such as strikes, boycotts, and picketing, would be used only against primary employers.³⁹ When the union activity attempts to induce nondealing with another employer (the "secondary employer") by economic threats, however, the activity "goes beyond the bounds of fair persuasion" and is impermissible secondary conduct.⁴⁰ At common law, courts tended to condemn as secondary any pressure that targeted a neutral secondary employer for the purpose of forcing that employer to cease dealing with the primary employer.⁴¹

Although the distinction between primary and secondary activity has been described as not "glaringly bright" and "more nice than obvious,"⁴² it is an attempt to recognize both a labor union's right to pressure its employer in a primary dispute, and also, to protect a truly neutral party from opprobrious

38. R. SMITH, L. MERRIFIELD, T. ST. ANTOINE & C. CRAVER, *LABOR RELATIONS LAW, CASES AND MATERIALS* 365 (1984) [hereinafter cited as R. SMITH].

39. *Local 825*, 400 U.S. at 303.

40. R. SMITH, *supra* note 38, at 365. See also *Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 672 (1961).

41. R. SMITH, *supra* note 38, at 365.

42. *Local 761*, 366 U.S. at 673-74 (picketing at gate of neutral subcontractor found unlawful where union's objective was to involve neutral employees in the dispute). *Id.* at 670-71. The test outlined by the court in determining specific objectives that were illegal under § 8(b)(4)(B) was that "[e]mployees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person." *Id.* at 673. Judge Learned Hand, in *International Bhd. of Elec. Workers, Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950) stated that "[t]he gravamen [sic] 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 business with the employer in the hope that this will induce the employer to give in to his employees' demands." *Id.*

behavior in disputes not their own.⁴³ The concept of the secondary boycott is ambiguous and confusing, but it has been described as “a combination to influence *A* by exerting some sort of economic or social pressure against persons who deal with *A*.”⁴⁴ This pressure must be calculated to “[force] the third party to bring pressure on the employer to agree to the union’s demands.”⁴⁵

The use of secondary boycotts by unions became a target of congressional action.⁴⁶ Sections 8(b)(4)(B) and 8(e) of the Act had their genesis in early judicial application of the Sherman Antitrust Act, which courts invoked liberally to enjoin unions’ coercive pressure.⁴⁷ Concluding that extensive abuses proliferated during the Norris-LaGuardia era, a majority in Congress subsequently enacted the Taft-Hartley proscriptions against union secondary activity encompassed in section 8(b)(4)(A) of the Act.⁴⁸ Proponents of the

43. F. BARTOSIC & R. HARTLEY, *supra* note 6, at 124-26. See also *Local 825*, 400 U.S. at 302-03.

44. St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 U. DET. L.J. 189 (1962) (quoting F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 43 (1930)).

45. *Local 825*, 400 U.S. at 303.

46. See *supra* notes 4-5 and accompanying text.

47. The Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1982)). Although applications of antitrust legislation to secondary boycott are outside the scope of this Note, they did play a role in the ultimate shaping and evolution of the secondary boycott proscriptions as they appear in modern form. For informative background material, see *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 445 (1921) (§ 6 of the Clayton Act contains “nothing . . . to exempt [a union] or its members from accountability [when] . . . they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade.”); *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 800-03 (1945) (history of federal court injunctions against various forms of labor collective activity as unlawful restraints of trade under the Sherman Antitrust Act). A Supreme Court decision in 1941 terminated application of the antitrust law to union secondary activity. See *United States v. Hutcheson*, 312 U.S. 219 (1941); see also F. BARTOSIC & R. HARTLEY, *supra* note 6, at 123.

48. This section provides, in relevant part:

(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 [*the employees of any employer*] to engage, in a strike or a [concerted] refusal in the course of [their] employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where an object thereof is—

(A) forcing or requiring any employer . . . [to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, or manufacturer, or to cease doing business with any other person] . . .

29 U.S.C. § 158(b)(4)(i)(A) (1982) (emphasis added; bracketed portions eliminated in 1959 amendments).

See also S. REP. NO. 105, *supra* note 4, at 22, 1 LMRA LEGISLATIVE HISTORY, 1947, *supra* note 4, at 428. In setting out the proscriptions of the Taft-Hartley amendments, the report states that

strikes or boycotts, or attempts to induce or encourage such action, are made viola-

amendments, including the bill's sponsor, specifically indicated that the legislation was aimed only at secondary pressures, and that primary activity remained permissible.⁴⁹

*B. Application of the Secondary Boycott Provisions
to Union Contract Clauses*

The NLRB and the courts have consistently and uniformly invoked these provisions only against secondary union conduct.⁵⁰ The Supreme Court has reinforced this narrow interpretation by refusing to prohibit primary strikes and picketing notwithstanding a collateral impact on neutral employers.⁵¹

tions of the Act if the purpose is to force an employer or other person to cease using, selling, handling, transporting . . . or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

Id.

In enacting § 8(b)(4)(A), Congress aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread . . . dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods.

Local 1976, United Bhd. of Carpenters & Joiners v. NLRB (Sand Door), 357 U.S. 93, 100 (1958). See generally Lesnick, *supra* note 9.

49. See *National Woodwork*, 386 U.S. at 623, 624. The Court observed that "[c]ommentators of the post Norris-LaGuardia era . . . while continuing to deplore the chameleon-like qualities of the term 'secondary boycott,' agreed upon its central aspect: pressure tactically directed toward a neutral employer in a labor dispute not his own." *Id.* at 623. See also 1 C. TELLER, THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING § 145 (1940); S. REP. NO. 105, *supra* note 4, reprinted in 1 LMRA LEGISLATIVE HISTORY, 1947, *supra* note 4, at 407; H.R. REP. NO. 510, at 43, reprinted in 1 LMRA LEGISLATIVE HISTORY, 1947, *supra* note 4, at 547.

50. See Lesnick, *supra* note 9, at 1364.

51. *Local 825*, 400 U.S. at 303. See also *Local 761*, 366 U.S. at 672-73. The limitation to secondary situations was in conformity with the "'dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.'" *Id.* at 679 (quoting *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951)). See also *DiGiorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951); *J.G. Roy & Sons Co. v. NLRB*, 251 F.2d 771 (1st Cir. 1958); *Rabouin v. NLRB*, 195 F.2d 906, 912 (2d Cir. 1952); *Piezonki v. NLRB*, 219 F.2d 879 (4th Cir. 1955); *NLRB v. General Drivers, Warehousemen & Helpers, Local 968*, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); *Local 618, Automotive Petroleum Employees Union v. NLRB*, 249 F.2d 332 (8th Cir. 1957); *NLRB v. Local Union No. 55*, 218 F.2d 226 (10th Cir. 1954).

See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73

Accordingly, primary activity will not be transformed into prohibited secondary conduct merely because it has a severe impact on neutral employers.⁵² The Court thus has reinforced that the purpose of section 8(b)(4)(A) was to shelter only truly neutral employers from the reach of union pressure and has recognized that section 8(b)(4)(A) was not subject to literal interpretation.⁵³ The Court stated that the provision specifically prohibited "the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods."⁵⁴

Before the enactment of section 8(e) the enforcement of hot cargo clauses⁵⁵ was regulated under section 8(b)(4)(A).⁵⁶ However, both the NLRB and the courts have had difficulty ascertaining the legality of the enforcement of such clauses against secondary parties.⁵⁷ Courts addressing hot cargo clauses under section 8(b)(4)(A) permitted contractually-bargained hot cargo agreements to remain outside the reach of the provision. The first case to come before the Board after the enactment of section 8(b)(4)(A), *Teamsters Local 294 (Conway's Express)*,⁵⁸ involved a multiemployer agreement that allowed the union to refuse to handle goods of any employer involved in a labor dispute. The union solicited the assistance of secondary employees to refuse to handle goods in furtherance of a strike called against Conway for an alleged breach of Conway's obligations under another provision of the agreement.⁵⁹ The NLRB found that when the secondary employers had consented in advance to the boycott, the employees were merely exercising their contractual rights.⁶⁰ The Board stated that section 8(b)(4)(A) did not "prohibit *employers* from refusing to deal with other persons, whether because they desire to assist a labor organization in the

HARV. L. REV. 1086, 1112 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

52. Cox, *supra* note 51, at 271.

53. See NLRB v. International Rice Milling Co., 341 U.S. 665 (1951) (fortuitous impact on neutral employees by primary union strikers not within proscriptions of § 8(b)(4)(A)). See also F. BARTOSIC & R. HARTLEY, *supra* note 6, at 124. But see NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688-89 (1951).

54. *Sand Door*, 357 U.S. at 100.

55. See *supra* notes 12-13 and accompanying text.

56. R. DERESHINSKY, *supra* note 10, at 96.

57. *Id.* at 97.

58. 87 N.L.R.B. 972 (1942), *aff'd sub nom.* Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952). See also Pittsburgh Plate Glass, 105 N.L.R.B. 740 (1953) (refusal to handle freight per bargaining contract between union and employer permissible).

59. *Conway's Express*, 87 N.L.R.B. at 981-82.

60. *Id.* at 982 (nothing in § 8(b)(4)(A) precluded voluntary execution of "hot cargo" or "struck work" provisions in the collective bargaining agreement).

protection of its working standards, or for any other reason.”⁶¹ Consequently, *Conway* established that a hot cargo clause was not a per se violation of section 8(b)(4)(A) because the section simply did not proscribe any additional means of inducement of employees by the union.⁶² The case was affirmed by the United States Court of Appeals for the Second Circuit.⁶³

C. Hot Cargo and Loopholes—The Sand Door Decision

In 1958, the Supreme Court’s holding in *Local 1976, United Brotherhood of Carpenters and Joiners v. NLRB (Sand Door)*⁶⁴ effectively overruled *Conway’s Express*.⁶⁵ After reviewing the “checkered career” of the NLRB in this arena,⁶⁶ the Court rejected the union’s argument that an employer who has voluntarily entered into a hot cargo contract should not be protected. The union had contended that the purpose of the statute was to extricate truly neutral parties from involuntary participation in third party labor disputes, but that this reasoning was inapplicable to voluntary employers.⁶⁷ The Court noted that the NLRB “has rejected the argument as not comporting with the legislative purpose to be drawn from the statute.”⁶⁸ It determined that an employer must have an uncoerced choice whether to support secondary objectives, regardless of any private contractual arrangement.⁶⁹ Permitting the union to use section 8(b)(4)(A) to justify activity that would in effect be impermissible in the absence of the hot cargo clause, the Court reasoned, would defeat the narrow legislative purpose contemplated by Congress.⁷⁰ Although the Court stated that while “[a] voluntary employer boycott does not become prohibited activity simply because a hot cargo clause exists,”⁷¹ the existence of the clause will not operate as a defense to an employer’s unfair labor practice charge where the union engages in conduct prohibited by section 8(b)(4)(A).⁷²

61. *Id.* (emphasis in original).

