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The Development of Judicial Relief Available to Unions for Employer Violations of Subcontracting Clauses in the Construction Industry

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The Development of Judicial Relief Available to Unions for Employer Violations of Subcontracting Clauses in the Construction Industry

Agreements between unions and employers in the construction industry often contain clauses designed to limit the subcontracting of work to be done at the construction site; such clauses may either be primary or secondary in nature.[1] The scope of the contractual limita-

1. The test as to the primary nature of a subcontracting clause in an agreement with a general contractor is whether it "seeks to protect and preserve the work and standards (the union) has bargained for." Orange Belt District Council of Painters No. 48 v. NLRB, 328 F.2d 534, 538 (D. of C. 1964). A subcontracting clause is secondary in nature if it aims to regulate working conditions of a subcontractor's employees or sanctions a boycott against a subcontractor because his products or labor policies are objectionable to the union. *Id.* A secondary subcontracting clause is often used interchangeably with a "hot-cargo" clause. A hot-cargo clause is an agreement between the general contractor or employer and the union whereby the employer (hereinafter referred to as the neutral or secondary employer) agrees that his employees shall not be required to handle goods of other employers or subcontractors (hereinafter referred to as primary employers) who are engaged in labor disputes or who have been declared "unfair" to organized labor. A secondary subcontracting clause is similar to the hot-cargo clause in the respect that the subcontracting clause prohibits the secondary employer (general contractor) from subcontracting work to primary employers. This clause usually forced the secondary employer to cease dealing with or to engage in a secondary boycott against the primary employer. Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1964), prohibits secondary boycotts in virtually all situations. Moreover, Section 8(e) of the NLRA, 29 U.S.C. § 158(c) (1964), makes it an unfair labor practice for employers to enter into hot cargo agreements. Secondary subcontracting clauses in the construction industry are lawful, however, under the proviso to Section 8(e), relating to the subcontracting of work to be done *at the construction site*, because of the close community of interests there. Primary subcontracting clauses, on the other hand, fall outside the ambit of Section 8(b)(4) and Section 8(e) and are therefore lawful whether or not the subcontracting of work is to be done at the construction site since primary subcontracting clauses are not directed at involving neutral employers in a labor dispute not of their own. Orange Belt Council of Painters No. 48 v. NLRB, 328 F.2d 534, 538 (1964).

Subcontracting clauses may take various forms. Some prohibit subcontracting under any circumstances; some prohibit it unless there is sufficient work in the shop to keep shop employees busy. Most, however, limit subcontracting to firms which have signed union contracts with the union who is a party to the collective bargaining agreement with the general contractor, or prohibit subcontracting to firms having agreements with rival unions whose work standards are below area standards. There is a dearth of authority as to what type of clauses are considered to be primary or secondary. There is *dictum* in several appellate decisions to the effect that where subcontracting clauses limits the work to subcontractors maintaining labor standards commensurate with those of the employer who is a party to the collective bargaining agreement, the clause is primary. *Id.* District No. 9, International Assn. of Machinists v. NLRB, 315 F.2d 33, 36 (1963). *Cf.* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 273 (1959). It is not clear whether the Board would endorse this principle. The Board held that where the subcontracting clause seeks to blacklist all non-union subcontractors, the clause is secondary. Hod Carriers, Local 300, 154 N.L.R.B. 1744 (1965). It would seem that where the clause seeks to *preserve jobs for unit employees* by reserving all work of a particular kind to union members of the bargaining

tions which a union may impose upon the neutral, secondary employer's right to subcontract work to a primary employer has been a constant source of litigation. In addition, much litigation has involved the question of the tactics which a union may employ in order to obtain and enforce subcontracting clauses.

This comment does not attempt to discuss problems relevant to the procurement, content, or enforcement of subcontracting clauses in industries other than the construction industry.[2] Rather, its focus is upon the sanctions a union may invoke for employer violation of a subcontracting clause in the construction industry.

Judicial and Legislative Reaction to Subcontracting Clauses

Sand Door

When originally enacted, Section 8(b)(4)(A) of the National Labor Relations Act provided that it was an unfair labor practice for a union to induce employees to strike against or engage in a concerted refusal to handle goods for their employer when an object is to force him or another person to cease doing business with some third party (primary employer), *i.e.*, to force a secondary employer to put a "hot cargo" ban into effect.[3] In *Sand Door*,[4] the Supreme Court was confronted with the

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unit, the clause is primary; where, however, the clause forbids an employer to use subcontractors not meeting union standards either because the subcontractor is non-union or has an agreement with a union having lower work standards, the clause is secondary. See National Woodwork Manufacturers Assn. v. NLRB, 387 U.S. 926 (1967). The final determination, however, depends on the circumstances of the case and blanket pronouncements cannot be made. This comment assumes all clauses as secondary unless otherwise indicated.

The distinction as to whether a subcontracting clause is primary or secondary is important in the areas of where work is not to be done at the construction site, see *infra* note 21, and where the clause is sought to be enforced by the union through economic action, see *infra* note 29. The final determination as to the nature of the clause can have ramifications when a union seeks an injunction, see *infra* note 43. Generally, however, the distinction is not relevant to a discussion of the judicial relief available for the enforcement of subcontracting clauses. See *infra*. See generally, 3 CCH L. Rep. ¶ 5222.

2. For a discussion of the content of management's duty to bargain over decisions to subcontract all or part of its operations in industries other than construction see, Farmer, *Good Faith Bargaining Over Subcontracting*, 51 Geo. L.J. 558 (1963); Comment, *Employer's Duty to Bargain about Subcontracting and Other "Management Decisions,"* 64 Colum. L. Rev. 294 (1964).

