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SUBCONTRACTING CLAUSES AND SECTION 8(e) OF THE
NATIONAL LABOR RELATIONS ACT

The addition of section 8(e)¹ to the National Labor Relations Act² in 1959 jeopardized the validity of all subcontracting clauses—provisions in employer-union collective bargaining agreements which in some manner eliminate or condition the employer's right to contract out work or which penalize the exercise of that right.³ Although it was not the congressional

¹ "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and section (b) the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception." 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1963).

² 49 Stat. 449 (1935) (Wagner Act), as amended, 29 U.S.C. § 151 (1958) (Taft-Hartley Act).

³ One in every five major contracts now contains some kind of subcontracting clause. Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LAB. REV. 579 (1961). Actually, the number of contracts which in fact contain some restriction on subcontracting is considerably larger than this because of the recent practice of many arbitrators to infer a restriction on subcontracting from other terms in the contract. See Fayerweather, *Implied Restrictions on Work Movements—The Pernicious Crow of Labor Contract Construction*, 38 NOTRE DAME LAW. 518 (1963).

intent that section 8(e) indiscriminately abolish all subcontracting clauses,⁴ this is the literal impact of the language used in the section.

Congress formulated section 8(e) in such a way as to condemn all clauses which cause secondary pressure to be applied to "unfair" employers for the purpose of compelling their acquiescence in various union demands.⁵ These are popularly known as "hot cargo" clauses.⁶ Prior to the enactment of section 8(e) it was common for a union to obtain a hot-cargo promise from each employer with whom it bargained to the effect that the employer would agree to cease or refrain from doing business with any employer whom the union might designate as "unfair." When such a promise was contained in the collective bargaining contracts of the customers or suppliers of an employer involved in a labor dispute it provided a strong inducement for him to settle his differences with the union in order to avoid being designated "unfair," with resultant loss of business from those customers and suppliers.

There were two basic reasons why Congress objected to the unions' use of this indirect or secondary pressure whereby a neutral employer is contractually committed to apply pressure on the "unfair" employer for the union's benefit. First, the use of secondary pressure tends to enlarge the primary labor dispute between the union and the "unfair" employer by involving neutral employers in the controversy, thereby magnifying the disruptive effects of the altercation on the economy.⁷ 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.⁸

⁴ See notes 11, 14 *infra*.

⁵ 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) [hereinafter cited as SYMPOSIUM]. Speaking of a bill identical to 8(e) with the only exception that the construction and apparel industry provisos had not yet been added, Representative Griffin said, "[I]t is important to keep in mind that our substitute bill would not change—it would only reinforce what was the intent of Congress at the time it passed the Taft-Hartley Act. That intent was to outlaw secondary boycotts." 105 CONG. REC. 15531 (1959), 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1568 (1959) [hereinafter cited as 1 or 2 LEGIS. HIST.].

⁶ The "hot-cargo clause" got its name from the fact that originally it was a clause which exempted employees from any obligation to handle goods which were viewed as "hot" because they came from "unfair" employers. As a practical matter, this clause usually forced the employer to cease dealing with the "unfair" employer and, consequently, this resulted in the application of pressure on the "unfair" employer to alter his labor policies to the satisfaction of the union in order again to become classified as a "fair" employer. This pressure applied to the "unfair" employer is called *secondary* pressure rather than *primary* pressure because it is exerted indirectly by another employer rather than directly by the union. See generally 3 CCH LAB. L. REP. ¶ 5222.

⁷ See *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294, 297 (N.D. Cal. 1960).

⁸ See *Los Angeles Mailers' Union 9, I.T.U. (Hillbro Newspaper Printing Co.)*, 135 N.L.R.B. 1132, 1137 (1962).

The assault upon these secondary pressure tactics began in 1958 when the Supreme Court decided *Sand Door*.⁹ In that case it was held that, although the presence of a hot-cargo clause in a contract was not per se illegal under the National Labor Relations Act, it was an unfair labor practice for a union to strike in order to *force* an unwilling employer to abide by a hot-cargo clause in his collective bargaining contract should he later decide to disregard that provision. Nevertheless, the hot-cargo clause still retained vitality because there remained at the union's disposal a variety of techniques capable of convincing most neutral employers "voluntarily" to honor their contractual commitments to the unions.¹⁰ Therefore, Congress found it necessary to finish the task begun in *Sand Door* by declaring, through section 8(e), that all hot-cargo contracts are totally void and that it is an unfair labor practice even to enter into such an agreement.¹¹

This congressional proscription of hot-cargo clauses encompasses some subcontracting clauses, because several varieties of subcontracting clauses can be used to exert secondary pressure on "unfair" employers, and as such they become hot-cargo clauses.¹² However, other varieties of subcontracting clauses cannot be used to exert secondary pressure on "unfair" employers.¹³ For example, a clause which is motivated solely by the union's desire to protect the jobs of its members in the bargaining unit, and which simply stipulates that no work shall be subcontracted away from the bargaining unit, has neither the purpose nor the effect of applying discriminatory secondary pressure upon outside "unfair" employers.¹⁴ Furthermore, this type of subcontracting clause has neither a tendency to magnify labor disputes nor the capacity to involve neutral employers in them, because it operates independently of the union's current relations with other employers. These clauses seem clearly to fall beyond the congressional purpose underlying section 8(e).¹⁵

⁹ Local 1976, *United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958).

¹⁰ The desire of an employer to retain the confidence and trust of the union would incline him toward compliance with the clause. In addition, the threat of excessive demands by the union at the next bargaining session would be persuasive for many employers, particularly if the expiration date of the old contract is not far off. Finally, the failure to abide by this clause might be considered a material breach of the contract, which would terminate the old contract and require new negotiations with the union.

¹¹ See *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294 (N.D. Cal. 1960); *Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.)*, 136 N.L.R.B. 977, 985 (1962); 105 CONG. REC. 16590 (1959), 2 LEGIS. HIST. 1708 (remarks of Representative Thompson); Rothman, *Problems Raised by New Secondary-Boycott Restrictions*, 45 L.R.R.M. 78 (1960).

¹² See notes 94-100 *infra* and accompanying text for examples of this kind of clause.

¹³ See *Orange Belt Dist. Council v. NLRB*, 2 LAB. REL. REP. (55 L.R.R.M.) 2293, 2296 (D.C. Cir. Feb. 10, 1964).

¹⁴ For the argument that this kind of clause can not exert secondary pressure on "unfair" employers, see notes 72-74 *infra* and accompanying text.

¹⁵ There is no advocacy for the abolition of subcontracting clauses in the entire reported history of the Landrum-Griffin bill. *Teamsters Union (Wilson & Co.)*, 53 L.R.R.M. 1475, 1483 (1963) (dissenting opinion of Member Brown); see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1119 (1960). *But cf.*

However, a literal reading of section 8(e) seems to extend its proscription considerably beyond that contemplated by Congress. Literally, section 8(e) prohibits all agreements whereby an employer promises a union that he will cease or refrain from handling the products of any other employer or cease doing business with any other person. This censure is sufficiently comprehensive to encompass the entire spectrum of subcontracting clauses because, in some measure, each subcontracting clause requires the general employer to promise to cease or refrain from doing business with subcontractors. Congress unfortunately relied upon this ambiguous characteristic—ceasing or refraining from doing business with another—to identify and convict the hot-cargo clause in section 8(e); consequently, the language of the section appears inadvertently to proscribe clauses used solely for job protection as well as clauses having illegal secondary objectives.