62. *Id.* at 982-83 (quoted by R. DERESHINSKY, *supra* note 10, at 98-99). In dissent, Member Reynolds chastised the majority for ignoring reality, stating that to the extent the union contract provisions authorize secondary activity, “they are repugnant to the basic public policies of the Act.” He proposed that “contracts which are repugnant to the Act and which conflict with this duty of the Board must obviously yield.” R. DERESHINSKY, *supra* note 10, at 98 (quoting *Conway’s Express*, 87 N.L.R.B. at 995).

63. 195 F.2d 906 (2d Cir. 1952).

64. 357 U.S. 93 (1958).

65. 87 N.L.R.B. at 972.

66. 357 U.S. at 101-103.

67. *Id.* at 105.

68. *Id.*

69. *Id.*

70. *Id.* at 100, 105.

71. *Id.* at 107.

72. *Id.* at 108.

*D. Response to Excess: The Legislative Intent of
Sections 8(b)(4)(B) and 8(e)*

The language of section 8(b)(4) prompted one writer to state that it is "surely one of the most labyrinthine provisions ever included in a federal labor statute."⁷³ Although attempting to reduce unfair labor practices in which unions engaged, section 8(b)(4), in its original form as section 8(b)(4)(A),⁷⁴ allowed unions to achieve unlawful objectives by circumventing the explicit proscriptions of the provision.⁷⁵ The *Sand Door* decision had demonstrated that a loophole existed in the secondary boycott provisions and, as a result, Congress enacted section 8(e) to proscribe the execution of hot cargo clauses.⁷⁶ Thus, where the NLRB's decision in *Conway's Express*⁷⁷ held that neither the making nor the enforcement of a hot cargo

73. Aaron, *supra* note 51, at 1113.

74. Section 8(b)(4) prohibited a union from inducing or encouraging "employees of any employer to engage in, a strike or a concerted refusal in the course of their employment." 29 U.S.C. § 158(b)(4)(ii) (1959).

75. The provision did not proscribe illegal objectives where inducement of a *single* employee was concerned "since it involved neither a strike nor a concerted refusal to work." Aaron, *supra* note 51, at 1113. Additionally, if persons whom the union attempted to "induce or encourage" did not qualify as "employees," or worked for an organization exempt from the definition of "employer," the union also could circumvent the provision. *Id.* Also, pressure exerted on the secondary employer as opposed to employees, was not prohibited. *Id.*

See also H.R. REP. NO. 741, 86th Cong., 1st Sess. 20-21, reprinted in 1 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 778-79 (1959) [hereinafter cited as 1 LMRDA LEGISLATIVE HISTORY, 1959], where the Committee on Education and Labor reported that the inclusion of a hot cargo prohibition in the amendment would "close a loophole in the present law against secondary boycotts." Because the essential elements of § 8(b)(4)(A) were the inducement of employees by the union and a strike or concerted refusal to perform services, an inducement of employees by the union alone produced no unfair labor practice. *Id.* at 21, 1 LMRDA LEGISLATIVE HISTORY, 1959, at 779. The amendment sought to remedy this gap in the legislation.

But see Cox, *supra* note 51, at 257. Professor Cox stated that one of the propositions of the amendments was that "strong independent labor unions are essential institutions in American society." *Id.*

76. *Sand Door*, 357 U.S. at 93. For text of § 8(e), see *supra* note 12; see also H.R. REP. NO. 1147, 86th Cong., 1st Sess. 38-40 (1959), reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 942-44.

A typical hot cargo clause in a collective bargaining agreement would read:

It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees . . . refuse to handle unfair goods. . . . The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from or deliveries to establishments where picket lines, strikes, walk-out or lockout exist.

Truck Drivers & Helpers, Local 728, 119 N.L.R.B. 399, 400 (1957).

77. 87 N.L.R.B. at 979.

clause was illegal, the Supreme Court's decision in *Sand Door*⁷⁸ modified this position by upholding the execution of a contract, but not as a defense to an unfair labor practice. Therefore, with the enactment of section 8(e), Congress sought to eliminate entirely the execution of hot cargo clauses in collective bargaining agreements.⁷⁹

The addition of clause (B) to section 8(b)(4) proscribed union activity "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,"⁸⁰ thereby removing the interstices in the secondary boycott prohibitions. Moreover, in response to the Court's decision in *NLRB v. International Rice Milling Co.*,⁸¹ that construed the word "concerted" to apply to inducement of two or more employees, the word "concerted" was eliminated in the revision.⁸²

Inclusion of the primary strike proviso in clause (B) preserved a union's right to engage in primary activity.⁸³ While the intent of Congress in enact-

78. 357 U.S. 93 (1958).

79. See, e.g., H.R. REP. NO. 741, *supra* note 75, at 20-21, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 778-79; S. REP. NO. 187, 86th Cong., 1st Sess. 78-80, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 474-76: "These 'hot cargo' contracts have been the subject of much litigation before the Board. . . . [a] review of these cases leads to the conclusion that . . . generally speaking [a hot cargo contract] does provide a large loophole in the ban on secondary boycotts." *Id.* at 80, 1 LMRDA LEGISLATIVE HISTORY 1959, *supra* note 75, at 476.

80. § 8(b)(4)(B), 29 U.S.C. § 150(b)(4)(i)(B) (1982). Although § 8(b)(4)(B) does not explicitly mention secondary boycotts, the Act "proscribes specific unlawful means and objectives. To violate the section, a union must be found to have used an unlawful means to accomplish an unlawful objective," for instance, strikes or refusals to handle goods, or "inducement or encouragement of these activities." F. BARTOSIC & R. HARTLEY, *supra* note 6, at 123-24. An impermissible secondary objective proscribed by the Act would be to force or require "any person to cease using or handling the products of another producer or to cease doing business with any other person." *Id.* at 124.

81. 341 U.S. 665 (1951).

82. See Cox, *supra* note 51, at 274. "Section 8(b)(4)(A) of the Taft-Hartley Act forbade only the inducement of 'employees' to engage in a concerted refusal to work 'in the course of their employment.' The amendments make it unlawful 'to threaten, coerce or restrain any person' where an object is to force him to cease doing business with any other person." *Id.*

83. The proviso reads: "Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U.S.C. § 158(b)(4)(B) (1982).

See H.R. REP. NO. 1147, *supra* note 76, at 38, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 942, and Senator Kennedy's explanation, 105 CONG. REC. 16,413-14 (1959), reprinted in 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1431-32 (1959) [hereinafter referred to as 2 LMRDA LEGISLATIVE HISTORY, 1959].

See also Aaron, *supra* note 51, at 1116. The author states that the net effect of the two provisions would be that, although "picketing at the site of the primary dispute" would not be unlawful even if it results in encouraging employees of a secondary employer to cease handling

ing section 8(e) and revising section 8(b)(4)(B) was to curtail activity that section 8(b)(4)(A) permitted,⁸⁴ this proviso indicated a congressional desire to remove primary activity from the reach of the Act.⁸⁵ Thus, "Congress intended merely to reflect the existing law."⁸⁶ Likewise, the committee reports and debates concerning section 8(e) strongly indicate that Congress intended to close a loophole left by the *Sand Door* decision,⁸⁷ and the final hearings before the Senate Select Committee confirmed that the drafters' objective was to eliminate pervasive secondary conduct by unions.⁸⁸ Similarly, the legislative history of section 8(e) confirms that the provision did not expand the conduct forbidden by section 8(b)(4)(A).⁸⁹ Thus, section 8(e) pro-

goods, "intentional inducement of even individual employees of a secondary employer, if accomplished away from the site of the primary dispute, will be deemed an unfair labor practice." *Id.*

84. See 105 CONG. REC. S1567 (daily ed. Feb. 4, 1959) (statement of Sen. Dirksen), reprinted in 2 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 83, at 993:

The administration's bill would eliminate areas of presently permissible secondary activity which lead to the injury of innocent third parties No bill which fails to contain provisions in these areas of blackmail picketing and the secondary boycott loopholes can claim to be a truly effective labor reform measure The testimony before the select committee again and again illustrated the method by which certain unions . . . utilized the inadequacies of the present secondary boycott provisions to force employers to do business with only those people approved by union officials.

Id.

85. H.R. REP. NO. 1147, *supra* note 76, at 38, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 942 ("The purpose of this provision is 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.").

86. *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 526 (1977) ("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.") (quoting H.R. REP. NO. 1147, *supra* note 76, at 38, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 942).

87. 357 U.S. 93 (1958). See, e.g., S. REP. NO. 187, *supra* note 79, at 78-80 (minority views), reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 474-76; H.R. REP. NO. 741, *supra* note 75, at 20-21, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 778-79. The Report stated that a review of the decisions before the NLRB, the courts and the Interstate Commerce Commission produced evidence that generally a hot cargo clause provides "a large loophole" in the prohibition on secondary boycotts, notwithstanding where such a clause is no defense to an unfair labor practice. S. REP. NO. 187, *supra* note 79, at 80 (minority views), reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 476. The 1959 amendment proposed to make it an unfair labor practice for a union to "coerce an employer to enter into such an agreement, or having entered into it, for a union to coerce the employer to live up to it, or to induce his employees to take economic action to force the employer to live up to it." *Id.* The Taft-Hartley amendments merely imposed restrictions on the latter. *Id.*

88. See generally FINAL REPORT OF THE SENATE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, S. REP. NO. 1139, *supra* note 5.