3. See *supra* note 1. Prior to 1959, this was the only statutory secondary boycott prohibition. Section 8(b)(4)(A) when enacted stated:

> (b) It shall be an unfair labor practice for a labor organization or its agents— . . . (4) 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 or self-employed person to join any labor or

question concerning the relation between a hot cargo provision in a collective bargaining agreement and the charge of an unfair labor practice proscribed by Section 8(b)(4)(A). The case arose out of a dispute between the carpenters' union and an employer engaged in the building construction trade. S was the exclusive distributor of doors manufactured by P, a non-union manufacturer. H and J were general contractors who were, at the time of the dispute, engaged in the construction of a hospital in Los Angeles. H and J (secondary employers) entered into a labor agreement with the union which contained a provision to the effect that "workmen shall not be required to handle non-union material."[5] The union notified the general contractors that it would not hang the doors manufactured by P which were purchased by S (primary employer) and delivered to the construction site. S filed charges with the National Labor Relations Board, and the Board found that the union had induced and encouraged employees to engage in a concert refusal to handle P's doors for the purpose of forcing the general contractors (H and J) to terminate their business relationship with S, which conduct was in violation of section 8(b)(4)(A).[6] The Ninth Circuit Court of Appeals enforced the Board's cease and desist order[7] and the Supreme Court granted certiorari.[8] The Supreme Court affirmed, holding that a refusal to handle hot goods, or a union's inducement of employees to refuse to handle such goods, was unlawful, despite the existence of a "hot-cargo" clause, unless the employer instructed employees not to handle them. Consequently, even though an employer might choose voluntarily to agree with a union not to deal with certain persons, a union could not lawfully attempt to enforce such an agreement by strike action or a concerted work stoppage—even if the secondary employer acquiesced in the union's demand that his employees honor a "hot-cargo" clause, the union's *demand* was unlawful. Implicit in the Court's decision was the consideration that there is the possibility that the contractual provision itself may not have been the result of the employer's free choice and therefore "a union may

employer association or any employer or other 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; . . . .

29 U.S.C. § 158(b)(4)(A) (1947), *as amended*, 29 U.S.C. § 158(b)(4)(B) (1964). The text of the National Labor Relations Act may be found in 29 U.S.C. § 151 *et seq.* (1964).

4. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958).
5. *Id.* at 95.
6. 113 N.L.R.B. 1210 (1955).
7. 241 F.2d 147 (9th Cir. 1957).
8. 355 U.S. 808 (1957).

not . . . order its members to cease handling goods, and that any direct appeal to the employees to engage in a strike or concerted refusal to handle goods is proscribed."[9]

Since *Sand Door* did not preclude the voluntary observance of a hot cargo provision by an employer, the mere execution of such clauses was held not to be a violation of Section 8(b)(4)(A). Therefore, an amicable agreement between the union and the secondary employer whereby the latter could "unilaterally" decide to engage in a boycott of the primary employer's goods could be effectuated. The unions could, however, call upon various techniques capable of inducing such "unilateral" action such as the desire of the employer to retain the confidence and trust of the union; the threat of excessive demands at the next barganing session; or the possibility that a repudiation of the agreement might be found in a failure to abide by the clause thus requiring new negotiations with the union. Moreover, *Sand Door* rejected the idea that the congressional purpose in enacting section 8(b)(4)(A) was to give the primary employer or the general public full protection against a secondary boycott.[10]

Section 8(e) of the Landrum-Griffin Amendments—Legislative Response to Sand Door

Section 8(e),[11] added to the National Labor Relations Act by the Labor-Management Reporting and Disclosure Act of 1959,[12] forbids

9. 357 U.S. 93, 106 (1958).

10. For a discussion of some of the problems left open, see Fenton, *Hot Cargo and the Taft-Hartley Act*, 31 ROCKY MT. L. REV. 153, 161 (1958).

11. Section 8(e) provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this section shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, that for the purposes of this subsection and Section (b) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relations of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, that nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. 79 Stat. 543 (1959), 29 U.S.C. § 158(c) (1964).

12. 79 Stat. 519, 29 U.S.C. § 401 *et seq.* (1964).

the mere execution of hot cargo and secondary subcontracting clauses and makes it an unfair labor practice for an employer to enter into such an agreement.[13] There are two basic reasons proposed for Congress' objection to the unions' use of secondary pressure. First, use of secondary pressure tends to enlarge the primary labor dispute between the union and the "unfair" employer by involving neutral employers, thereby magnifying the disruptive effects of the altercation on the economy.[14] Second, it is inequitable for a union to compel a neutral employer to become its forced ally in a foreign labor dispute and to require him to terminate a profitable or long-standing business relationship even though the neutral employer may be sympathetic to the position of the "unfair" employer.[15] In industries other than the construction and garment industries some commentators predicted that the secondary subcontracting clause had been indiscriminately abolished[16] while others contended that the prohibitions of Section 8(c) should not be applied to those clauses Congress clearly did not intend to abolish.[17]

The construction industry was exempted from the secondary subcontracting clause prohibitions by a proviso to Section 8(e).

> Nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the constructure, alteration, painting, or repair of a building, structure, or other work.[18]

The purpose of the exemption was to provide a workable solution to the problem which arises when union men are forced to work alongside nonunion men on the same construction site.[19]

The initial problem which arose concerning the application of the construction industry exemption was its scope. Specifically, the diffi-

13. *See* Powell, *The Impact of Section 8(e) on Subcontracting Clauses in Collective Bargaining Agreements*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 897, 904 (Slovenko ed. 1961).

14. *See* Brown v. Local 17, Amalgamated Lithographers, 180 F. Supp. 294, 297 (N.C. Cal. 1960).

15. *See* Los Angeles Mailers' Union 9, I.T.U., 135 N.L.R.B. 1132, 1137 (1962).