This myopic draftsmanship prompted several writers to predict, at the time section 8(e) was enacted, that its passage had sounded the death knell for the subcontracting clause.¹⁶ Others, taking a contrary view, contended that section 8(e) should not be applied to those clauses which Congress clearly did not intend to abolish.¹⁷ Still others, in a more cautious vein, recognized the problem but refused to predict its ultimate resolution.¹⁸ Four and one-half years of NLRB and court decisions have resolved many of the questions raised by these writers, but they have also created interpretative problems unanticipated earlier. Today, three channels exist whereby a subcontracting clause may avoid the proscription of section 8(e): (1) the subcontracting clause may fall beyond the literal wording of section 8(e); (2) it may be so alien to the purpose of section 8(e) that the Board will simply refuse to apply the literal criteria of 8(e); (3) it may find refuge within the construction or garment industry provisos appended to section 8(e). Each of these possibilities will be examined in turn.

Felhaber, SYMPOSIUM 917, who disagrees with this conclusion. He relies chiefly upon the fact that Senator Morse, 105 CONG. REC. 16399 (1959), 2 LEGIS. HIST. 1428 and Representative Thompson, 105 CONG. REC. 16590 (1959), 2 LEGIS. HIST. 1708, warned Congress that they believed § 8(e) would also prohibit all subcontracting clauses, yet Congress failed to amend the bill in response to these warnings. This proves, he concludes, that Congress must have intended this result. However, the more logical conclusion would seem to be that, because it was late in the session and the bill represented a great many delicately balanced compromises, Congress was fearful of reopening the bill to new amendments. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 273 (1959), indicates that it is also unlikely Congress believed the warnings were accurate.

¹⁶ Dannett, *The Legality of Subcontracting Provisions Under Section 8(e)*, in SYMPOSIUM at 905; 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, *supra* note 15, at 273; Powell, *The Impact of Section 8(e) on Subcontracting Clauses in Collective Bargaining Agreements*, SYMPOSIUM 897, 904; Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L.Q. 724, 745 (1960).

¹⁸ Rothman, *supra* note 11, at 85.

I. SUBCONTRACTING CLAUSES AND THE LANGUAGE OF SECTION 8(e)

Neither the NLRB nor the courts have looked kindly upon attempts to exploit the ostensible loopholes generously permeating the complex language of section 8(e).¹⁹ A slavish adherence to the literal meaning of each word was quickly rejected, and the slogan soon became, "[L]iteralism is not the touchstone for construction of section 8(e)."²⁰ This attitude is evidenced by the expansive interpretations accorded the following phrases within section 8(e).

- A. "It shall be an unfair labor practice . . . to enter into any contract. . . ."²¹

Although a later phrase in section 8(e) declares unenforceable and void any clause whereby the employer promises to cease or refrain from doing business with another,²² the existence of such a clause is not an unfair labor practice unless it has been "entered into" within the meaning of section 8(e). This distinction is important because, even though a clause may be unenforceable, it must constitute an unfair labor practice before the NLRB acquires jurisdiction²³ to prevent a union from utilizing its post-*Sand Door*²⁴ techniques to persuade the employer "voluntarily" to comply with the clause.²⁵ Many unions, therefore, were optimistic that clauses, otherwise violative of section 8(e), would escape its proscriptions if signed (hence "entered into") before the passage of the Landrum-Griffin Act in 1959 or more than six months before the filing of a complaint with the Board.²⁶ However, these hopes were to go unrealized. In *District 9, IAM*,²⁷ the Board found an unfair labor practice under section 8(e) although the clause in question had been signed long before that section became law. Shortly thereafter, in *Dan McKinney Co.*,²⁸ the Board again found an unfair labor practice, although this time the clause in question had been signed more

¹⁹ See *Milk Drivers & Dairy Employees, Local 546 (Minnesota Milk Co.)*, 133 N.L.R.B. 1314 (1961), *enforced*, 314 F.2d 761 (8th Cir. 1963).

²⁰ *District 9, IAM v. NLRB*, 315 F.2d 33, 36 (D.C. Cir. 1962).

²¹ This subsection heading, as well as subsection headings IB, IC, ID and IE, are phrases taken from § 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1963), and emphasis is added to the particular words discussed in each heading.

²² "[A]ny contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ." 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1963).

²³ 49 Stat. 453 (1935), 29 U.S.C. § 160 (1958).

²⁴ *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958).

²⁵ See note 10 *supra*.

²⁶ The NLRA has a six-month statute of limitations. 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1958).

²⁷ *District 9, Int'l Ass'n of Machinists*, 134 N.L.R.B. 1354 (1961) (Members Fanning and Brown dissenting), *enforced*, 315 F.2d 33 (D.C. Cir. 1962); see *Automotive, Petroleum, Local 618 (Greater St. Louis Automotive Trimmers & Upholsterers Ass'n)*, 134 N.L.R.B. 1363 (1961) (Members Fanning and Brown dissenting).

²⁸ *Dan McKinney Co.*, 137 N.L.R.B. 649 (1962) (Members Fanning and Brown took no part in the decision).

than six months before the complaint was filed. In explaining its position on this matter the Board stated: "[W]e have indicated our belief that the words 'to enter into' must be interpreted broadly and encompass the concepts of reaffirmation, maintenance, or giving effect to any agreement which is within the scope of Section 8(e)."²⁹ With the courts' apparent acceptance of the Board's interpretation of these words,³⁰ the draftsmen of subcontracting clauses lost the possibility of utilizing the words "to enter into" as a device to escape section 8(e).

- B. "It shall be an unfair labor practice . . . whereby such employer ceases or refrains or agrees to *cease or refrain from . . . dealing in any of the products* of any other employer, or to *cease doing business* with any other person. . . ."

This peculiar wording held out particular promise to those seeking to circumvent the language of section 8(e). The word "refrain," while present in the "handling products" phrase, is conspicuously absent from the "doing business" phrase. Thus, the language of the statute appears not to prohibit an agreement whereby the employer promises only *to refrain from doing business* with another employer, provided this does not constitute a promise *to refrain from handling his products* as well. The practical application of this distinction could be extensive because frequently the subcontractor is to contribute services, and not products, to the general employer. For example, subcontracting clauses in which the employer promises to *refrain* from using the services of another to provide the transportation and delivery of his goods, or to provide the maintenance or janitorial services for his plants and offices, would appear valid according to the statutory language.

There is something to be said in support of such a distinction. For example, the "dealing in products" clause, which immediately precedes the "doing business" clause, contains both the words "cease" and "refrain," and it would seem most natural and consistent with the rules of parallel construction simply to copy both words into this later phrase as well.³¹ The fact that this was not done tends to indicate that the word "refrain" was dropped by conscious choice.

However, stronger arguments militate against this distinction. The atmosphere of tension and urgency which prevailed when Congress drafted this section suggests that the variance might have been inadvertent.³² Furthermore, early discussion of the forerunner of section 8(e) frequently referred to that bill as one designed to "make it an unfair labor practice

²⁹ *Id.* at 654; see *General Teamsters, Local No. 890 (San Joaquin Valley Shippers' Labor Comm.)*, 137 N.L.R.B. 641 (1962) (Members Fanning and Brown took no part in the decision).

³⁰ See *Los Angeles Mailers' Union 9, Int'l Typo. U. v. NLRB*, 311 F.2d 121 (D.C. Cir. 1962); *District 9, IAM v. NLRB*, 315 F.2d 33 (D.C. Cir. 1962).

³¹ DICKERSON, *LEGISLATIVE DRAFTING* 62 (1954).

³² See Leiter, *LMRDA and its Setting*, SYMPOSIUM 12, 18; Loftus, *LMRDA in Retrospect*, SYMPOSIUM 8.

. . . whereby such employer . . . agrees . . . to cease doing, or *refrain from doing, business* with [another employer]."³³ However, the most persuasive argument that can be made for reading the word "refrain" into the "doing business" clause is that its omission would leave standing the many hot-cargo clauses which do not involve the *products* of another employer, and thus circumvent the statute and thwart a clear congressional policy.³⁴ Underscoring this last argument is the fact that the Teamsters Union, whose activities provoked Congress to enact his section,³⁵ would find such a distinction tailor-made for its hot-cargo clauses, because the Teamsters Union is primarily involved in the service rather than manufacturing industries. If upheld, this distinction would have enabled the Teamsters Union to apply contractual secondary pressure on any trucker or warehouseman with whom it had a dispute through "refrain from doing business" clauses.