89. See S. REP. NO. 187, *supra* note 79, at 78, reprinted in 1 LMRDA LEGISLATIVE HISTORY, 1959, *supra* note 75, at 474 (ban of secondary boycotts primarily to protect "genuinely neutral" employers against economic coercion by union in a labor dispute unrelated to

hibits agreements with secondary objectives where the enforcement of such agreements would violate section 8(b)(4).⁹⁰ Finally, inclusion of the construction and garment industry provisos has been interpreted as "strong confirmation that Congress meant that both sections 8(e) and 8(b)(4)(i)(B) reach only secondary objectives."⁹¹

II. POST-SECTION 8(E) DEVELOPMENT

A. *The Work Preservation Doctrine: National Woodwork Manufacturers Association v. NLRB*

In the years following the enactment of section 8(e), hot cargo provisions continued to appear in collective bargaining agreements. Some of these provisions included, for instance, struck work and picket line clauses,⁹² and most notably, work allocation clauses.⁹³ Because of the broad language of section 8(e), the latter classification proved to be the most troublesome,⁹⁴ and the subsequent evolution of a broad interpretation of section 8(e) was to have a far-reaching impact on the ultimate construction of all hot cargo clauses.⁹⁵

Work preservation clauses are contract clauses negotiated by a union or

the neutral employer); see also *A. Duie Pyle*, 383 F.2d at 775-76; *Goetz*, *supra* note 7, at 664 ("sweep of § 8(e) no broader than § 8(b)(4)(B)"); R. DERESHINSKY, *supra* note 10, at 114; Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965); *National Woodwork*, 386 U.S. at 635 ("[a]lthough the language of § 8(e) is sweeping, it closely tracks that of § 8(b)(4)(A), and just as the latter and its successor § 8(b)(4)(B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, § 8(e) does not prohibit agreements made and maintained for that purpose").

90. *St. Antoine*, *supra* note 44, at 207. The author illustrates the method by which section 8(e) violations are analyzed:

When an agreement is brought into question under section 8(e) . . . the test generally should be whether a union would violate the secondary boycott ban of section 8(b)(4)(B) by inducing employee conduct of the type authorized by the agreement, or by inducing employees to make their employer do what he has committed himself to in the agreement. If the inducement would be a violation of section 8(b)(4)(B), the agreement should be held a violation of section 8(e). But if the agreement does not sanction a secondary boycott it should be sustained.

Id.

91. *National Woodwork*, 386 U.S. at 638. Note the Court's argument concerning the probative value of the garment industry proviso as a justifiable exception. *Id.*

92. See, e.g., *Truck Drivers, Local No. 413*, 140 N.L.R.B. 1474 (1963), *enforced in part*, 334 F.2d 539 (D.C. Cir. 1964).

93. See *Meat & Highway Drivers v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964).

94. R. DERESHINSKY, *supra* note 10, at 109. Compare *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964) with *Machinists Dist. 9 (Greater St. Louis Automotive Ass'n)*, 134 N.L.R.B. 1354 (1961), *enforced*, 315 F.2d 33 (D.C. Cir. 1962).

95. R. DERESHINSKY, *supra* note 10, at 113.

acquired through concerted activity "to protect for [a union's] members, in a particular collective bargaining unit, the various work assignments that they have traditionally or historically performed and are currently performing."⁹⁶ Subsequent to enactment of section 8(e), the decisions had developed guidelines to govern lawful work preservation or, alternatively, to identify clauses that had an impermissible work acquisition objective.⁹⁷ The NLRB developed a test that enabled a union to preserve any work currently being performed if it was traditionally performed by the bargaining unit employees.⁹⁸ The Board would not subject contract provisions of this nature to the secondary boycott and hot cargo sanctions of the Act.⁹⁹ Conversely, the Board would find an illegal work acquisition objective where bargaining unit employees sought to obtain work never performed by the unit or for union members generally,¹⁰⁰ but "lost" work could be legitimately secured again.¹⁰¹

Courts of appeals have consistently recognized that although a valid work preservation clause may have an impact on third parties, that impact does not necessarily transform the clause into illegal secondary activity.¹⁰² Although the courts generally have enforced Board orders in determinations

96. Note, *supra* note 20 at 907. The work preservation doctrine "provides generally that efforts to preserve work for employees displaced by technological innovation are not unlawful secondary activities and that union-management contracts with the same purpose are not proscribed 'hot cargo' agreements." *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 892 (D.C. Cir. 1979). *See also* *International Bhd. of Teamsters*, 197 N.L.R.B. 673 (1972) ("the provisions do not proscribe agreements or conduct aimed at recapturing or reclaiming for unit employees work which they previously performed"). Furthermore, courts of appeals have consistently held that a valid work preservation clause is not transformed into prohibited secondary activity merely because of its serious impact on third parties. *See, e.g., Local No. 742, United Bhd. of Carpenters & Joiners v. NLRB*, 444 F.2d 895, 901 (D.C. Cir.); *cert denied*, 404 U.S. 986 (1971).

97. Note, *supra* note 20, at 911.

98. *Id.* *See* *Service & Maintenance Employees' Union (Superior Souvenir Book Co.)*, 148 N.L.R.B. No. 1033 (1964); *International Ass'n of Heat & Frost Insulators & Asbestos Workers (Armstrong Contracting & Supply Corp.)*, 148 N.L.R.B. 866 (1964); *Milk Wagon Drivers (Drive-Thru Dairy, Inc.)*, 145 N.L.R.B. 445 (1963); *see also* Note, *supra* note 20, at 911 n.26.

99. *Id.*

100. *See* *Raymond O. Lewis (National Bituminous Coal Wage Agreement)*, 148 N.L.R.B. 249 (1964); *Milk Drivers Union (Pure Milk Ass'n)*, 141 N.L.R.B. 1237 (1963), *enforced*, 335 F.2d 326 (7th Cir. 1964); *Meat & Highway Drivers (Wilson & Co.)*, 143 N.L.R.B. 1221 (1963), *enforced in part*, 335 F.2d 709 (D.C. Cir. 1964).

101. *Plumbers & Pipefitters Union (American Boiler Mfrs. Ass'n)*, 154 N.L.R.B. 285 (1964), *modified on other grounds sub. nom.* *American Boiler Mfrs. Ass'n v. NLRB*, 366 F.2d 815 (1966), *aff'd*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970).

102. *See, e.g., Local No. 742, United Bhd. of Carpenters & Joiners v. NLRB*, 444 F.2d 895, 901 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d at 552; *NLRB v. Local 28, Sheet Metal Workers Int'l Ass'n*, 380 F.2d 827, 830 (2d Cir. 1967).

of work preservation,¹⁰³ the Court of Appeals for the District of Columbia developed a concept known as the “fairly claimable” criteria to resolve work preservation disputes.¹⁰⁴ The court recognized that activity which protects jobs fairly claimable by the union is primary under the provisions, notwithstanding incidental secondary effects on a neutral employer.¹⁰⁵

In 1967, with the work preservation doctrine gaining support from the “New Frontier NLRB,”¹⁰⁶ the Supreme Court decided the landmark case of *National Woodwork Manufacturers Association v. NLRB*,¹⁰⁷ that “established the . . . doctrine as the main criterion for determining the legality or illegality of activity under section 8(e).”¹⁰⁸ *National Woodwork* addressed a provision in a collective bargaining agreement with a general contractor which prohibited the handling of premachined doors at the jobsite.¹⁰⁹ When the manufacturer’s premachined doors did arrive at the jobsite, the union ordered its members not to handle the doors.¹¹⁰ The manufacturer subsequently charged the union with violation of section 8(e) for entering into the will-not-handle provision, and violation of section 8(b)(4)(B) for the unfair labor practice of “forc[ing] a person to cease using the products of another manufacturer.”¹¹¹ The NLRB dismissed the charges, concluding that the provision represented lawful work preservation.¹¹² The United States Court of Appeals for the Seventh Circuit reversed the dismissal of the section 8(e)

103. Note, *supra* note 20, at 912.

104. *Meat & Highway Drivers*, 335 F.2d 709 (D.C. Cir. 1964), *enforcing in part*, *Wilson & Co.*, 143 N.L.R.B. 1221 (1963) (union’s attempt to preserve delivery jobs after most employers had moved out of region was primary activity, and work allocation clause was lawful); *see also* *Sheet Metal Workers Int’l Ass’n, Local Union No. 223 v. NLRB*, 498 F.2d 687 (D.C. Cir. 1974) (unlawful secondary objective will be found in provision of labor agreement unless it can be determined that at the time the agreement was signed, the object was preservation of “fairly claimable” work for the bargaining unit employees); F. BARTOSIC & R. HARTLEY, *supra* note 6, at 140.

105. *Meat & Highway Drivers*, 335 F.2d at 713. *Cf.* *Local 761, Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667 (1961).

106. R. DERESHINSKY, *supra* note 10, at 116.

107. 386 U.S. 612 (1967).

108. R. DERESHINSKY, *supra* note 10, at 113. *Accord* *Houston Insulation Contractors Ass’n v. NLRB*, 386 U.S. 664 (1967) (companion case to *National Woodwork*; judgment of NLRB affirmed by Court where Board stated that union’s conduct taken to protect work deprivation traditionally performed by union members and constituted primary activity. The union members belonged to another local but worked for the same employer).

109. 386 U.S. at 612.

110. *Id.* at 616.

111. *Id.*

112. *Id.* at 616-17. The Trial Examiner, in finding that the agreement constituted lawful work preservation and, thereby, primary activity, stated that the provision

is not concerned with the nature of the employer with whom the contractor does business nor with the employment conditions of other employers or employees . . .

Its purpose is plainly to regulate the relations between the general contractor and his

charge. In so holding, the court contended that the will-not-handle provision resembled the product boycott situation condemned in *Allen Bradley Co. v. Union*.¹¹³ The court sustained dismissal of the section 8(b)(4)(B) charge, agreeing that the union's conduct as to the general contractor was a primary dispute within the clause (B) exemption.¹¹⁴

The Supreme Court, reiterating that it had consistently refused to interpret section 8(b)(4) to prohibit traditional primary activity,¹¹⁵ affirmed the Board's decision in upholding the contract provision as lawful work preservation.¹¹⁶ The Court criticized the court of appeals' reliance on *Allen Bradley*.¹¹⁷ It distinguished *Bradley* on the grounds that the union there entertained secondary objectives because "the cessation of business was being used tactically, with an eye to its effect on conditions elsewhere."¹¹⁸ The Court stated that where a boycott is carried on, as in *Allen Bradley*, "not as a shield to preserve . . . jobs . . . but as a sword to reach out and monopolize all the [jobs] for [union] members,"¹¹⁹ secondary boycott proscriptions were applicable.