16. *See* Peet, *The Subcontracting Clause in Collective Bargaining Agreements*, 38 U. DET. L.J. 389 (1961); Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions*, 48 GEO. L.J. 327, 337-38 (1960).

17. COX, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 273 (1959); Powell, *supra* note 13, at 904.

18. 29 U.S.C. § 158(c) (1964).

19. *See*, NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 1385 (remarks of Senator Javits), 1432 (remarks of Senator Kennedy) (1959).

culty was in determining whether the exemption was meant to include work that could be performed at the construction site, or only work *actually* done at the construction site.[20] The Board held that the exemption was limited to the latter.[21] The exemption does not extend to "hot-cargo" agreements concerning supplies or materials produced or manufactured elsewhere and delivered to construction sites, even though such work might be viewed as part of the construction process and is a kind that may feasibly be done at the construction site. The factual basis of the *Sand Door* decision was therefore upheld.

Interpretation and Construction of the Construction Industry Proviso to Section 8(e)

Union Efforts to Secure a Subcontracting Clause

Under the 1959 Amendments to the National Labor Relations Act, Section 8(b)(4)(A) makes it an unfair labor practice for a union to use strikes, inducements to strike, threats, or other coercion for the purpose of forcing an employer to enter into a "hot cargo" agreement.[22] In view of this language, the Board first took the position that a union could not use force or coercion in order to obtain a secondary subcontracting clause which, if entered into voluntarily, would be sheltered from Section 8(e) by the construction industry proviso.[23] The NLRB now holds that coercion to obtain a hot-cargo pact in the construction

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20. Senator McNamara stated during congressional debates that the proviso was applicable to an agreement that a building contractor would not subcontract fabrication work that could be done on the job site, as well as work that was actually done on the site. Congressman Kearns immediately replied that the language of the proviso related only to "work actually done at the site." Marcus, *Secondary Boycotts*, Symposium, *supra* note 13, 822, 831.

21. Carpenters, Ohio Valley Dist. Council, 136 N.L.R.B. 977 (1962). However, a contract clause providing that no union member of the contracting union would handle certain prefabricated building materials on a construction site was viewed as a lawful effort to preserve for craftsmen work which they had traditionally performed on the job site rather than a boycott of the manufacturer, consequently there was no violation of Section 8(e) or Section 8(b)(4)(B) since the clause was considered primary. National Woodwork Manufacturers Assn. v. NLRB, 387 U.S. 926 (1967).

22. Section 8(b)(4)(A) provides: "It shall be an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person, . . . where . . . an object thereof is . . . (A) *Forcing* or *requiring* any employer . . . to *enter* into any agreement which is prohibited by subsection (e) of this section." (Emphasis added.) 29 U.S.C. § 158(b)(4)(A) (1964). Under the original Section 8(b)(4)(A), see *supra* note 3, the union committed an unfair labor practice where it *induced employees* to strike in order to force the employer to enter a hot-cargo agreement. Now, the union will commit an unfair labor practice by *coercing any person* in order to force the employer to enter such an agreement.

23. Hod Carriers Union, 145 N.L.R.B. No. 46, 55 L.R.R.M. 1070 (1964).

industry is lawful.[24] The federal courts also support this policy. In *Cuneo for and on Behalf of N.L.R.B. v. International Union of Operating Engineers, Local 825*[25] the respondent labor union had engaged in work stoppages in order to induce a construction employer's association to accept the union's plea for a secondary subcontractor's clause in a collective bargaining agreement. The employer's association sought a temporary injunction alleging that the union had violated Section 8(b)(4)(A). In construing the language of the construction industry proviso to Section 8(e) the court held that:

> Section 8(b)(4)(A) of the Act prohibits work stoppages to obtain a 'hot cargo' agreement. . . . The subcontractor clause here involved is such an agreement. . . . However, the Court finds that the work stoppages in question, insofar as they were intended to induce members of the association to agree to a subcontractor clause with respondents, come within the construction industry proviso in Section 8(e). . . .[26]

The court adopted the better view in reaching its conclusion since Section 8(b)(4)(A) surely is not violated in this situation. Section 8(b)(4)(A) prohibits coercion only when used to obtain a clause which contravenes Section 8(e), and this is not done by the clause in question because of the construction industry proviso. Section 8(b)(4)(A) incorporates that proviso by reference.

Union Efforts to Enforce Subcontracting Clauses

There are various methods available to the union seeking to enforce a subcontracting clause breached by the secondary employer. Not all of the methods, however, are clothed with legality, consequently the Board and the courts will not permit enforcement of the subcontracting clause in all circumstances.

The first method of enforcement to be considered is the union's attempt to seek compliance by the secondary employer through work stoppages. In *N.L.R.B. v. Local 825, Operating Engineers*[27] the general contractor and a subcontractor (secondary employers) each had collective bargaining contracts with the union. The contracts contained secondary subcontracting clauses providing that any employer who sublet

24. Los Angeles Building and Construction Trades Council, 151 N.L.R.B. (No. 46, 1965).
25. 216 F. Supp. 173 (D.N.J. 1963).
26. *Id.* at 175. *See* NLRB v. International Brotherhood of Electrical Workers, Local Union No. 683, AFL-CIO, 359 F.2d 385 (6th Cir. 1966).
27. 326 F.2d 218 (3d Cir. 1964).

his work did so subject to the terms and conditions of the agreement. The subcontractor contracted out electrical work to N (the primary employer) who did not have a collective bargaining contract with the union. As a result of the union's dispute with N over the operation of certain power angus, the union engaged in work stoppages contesting the operation of the machines. N filed charges alleging a violation of Section 8(b)(4)(B).[28]

The union contended that since an object of the work stoppage was to enforce the secondary subcontract clause contained in its agreements, such conduct is lawful under Section 8(e) of the Act. The Board and the Circuit Court on appeal held that while the secondary subcontracting clause was lawful, any attempt to enforce the clause by economic means was a violation of Section 8(b)(4)(B) which bars use of threats or coercion to cause one employer to cease doing business with another.[29] The refusal to permit work stoppages and strikes as a method of enforcement can be viewed as an instinctive reaction by the Board and Courts to a method which is being used directly to cause the cessation of a business relationship, and hence a violation of Section 8(b)(4)(B). Moreover, such a result is in conformance with the state of the law prior to the enactment of Section 8(e) when the unions could seek only voluntary compliance with secondary subcontracting clauses.