Although this controversy is not yet fully resolved,³⁶ the Board seems to be committed to a course of eliminating this potential "loophole" by obliterating any effective distinction between the two phrases. One technique to effect this purpose has been interpretation of the word "refrain," when used in a subcontracting clause, as containing an implied promise to "cease." In *Arden Farms*³⁷ the Board held that section 8(e) is violated by a clause in which the employer promises only to *refrain from doing future business* with any person engaged in milk distribution. The reason given was that "if the term, 'refrain,' is to have its ordinary meaning, they must also cease whatever business they are now doing with such other persons."³⁸ Even though the parties' subsequent course of conduct in this case left no doubt that the employer was not expected to terminate his existing business relationships with subcontractors, the Board still found a "cease" meaning in the "refrain" subcontracting clause by insisting upon interpreting the clause as written rather than as subsequently applied by the parties.³⁹

The expansion of this technique was portended in *Bituminous Coal Operators Ass'n*,⁴⁰ which suggests that a "cease" meaning may be implied any time the employer promises to "refrain" from dealing with subcontractors with whom he has *existing relations*.⁴¹ The reasoning would be

³³ 105 CONG. REC. 6557 (1959) (remarks of Senator Gore). (Emphasis added.)

³⁴ See note 11 *supra*.

³⁵ The original Elliot bill, forerunner of the LMRDA, was exclusively directed toward the common carriers. H.R. No. 8342, 86th Cong., 1st Sess. (1959), 1 LEGIS. HIST. 755; see 105 CONG. REC. 5889 (1959), 2 LEGIS. HIST. 1162 (remarks of Senators Kennedy and Gore).

³⁶ See *Hoffman v. Joint Counsel of Teamsters*, 45 CCH Lab. Cas. 27423 (N.D. Cal. 1962). This decision is criticized in Comment, 38 N.Y.U.L. REV. 97, 107 (1963).

³⁷ *Teamsters Union (Arden Farms Co.)*, 52 L.R.R.M. 1322 (1963).

³⁸ *Id.* at 1324.

³⁹ *Ibid.*

⁴⁰ *UMW (Bituminous Coal Operators Ass'n)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1037 (Sept. 9, 1963). The subcontracting clause in this case seemed to violate the "dealing in products" phrase more clearly than the "doing business" clause.

⁴¹ Although this case was decided on other grounds, the Board seemed cognizant of the fact that a "refrain" clause may ultimately result in the cessation of current business relationships. *Id.* at 1040 (dictum).

that the "refrain" clause will prevent the renewal of existing contracts with these subcontractors, and the general employer will therefore be required to cease doing business with them when the old contracts expire.

In still a further attempt to negate any distinction between the two phrases, the Board has interpreted the word "products," which is found in the "cease or refrain from dealing in products" phrase, so broadly that it is now practically synonymous with the words "doing business."⁴² The word "products" now includes thought, labor, and business enterprises as well as tangible objects.⁴³ This definition is broad enough to include delivery services⁴⁴ and presumably maintenance or janitorial services as well. Thus, although a subcontracting clause which requires the employer to *refrain* from using the services of another might conceivably still escape the "doing business" phrase, it would most probably violate the "cease or refrain from dealing in products" phrase.

- C. "It shall be an unfair labor practice for 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 . . . dealing in any of the products of any other employer, or to cease doing business with any other person"

Section 8(e) appears to interdict only those clauses whereby the employer promises to cease or refrain from dealing with others. This led several early writers to suggest that a clause could escape this section if the employer promised instead to refrain from disciplining his employees should they refuse to handle goods which were also handled by subcontractors.⁴⁵ This, of course, would be an effective device to discourage subcontracting because employers would be hesitant to contract out work if their own employees could refuse to handle any material involved in the subcontracting process. Although this type of subcontracting clause has been highly prolific in spawning case law, the Board⁴⁶ and the courts⁴⁷ have consistently found that such clauses really constitute an "implied" promise by the employer to cease or refrain from dealing with others. Some unions began inserting a companion clause requiring that management personnel

⁴² See *Teamsters Union (Arden Farms Co.)*, 52 L.R.R.M. 1322 (1963).

⁴³ *Milk Drivers & Dairy Employees Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901, 907 (1961). Although the Board in this case was dealing with the phrase, "products [which] are produced by an employer," found in § 8(b)(4) of the National Labor Relations Act, this interpretation of the word "products" has been carried over to § 8(e).

⁴⁴ See *Teamsters Union (Arden Farms Co.)*, 52 L.R.R.M. 1322 (1963). *But see* *Retail Clerks Union Local 770 v. NLRB*, 296 F.2d 368, 371-72 (D.C. Cir. 1961).

⁴⁵ Previant, *The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis*, 48 GEO. L.J. 346, 355 (1959); Comment, 45 CORNELL L.Q. 724, 745 (1960).

⁴⁶ *Dan McKinney Co.*, 137 N.L.R.B. 649, 652 (1962); *New York Mailers' Union 6, ITU (New York Herald Tribune, Inc.)*, 136 N.L.R.B. 196 (1962), *modified but enforced in pertinent part*, 316 F.2d 371 (D.C. Cir. 1963); *cf.* *Amalgamated Lithographers of America (Ind.)*, 130 N.L.R.B. 985, 988 (1961), *aff'd*, 309 F.2d 31 (9th Cir. 1962).

⁴⁷ *Los Angeles Mailers' Union 9, ITU v. NLRB*, 311 F.2d 121, 124 (D.C. Cir. 1962).

themselves provide the labor necessary to continue dealing with the subcontractors rather than terminate the subcontract relationship, but the Board, with excusable cynicism, has found this alternative so impractical and unpalatable to management that realistically it amounts to an implied promise by the employer to cease dealing with others.⁴⁸

D. "It shall be an unfair labor practice . . . whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in any of the products of any *other employer*, or to cease doing business with any *other person*."

Occasionally it is difficult to determine whether those with whom the employer agrees to cease doing business are in an employment relationship with him or are independent subcontractors.⁴⁹ This distinction is critical because the Board has held that section 8(e) does not prevent an employer from promising a union which represents some of his employees that he will cease or refrain from giving certain work to other of his employees outside that bargaining unit.⁵⁰ It is easy to see that employees are not protected by the "dealing in products" clause, but it is difficult to comprehend why non-bargaining unit employees are not protected by the "cease doing business" clause, which uses the comprehensive term "persons" for its object. Although it is possible the Board believed these situations were adequately governed by the provisions of the National Labor Relations Act which regulate jurisdictional disputes between several employee units under a single employer,⁵¹ section 8(e) appears to have been prematurely dismissed. Section 8(b)(4)(D), the principal section regulating internal jurisdictional disputes, is not violated unless the employer is *forced or required* to cease doing business with some of his employees for the benefit of other employees.⁵² However, this still leaves the union the array of devices

⁴⁸ See, e.g., *Truck Drivers Local 413 (Patton Warehouse, Inc.)*, 140 N.L.R.B. 1474, 1482-85 (1963).

⁴⁹ For example, in one case a milk deliveryman rented his truck from the processor and the processor set up a route for him. However, the deliveryman had to buy the milk outright from the processor and he was free to sell it at any price and on whatever terms he wished to his own customers. His entire income came from the resale profit. The Board held that the deliveryman was an employee of the processor although the trial examiner believed he was an independent subcontractor. *Milk Drivers & Dairy Employees, Local 546 (Minnesota Milk Co.)*, 133 N.L.R.B. 1314 (1961), *enforced*, 314 F.2d 761 (8th Cir. 1963).