The Supreme Court recognized that Congress' apparent desire in enacting section 8(e) was to remove primary work preservation agreements from the reach of the provision.¹²⁰ The Court stated that to assess whether enforcement of a work preservation clause, such as the will-not-handle agreement in *National Woodwork*, was violative of the secondary boycott provisions, an

own employees and to protect a legitimate economic interest of the employees by preserving their unit work.

Id. at 617-18 (emphasis added) (quoting *United Bhd. of Carpenters & Joiners v. NLRB*, 149 N.L.R.B. at 657).

113. *National Woodwork*, 386 U.S. at 618 (citing *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945)). In *Allen Bradley*, a group comprised of the union, various contractors, and manufacturers attempted to boycott local contractors and manufacturers by barring equipment manufactured outside a certain delineated area, thereby expanding membership and broadening employment opportunities for union members. *Id.* at 800, 803. The Supreme Court stated that "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808.

114. *National Woodwork*, 386 U.S. at 618.

115. *Id.* at 626, 627. See also *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

116. *National Woodwork*, 386 U.S. at 645-46.

117. *Id.* at 628.

118. *Id.* at 629. See also Lesnick, *supra* note 89, at 1017-18.

119. 386 U.S. at 630.

120. *Id.* at 633-39. See also *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964). The Court in *National Woodwork* stated that its decision in *Fibreboard* "implicitly recognizes the legitimacy of work preservation clauses like that involved here." That case involved a refusal to bargain over contracting-out of work previously performed by bargaining-unit employees. *National Woodwork*, 386 U.S. at 642.

inquiry into "all the surrounding circumstances"¹²¹ was required to determine whether the union's objective was work preservation for the bargaining-unit employees, or "whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere."¹²² Since "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees,"¹²³ and the union's conduct in the case was predicated upon a refusal to hang prefabricated doors whether or not they were union-made,¹²⁴ the activity *only* related to the work preservation of traditional bargaining-unit tasks,¹²⁵ and *a fortiori*, the union objectives were not secondary in nature.¹²⁶ Both the NLRB and the courts have continued to abide by the work preservation criteria as enunciated in *National Woodwork*. The decisions following *National Woodwork*, however, generally were unable to "clarify the permissible scope" of work preservation.¹²⁷

B. A Piece of the Puzzle: The Pipefitters Right To Control Test

Before the Supreme Court's decision in *National Woodwork*,¹²⁸ the National Labor Relations Board had formulated a standard known as the "right to control" doctrine.¹²⁹ Essentially, this concept states that to be designated as a primary employer for purposes of a labor dispute, an employer must be in a position to allocate the work at issue.¹³⁰ The doctrine was

121. *National Woodwork*, 386 U.S. at 644. The Court elaborated on what it perceived to be "surrounding circumstances." These "might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." *Id.* at 644 n.38. See generally Comment, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1185-99 (1964).

122. *National Woodwork*, 386 U.S. at 644.

123. *Id.* at 645.

124. *Id.* at 646.

125. *Id.*

126. *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547, 552 (8th Cir. 1968). See also Note, *supra* note 20, at 915. The author refused to impute a "broader holding" to the Supreme Court ruling in *National Woodwork* simply because the factual situation disclosed that the disputed task had been performed by the union workers at the jobsite "at least customarily." *Id.* at 915 n.42.

127. See Note, *Work Recapture Agreements and Secondary Boycotts: ILA v. NLRB*, 90 HARV. L. REV. 815, 821-22 (1976).

128. 386 U.S. 612 (1976).

129. See Note, *supra* note 20, at 918. "From the Board's point of view, if an employer lacks the power of control necessary to satisfy the union's demands, he is a neutral secondary employer, since the union must be trying to influence the person that can meet its demands. This latter person, with control over the situation, is thus the primary employer." *Id.*

130. A classic illustration of this doctrine is provided in *Ohio Valley Carpenters v. NLRB*, 339 F.2d 142, 145 (6th Cir. 1964), where the court states: "[I]f a union demands that a

developed and implemented by the NLRB prior to the Court's decision in *National Woodwork*.¹³¹

The right to control doctrine has been maligned for unequivocally ignoring the reality of the primary-secondary distinction because the fact that an employer possesses the "right to control" may be purely fortuitous and without causal connection to the situation.¹³² Where the immediate employer may not necessarily be the primary employer under the right to control doctrine,¹³³ the enforceability of the agreement would be dependent upon "fortuitous business arrangements [having] no significance so far as the evils of the secondary boycott are concerned."¹³⁴ Conversely, the rights of the bargaining unit employees under a valid work preservation agreement are equally affected regardless of the employer's relationship to the employees.

National Woodwork did not, however, reach the legitimacy of the right to control doctrine as either a dispositive or probative factor in ascertaining the primary employer for lawful work preservation.¹³⁵ Although the doctrine

contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute, it is manifest that an object of the union is to induce this cessation of business."

131. See, e.g., *Local 1066, International Longshoremen's Ass'n (Wiggin Terminals, Inc.)*, 137 N.L.R.B. 45 (1962); *Local 5, United Ass'n of Journeymen Plumbers*, 137 N.L.R.B. 828 (1962), *enforced*, 321 F.2d 366 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963); *International Longshoremen's Ass'n (Board of Harbor Commissioners)*, 137 N.L.R.B. 1178 (1962), *enforced*, 331 F.2d 712 (3d Cir. 1964) (where "[t]he employer, under economic pressure by a union is without power to resolve the underlying dispute, such employer is the secondary or neutral employer and . . . the employer with power to resolve the dispute is the primary employer." 137 N.L.R.B. at 1182).

132. See Note, *supra* note 20, at 920. Board Member Gerard A. Brown, who has dissented in all the Board cases involving the right of control doctrine, "has taken the position that right of control should not be given determinative weight, but . . . should be just one of the factors considered in any particular case." *Id.* Hence, Member Brown felt that the doctrine's probative force would be insufficient where the union's agreement and attendant action have lawful work preservation objectives. *Id. Contra R. DERESHINSKY, supra* note 10, at 119. The author asserts that the right of control test makes the status of the parties ascertainable. *Cf. Feldacker, Subcontracting Restrictions and the Scope of Sections 8(b)(4)(A) and 8(e) of the NLRA*, 17 LABOR L.J. 170, 182-185 (1966); Comment, "Hot Cargo" *Clauses in Construction Industry Labor Contracts*, 37 FORDHAM L. REV. 99, 109-11 (1968).

133. This would occur, for instance, where a general contractor arrives on a jobsite subsequent to a collective bargaining arrangement.

134. Note, *Secondary Boycotts and Work Preservation*, 77 YALE L.J. 1401, 1416 (1968) (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. at 693 (Douglas, J., dissenting)). "The effects upon the general contractor (when the general contractor is removed from the direct confrontation but is aware of the work preservation agreement) are thus ancillary to a primary dispute with the immediate employer vindicating bargaining unit concerns." *Id.* at 1417. See also *Journeymen Local 5*, 137 N.L.R.B. 828, 836 (1962) (dissenting opinion of Member Brown).

135. *National Woodwork* ostensibly did not alter the right of control doctrine because it was not required to reach the issue; the general contractor had undisputed "control" and this

had received a mixed reception in the courts, both the courts and the NLRB generally continued to apply the doctrine to some degree in determining the primary employer where work preservation clauses were implicated.¹³⁶

In 1977, with its ruling in *National Labor Relations Board v. Enterprise Association of Pipefitters*,¹³⁷ the Supreme Court affirmatively decided the right to control question. The Court in *Pipefitters* affirmed the work preservation logic espoused by *National Woodwork*¹³⁸ and confirmed that the issue

was stipulated by the parties. See also Note, *supra* note 20, at 922. The author suggests that the "*National Woodwork* test was designed solely to facilitate a determination as to whether particular activity has a valid work preservation objective," strengthened by the "surrounding circumstances" analysis of the decision. Hence, where these factors relate only to work preservation, they are not applicable in determining whether the employer is in a position to adhere to the union's demands. *Id.* It is further suggested that a "sound reason for limiting the doctrine" rests with a contractor's insulation from union economic sanctions merely because such employer may not possess the requisite "right to control," but in effect, should be held accountable for the bargaining unit demands. *Id.* at 922-23.

136. International Longshoremen's Ass'n (Board of Harbor Comm'rs), 137 N.L.R.B. 1178 (1962), *enforced as modified*, 331 F.2d 712 (3d Cir. 1964); Ohio Valley Carpenters Dist. Council (Cardinal Indus.), 144 N.L.R.B. 91 (1963), *enforced*, 339 F.2d 142 (6th Cir. 1964); Journeymen, Local 636 v. NLRB, 278 F.2d 858 (D.C. Cir. 1960); Journeymen, Local 5 v. NLRB, 321 F.2d 366 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963); NLRB v. Pipefitters, Local 638, 285 F.2d 642 (2d Cir. 1960); American Boiler Mfrs. Ass'n v. NLRB, 366 F.2d 823 (8th Cir. 1966). The Supreme Court recognized that "[g]enerally, the Courts of Appeals did not treat the Board's control test as a *per se* rule, reasoning instead that the absence of the right to control the work sought is strong evidence that the objective of the economic pressure being applied by the union is to affect someone other than the struck employer." *Pipefitters*, 429 U.S. at 527 n.15.

See also *George Koch Sons, Inc. v. NLRB*, 490 F.2d 323, 327 (4th Cir. 1973) ("Despite the union's opposing contention, the Board has not exalted right-to-control as *per se* the conclusive indicium of a secondary boycott . . . [but has] obediently followed [*National Woodwork's*] instruction, according weight to all existing and relevant circumstances."); *Associated Gen. Contractors v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975) ("union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign"). For cases rejecting the right of control doctrine, see *NLRB v. Local 164, International Bhd. of Elec. Workers (Ridgewood Bd. of Educ.)*, 158 N.L.R.B. 838, *enforcement denied*, 388 F.2d 105 (3d Cir. 1968); *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547 (8th Cir. 1968); *Local No. 636, United Ass'n of Journeymen v. NLRB*, 430 F.2d 906 (D.C. Cir. 1970). In the *Ridgewood* case, the right of control was determined to be only one factor in considering the legality of the agreement, and if the dispute involved work preservation only and the union's effort to enforce against a contracting employer, no illegal secondary objectives would be found. R. DERESHINSKY, *supra* note 10, at 118.