Since secondary subcontracting clauses cannot be enforced by economic means, the union next sought to enforce such clauses through breach of contract suits. Section 301(a) of the National Labor Relations Act[30] provided the union with a forum in which it could seek

28. Section 8(b)(4)(B) provides:
It shall be an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person . . . where . . . 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 . . . or to *cease* doing business with any other person . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, any primary strike or primary picketing. (Emphasis added.)
29 U.S.C. § 158(b)(4)(B) (1964). While Section 8(b)(4)(A), see *supra* note 22, prohibits a union from coercing *the employer to enter* a hot-cargo agreement, Section 8(b)(4)(B) prohibits a union from coercing *any person* to *cease* doing business with *any other person*.

29. 326 F.2d at 321. *See also* Cunio v. Essex County & Vicinity Dist. Council of Carpenters, 207 F. Supp. 932 (D.N.J. 1962); Lebus v. Local 60, 193 F. Supp. 392 (E.D. La. 1961). If, however, the subcontracting clause is primary, economic enforcement thereof is not proscribed by Section 8(b)(4)(B). Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534, 538 (D. of C. 1964). See *supra* note 1.

30. Section 301(a) states:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter,

enforcement. The initial attempt to seek judicial enforcement came in *Local Union No. 48 of Sheet Metal Workers International Association v. The Hardy Corp.*[31] The union sought damages[32] and a declaration of its rights[33] for an alleged secondary employer violation of a secondary subcontracting clause which provided that no work would be subcontracted to any person who failed to agree in writing to comply with the terms of the collective bargaining agreement relating to conditions of employment. The secondary employer contended in its answer that the secondary subcontracting clause was unenforceable and the union's bringing of the lawsuit was a violation of Section 8(b)(4)(B). The district court noted that while Section 8(e) specifically exempted the garment industry from the provisions of Section 8(b)(4)(B), no such exemption is applicable to the construction industry. Thus the court reasoned, in accordance with the then existing law, that the union could seek only voluntary compliance by the employer. Moreover, the court held that union insistence through lawsuits upon employer compliance was a form of *coercion*[34] proscribed by Section 8(b)(4), consequently the court refused to order compliance by the employer or award damages to the union.[35]

On appeal, however, the Circuit Court reversed and remanded the decision of the District Court in *Sheet Metal Workers.*[36] The court

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. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a) (1964).

31. 218 F. Supp. 556 (D.C. Ala. 1963).

32. 29 U.S.C. § 185(a) (1964).

33. 28 U.S.C. § 2201 (1964).

34. The NLRA as amended by the 1959 amendments, Section 8(b)(4) now forbids, not only strikes or inducements to strike, but also *threats, coercion,* or *restraint* of any person in order to effectuate a "hot-cargo" ban (Section 8(b)(4)(B)) and *threats, coercion,* or *restraint* in order to force an employer to enter into such an agreement (Section 8(b)(4)(A)). See *supra* notes 22 and 28. The court cited the definition of "coerce" from Webster's New Collegiate Dictionary (1960) as—"(1) to restrain by force, especially by law or authority; to repress, curb; (2) to compel to any action." Moreover, the court, apparently sympathetic to the pure theory approach to legal philosophy, cited H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945), as a definitive work on the coercive power of the law. 218 F. Supp. at n.2 of 561.

35. The court stated:

Judicial enforcement of the hot-cargo agreement would constitute a more subtle form of coercion than a threatened strike or picket, but it is coercion and, if this Court sets a precedent in this case for more of the same conduct in the future, has overtones of being an infinitely more successful form of coercion than either a strike or a picket.

Likewise, if this Court should award damages to the union for the failure of the employer to abide by the terms of the hot-cargo agreement, the employer would still be under a form of "coercion". . . . (Footnotes omitted.) *Id.* at 561, 562.

36. 332 F.2d 682, 688 (5th Cir. 1964).

recognized the problem whether the word "coerce" in Section 8(b)(4) meant to preclude judicial enforcement of secondary subcontracting clauses authorized by Section 8(e). The court reviewed the state of the law at the time Section 8(e) was enacted and concluded that the purpose of the language in Section 8(b)(4)(ii) was to make unlawful the threat of strike or other economic retaliation against the secondary employer in order to force him to cease doing business with the primary employer with whom the union had a dispute. Thus, in determining whether judicial enforcement amounted to "coercion" within the meaning of the statute, the court concluded that enforcement through court action is not the same type of coercion as self-help such as boycotts or picketing:

> . . . that the Congress used "coerce" in the section under consideration as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute.[37]

The court based its opinion in part upon statements made by Senators Kennedy, McClellan and Goldwater during the debates on the amendments to the National Labor Relations Act.[38] Moreover, the court reasoned that Congress would not have expressly saved such clauses from invalidity without intending that they be enforceable through proper judicial proceedings. Thus, the decision can be seen as a reaction by the court to a situation wherein the balance between right and remedy was askew. A statutory enactment would certainly be something less than efficacious if it provided all rights but no remedies.

At this state of the development of judicial relief in subcontracting clause violations it was apparent to the union that it could proceed against the breaching employer in a Section 301 suit for both primary and secondary subcontracting clause violations.[39] The relief available

37. *Id.* at 686.