⁵⁰ *Milk Drivers & Dairy Employees, Local 546 (Minnesota Milk Co.)*, *supra* note 49; *Teamsters Union (Milwaukee Cheese Co.)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1134, 1135 (Oct. 7, 1963).

⁵¹ Section 8(b)(4)(D) prohibits "*forcing or requiring* any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization or in another trade, craft, or class . . ." 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(b)(4)(D) (Supp. IV, 1963). (Emphasis added.) Section 10(k) of the NLRA gives the Board jurisdiction to determine disputes arising under § 8(b)(4)(D), 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1958).

⁵² See note 51 *supra*.

developed after *Sand Door*⁵³ to convince the employer "voluntarily" to enter into and respect a clause which requires him to allocate work to the bargaining unit employees at the expense of the non-bargaining unit employees.⁵⁴ Consequently, if the union is able to convince the Board that certain "independent contractors" are really employees and not subcontractors, it will be free to request clauses against them identical in nature and function to the subcontracting or hot-cargo clauses. Furthermore, because the line between an independent subcontractor and an employee is not well defined, this offers substantial opportunity to those who wish to draft subcontracting clauses which escape section 8(e).⁵⁵

II. SUBCONTRACTING CLAUSES AND THE PURPOSE OF SECTION 8(e)

In spite of the unions' failure to convince the Board that various subcontracting clauses are beyond the literal wording of section 8(e), the Board has not been unmindful that the congressional policy behind section 8(e) did not contemplate abolition of those subcontracting clauses which are free from secondary pressure characteristics.⁵⁶ As a result, the Board has become amenable to the suggestion that it exempt such clauses from the operation of section 8(e).⁵⁷ However, this exemption has proved arduous to administer because of the difficulty of determining pragmatically whether a given subcontracting clause possesses secondary pressure characteristics. This problem of classification is created by two factors. First, since one of the inevitable ramifications of any subcontracting clause is that the employer must *cease* or *refrain* from doing business with certain other employers, a subcontracting clause can be an effective substitute for the defunct hot-cargo clause. Therefore, unions frequently camouflage prohibited secondary objectives within subcontracting clauses which, on the face of the contract, appear directed only toward primary objectives.⁵⁸ Although such a clause deals with subcontracting, it would surely subvert congressional policy to grant it immunity. This forces the Board to undertake an extensive analysis of each subcontracting clause in order to determine whether it is as foreign to the proscription of section 8(e) as it might appear at first glance.

⁵³ *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958).

⁵⁴ See note 10 *supra*.

⁵⁵ Among the relevant factors in drawing such a line are (1) the degree of control exercised over the one doing the work, (2) the method of payment, (3) the place where the work is to be done, (4) the ownership of the tools used, and (5) specialization of the work done. See *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948); 62 *MICH. L. REV.* 127 (1963).

⁵⁶ See note 15 *supra*.

⁵⁷ See *Orange Belt Dist. Council v. NLRB*, 2 *LAB. REL. REP.* (55 L.R.R.M.) 2293, 2295 (D.C. Cir. Feb. 10, 1964).

⁵⁸ For example, the following clause is phrased in subcontracting terms: "Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, preference must be given to such shop or subcontractors approved or having contracts with [this Union]." *District 9, Int'l Ass'n of Machinists v. NLRB*, 315 F.2d 33, 35 (D.C. Cir. 1962). Nevertheless, by refusing to approve "unfair" subcontractors, the union is able to use this as a hot-cargo clause.

Second, even though a subcontracting clause is entered into in good faith, it will frequently assume an unfamiliar, if not bizarre form as the result of a compromise between the conflicting wishes of labor and management. Fearing the erosion of job opportunities for the employees in the bargaining unit, the unions often feel it necessary to obtain some restriction or prohibition on management's right to subcontract out work.⁵⁹ Employers, on the other hand, widely regard the right to subcontract as a managerial prerogative which ought not to be shared with labor.⁶⁰ In addition, management has a strong desire to retain some flexibility to subcontract work when a subcontractor offers a higher degree of automation, economies of specialization, or a lower wage rate, and is thus able to do the work at a substantial saving.⁶¹ Strange hybrid clauses, which defy ready classification, spring from these competing interests of labor and management and occupy a "twilight zone" where subcontracting is permitted, but only on certain conditions, to certain subcontractors, or upon payment of certain penalties.

As an aid in determining which subcontracting clauses should be eligible for this exemption from the pronouncements of section 8(e), the Board has found section 8(b)(4)(B)⁶² a helpful analogy.⁶³ Section 8(b)(4)(B) rests the legality of certain union activities upon a determination of whether the union objectives involved are primary or secondary in nature.⁶⁴ This

⁵⁹ Several recent decisions have held that an employer must bargain with the union before he decides to subcontract out work. *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846 (5th Cir. 1963); *Fibreboard Paper Prod. Corp.*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963). *But cf. Adams Dairy v. NLRB*, 322 F.2d 553 (8th Cir. 1963). However, this does not alleviate in any real sense the union's concern for job security because, once the employer has discussed his intentions in good faith with the union, he may proceed with his plans to subcontract even though no agreement has been reached. *Town & Country Mfg. Co. v. NLRB*, *supra* at 847; *Fibreboard Paper Prod. Corp.*, *supra* at 551; see Note, 38 NOTRE DAME LAW. 288 (1963). See generally Comment, 64 COLUM. L. REV. 294 (1964).

⁶⁰ Lunden, *supra* note 3, at 579.

⁶¹ Weber, *Plant Removals and Subcontracting of Work—Social and Economic Considerations*, 14 LAB. L.J. 373-74 (1963).

⁶² "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, where not otherwise unlawful, any primary strike or primary picketing. . . ." 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(B) (Supp. IV, 1963). (Emphasis added.)

⁶³ See *Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.)*, 136 N.L.R.B. 977, 987 (1962). At least one author would have § 8(b)(4)(B) serve as more than just an analogy to § 8(e). It is his contention that "the test should be whether a union would violate the secondary-boycott ban of section 8(b)(4)(B) by inducing . . . employees to *make* their employer do what he has committed himself to do 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)." St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 U. DET. L.J. 189, 206-07 (1962). (Emphasis added.) It is submitted, however, that this provides little additional assistance, as it just pushes the question back one more step. Furthermore, there are several significant differences between the two sections which would frequently render this proposed test inaccurate. See, *e.g.*, note 65 *infra*.

⁶⁴ The word "primary" as used herein refers to an activity or objective which is of

primary-secondary objective dichotomy can also be utilized profitably to determine the legality of various subcontracting clauses under section 8(e). However, the term "object," which includes intermediate and incidental objects when used in section 8(b)(4)(B),⁶⁵ should be restricted within the context of section 8(e) to mean only those *ultimate objects or purposes* which motivated the union to request such a clause.⁶⁶ Were the more expansive section 8(b)(4)(B) definition of "object" applied under section 8(e), it would result in a practical desiccation of the exemption because every subcontracting clause contains an incidental object of a secondary nature. Illustratively, although the ultimate object of a particular subcontracting clause may be primary in that the union seeks to protect the work of the bargaining unit, this arrangement necessarily contemplates the incidental secondary objective of preventing the employer from giving that work to another employer. This incidental secondary objective, however, is quite different from the tainted secondary pressure embodied in a hot-cargo clause whereby a union deliberately uses one employer as a battering ram to break down another employer's resistance to certain union demands. It possesses neither the tendency to enlarge outside labor disputes nor the capacity to involve neutral employers in foreign altercations. Therefore, the inevitable presence of such an incidental objective should not be sufficient to condemn the subcontracting clause.