The NLRB continued to apply the right of control doctrine to explicate primary-secondary situations in labor disputes in the following: *International Ass'n of Heat & Frost Insulators, Local 12*, 193 N.L.R.B. 40 (1971); *Enterprise Ass'n, Local 638*, 183 N.L.R.B. 516 (1970); *Local 742, Carpenters*, 178 N.L.R.B. 351 (1969); *Local 636, Plumbers & Pipefitters*, 177 N.L.R.B. 189 (1969); *Pipefitters, Local No. 120*, 168 N.L.R.B. 991 (1967).

137. 429 U.S. 507 (1977).

138. 429 U.S. at 510. The Court stated: "Among other things, it is not necessarily a violation of § 8(b)(4)(B) for a union to picket a employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's

turned on the *National Woodwork* criteria for determining primary-secondary conduct.¹³⁹ Nonetheless, the Court struck down a circuit court decision that had rejected the right to control test of the NLRB as violative of the principles of *National Woodwork*.¹⁴⁰ The Court further illuminated the *National Woodwork* position by stating that although a work preservation clause may be valid under sections 8(b)(4)(B) and 8(e), this does not foreclose a possibility of further illegal activity violative of sections 8(b)(4)(B) and 8(e) should the union engage in impermissible secondary activity to enforce the clause. Under the *Sand Door* rule,¹⁴¹ which was never rejected, the Court stated that a valid contract could not immunize conduct otherwise prohibited by the provisions. Thus, the work preservation agreement and its enforcement in *National Woodwork* was legitimate *because* the union did not engage in otherwise impermissible activity.¹⁴²

In examining the "surrounding circumstances" criteria, the Supreme Court in *Pipefitters* accepted the NLRB's position that it had properly considered all factors in reaching a conclusion that the union's conduct was secondary as to the employer.¹⁴³ The Court rejected the court of appeals' conclusion that the Board had historically applied the right to control test mechanically, and not as a contributing factor, to the "surrounding circumstances" guideline.¹⁴⁴ The Court held that although the Board or the appellate court could weigh the circumstances differently, the Board's assessment of each of the factors was not "a departure from the totality-of-the-circumstances test."¹⁴⁵

In dissent, Justice Brennan maintained that the right to control doctrine contradicted *National Woodwork's* recognition that a work preservation agreement is lawful under the Act's provisions.¹⁴⁶ His reasoning centered

demand the employer would have to cease doing business with another employer." *Id.* (quoting *National Woodwork*, 386 U.S. at 612).

139. 429 U.S. at 511.

140. *Id.* at 521. The court of appeals held that the right of control test was "invalid as a matter of law" because it failed to comport with *National Woodwork's* "all the surrounding circumstances" test. *Id.* at 521-23.

141. 357 U.S. 93 (1958).

142. 429 U.S. at 519-20. The Court stated that the conclusion reached by the court of appeals "ignores the substance of our decision in *Sand Door*." Although a work preservation clause may be "valid in its intendment," applying the provision outside the primary relationship to neutral employers is illegal under the Act. *Id.* at 521 n.8.

143. 429 U.S. at 522-23.

144. 429 U.S. at 523 n.11. See *George Koch Sons, Inc., Local 438, United Pipe Fitters*, 201 N.L.R.B. 59, 64 (1973) ("Board has . . . continue[d] to eschew a mechanical application of its control test in order to ascertain whether the struck employer is truly an offending employer").

145. 429 U.S. at 524.

146. *Id.* at 537 (Brennan, J., dissenting). "Since the purpose of the union's pressure was,

on the fact that, regardless of the right to control evaluation, the real target of the union's pressure should be identified because the injury to the employees was identical under all the circumstances.¹⁴⁷ In addition, Justice Brennan maintained that the subcontractor was not the neutral employer contemplated by Congress,¹⁴⁸ and that the fact that the general contractor made the decision was extraneous to the union.¹⁴⁹

Since the *Pipefitters* decision, courts of appeals have continued to approve the Board's implementation of the doctrine in the work preservation area. They have reinforced the use of the test as a relevant factor in the "totality of circumstances in evaluating the unions' objectives."¹⁵⁰

C. Extending Work Preservation: The Rules on Containerization and ILA-I

The Court's struggle to delineate the primary-secondary distinction in the work preservation arena has been complicated even further by the introduction and evolution of modern technology affecting traditional bargaining-

by the Board's own finding, work preservation, and since *National Woodwork* holds that work preservation is a legitimate primary objective, the only possible conclusion on this record is that the pressure here was primary, and not prohibited by § 8(b)(4)(B)."

Accord Brief for the United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Amicus Curiae at 8-9, *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977). Because the Board's finding should have been "based on an evaluation of all the surrounding circumstances" to target the union's objective, the Board's reasoning "completely overlooks the point that . . . the union's action did not carry with it any inherent indicia of secondary motivation. Indeed, this is a situation where the employees' conduct is presumptively primary." *Id.* Counsel asserted that evidence of a primary motive inheres in the confirmed lawfulness of a work preservation agreement by the Supreme Court. *Id.*

147. 429 U.S. at 539-41.

148. *Id.* at 538.

149. *Id.* at 539.

150. *Electro-Coal Transfer Corp. v. Locals 1418 & 1419, International Longshoremen's Ass'n*, 591 F.2d 284 (5th Cir. 1979) (considered the employer's right to control over the work as a relevant circumstance in the totality of circumstances test, even though this case dealt with a product boycott). See also *International Longshoremen's Association, Local 1575 v. NLRB*, 560 F.2d 439, 447 (1st Cir. 1977) (Board's discretion to assign different weight to the right to control test than did the court of appeals was not a departure from the totality of circumstances test outlined in *National Woodwork*). The court stated that the *Pipefitters* decision illustrated that work preservation does not necessarily insulate a union from unlawful secondary activity, and that the range of work preserved under the work preservation doctrine had significantly narrowed since the *Pipefitters* decision. *Id.* (citing *Pipefitters*, 429 U.S. at 528 n.16); *Chamber of Commerce v. NLRB*, 574 F.2d 457 (9th Cir. 1978) (Board's right of control test not a *per se* evaluation, and the surrounding circumstances must be examined by the Board). Cf. *ILA-II*, 105 S. Ct. at 3053 n.12 (the "rationale of the third major precedent in this area, [*Pipefitters*] is not directly implicated in this case . . . [because] the *Pipefitters* test is satisfied here").

unit strongholds.¹⁵¹ A major dispute has centered around the increasing effect of intermodal containerization,¹⁵² and the concomitant handling by the courts of collectively-bargained Rules on Containers designed to mitigate the reduction in longshore work engendered by such containerization.¹⁵³

151. The implications of automation and technological innovation as factors in job displacement have become a pressing concern to courts, legislatures, and the bargaining parties, and the solutions are not readily ascertainable.

[I]n this area of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives . . . of working [people] . . . these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 225 (1964) (Stewart, J., concurring). Additionally, the 87th and 88th Congress had taken a particular interest in the job displacement dilemma resulting from the proliferation of technological progress. See, e.g., *National Woodwork*, 386 U.S. at 641 n.36: "Many achievements in attempting to overcome the difficulties created by radical technological change can and should be accomplished through collective bargaining and joint labor-management efforts. . . . Even greater concentration by labor and management on these problems is needed in the period ahead." *Id.* (quoting *Hearings before the Subcomm. on Unemployment and the Impact of Automation of the House Comm. on Educ. and Labor*, 87th Cong., 1st Sess. 3 (1961) (statement of Secretary of Labor, Arthur Goldberg)).

See also Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LABOR L.J. 397, 398 n.7 (1970). Ross contends that intermodal containerization is the "single most important innovation in ocean transport since the steamship displaced the schooner." *Id.*

152. In *ILA-I*, the Supreme Court explained that

Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

447 U.S. at 494.

With the advent of containerization, much of the on-pier work involving transfer of loose, or "break-bulk," cargo has diminished. This work has been reduced even further by the availability of containers to shippers and consolidators for off-pier loading. *ILA-I*, 447 U.S. at 495-96. "A freight consolidator combines the goods of various shippers into a single shipment at its own off-pier terminal and delivers the shipment to the pier." *Id.* at 496 n.8.

For a useful and informative odyssey through the union response to containerization, and the emergence of containerization as a "real issue" in the collective bargaining sphere, see Ross, *supra* note 151, at 397. The author points out the essential factual criteria governing the atmosphere during technological change during the evolution of intermodal containerization on the East and West Coast waterfronts, and the corresponding conflicts and philosophies that developed between the two major longshore unions (the ILA and the ILWU). The corresponding jurisdictional controversies that resulted from ILA collective bargaining processes are particularly noteworthy. *Id.*

See also Ullman, *The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation*, 2 J. MAR. L. & COMM. 625, 627 (1971); Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L. REV. 1077, 1078 (1969).

153. For a history of the evolution of the present rules, see *ILA-I*, 447 U.S. at 496-99. For

The Court of Appeals for the Second Circuit first adjudicated in the containerization area with its 1970 decision in *Intercontinental Container Transport Corp. v. New York Shipping Association*.¹⁵⁴ Although the case was brought under the Sherman Act,¹⁵⁵ the court held that lawful work preservation agreements were "within the area of proper union concern" as enunciated by *National Woodwork*,¹⁵⁶ and thus were not violative of the antitrust laws.¹⁵⁷

Following the decision in *Intercontinental Container*, two off-pier consolidators filed charges against the New York Shipping Association and the International Longshoremen's Association, alleging that the Rules on Containers were unlawful secondary boycott agreements.¹⁵⁸ The NLRB held that the union had engaged in a secondary boycott by attempting to secure work traditionally performed by consolidators. The Second Circuit Court of Appeals affirmed that finding in *International Longshoremen's Association v. NLRB (Conex)*.¹⁵⁹ The court concluded that the work in dispute was the

purposes of this Article, it is important to note only the final version of the rules incorporated in the 1974 agreement between the Council of North Atlantic Shipping Associations (CONASA) and the International Longshoremen's Association (ILA). The Court in *ILA-I* succinctly summarizes this version:

[U]nder the final version of the Rules . . . if containers owned or leased by the shipping companies are to be stuffed or stripped locally by anyone other than the employees of the beneficial owner of the cargo, that work must be done at the piers by ILA labor. FSL containers [full shippers' loads, or those owned by one shipper or consignee] that are transported intact to or from the beneficial owner or that are warehoused locally for 30 days, and consolidated containers [holding goods belonging to more than one consignee] coming from or bound for points outside the local area, do not have to be stuffed or stripped by ILA members.