38. Senator Kennedy—"It is not intended to change the law with respect to the judicial enforcement of these contracts." *Id.*

Senator McClellan—"Various law-review commentators have since suggested that such a clause might still be effective to permit an action for damages or specific performance against an employer." . . . *Id.*

Senator Goldwater—"Thus, although employers and unions who are under exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint . . . may be used by any party." . . . *Id.* at 686, 687.

39. *See* El Paso Bldg. and Construction Trades Council v. El Paso Chapter Associated

in Section 301 cases varies from specific performance of a promise to arbitrate,[40] to enforcement or annulment of an arbitration award,[41] or an award of compensatory damages.[42] The general character of direct actions on the contract is a lack of immediate relief; that is, such actions generally succumb to the heavy backlog of cases on the dockets with the result that a decision on the merits is delayed for perhaps two years. Additionally, since the union is unable to use concerted activity to force the employer to comply with the secondary subcontracting clause, and since the union may be uncertain as to whether the clause in question would be deemed to be primary and thus be unwilling to enter into economic activity to enforce it in the fear that unfair labor practice charges would be filed against it,[43] the work may have been completed by the primary "unfair" subcontractor, and consequently the union's relief under Section 301 would be limited to compensatory damages. Moreover, the general contractor (secondary employer) may have accomplished the result sought to be proscribed in the secondary subcontracting clause, that of subcontracting to a primary employer who may either have no collective bargaining contract with any union or who may have a collective bargaining contract with a rival union. Such a result would circumvent the purpose of the subcontracting clause and the proviso to 8(e), *i.e.*, protection of the strong tradition of union shop construction projects.[44] Since the amount of compensatory damages suffered by the union may be small due solely to the lack of a pecuniary standard for the measurement of such damages,[45] the breaching secondary employer may have accomplished his objective of reducing costs by subcontracting to primary employers employing lower wage standards than those contained in the breaching secondary employer's collective bargaining agreement.

Therefore, within the context of subcontracting clause violations, the type of action the union would instinctively seek is obvious—work stoppage. Since, as previously discussed, use of the standard forms of

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General Contractors of America, 376 F.2d 298 (5th Cir. 1967); NLRB v. International Broth. of Electrical Workers Local Union No. 683, AFL-CIO, 359 F.2d 385 (6th Cir. 1966).

40. Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).

41. United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

42. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962).

43. See *supra* note 1.

44. *Cf.* Remarks by Senator Kennedy, II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1432 (1959).

45. See *infra* note 87, and accompanying text.

coercion in labor disputes by the union may result in the employer filing unfair labor practice charges, unless the clause is deemed to be primary, the only remaining weapon available to the union is an injunction. Thus, the union could stop work within a short time after an alleged breach by the employer with a temporary injunction, and secure a hearing on the merits as to the permanency of the injunction shortly thereafter.[46]

What appears to be the first attempt to secure an injunction for an employer violation of a subcontracting clause occurred in *International Union of Operating Engineers, Local 66, AFL-CIO v. Hallstrom*.[47] The union obtained a preliminary injunction against H (the secondary employer, enjoining him from awarding certain excavation work at the site of construction to M Contractors (the primary employer). The basis for the preliminary injunction was an affidavit by the union asserting immediate and irreparable harm resulting from H's violation of a subcontracting clause by his contracting out work to M who did not have a signed labor agreement with the union.[48] M had a master labor agreement with the United Mine Workers, District 50, but its provisions were below area standards, thus permitting M to underbid the AFL-CIO contract. Upon hearing the case on the merits, the court held that it was H's duty to obtain the signature of the subcontractor M to the agreement in question, thereby enjoining H from awarding the work to M until his signature was obtained.[49] The defendants appealed to the Supreme Court of Pennsylvania which affirmed *per curiam*.[50]

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46. *See* FED. R. CIV. P. 65. Moreover, one may file an action for an injunction and at the close of the pleadings file a motion for summary judgment pursuant to FED. R. CIV. P. 12(c). *See also* PA. R. CIV. P. 1531 for the method of securing a preliminary injunction with or without notice and a subsequent hearing. The procedure in Pennsylvania would be to file for a preliminary injunction under Rule 1531 and attach a complaint in Equity seeking a permanent injunction.

47. No. 4 May Term, 1968, in Equity (Court of Common Pleas, Clearfield County, Pa., filed Aug. 7, 1968). This decision of the lower court is unreported as of this publication.

48. The text of the clause stated:

> In the event the Contractor sublets any part of the Contract, for work to be done at the site of the construction it is agreed that all subcontractors involved shall upon direct contact by the Union be governed by the terms of this agreement. Further, the subcontractors shall sign this contract before said subcontractors shall start to work. *Id.* at 1.

49. *Id.* at 3.

50. International Union of Operating Engineers Local 66, AFL-CIO v. Hallstrom, 432 Pa. 628, 248 A.2d 315 (1968).

The pursuit of the state court injunction in *Operating Engineers v. Hallstrom* can probably be attributed to the union's fear that a federal court could be restricted from issuing an injunction because of the Norris-LaGuardia Act.[51] Section 4 of the Act[52] narrowly restricts the equity jurisdiction of federal courts relevant to the issuance of restraining orders or injunctions in labor disputes. In essence, a federal court can only issue an injunction where irreparable injury is threatened. The state courts, however, may issue injunctions for the breach of a collective bargaining agreement through their traditional equity powers.[53] However, the court in *Avco Corp. v. Aero Lodge No. 735, Int. Ass'n. of Machinists & Aerospace Workers*[54] stated that the remedies in state courts are limited to the remedies available under federal law.[55] On appeal, the Supreme Court found it unnecessary to rule on the *dictum* of the Circuit Court but reserved its opportunity to consider the

51. 29 U.S.C. § 101 (1964).