Thus, with several notable exceptions to be discussed later, the exemption from section 8(e) constructed by the Board might well read: "If the exclusive object of a subcontracting clause is protection of the primary

direct concern to the employees in the bargaining unit rather than something which is necessarily first or major in importance. The word "secondary" as used herein refers to an activity or objective which is directly concerned with the labor policies of an employer outside the bargaining unit rather than something which is necessarily inferior or minor in importance.

⁶⁵ Several Board decisions dealing with § 8(b)(4)(B) seem to define the word "object" to include "intermediate" objects as well as "ultimate" objects. *International Longshoremen's Ass'n (The Bd. of Harbor Comm'rs)*, 137 N.L.R.B. 1178, 1184-86 (1962) (Member Brown dissenting); *Local 5, United Ass'n of Journeymen (Arthur Venneri Co.)*, 137 N.L.R.B. 828 (1962), *aff'd as modified*, 321 F.2d 366 (D.C. Cir. 1963) (Member Brown dissenting); *Local 1066, Int'l Longshoremen's Ass'n (Wiggin Terminals, Inc.)*, 137 N.L.R.B. 45 (1962) (Members Brown and Fanning dissenting). However, in each of these situations the employer of the bargaining unit did not control the work which his employees sought. Consequently, when his employees struck him, although their "ultimate" object was only to obtain more work for their own unit, it was secondary activity of the kind prohibited by § 8(b)(4)(B) because the strike was designed to force their employer to pressure an outside employer into re-allocating his work. This problem can not arise in the context of the subcontracting clause because the employer who is asked to sign the subcontracting clause is always the same employer who controls the work and he is not thereby required to put pressure on an outside employer in order to obtain the work re-allocation sought by the bargaining unit.

⁶⁶ See *Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.)*, 136 N.L.R.B. 977, 985-86 (1962); *cf. Local 761, IUE v. NLRB*, 366 U.S. 667, 672-74 (1961); *Douds v. Int'l Longshoremen's Ass'n*, 224 F.2d 455 (2d Cir. 1955). *But see Local 282, Int'l Bhd. of Teamsters (Precon Trucking Corp.)*, 139 N.L.R.B. 1077, 1087 (1962).

economic interests of the employees in the bargaining unit as opposed to the application of secondary pressure on a subcontractor in an effort to obtain his acquiescence in union demands, the clause falls outside the congressional purpose for section 8(e) and will therefore be exempt from its proscription."⁶⁷

Because the application of this rule necessarily involves an *ad hoc* determination of the motives which lie behind each particular clause, generalizations should be approached with a certain amount of skepticism.⁶⁸ The crucial considerations in ferreting out the true "objects" behind any given clause will be individualized factors such as the relative bargaining strength of the two parties, the existence of a dispute or possible dispute between the bargaining unit union and the subcontractors, the past course of dealings between the union and general employer, and the general economic personality of the particular industry involved. Nevertheless, a general analysis of the various categories of subcontracting clauses may help to provide some guidelines and isolate those characteristics peculiar to each category which the Board and courts are likely to find relevant.

A. *Clauses Which Restrict the Type of Work Which May Be Subcontracted*

When a subcontracting clause unqualifiedly stipulates that the employer may not subcontract out any work which is or has been *traditionally* performed by employees within the bargaining unit, both the Board⁶⁹ and the courts⁷⁰ have readily recognized its validity. Such a clause reflects the primary objective of protecting job opportunities for the employees within the bargaining unit. Furthermore, the incidental secondary effects of such a clause are minimal because the subcontractor is not deprived of work which he has relied upon in the past; he is merely denied the opportunity to acquire new work from the employer. In addition, this clause exerts no secondary pressure on the subcontractor to change his internal labor practices because, regardless of those practices, he is precluded from acquiring the work covered by the subcontracting clause.

These same considerations are equally persuasive in defending the validity of a subcontracting clause which permits the employer to subcontract out only overflow work which the bargaining unit is unable to perform

⁶⁷ This test was clearly established in *Orange Belt Dist. Council v. NLRB*, 2 LAB. REL. REP. (55 L.R.R.M.) 2293 (D.C. Cir. Feb. 10, 1964). See *Bakery Wagon Drivers and Salesmen v. NLRB*, 321 F.2d 353, 358 (D.C. Cir. Feb. 10, 1963) (dictum).

⁶⁸ See *Retail Clerks Local 770 v. NLRB*, 296 F.2d 368, 373-74 (D.C. Cir. 1961); *Milk Drivers & Dairy Employers, Local 546 (Minnesota Milk Co.)*, 133 N.L.R.B. 1314 (1961), *enforced*, 314 F.2d 761 (8th Cir. 1963).

⁶⁹ *Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.)*, 136 N.L.R.B. 977, 984-86 (1962); *UMW (Bituminous Coal Operators Ass'n)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1037, 1038 (Sept. 9, 1963) (dictum).

⁷⁰ *Coulon v. Carey Cadillac Renting Co.*, 50 L.R.R.M. 2888 (S.D.N.Y. 1962); *Bakery Wagon Drivers v. NLRB*, 321 F.2d 353 (D.C. Cir. 1963) (dictum).

because of a shortage of equipment or manpower.⁷¹ Such a clause, while still maximizing the work opportunities for the bargaining unit, is often more desirable to the employer because it gives him sufficient flexibility to accommodate temporary or periodic increases in his work load without resort to the more expensive procedure of expanding his facilities or hiring additional employees, as he would be forced to do if subcontracting were completely prohibited.

Although these clauses are valid when standing alone, the Board has diligently prevented their use in a manner which achieves secondary objectives. These clauses could be so used, for example, if the union enforced the written clause only when it had a dispute with one of the employer's subcontractors. If the enforcement of the written clause has not been uniform, the Board is certain to suspect an underlying hot-cargo agreement in contravention of section 8(e).⁷²

However, the Board seems to discard the "primary-secondary objective" test when the clause covers work which has not been performed *traditionally* by the bargaining unit.⁷³ A clause covering non-traditional work may be just as consecrated to the primary objective of bettering the lot of the bargaining unit employees and just as foreign to the congressional purpose for section 8(e) as those clauses involving only the work traditionally done within the bargaining unit.⁷⁴ Nevertheless, there are several justifications for the decision to apply section 8(e) strictly in this situation. First, such a clause is more likely to encompass a disguised hot-cargo purpose; it possesses a greater capacity for exerting effective secondary pressure on disfavored subcontractors than does a clause involving traditionally done work because it may actually deprive subcontractors of present business rather than simply deny them the possibility of future business. The discernment of the actual objectives behind a given subcontracting clause is a sufficiently imprecise science that the Board might understandably balk at the prospect of searching into the motives behind a clause so susceptible to misuse. Second, while clauses covering only traditional work tend to stabilize the work distribution by preserving the status quo, clauses covering non-traditional work tend to disrupt the status quo and create attendant problems of unemployment and readjustment for employees and communities losing their traditional work.

⁷¹ See *Retail Clerks Local 770 v. NLRB*, 296 F.2d 368, 373-74 (D.C. Cir. 1961) (dictum); cf. *Teamsters Union (Arden Farms Co.)*, 52 L.R.R.M. 1322, 1323 (1963) (dictum).

⁷² See *Bakery Wagon Drivers & Salesmen, Local 484 (Sunrise Transportation)*, 137 N.L.R.B. 987 (1962), *enforced*, 321 F.2d 353 (D.C. Cir. 1963).

⁷³ See *Teamsters Union (Wilson & Co.)*, 53 L.R.R.M. 1475, 1477-78 (1963) (Chairman McCulloch and Member Brown dissenting); *Highway Truck Drivers & Helpers, Local 107 (E. A. Gallagher & Sons)*, 131 N.L.R.B. 925 (1961) (Chairman McCulloch and Member Brown took no part in this decision); cf. *Local 282, Int'l Bhd. of Teamsters (Precon Trucking Corp.)*, 139 N.L.R.B. 1077, 1086-89 (1962) (Member Brown dissenting).