447 U.S. at 499. See also Appendix, 447 U.S. at 513-22, for the text of the rules. The penalty imposed for infraction is stiff—"liquidated damages of \$1,000 per container." *Id.* at 519. A summary of the present rules is also outlined in the NLRB decision, 266 N.L.R.B. 230, 233 (1983).

154. 426 F.2d 884 (2d Cir. 1970).

155. The Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1982)). The charging party (International Container) asserted that the New York Shipping Association (NYSA) and the ILA entered into a "combination and conspiracy" in executing and enforcing a collective bargaining agreement, which reserved to the ILA the work of unloading and loading containers in the New York port area, and further perpetrated this conspiracy by levying fines on violators. 426 F.2d at 836.

156. 426 F.2d at 887.

157. *Id.* The Court made an additional finding that the NYSA agreement was within the labor antitrust exemption where the union acted alone, and not in combination, in its self-interest, and the rules fell within the ambit of a labor dispute where "containerization has for many years been a bitterly contested issue in the negotiations." 426 F.2d at 888. Cf. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945).

158. See *International Longshoremen's Ass'n, and Consolidated Express, Inc., and Twin Express, Inc.*, 221 N.L.R.B. 956 (1975).

159. 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (The court of appeals

off-pier stuffing and stripping of containers,¹⁶⁰ rather than the unloading and loading of ships. Consequently, the court found that the ILA was engaged in work acquisition, rather than work preservation, and it struck down the rules as impermissible secondary activity.¹⁶¹ In a companion case arising in the First Circuit, in *ILA v. NLRB*,¹⁶² the court of appeals similarly found that the union, in seeking to displace nonunion employees at a consolidator's facilities, manifested an interest not only in work preservation, but also in union organization of the consolidators.¹⁶³ The court stated that in itself this finding was sufficient to render inapposite the *National Woodwork*¹⁶⁴ work preservation exemption to secondary pressure.¹⁶⁵

The containerization issue was addressed squarely by the Supreme Court in 1980, when it decided *National Labor Relations Board v. International Longshoremen's Association (ILA-I)*,¹⁶⁶ consolidating cases brought before the Board as a result of the *Conex* decision.¹⁶⁷ The Supreme Court reinforced the propriety of primary union activity and reiterated the criteria announced in both *National Woodwork*¹⁶⁸ and *Pipefitters*¹⁶⁹ in determining exactly what constituted a lawful work preservation agreement.¹⁷⁰ In applying the doctrine, the Court reaffirmed that emphasis must be placed on the work in dispute.¹⁷¹ The Court noted, however, that the identification of the

distinguished its decision in *Intercontinental Container*, 537 F.2d at 708 n.1, as one arising in an antitrust context.).

160. 537 F.2d at 711. A definition of "stuffing" and "stripping" appears in the courts of appeals' decision. *Id.* at 708. See also *International Longshoremen's Ass'n*, 221 N.L.R.B. at 969.

161. 537 F.2d at 712.

162. 560 F.2d 439 (1st Cir. 1977).

163. *Id.* at 445.

164. 386 U.S. 612 (1967).

165. 560 F.2d at 443-46.

166. 447 U.S. 490 (1980).

167. 537 F.2d 706 (2d Cir. 1976). See also *Dolphin Forwarding*, 236 N.L.R.B. 525 (1978); *Associated Transp.*, 231 N.L.R.B. 351 (1977).

168. 386 U.S. 612 (1967).

169. 429 U.S. 507 (1977).

170. 447 U.S. at 504. The Court stated that "a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called 'right-of-control' test of *Pipefitters*." *Id.*

171. 447 U.S. at 506-07. In this case, the Court indicated that the Board's focus on the work in dispute as "the off-pier stuffing and stripping of containers" was erroneous. *Id.* at 506, 508. The Court added that "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer." *Id.* at 507 n.22 (citing *Pipefitters*, 429 U.S. at 510, 526).

work in dispute in *National Woodwork* and *Pipefitters* required “no subtle analysis.” Yet, agreements emanating from displacement of traditional jobs or technological innovation, such as those in *ILA-I*, required a more difficult analysis.¹⁷² The Court stated that this analysis should be such as to permit the collective bargaining process to address sufficiently the threats to traditional jobs posed by technological change.¹⁷³ Conversely, the Court maintained that the work preservation doctrine must be tempered with an attitude of accommodation by union workers, who must not present an intransigent response to such change.¹⁷⁴

The Court stated that, while the analysis should take into consideration “all the surrounding circumstances,”¹⁷⁵ it should focus on the work of bargaining unit employees, evaluating the work both before the innovation and “as the agreement proposes to preserve it.”¹⁷⁶ Hence, in focusing on the work of the truckers and warehousemen after the introduction of containerization, the Court concluded that the Board in *ILA-I* effectively foreclosed any possibility of preserving longshore work.¹⁷⁷ It stated that the Board’s reasoning was seriously defective because the very reason for negotiation of the rules was the fact that longshoremen *never* had performed this particular work away from the pier.¹⁷⁸ Consequently, the Court agreed with the court of appeals that, using the Board’s analysis, the “work preservation doctrine is sapped of all life.”¹⁷⁹

The Court in *ILA-I* then stated that the second step of the work preservation analysis involved an examination of the method used by the parties to preserve the work in the face of a massive technological change that eliminated the necessity for longshore handling of cargo in particular intermedi-

172. 447 U.S. at 505.

173. *Id.* at 505 (citing *National Woodwork*, 386 U.S. at 641-42). *Contra ILA-I*, 447 U.S. at 526 n.2 (Burger, C.J., dissenting). In referring to the ILA rules as a “gross perversion of the work preservation doctrine,” *id.* at 526, the Chief Justice likened the ILA assertions to “echoes of the complaints of stablekeepers and harness manufacturers when the automobile first gained wide acceptance.” *Id.* at 526 n.2; *but see* *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964): “One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.” *Id.* at 211.

174. 447 U.S. at 506.

175. *Id.* at 507 (quoting *National Woodwork*, 386 U.S. at 644). *See supra* note 121 and accompanying text.

176. 447 U.S. at 507.

177. *Id.* at 507-08.

178. *Id.* at 508. The Court carefully clarified its holding. It did not rule that the agreement was lawful work preservation, but that “the Board’s definition of the work in controversy was erroneous as a matter of law.” *Id.* at 511 n.26. Hence, the case was remanded to the Board for further determination.

179. *Id.* at 508 (quoting 613 F.2d at 909).

ate stages.¹⁸⁰ The Court asserted that this analysis compels an evaluation of the relationship between the work the union attempted to preserve and the traditional work it had performed.¹⁸¹ Hence, the Court stated that the arguments posed by the parties, such as whether the stuffing and stripping of cargo is "functionally equivalent" to traditional longshore duties or, whether the work formerly done by ILA labor at the pier has been effectively eliminated by fundamental changes precipitated by containerization, must be resolved on remand to the Board.¹⁸² Thus, the Court instructed the Board to consider the work at issue from the proper perspective, and subsequently, to apply the *National Woodwork* criteria to determine whether the rules constituted a lawful work preservation agreement.¹⁸³

On remand to the NLRB,¹⁸⁴ the Board reviewed the decision of the Administrative Law Judge (ALJ) as applied to consolidators,¹⁸⁵ shortstopping truckers,¹⁸⁶ and traditional warehousemen.¹⁸⁷ It agreed with the ALJ's conclusion that under the *National Woodwork* criteria¹⁸⁸ the rules had a lawful work preservation objective as applied to consolidators.¹⁸⁹ The Board also focused on the work in dispute and supplied a definition where it found that the ALJ had failed to do so.¹⁹⁰ But the Board found that the rules had an illegal work acquisition objective when applied to shortstopping truckers and warehousemen, and concluded that the ALJ had improperly focused on the "economic character" of the truckers' and warehousemen's industry and on work historically performed by such employees.¹⁹¹ The Board also found

180. *Id.* at 509.

181. 447 U.S. at 510. The Court said that "the result [would] depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *Id.* at 510 n.24.

182. *Id.* at 510-11. The Court stated that "[t]hese questions are not appropriate for initial consideration," and "[s]ince the Board has not had an opportunity to consider these questions in relation to a proper understanding of the work at issue we will not address them here." *Id.* at 511.

183. *Id.*

184. International Longshoremen's Ass'n, 266 N.L.R.B. 230 (1983).

185. *Id.* at 235. For a summary of definitions germane to the containerization cases and the longshore industry in general, see *id.* at 241.

186. *Id.* at 235.

187. *Id.* at 236.

188. 386 U.S. 612 (1967).

189. 266 N.L.R.B. at 235-36.

190. *Id.* at 236. The Board defined the work in controversy as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective bargaining relationship with the ILA." *Id.* Counsel for Respondent International Longshoremen's Association in *ILA-II* commented that the Board "filled what it considered to be a lacuna in the ALJ's decision." Brief in Opposition to Petitioner at 6 n.7, *ILA-II*, 105 S. Ct. at 3045.

191. 266 N.L.R.B. at 236.

that it was unnecessary to rely on the ALJ's findings that the rules were work acquisition because they sought to "compensate longshoremen for losses at the expense of inland employees whose jobs did not derive from containerization," and that the ALJ had not conformed to the Supreme Court's directive to focus on the work of the bargaining-unit employees.¹⁹² Nonetheless, the Board reached virtually the same conclusion, that the rules represented unlawful work acquisition. It reasoned that, with the advent of containerization, some of the work traditionally performed by the longshoremen at the pier and historically duplicated by truckers and warehousemen effectively had been eliminated.¹⁹³ While the ALJ's focus had been on *newly created* work, the Board determined that work duplicated by the ILA after containerization "no longer exist[ed] as a step in the cargo handling process."¹⁹⁴

The Court of Appeals for the Fourth Circuit refused to enforce the Board's order¹⁹⁵ and found that the rules did not deprive shortstopping truckers or traditional warehousemen of work.¹⁹⁶ Additionally, the court found that a collective bargaining agreement regarding duplicative or technologically eliminated work did not, in itself, require a finding that the agreement constituted unlawful work acquisition.¹⁹⁷

III. NATIONAL LABOR RELATIONS BOARD V. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION: CLARIFYING THE CONFUSION

On a writ of certiorari to the Court of Appeals for the Fourth Circuit, the dispute came before the Supreme Court in *National Labor Relations Board v. International Longshoremen's Association (ILA-II)*.¹⁹⁸ In a six to three decision written by Justice Brennan, the Court upheld the collectively-bargained Rules on Containers,¹⁹⁹ originally litigated in *Conex*,²⁰⁰ as applied to the

192. *Id.* at 236.