52. Section 4 reads:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

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

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of any intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 103 of this title.

29 U.S.C. § 104 (1964).

53. General Bldg. Contractors' Ass'n, et al. v. Local Unions Nos. 542, 542A et al., 370 Pa. 73, 87 A.2d 250 (1952); Philadelphia Marine Trade Association v. International Longshoremen's Association, Local Union No. 1201, 382 Pa. 326, 115 A.2d 733 (1955).

54. 376 F.2d 337 (6th Cir. 1967).

55. *Id.* at 343.

issue in a future case.[56] Thus, the continued validity of state court injunctions in conflict with federal labor law remains an unresolved issue, although there is some evidence of a reduction in such state court injunctions.[57] The problem remains, however, whether the Norris-LaGuardia Act bars the granting of an injunction in subcontracting clause violations.

Somewhat contemporaneous with the state court injunction in *Operating Engineers v. Hallstrom,* the District Court for the Northern District of Indiana issued an injunction for an employer violation of a subcontracting clause in *Operating Engineers v. Slutsky.*[58] The subcontracting clause at issue required the employer to subcontract only to "a person, firm, or corporation party to a current Labor Agreement with the Union."[59] The court issued a permanent injunction on the union's motion for judgment on the pleading enjoining S from subcontracting any excavation work to the primary "unfair" employer, B.[60] However, the court did not indicate the status of the subcontracting controversy should B decide to sign the agreement. Moreover, the federal court made no reference to the Norris-LaGuardia Act. Thus it would appear that any fear of the Act in the federal courts relevant to subcontracting clause injunctions is unjustified. However, the problem should not be lightly dismissed and the issue must be explored if one is to ultimately justify subcontracting clause injunctions.

The Norris-LaGuardia Act has been termed as "one of labor's greatest and most enduring legislative victories."[61] The purpose for its exactment was to prevent employers from obtaining an unfair advantage in labor disputes and assure government neutrality.[62] It was not the union's use of the injunction that prompted enactment of the Act but rather its use by employers, and it can safely be said that the unions' use of the injunction to obtain compliance with subcontracting clauses by employers was not contemplated by Congress when it passed the Act. Thus the present problem must be viewed in the light of the Act's purpose, *i.e.,* to insure the use of concerted activity by workers correlative to their right to organize and bargain collectively.[63]

56. Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560-62 (1968).
57. *See,* Stern, *Increasing Unavailability of State Injunctions for Breaches of No-Strike Provisions Under Section 301,* 40 PENN. BAQ 143 (1968).
58. 69 L.R.R.M. 2741 (N.D. Ind. 1968).
59. *Id.* at 2742.
60. *Id.* at 2742.
61. Aaron, *The Labor Injunction Reappraised,* 14 LABOR L.J. 41, 46 (1963).
62. *Id.* at 46, 47.
63. *Cf.,* COX, LAW AND THE NATIONAL LABOR POLICY 4-7 (1960).

In order to fall within the restrictions of Section 4 of the Norris-LaGuardia Act the activity sought to be enjoined must be the result of a "labor dispute" as the term is defined in the Act.[64] If such a "labor dispute" does not exist the court may issue an injunction if warranted according to the general principles of equity.

The dispute over a subcontracting clause violation stems from the alleged employer violation of the collective bargaining agreement. Thus, one might suppose that Section 301 of the National Labor Relations Act, authorizing suits in federal courts for breach of collective bargaining agreements, would preclude the application of Section 4 of the Norris-LaGuardia Act in subcontracting clause violations since the Act's purpose was to protect employees' concerted activities for collective bargaining purposes and, in respect to the subcontracting clause situation, a collective bargaining agreement has already been consummated. However, the Supreme Court's broad language in *Sinclair Refining Co. v. Atkinson*[65] raises doubt as to whether the foregoing assumption is valid. The Court stated that an employer's petition for the issuance of an injunction for the union's violation of a no-strike clause was a "labor dispute" concerning "any controversy concerning terms or conditions of employment" within the meaning of the Norris-LaGuardia Act.[66] Does this language mean that the issuance of injunctions in subcontracting clause violations are barred by the Norris-LaGuardia Act? The Court considered the fact that the preliminary draft of Section 301 would have repealed Norris-LaGuardia, but, the Court concluded, since the final form of Section 301 as enacted by Congress did not specifically repeal the Norris-LaGuardia Act, Section 4 of the Act still retained effect *vis-a-vis* Section 301 suits, *i.e.*, if a federal court was precluded from issuing an injunction under the Norris-LaGuardia Act, the court could not now issue an injunction in a Section 301 suit.[67] The Court, therefore, refused to issue the injunction. An important distinction in *Sinclair* relevant to subcontracting injunctions is that the injunction in *Sinclair* was originally within the purview of Section 4 of the Norris-LaGuardia Act while it remains questionable

64. The term is defined as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless or whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (1964).

65. 370 U.S. 195 (1962).

66. *Id.* at 199. Norris-La Guardia Act, § 4, 29 U.S.C. § 104 (1964).

67. *Id.* at 203-210.

whether subcontracting injunctions were originally proscribed by Section 4. Moreover, the union's activity, *i.e.*, a strike, was the very thing Section 4 of the Norris-LaGuardia Act sought to protect from employer's interference through his use of an injunction.[68] Thus, the decision in *Sinclair* is not necessarily fatal to Section 301 suits seeking injunctions for subcontracting clause violations. In addition, the predominant number of decisions under Norris-LaGuardia Section 4 involve the refusal to grant injunctions to employers thus supporting the view that the Act was intended for union benefit.[69] While it may be argued that subcontracting clause disputes involve a "labor dispute" as defined in Norris-LaGuardia, it must be noted that the Act does not prohibit all injunctions but only those enumerated in Section 4.