⁷⁴ See *Teamsters Union (Wilson & Co.)*, *supra* note 73, at 1481-82 (dissenting opinion of Chairman McCulloch).

However, a vocal minority of the Board remains unconvinced that subcontracting clauses involving non-traditional work should be categorically condemned under section 8(e).⁷⁵ They are more confident of the Board's ability to detect a secondary objective. In addition, they assert that a union has always been free to bargain for the expansion of the employment opportunities within the bargaining unit. Finally, the minority is worried about the fact that the majority rule might deprive a bargaining unit of the opportunity to acquire new work which is created by technology between bargaining sessions even though it falls within the jurisdiction of the unit. because it cannot be classified as work which that unit has traditionally done. The result is that this area of the law can not be regarded as conclusively settled.

B. *Clauses Which Limit the Subcontractors With Whom the
General Employer May Deal*

The most recurrent subcontracting clause in this category is one that permits the employer to subcontract work from the bargaining unit only to those subcontractors who provide wages and working conditions for their employees comparable to those received by the employees within the bargaining unit.⁷⁶ In support of such a clause it is contended that its objective is the primary one of protecting the jobs of the employees within the bargaining unit because a major incentive to subcontract is removed when the employer is prohibited from seeking a cheaper labor force to do his work.⁷⁷

Against this position, two objections are commonly raised. First, it is contended that this clause can not be satisfactorily explained by the primary objective of preserving jobs for the bargaining unit because, if this were the union's only objective, it could be more directly and securely accomplished by a complete prohibition on subcontracting. It is claimed that this reveals a secondary objective to apply pressure on subcontractors to raise the wages of their own employees so that they may remain eligible

⁷⁵ Teamsters Union (Wilson & Co.), *supra* note 73, at 1481 (dissenting opinion of Chairman McCulloch). If new work displaces the work originally done by the bargaining unit it is hoped that the court would be more inclined to find the new work of a nature which has been "traditionally" performed by the bargaining unit in order to permit the bargaining unit to recapture the job opportunities lost when the old work was displaced. Although the minority in *Wilson & Co.* made this argument, the majority nevertheless held that a bargaining unit which had provided local delivery service for an employer could not attempt to recapture work lost to a direct non-stop shipper because it had not traditionally engaged in deliveries which originated outside the city limits.

⁷⁶ For a good example of such a subcontracting clause, see UMW (Bituminous Coal Operators Ass'n), 2 LAB. REL. REP. (54 L.R.R.M.) 1037, 1038 (Sept. 9, 1963), where the clause read: "[The employers] agree that all bituminous coal . . . procured or acquired by them . . . under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract."

⁷⁷ See Teamsters Union (Wilson & Co.), 53 L.R.R.M. 1475, 1482-84 (1963) (dissenting opinion of Member Brown); *cf.* Teamsters Union v. Oliver, 358 U.S. 283, 293-94 (1959).

for the general employers' business.⁷⁸ However, this ignores the reality of compromise. It is possible that the employer may simply refuse to surrender his entire ability to subcontract work, and that the union must settle for a compromise clause which at least removes the attraction of a cheaper labor force from those factors which might encourage a decision to subcontract. Consequently, it is erroneous to presume *conclusively* that this kind of clause evidences a secondary objective. Nevertheless, like the clause involving work which has not traditionally been performed by the bargaining unit employees, such a clause possesses sufficient danger of being misused that extreme skepticism on the part of the Board is again justified.

The second objection is that the ramifications of this clause are so strongly secondary in nature that it contravenes the congressional policy behind section 8(e) even if the objective of the clause is primary. Concededly, such a clause could be used to exert considerable pressure on the various subcontractors to raise the wage level of their employees to bargaining unit wage rates. However, it seems more important for section 8(e) classification purposes that a bona fide subcontracting clause of this character has neither the tendency to spread labor disputes nor the effect of forcing a neutral employer into a secondary labor controversy—the two problems with which Congress was most concerned in enacting section 8(e).⁷⁹

Only a problematical conclusion can be ventured as to the ultimate resolution of these conflicting arguments. The Board has exhibited an unmistakable inclination toward the invalidation of all clauses of this character.⁸⁰ On the other hand, there is clear dicta by the courts suggesting that, absent evidence of secondary motives, a clause of this nature should properly be beyond the censure of section 8(e).⁸¹ It is submitted that the courts have embraced the view more harmonious with the congressional purpose for section 8(e) by retaining the "primary-secondary object" test and by granting absolution to such a clause when the absence of a secondary objective is clearly established.

It is further suggested that the Board's decisions implying the contrary conclusion may be satisfactorily distinguished because in each case there was some evidence of a secondary objective. The subcontracting clause in

⁷⁸ See *UMW (Bituminous Coal Operators Ass'n)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1037, 1039-40 (Sept. 9, 1963).

⁷⁹ See notes 7-8 *supra*.

⁸⁰ See *Teamsters Union (Milwaukee Cheese Co.)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1134, 1135 (Oct. 7, 1963); *UMW (Bituminous Coal Operators Ass'n)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1037, 1039-40 (Sept. 9, 1963); *Painters Union (Falstaff Brewing Corp.)*, 2 LAB. REL. REP. (54 L.R.R.M.) 1001, 1002 (Sept. 2, 1963); *Teamsters Union (Wilson & Co.)*, 53 L.R.R.M. 1475, 1478-79 (1963) (Chairman McCulloch and Member Brown dissenting); *Truck Drivers Local 413 (Patton Warehouse, Inc.)*, 140 N.L.R.B. 1474, 1485-86 (1963).

⁸¹ See *Retail Clerks Local 770 v. NLRB*, 296 F.2d 368, 374 (D.C. Cir. 1961); *District 9, Int'l Ass'n of Machinists v. NLRB*, 315 F.2d 33, 36 (D.C. Cir. 1962) (dictum); *cf. Teamsters Union v. Oliver*, 358 U.S. 283, 293-94 (1959); *Building & Construction Trades Council v. NLRB*, 2 LAB. REL. REP. (55 L.R.R.M.) 2297 (D.C. Cir. Feb. 10, 1964) (dictum).

*Wilson & Co.*⁸² pertained only to overflow work which the bargaining unit, by definition, could not perform in any event.⁸³ In that situation there obviously could not be a primary objective for requiring that this work be done only by subcontractors who pay union wages. The *Milwaukee Cheese*,⁸⁴ *Falstaff*,⁸⁵ and *Patton Warehouse*⁸⁶ cases all involved bargaining units of craft rather than employer-wide dimension, and in each case the Board was confronted with a clause similar to the following: "The employer agrees to refrain from using the services of any person who does not observe the wages, hours, and conditions of employment *established by labor unions having jurisdiction over the type of services performed.*"⁸⁷ This clause can not be fully explained by primary objectives because it limits not only those subcontractors to whom the general employer may give work which would otherwise be done in the bargaining unit, but it similarly limits those subcontractors who may receive work of a nature completely beyond the jurisdiction and interest of the bargaining unit. For example, if a union representing a bargaining unit of truck drivers obtains such a clause, the clause would restrict the trucking company in subcontracting maintenance work on its trucks as well as delivery work, although the bargaining unit has no primary interest in maintenance.⁸⁸ In addition, these limitations also apply to overflow work in which the bargaining unit has no legitimate primary interest. The *Bituminous Coal* case,⁸⁹ although the most difficult to distinguish, involved extrinsic evidences of a secondary objective behind the subcontracting clause, which could be used to explain the Board's holding.⁹⁰ Although these various factors may be used to distinguish the Board decisions, they should not obscure the fact that the Board basically remains hostile to this kind of clause.⁹¹

⁸² Teamsters Union (*Wilson & Co.*), 53 L.R.R.M. 1475 (1963) (Chairman McCulloch and Member Brown dissenting).