193. *Id.* at 237.

194. *Id.*

195. *American Trucking Ass'n v. NLRB*, 734 F.2d 966 (4th Cir. 1984).

196. *Id.* at 978-80.

197. *Id.*

198. 105 S. Ct. 3045 (1985).

199. The Rules on Containers at issue in this case are "substantively identical to the Rules printed as an Appendix to *ILA-I* . . . [T]hese Rules have been negotiated between the ILA and the Council of North Atlantic Shipping Associations [CONASA], a multiemployer bargaining group encompassing the marine shipping companies in 36 major ports on the Atlantic and Gulf coasts." *Id.* at 3048 n.2. See also Ross, *supra* note 151, for a comprehensive analysis of comparative collective bargaining tactics of the West Coast union, the International Longshoremen and Warehousemen's Union (ILWU).

200. 537 F.2d 706. See *supra* notes 159-61 and accompanying text.

shortstopping truckers and traditional warehousemen.²⁰¹ After reviewing the congressional intent behind sections 8(b)(4)(B) and 8(e), the Court reemphasized that *National Woodwork* principles comported with the congressional desire to forbid only secondary objectives.²⁰² Further, the Court stated that the reach of section 8(e) included lawful work preservation agreements because such clauses are used as a “shield” to protect traditional jobs, not as a “sword” to achieve secondary objectives,²⁰³ and not to “reach out to monopolize jobs” of nonlongshore labor.²⁰⁴

The Supreme Court noted that when the ALJ, the NLRB, and the court of appeals ascertained a lawful work preservation objective in the rules, their consideration of the extra-unit effects of such an agreement on shortstoppers and warehousemen was erroneous.²⁰⁵ The Court reasoned that not only was their finding insufficient to demonstrate an unlawful work acquisition objective, but absent additional union motivation to “reach out and monopolize” when ILA jobs were not threatened, the reasoning was inapposite.²⁰⁶ Additionally, the Court held that the Board’s finding that technologically eliminated or duplicative work transformed a work preservation clause into an illegal agreement was misplaced.²⁰⁷ Indeed, not only was elimination *not* dispositive to condemn work preservation agreements, but, as a factor of analysis, it “provides the very premise for such agreements.”²⁰⁸ The Court further indicated that the relevant inquiry for work preservation was whether the union engaged in primary or secondary activity. The preeminent consideration, therefore, was whether the union’s efforts were directed toward the labor relations of an employer of the bargaining unit or “tactically calculated” toward achieving objectives outside the primary employer-employee relationship by affecting the business relations of a neutral employer.²⁰⁹

201. 105 S. Ct. 3045 (1985).

202. *Id.* at 3053.

203. *Id.* at 3053-54 (quoting *National Woodwork*, 386 U.S. at 630). For a succinct summary of the controlling authority in work preservation in relation to *National Woodwork*, see *International Longshoremen’s Ass’n*, 266 N.L.R.B. at 248.

204. 105 S. Ct. at 3054 (quoting *National Woodwork*, 386 U.S. at 630-31).

205. *Id.* at 3056.

206. *Id.* (quoting *National Woodwork*, 386 U.S. at 630).

207. *Id.* at 3056-57.

208. *Id.* See Brief in Opposition to Petitioner at 8, *ILA-II*. Counsel asserted that the court of appeals disposed of the Board’s “elimination” argument because contending “that work rendered unnecessary by technological change may not be properly preserved in a collective bargaining agreement . . . flies in the face of *National Woodwork*.” *Id.* (quoting *American Trucking Ass’n v. NLRB*, 734 F.2d at 979).

209. 105 S. Ct. at 3057. Counsel referred to the Board’s “fact-finding” process—where the rules do not transfer any off-pier work, and the Board failed to find that off-pier work was transferred to the ILA, it “reached a conclusion of work acquisition without the acquisition of

Consequently, the Court found that the ALJ, the Board, and the court of appeals all supported the conclusion that, absent "any significant ILA interest in the labor relations of the class of employers boycotted by the Rules,"²¹⁰ the rules sought to preserve, and not to acquire, traditional work. In noting that the rules were motivated by the justifiable desire of longshoremen to preserve jobs despite the diminishing cargo work at the pier, the Court indicated that the rules clearly evidenced a primary objective.²¹¹ This finding, combined with a positive answer to the right to control test, should have precluded the additional inquiry by the Board into extra-unit effects imposed on neutrals that transformed a lawful agreement into one of a secondary nature.²¹²

In his dissent, Justice Rehnquist attacked the rules as an unlawful violation of the plain language of section 8(b)(4)(B) and chastised the union for attempting to coerce third party neutrals through concerted action "to manipulate the allocation of resources in our economy" in the name of work preservation.²¹³ He reasoned that decisions beginning with *National Woodwork* had extrapolated too broadly from the legislative history of sections 8(b)(4)(B) and 8(e) to find support for the primary-secondary distinction.²¹⁴ Justice Rehnquist did not recognize, as the majority did, that work preservation agreements were categorized as primary activity and thus exempted from the secondary boycott proscriptions in sections 8(b)(4)(B) and 8(e).²¹⁵

Justice Rehnquist disputed the Court's acceptance of the work preservation/work acquisition distinction as a basis for determining the legality of agreements, and he perceived the Court's approval of the doctrine to be a panacea for a union whose jobs were merely threatened.²¹⁶ He contended that the Court's focus on ILA work, and its unwillingness to consider extra-unit effects, appeared contradictory because a determination of work acquisition should concentrate, to some degree, on the work being acquired.²¹⁷ He asserted that permitting such agreements in the name of work preservation

any work." Counsel stated that this "oxymoronic dilemma" could not be corrected by asserting that ILA work had been inextricably integrated into off-pier work and hence "eliminated." Brief in Opposition to Petitioner at 10, *ILA-II*.

210. 105 S. Ct. at 3057 (quoting 266 N.L.R.B. at 249).

211. *Id.* at 3056.

212. *Id.* at 3057. See also Brief in Opposition to Petitioner at 15, *ILA-II*. "When the retained work bears a functional and historical relationship to the traditional unit work, the agreement has a primary work preservation objective . . . [and] does not lose that character merely because the retained work may also be related to the traditional work of others." *Id.*

213. 105 S. Ct. at 3060 (Rehnquist, J., dissenting).

214. *Id.* at 3060-61.

215. *Id.*

216. *Id.* at 3061-62.

217. *Id.* at 3061.

could result in duplicative work. Additionally, Justice Rehnquist agreed with Justice Burger that the union's activities "may render change so difficult, by artificially raising the costs of a new system, that they stifle technological advance."²¹⁸

Justice Rehnquist discounted the collective bargaining process as a solution to the economic problems raised by union work preservation clauses, principally because "if private ordering were sufficient to alleviate all labor problems then there would be no need for labor laws."²¹⁹ Furthermore, he stated that by enacting sections 8(b)(4)(B) and 8(e), Congress intended to prohibit certain types of union conduct regardless of potential resolution through the collective bargaining process.²²⁰

Finally, Justice Rehnquist criticized the majority's emphasis on the work preservation process because it invited the union to extend its influence beyond the traditional issues involved in a primary labor dispute to neutrals "who participate in the employer's markets."²²¹ By suggesting "that the natural tendency of the Rules will be to bring the truck terminals and warehouses to the pier," he stated that the rules effectively constituted the illegal secondary activity envisioned by legislative enactment of sections 8(b)(4)(B) and 8(e).²²² Thus, Justice Rehnquist contended that the objective of the rules was to obtain work not traditionally performed by longshore labor, and hence, they constituted impermissible activity under the Act.²²³

IV. THE EFFECT OF *ILA-II*: REINFORCING LAWFUL WORK PRESERVATION PRINCIPLES

The Court's decision in *ILA-II* is consonant with the line of reasoning that extends from the enactment of sections 8(b)(4)(B) and 8(e). The decision reinforced the entrenched legislative and judicial concept that the provisions were designed to reach only secondary objectives.²²⁴ This proposition has been judicially accepted and is well grounded in case law initiating with the *National Woodwork* decision.²²⁵

Second, the primary-secondary nature of the activity is readily ascertainable when examining work preservation agreements. Even prior to the *National Woodwork* decision, the NLRB frequently examined work

218. *Id.* (quoting *ILA-I*, 447 U.S. at 526-27 (Burger, C.J., dissenting)).

219. *Id.*

220. *Id.*

221. *Id.* at 3062.

222. *Id.*

223. *Id.* at 3063.

224. *Id.* at 3057. *See also supra* notes 31, 49, 50, and accompanying text.

225. 105 S. Ct. at 3057.

preservation clauses and developed manageable criteria for their enforcement, recognizing that a union could engage in lawful work preservation without running afoul of the secondary boycott proscriptions of the Act.²²⁶ Furthermore, some courts of appeals emphasized that incidental secondary effects on a neutral employer would not transform a legitimate clause into impermissible union activity.²²⁷

The work preservation doctrine gained approval in the *National Woodwork* decision. There, the Supreme Court recognized the legitimacy of union goals to maintain certain work, so long as the parameters of work preservation did not extend beyond the bargaining unit to monopolize jobs because they were non-union.²²⁸ Even with subsequent development of intermodal containerization and the collectively-bargained rules, courts have consistently recognized that accommodation of the longshore unions was effectively dictated by case law in the work preservation arena.²²⁹ For instance, the first decision in the area of containerization, *International Container Corporation*, recognized that the rules remained outside the secondary boycott proscriptions and were a proper union stronghold.²³⁰ *ILA-I* affirmed the appropriate guidelines that conformed to the primary-secondary distinction.²³¹ The principles enunciated in *ILA-I* were reinforced by the Court in *ILA-II*, where the Court clarified the relevant focus necessary to justify the longshore union's desire to maintain "traditional" work.²³² The Court concomitantly emphasized that such agreements were intended to elude the grasp of section 8(e), at least where their design lies in the "bona fide" primary activity of affecting labor relations of the bargaining-unit employees' work which the agreement sought to preserve.²³³ Consequently, section 8(e), which did not enlarge the type of conduct outlawed by section 8(b)(4)(B),²³⁴ was essentially designed to exclude such bona fide agreements.