The Supreme Court in *Textile Works v. Lincoln Mills*,[70] when confronted with the issue of whether Section 301 was a source of substantive law, stated that the Section "authorized federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."[71] Thus the court granted specific performance of an agreement to arbitrate. While not a suit for an injunction in the ordinary sense, specific performance of arbitration provisions does result in a form of mandatory injunction since it requires the parties to submit to the arbitration procedures specified in the contract. The results in *Sinclair* and *Lincoln Mills* prompted the court in *Local 328 v. Armour and Co.*[72] to conclude that:

> It is a little difficult to read the *Lincoln Mills* case in 1957 and then read the [*Sinclair* case] in 1962. As a matter of fact, this Court only reaches the conclusion that it is impossible to put the two together.[73]

In *Local 328 v. Armour* the union sought an injunction for the purpose of preventing the closing of the defendant's distribution plant in Marquette. The union relied on a provision in the contract which prohibited the employer from assigning the work of the employees involved to anyone other than the employees in the bargaining unit.[74]

68. Injunctions against violent strikes, however, were not prohibited. *See* 29 U.S.C. § 107 (1964).
69. *But see* Local Union 861 of Intern. Broth. of Electrical Workers v. Stone & Webster Engineering Corp., 163 F. Supp. 894 (W.D. La. 1958) (wherein the union sought an injunction for employer's alleged breach of contract through a lock-out).
70. 353 U.S. 448 (1957).
71. *Id.* at 451.
72. 294 F. Supp. 168 (W.D. Mich. 1968).
73. *Id.* at 171.
74. The text of the clause read: "The Employer agrees that it will not permit their

The union argued that the closing of the distribution plant and the utilization of common carriers to perform the work was a violation of the collective bargaining agreement relating to the jurisdictional rules. The court recognized "the first and great hurdle"[75] as involving the possible application of the Norris-LaGuardia Act. The court saw a hopeless dilemma in the proposal that although it has both the authority under Section 301 to fashion appropriate remedies pursuant to the *Lincoln Mills* doctrine, and the authority to grant an injunction to protect the jurisdiction of arbiters under arbitration clauses, it does not have authority to protect its own jurisdiction when it has the same jurisdiction as the arbiters in interpreting the collective bargaining agreement. Thus the court resorted to the "general rules of equity"[76] and granted the union's request for injunctive relief.[77]

In support of its decision, the court in *Armour* cited *Local Division 1098 v. Eastern Greyhound Lines*[78] wherein that court thought it ironical for an employer to object to the granting of an injunction since "[t]he Norris-LaGuardia Act, as is well known, was passed to prevent injunctions being granted at the behest of employers against labor unions or employees generally."[79] Aside from this initial reaction, the *Greyhound* court held that the Act was not applicable to the union's demand for a preliminary injunction pending the determination of arbiters as to the employer's right to move certain repair facilities from Washington, D.C. to Chicago.[80] The court relied upon *Lincoln Mills* for its holding.

The courts, therefore, have refused to recognize any broad assumption that the Norris-LaGuardia Act prohibits use of the injunction in every labor dispute. Rather, the courts, in keeping with the general purpose of the Act, should apply it only to those activities that are clearly within the Act's purview.[81] Thus *Sinclair* and *Lincoln Mills* need not be considered conflicting as indicated by the court in *Local 328 v. Armour. Sinclair* can readily be seen as activity clearly within the purview of Norris-LaGuardia while *Lincoln Mills* is a refusal to

employees or persons other than the employees in the bargaining units here involved to perform work which is recognized as the work of the employees in said units." *Id.* at 169.

75. *Id.*
76. *Id.* at 171.
77. *Id.* at 172.
78. 225 F. Supp. 28 (D.D.C. 1963).
79. *Id.* at 31.
80. *Id.*
81. See Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

apply the Act to activity never intended for the Act's prohibitions.[82] A reading of Norris-LaGuardia reveals, as the court in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*[83] concluded, that the Act sought to protect only employees and unions with the exception of Section 3(a,b),[84] and in Section 4(b).[85] An injunction to enforce a subcontracting clause is an effort to compel employer adherence to a collective bargaining agreement, and Sections 3(a,b) and 4(b) do not prohibit the use of an injunction in such an instance. If Congress sought to permit subcontracting clauses in the construction industry, there is no reason to believe the Congress did not also intend that such clauses would be enforceable, hence contemplating whatever relief is deemed appropriate including an injunction.[86]

The Application of General Equitable Principles—A Closer Look at What is Being Enforced

The initial general equitable principle relevant to the issuance of injunctions is that there exists no adequate remedy at law available to the moving party. Specifically within the context of subcontracting clause injunctions, it must appear that the union's remedy in damage, is inadequate due to the absence of any pecuniary standard available for its computation.

If the employer is permitted to breach the subcontracting clause,

82. Moreover, Local 1098 v. Greyhound Lines, 225 F. Supp. 28 (D.D.C. 1963), and Retail Clerks Union Local 1222 v. Alfred Lewis, Inc., 327 F.2d 442 (9th Cir. 1964) are further examples of the courts' refusal to apply the Norris-La Guardia Act where the activity fell outside the ambit of the Act.

83. 310 F.2d 513, 515-16 (7th Cir. 1962).

84. The Section reads as follows:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in Section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:
>
> Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby
>
> (a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or any employer organization; or
>
> (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization. 29 U.S.C. § 103 (1964).