⁸³ *Id.* at 1478.

⁸⁴ Teamsters Union (*Milwaukee Cheese Co.*), 2 LAB. REL. REP. (54 L.R.R.M.) 1134 (Oct. 7, 1963).

⁸⁵ Painters Union (*Falstaff Brewing Corp.*), 2 LAB. REL. REP. (54 L.R.R.M.) 1001 (Sept. 2, 1963). Although this subcontracting clause reads somewhat differently from that found in the other two cases, it shares the same defect.

⁸⁶ Truck Drivers Local 413 (*Patton Warehouse, Inc.*), 140 N.L.R.B. 1474 (1963).

⁸⁷ *Id.* at 1485. (Emphasis added.)

⁸⁸ Teamsters Union (*Wilson & Co.*), 53 L.R.R.M. 1475, 1484 n.30 (1963) (dissenting opinion of Member Brown).

⁸⁹ UMW (*Bituminous Coal Operators Ass'n*), 2 LAB. REL. REP. (54 L.R.R.M.) 1037 (Sept. 9, 1963).

⁹⁰ This involved a multiple employer bargaining unit. The Board felt that, under the particular circumstances of the case, the union could have obtained a clause which required that all subcontracting be done by other employers within the bargaining unit. Because the union permitted subcontracting outside the bargaining unit to any subcontractor who paid union wages, this evidenced a desire to influence the labor policies of outside employers which was inconsistent with an exclusive objective to maximize jobs for the bargaining unit. See *id.* at 1040.

⁹¹ "As we have found one of the objects of the . . . clause . . . is to . . . require the packers to assign to the employees in the bargaining unit work which they had never customarily performed before . . . we find that the . . . clause . . . is an agreement

Another type of clause which restricts the general employer's choice of subcontractors is one which permits him to subcontract only to other employers who are signatories with the union representing his bargaining unit.⁹² In this case the argument of "removing the economic incentive to subcontract" seems less convincing because the general employer is prohibited from dealing with all non-signatory subcontractors even though they are paying union wages or better.⁹³ It is also argued that since a total prohibition on subcontracting is valid, a fortiori a clause which only prohibits subcontracting to non-union employers should also be valid.⁹⁴ This argument, however, fails to recognize that Congress was concerned about secondary rather than subcontracting clauses, and that this particular clause applies a substantial secondary pressure on the subcontractor to unionize which pressure is absent from a clause that absolutely prohibits subcontracting.⁹⁵ As a result, the Board⁹⁶ and the courts⁹⁷ have easily found such clauses to be violations of section 8(e) because they are infected with the secondary objective of pressing unionism upon outside employers. Nor has the response toward these clauses been more benevolent when they are phrased so as to require only that the employer give "preference" to the signatory subcontractors; this still results in a practical discrimination against non-union subcontractors.⁹⁸

C. *Clauses Which Affix Certain Penalties to the Decision To Subcontract*

This category contains a heterogeneous assortment of clauses sharing the one characteristic that each permits the employer to subcontract whenever and to whomever he pleases—for a price. The popularity of the "penalty" clause is only partly explained by the unions' ill-advised belief that such a clause acquires immunity to section 8(e) in that the employer agrees to assume certain penalties should he subcontract, rather than being required to agree actually to cease or refrain from doing business with others.⁹⁹ In addition, a penalty clause is often preferred by the employer

violative of Section 8(e). . . ." *Teamsters Union (Wilson & Co.)*, 53 L.R.R.M. 1475, 1478 (1963).

⁹² An example of this is the clause in *Retail Clerks (Frito Co.)*, 138 N.L.R.B. 244, 245 (1962), which reads, "The Employers shall not sub-contract any work ordinarily performed by retail clerks in the stores or markets of the Employers, . . . except that such work may be sub-contracted to an employer who is signatory to an Agreement with the Union."

⁹³ See *Teamsters Union (Wilson & Co.)*, 53 L.R.R.M. 1475, 1476-77 (1963).

⁹⁴ This argument was unsuccessfully advanced by the union in *District 9, Int'l Ass'n of Machinists v. NLRB*, 315 F.2d 33, 35 (D.C. Cir. 1962).

⁹⁵ *Id.* at 36.

⁹⁶ *Retail Clerks (Frito Co.)*, 138 N.L.R.B. 244 (1962); *Teamsters Union (Arden Farms Co.)*, 52 L.R.R.M. 1322 (1963).

⁹⁷ *District 9, Int'l Ass'n of Machinists v. NLRB*, 315 F.2d 33 (D.C. Cir. 1962).

⁹⁸ *Automotive, Petroleum, Local 618 (Greater St. Louis Automotive Trimmers & Upholsterers Ass'n)*, 134 N.L.R.B. 1363 (1961); *Highway Truck Drivers & Helpers, Local 107, Etc. (E. A. Gallagher & Sons)*, 131 N.L.R.B. 925 (1961).

⁹⁹ See *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294, 301-03 (N.D. Cal. 1960); cf. notes 48-51 *supra* and accompanying text.

as a compromise arrangement because of its ability to retain for him some flexibility to subcontract, while also compensating the bargaining unit for the resulting diminution of work. In determining whether a given penalty clause possesses a secondary objective it is necessary to examine both the penalty itself and the conditions which invoke its imposition.¹⁰⁰ Only if both can be fully explained by primary motives will a clause of this nature be permitted to elude the proscriptions of section 8(e).

One type of penalty clause requires the employer to pay full wages to each idle employee within the bargaining unit for the period during which work that could be performed by the bargaining unit is being done by subcontractors.¹⁰¹ Although closely akin to the "overflow" clause discussed earlier,¹⁰² this clause is often more attractive to labor and management because of its greater flexibility. The employer may still value the ability to subcontract if his subcontractor is sufficiently automated and economical to offset the additional expense of paying the salaries of his own idle workers. The employees, on the other hand, acquire protection against a planned program of cutting back production where the employer, by disposing of some of his equipment, greatly decreases his own capacity, thereby dilating the work which he would then be able to subcontract under a straight "overflow" clause. The objective behind this penalty is primary in nature because it is designed for the direct benefit of the bargaining unit through compensation for lost wages. Furthermore, the condition which invokes this penalty is no more secondary in nature than that in a standard "overflow" clause, which has already acquired acceptance as a valid clause under section 8(e).¹⁰³ Consequently, although there has been no case law directly on point, this clause seems to have a firm claim to validity.¹⁰⁴

A second type of penalty clause permits the union to reopen the collective bargaining agreement to new negotiations if the employer subcontracts work.¹⁰⁵ The claim to immunity from section 8(e) is here predicated upon

¹⁰⁰ See *Bakery Wagon Drivers v. NLRB*, 321 F.2d 353 (D.C. Cir. 1963).

¹⁰¹ Such a clause might read as follows: "The employer remains free to subcontract work, but, if work is subcontracted while any of his employees are laid off or working less than 40 hours a week, then the employer is obligated for the duration of the subcontracting to pay such employees the difference between their current wages and the wages they would receive if they worked a full 40 hour week." Cf. *Local 282, Int'l Bhd. of Teamsters (Precon Trucking Corp.)*, 139 N.L.R.B. 1077 (1962).

¹⁰² See note 73 and accompanying text *supra*.

¹⁰³ *Ibid.*

¹⁰⁴ In *Local 282, Int'l Bhd. of Teamsters (Precon Trucking Corp.)*, 139 N.L.R.B. 1077 (1962), the Board held invalid a clause requiring the employer to pay each idle man his daily wage as *liquidated damages* during the period that work is subcontracted out in violation of an agreement not to subcontract work which could be done by the bargaining unit. However, if the clause had allowed the employer to subcontract out the work *without* violating the collective bargaining agreement by assuming the consequences of paying wages to the idle employees, there is a strong possibility that the Board would have upheld the clause. *Id.* at 1089-90.