Third, the Court's reasoning was sound in rejecting the NLRB's concern with the extra-unit effects of shortstopping truckers and traditional warehousemen.²³⁵ The Board's focus had virtually ignored previous judicial determinations that a valid work preservation clause was not transformed into prohibited secondary activity merely due to a collateral impact on third

226. See *supra* notes 96-101 and accompanying text.

227. See *supra* notes 102-05 and accompanying text.

228. See *supra* notes 123-26 and accompanying text.

229. See *supra* note 153 and accompanying text.

230. See *supra* notes 154-57 and accompanying text.

231. See *supra* notes 166-83 and accompanying text.

232. See *supra* notes 198-212 and accompanying text.

233. 105 S. Ct. at 3055-56.

234. *Id.*

235. *Id.* at 3056.

parties.²³⁶ That was precisely the logic employed by the Court in *ILA-I* in directing the Board to focus on the work of the bargaining-unit employees as the proper work in dispute.²³⁷ The ALJ found an unlawful work acquisition objective on the grounds that the work of truckers and warehousemen did not derive from containerization, and that the ILA had secondary objectives in seeking to compensate for losses at the expense of inland employees.²³⁸ This defeated the essential aspect of the Court's directive. Since the rules were designed to retain only the work of loading and unloading cargo at the pier,²³⁹ the Board further convoluted the analysis by rearranging the focus to include non-bargaining work in the calculation. This reasoning, *a fortiori*, foreclosed any possibility of finding valid work preservation objectives relating to the longshore work performed at the pier.

The importance of the work preservation doctrine lies in recognizing that the permissible aspect of the doctrine was measured by focusing on the bargaining unit work as it currently existed.²⁴⁰ It was unreasonable to assume, therefore, that by hypothetically altering the situs of the trucking and warehousing work, as Justice Rehnquist did in his dissent, the ILA bargaining unit essentially would appropriate the work at the pier. The majority reasoned that the work preservation doctrine required emphasis on the work in dispute as a legitimate and reasonable mechanism for delineating the primary objectives of the union.²⁴¹ This, in effect, was the method of "relevant inquiry under §§ 8(b)(4)(B) and 8(e)" defined by the Court.²⁴² Artificial adjustments in the majority's analysis, as proposed by the dissent, distorted the purpose of the doctrine—that purpose was to identify and define the legitimate scope of work preservation by focusing on the bargaining unit traditionally performing the work.

The decisions rendered prior to enactment of section 8(e) also lend support to the work preservation doctrine. For instance, although in *Sand Door* the Supreme Court held that an employer-voluntary hot cargo clause was not a defense to an unfair labor practice, it did not condemn the enforcement of hot cargo clauses per se so long as a choice was "available to the secondary employer notwithstanding any private agreement entered into between the parties."²⁴³ In enacting section 8(b)(4)(A) Congress intended to prevent the coercion of neutral employers through the inducement of their employ-

236. See *supra* note 51 and accompanying text.

237. 447 U.S. 490 (1979). See *supra* notes 166-71 and accompanying text.

238. 105 S. Ct. at 3051 (citing 266 N.L.R.B. at 235-36).

239. 266 N.L.R.B. at 237.

240. 105 S. Ct. at 3056.

241. *Id.* at 3056-57.

242. *Id.* at 3057.

243. 357 U.S. at 105. The Court stated: "Certainly the voluntary observance of a hot cargo

ees.²⁴⁴ Although Congress recognized that the *Sand Door* decision left a loophole that needed to be closed,²⁴⁵ conduct prohibited by section 8(b)(4)(A) was not expanded by the proscriptions of section 8(e).²⁴⁶

Finally, the Supreme Court in *ILA-II* recognized that displacement of traditional jobs through evolving technological innovation did not make useless the work the rules sought to preserve.²⁴⁷ In directing the NLRB to determine whether a valid work preservation clause existed, the Court in *ILA-I* stated that the determination should be "informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace."²⁴⁸ The Court in *ILA-II* reinforced a preference for collective bargaining by cautioning the parties to "eschew a resolution" primarily based on economic predilections, and to find one based on congressional intent.²⁴⁹ Consequently, unless Congress unequivocally excludes collective bargaining as an appropriate resolution and demonstrates an exclusive preference for the legislative mechanism, the Court will not preclude that option.²⁵⁰ Accordingly, because the work preservation doctrine consistently affords a constant and stable framework, upon which both management and labor rely, adherence to the doctrine provides consistent guidance for the parties.²⁵¹

The underpinnings initially outlined in *ILA-I* and reinforced in *ILA-II* dictated "negotiated compromise" as an attempted solution to the economic problems precipitated by changing technology. In this case, the rules represented that compromise.²⁵² Additionally, the negotiated compromise represented compliance with the major premise of our national labor laws; that is, "to encourage the practice and procedure of collective bargaining."²⁵³ The Court noted in *ILA-I*, and left intact in *ILA-II*, that in judging a collectively-

provision by an employer does not constitute a violation of § 8(b)(4)(A), and its mere execution is not . . . prima facie evidence of prohibited inducement of employees." *Id.* at 108.

244. *Id.* at 100.

245. See *supra* notes 76, 87, and accompanying text.

246. See *supra* note 89 and accompanying text.

247. 105 S. Ct. at 3057-58. One of the arguments posited in *ILA-I* was that the rules were "nothing less than an invidious form of 'featherbedding' to block full implementation of modern technological progress." 447 U.S. at 526-27 (Burger, C.J., dissenting). *Accord Note, The Rules on Containers: Work Preservation or Work Acquisition?*, 14 LAW & POL. INT'L BUS. 453, 479-80 (1982). *But see supra* notes 151-53 and accompanying text.

248. 447 U.S. at 511.

249. 105 S. Ct. at 3058 (quoting *National Woodwork*, 386 U.S. at 648-50).

250. *Id.* at 3057-58 (citing *ILA-I*, 447 U.S. at 526-27).

251. *Id.* at 3058.

252. *Id.* at 3058-59.

253. See *supra* note 2 and accompanying text.

bargained agreement the inquiry should not focus on whether the rules were a "rational or efficient response to innovation," but whether they were a permissible mechanism directed toward a reasoned response to the preservation of jobs.²⁵⁴

V. CONCLUSION

The Supreme Court in *National Labor Relations Board v. International Longshoremen's Association (ILA-II)* held that the collectively-bargained longshore Rules on Containers were a lawful work preservation agreement that lacked impermissible secondary objectives.

In enacting federal labor law, Congress intended to accommodate the interests of both employers and unions by eliminating economic pressure exerted on employers. At the same time, it intended to recognize labor's legitimate interest in negotiating conflicts through the collective bargaining process. The Taft-Hartley and Landrum-Griffin amendments to federal labor law proscribe classic secondary boycott situations in which a union exerts pressure against an employer not a direct party to a labor dispute, as distinguished from legitimate pressure exerted against a primary employer. Judicial analysis of work preservation clauses initiated with the establishment of union primary versus secondary activity resulting from the examination of section 8(b)(4)(A) of the National Labor Relations Act. Consequently, judicial interpretations of the secondary boycott provisions recognized that they were intended to reach *only* secondary activity, and that collateral impact on neutral employers would be acceptable. Hence, these decisions reinforced the congressional purpose to shelter only truly neutral employers from the reach of union pressure.

Beginning with *Conway's Express*, courts have emphasized this primary/secondary dichotomy in considering collectively-bargained work preservation agreements, and have successfully utilized this test to define the proper scope of the union's bargaining power. Nonetheless, Congress recognized that, in holding that a hot cargo clause per se was not unlawful, the *Sand Door* decision left a loophole in the secondary boycott proscriptions of federal labor law. The enactment of sections 8(b)(4)(B) and 8(e), strengthening the secondary boycott provisions, still limited union pressure to unlawful secondary activity. With the enactment of section 8(e), the NLRB devel-

254. 447 U.S. at 511. See also Ross, *supra* note 151, at 419. In positing the argument that "[s]ociety's interests in technological progress are not necessarily incompatible with that of unions," Ross states that the "optimum rate in which labor-saving technology is introduced is not the fastest possible rate. To the extent that this is true, union impediments may be considered as not merely obstacles to progress, but as efforts to buy time in which the human costs of change can be softened and made more tolerable." *Id.*

oped manageable guidelines to define the scope of work preservation. The landmark decision of *National Woodwork*, however, definitively established the work preservation doctrine as the main criterion for determining legal activity under section 8(e). Subsequent decisions have consistently recognized that organized labor's attempts to preserve work traditionally performed by unions constitute lawful work preservation.

Nonetheless, Congress could not have anticipated the myriad of problems precipitated by evolving technological change in the shipping industry, including the onset of intermodal containerization and the associated rules designed to deal with the elimination of jobs. By enunciating the principles announced in *National Woodwork*, however, the Supreme Court in *ILA-I* directed the Board to consider all the surrounding circumstances in evaluating work preservation and to focus on the work of bargaining unit employees in analyzing the rules. By instructing the Board to consider work preservation in the light of a massive technological change in the industry, the Court directed an evaluation of the relationship between the work the union attempted to preserve and the traditional work it had performed.

By focusing on the extra-unit effects of workers outside the bargaining unit, the Court in *ILA-II* recognized that the Board had effectively foreclosed an opportunity for work preservation for longshore labor. The Court, in stating that the union was motivated by a desire to preserve jobs despite diminishing cargo work at the pier, justifiably held that the rules evidenced a primary objective and did not encompass impermissible union pressure on a neutral employer.

The Supreme Court's decision in *ILA-II* reinforced an ongoing attempt to rationally accommodate the interests of both unions and employers by recognizing the legitimate parameters of the work preservation doctrine informed by the collectively-bargained rules. Because both management's and labor's reliance on the doctrine is firmly established, continued support for resolution of the problems precipitated by technological change is warranted. Manageable guidelines in the bargaining process, reinforced by the Court in *ILA-II*, foster the goal of national labor policy—to resolve dispute through the collective bargaining mechanism.

Nancy M. Rappa