85. See *supra* note 52 for text of section 4(b).

86. See *supra* notes 39, 40, and accompanying text.

with the union's remedy limited solely to damages, it is apparent that the remedy is inadequate. The particular work subcontracted may be such work as is reserved to the union under a jurisdictional clause in the contract, and it is difficult to imagine a standard for the pecuniary measurement of the loss of such work to the union. The damages would indeed be speculative. Moreover, an unenjoined breach by an employer may result in a denial of other rights and privileges provided in the agreement. Collective bargaining agreements often provide for servicing by the duly authorized business representative of the union.[87] If a subcontracting clause limits subcontracting to those firms which are in *signed relations* with the union, and the general contractor breaches the subcontracting clause, it is evident that rights under the service clause would be restricted since the business agent could not "service" the contract as to the non-signatory subcontractor. There are also several other clauses in a standard collective bargaining contract that may be infringed when a standard is not available for the measurement of damages.[88]

Another example of irreparable harm which would result if the general contractor was permitted to breach the subcontracting clause is the situation where Union A has a signed agreement with an association of general contractors limiting any subcontracting to association members. Contractor B, a member of the association, may bid on a particular project and be awarded the job. Subsequently, Contractor B may wish to subcontract and, without ever having begun the job, subcontracts to Contractor C, not an association member, whose employees may either be non-union or in signed relationship with a union with lower work standards than what Union A has bargained for. If Contractor B were not enjoined, Union A's subcontracting clause would be worthless since its members will have forever lost the opportunity to work on that particular job. The injured individual members of Union A may also be precluded from obtaining wages comparable in the way of damages to what they would have received by working the project. Moreover, the members would begin to lose faith in the ability of the union to secure jobs. Since the primary purpose of subcontract-

87. Service clauses generally provide that the business agent is permitted to enter the job site over which the employer exercises control of entry for the purpose of determining whether or not various sections of the agreement are being complied with, for example, referral provisions.

88. Such clauses might include the referral clauses, clauses requiring certain craft employees present on certain activities, or clauses relating to hours of work, lunch breaks, or the employment of apprentices on various jobs.

ing clauses is the preservation of union security,[89] if unions are in fact unable to keep substandard or "unfair" employers off the job site, the unions' usefulness to the members would be in doubt. Furthermore, there exists no standard for the pecuniary measurement of the members loss of faith in the union occasioned by the employer's breach of contract.

Assuming the employer is enjoined from subcontracting unless he obtains the signature of the "unfair" subcontractor on the agreement, to what provisions of the contract is the subcontractor liable. He would probably be required to pay permit money to the union for its servicing of the contract. Moreover, once having signed, the subcontractor would probably be required to pay into the union's pension and welfare plan.[90]

Most collective bargaining agreements require the employer to pay to the union with whom it is signed money deducted from the wages of employees in payment of membership dues in a labor organization.[91] It is doubtful whether a subcontractor who signs the agreement as required by the subcontracting clause could be required to pay such dues to the union since such action would appear to be a violation of Section 8(a)(2) of the NLRA[92] as financial contributions in support of a labor organization. However, should the subcontractor sign the agreement, the union could require the subcontractor to accept the union as the collective bargaining agent for his employees. Such a proposal would not violate the National Labor Relations Act in that the employees have not been given the right to organize free from either employer or union interference[93] in view of the authorization of such a

89. See *supra* note 44.

90. It is doubtful that a non-signatory subcontractor could be required to pay into the pension and welfare plan since any payment must be made pursuant to a written agreement between the parties. Moylia v. Geoghegan, 267 F. Supp. 641, 647 (S.D.N.Y. 1967). A union cannot use economic coercion in the form of picketing to enforce a subcontracting clause providing that the general contractor is financially responsible for certain fringe benefits if the subcontractor did not pay them as provided under the union agreement. Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534 (D. of C. 1964).

91. Section 302(c) of the National Labor Relations Act, 29 U.S.C. § 186(c) (1964) authorizes such payments.

92. The section reads as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> . . . .
>
> (b) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

29 U.S.C. § 158(a)(2) (1964).

93. Generally a collective bargaining agent must be certified by the Board pursuant to the representatives and elections provision of the Act, 29 U.S.C. § 159 (1964).

practice in the construction industry under Section 8(f).[94] The practical effect, however, of a non-union contractor signing the agreement in question would be to enhance the stature of the union in the eyes of his employees. For the union, this effect may be of help in the ultimate objective of any union-recognition.

Conclusion

Once separated from the instinctive prohibitory notions engendered by the Norris-LaGuardia Act, subcontracting clause injunctions appear to be the logical result in the steady development of judicial relief available for subcontracting clause violations. In many instances the injunction will be the only effective form of judicial relief available since the measurement of pecuniary loss for damages will be unascertainable. The injunction can thereby be seen as the best relief fashionable by the courts in subcontracting clause violations in order to effectuate the purpose of the construction industry exemption to Section 8(e)—union security and recognition of the inherent problems created by union and non-union workers present at the construction site.

However, merely because the moving party for the injunction asserts that the breach of the collective bargaining agreement is a subcontracting clause violation, the courts should be aware that in enforcing the subcontracting clause they may be also enforcing other provisions of the agreement. The court should first determine whether the agreement contains a valid subcontracting clause. If so, the court must then fashion its decree in such a manner so as to enable the parties to determine whether other provisions of the collective bargaining agreement will be enforced against the subcontractor should he decide to sign. This will eventually entail the development of guidelines stating the correlative rights and duties of the parties in light of the existing collective bargaining agreement. Where the subcontractor is in a signed relationship with a union other than the union moving for the injunction, special problems may be created if the subcontractor signs the

94. Section 8(f) provides:
It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of the agreement. . . .
29 U.S.C. § 158(f) (1964).

agreement. In short, the problem is complex, but the complexity can be limited if the courts look beyond the subcontracting clause itself to the other sections of the collective bargaining agreement it may be inadvertently enforcing against the subcontractor.

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