¹⁰⁵ The clause might read as follows: "The employer is free to subcontract out work, but if he should avail himself of this right, then the union has the option to reopen the contract for the limited purpose of renegotiating wages, overtime, seniority,

the contention that the basic assumptions underlying the old collective bargaining agreement are altered when the employer decides to subcontract out work. It is asserted, therefore, that new arrangements concerning the length of the work week, unemployment benefits, new job assignments, etc., must be made to protect the employees within the bargaining unit.¹⁰⁶ However, the great latitude given the union in implementation of the penalty casts doubt upon the validity of this type of clause. For example, renegotiations might become substantially more difficult if the employer chooses to deal with subcontractors currently disfavored by the union. Even in the absence of an explicit threat of this nature, the experienced employer will surely recognize the danger and probably choose to avoid those subcontractors whom the union is attempting to pressure into labor settlements, rather than precipitate a bitter renegotiation. The Board, however, has not yet had to determine whether this penalty sufficiently suggests the possibility of a secondary objective to invalidate the clause, because it has been confronted only with clauses which invoke this penalty when the subcontracting is to non-union employers. As there is no valid primary reason why the union should need to renegotiate only when the subcontracting goes to a non-union employer, it has been easy to find a fatal secondary objective in these cases.¹⁰⁷

A third penalty clause allows the employer to subcontract to whomever he wishes, provided he bear the burden of providing managerial personnel to handle all materials which are also handled by any subcontractor designated "unfair" by the union.¹⁰⁸ After the unions failed in their attempt to steer this "refusal to handle" clause around the *language* of section 8(e),¹⁰⁹ they began to suggest instead that it lay beyond the *purpose* of the section. Although it has been urged with considerable passion that this clause embodies a primary objective in that it shields the employees from the distasteful task of having to touch the same material touched by an "unfair" employer,¹¹⁰ the Board seems more impressed with the fact that the "refusal

and the pension fund." *Cf. Employing Lithographers of Greater Miami v. NLRB*, 301 F.2d 20, 29 (5th Cir. 1962).

¹⁰⁶ See *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294 (N.D. Cal. 1961).

¹⁰⁷ See *NLRB v. Amalgamated Lithographers of America (Ind.)*, 309 F.2d 31, 36 (9th Cir. 1962); *Employing Lithographers of Greater Miami v. NLRB*, 301 F.2d 20, 29-30 (5th Cir. 1962).

¹⁰⁸ *Cf. Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294, 303 (N.D. Cal. 1960), which involved the following clause: "The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America"

¹⁰⁹ See notes 46-47 *supra* and accompanying text.

¹¹⁰ See *NLRB v. Amalgamated Lithographers of America (Ind.)*, 309 F.2d 31, 42 (9th Cir. 1962). *But cf. Truck Drivers Local 413 (Patton Warehouse, Inc.)*, 140 N.L.R.B. 1474, 1481-82 (1963), where the Board accepted an argument similar to this in upholding a clause which protects employees from discipline if they refuse to obey the distasteful (and often dangerous) request to cross a legitimate picket line surrounding the subcontractor's plants.

to handle" consequence occurs only when the employer is dealing with an "unfair" subcontractor against whom the union wishes to apply pressure. Because this clause is an exact duplicate of the hot-cargo clause, both in form and effect, the Board has consistently presumed a secondary objective which renders the clause violative of section 8(e).¹¹¹

III. SUBCONTRACTING CLAUSES AND THE PROVISOS TO SECTION 8(e)

The final possibility for a subcontracting clause to escape section 8(e) is to acquire absolution through one of the two provisos appended to the section.

The first proviso exempts agreements between unions and employers in the construction industry which relate to the subcontracting of work to be done at the construction site.¹¹² Since the employees of the general contractor often work alongside the employees of the subcontractors at the construction site, Congress felt that this situation was particularly pregnant with labor strife unless the employees of the general contractor could obtain a promise that on-site work would be subcontracted only to "fair" employers who would not create friction.¹¹³ Hence a proviso was added to section 8(e) to exempt this kind of promise. With this purpose for the proviso in mind, the Board has resisted attempts to expand its scope to include work which is merely capable of being done at the job site in addition to work actually performed there.¹¹⁴ As a result, this proviso will not provide shelter for an agreement relating to the subcontracting of prefabrication work done away from the actual job site.¹¹⁵

Considerable controversy has centered on the effect of this proviso upon section 8(b)(4)(A),¹¹⁶ which proscribes the use of force or coercion to obtain any agreement prohibited by section 8(e), and section 8(b)(4)(B),¹¹⁷ which prohibits the use of force or coercion to achieve the same secondary objectives which section 8(e) prevents from being attained by agreement. The Board has held that it is an unfair labor practice if force or coercion is used to *obtain* a clause which, if entered into voluntarily, would be sheltered

¹¹¹ See *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294, 303-04 (N.D. Cal. 1960).

¹¹² See note 1 *supra*.

¹¹³ Comment, 38 N.Y.U.L. Rev. 97, 110-11 (1963).

¹¹⁴ *Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.)*, 136 N.L.R.B. 977 (1962).

¹¹⁵ *Sheet Metal Workers Int'l Ass'n, AFL-CIO (The Burt Mfg. Co.)*, 127 N.L.R.B. 1629, 1633 (1960). This issue evoked substantial controversy in Congress. For a presentation of the opposing arguments, see Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions*, 48 Geo. L.J. 327, 342-43 (1960).

¹¹⁶ Section 8(b)(4)(A) reads: "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. . . ." 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(A) (Supp. IV, 1963).

¹¹⁷ For the text of 8(b)(4)(B), see note 62 *supra*.

from section 8(e) by the construction industry proviso.¹¹⁸ However, the courts have adopted the better view in reaching the contrary conclusion.¹¹⁹ Section 8(b)(4)(A) surely is not violated in this situation, because it 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. Nor does such coercion violate section 8(b)(4)(B), because the union's objective behind the coercion is not directly to force the employer to cease dealing with another, but only to obtain the inclusion of a certain clause in the collective bargaining agreement. However, there is unanimity in the conclusion that it is an unfair labor practice to use coercion to *enforce* a clause already in a collective bargaining contract which is covered by the construction proviso.¹²⁰ In this instance the coercion is being used directly to cause the cessation of a business relationship, and section 8(b)(4)(B) is thereby violated. Furthermore, it is unlikely that a court would enforce such a clause for the union or award damages to the union if the employer failed to honor it, because, in a sense, this would also constitute coercion to obtain the cessation of a business relationship in violation of section 8(b)(4)(B).¹²¹ Consequently, a clause which relies on the construction proviso for immunity from section 8(e) retains the same unenforceable status it acquired after *Sand Door*.¹²²

The second proviso exempts agreements concerning jobbers, manufacturers, contractors, and subcontractors, but not retailers, who work on the goods or premises of a jobber or manufacturer of clothing and apparel or perform a part of the integrated process of production of clothing and apparel.¹²³ The deplorable history of sweatshops in the garment industry and the difficulty which unions encountered in trying to organize them because of the ease with which they were disbanded and set up elsewhere led Congress to conclude that the unions needed to retain the hot-cargo clause as an instrument for instituting unionism and better working conditions in this industry.¹²⁴ Therefore, Congress not only exempted the garment industry from section 8(e) and section 8(b)(4)(A), but also exempted the industry from section 8(b)(4)(B) by specifically providing that

¹¹⁸ Hod Carriers Union (*Fiesta Pools, Inc.*), 2 LAB. REL. REP. (55 L.R.R.M.) 1070 (Jan. 20, 1964); Hod Carriers Union (*Swimming Pool Gunite Contractors*), 2 LAB. REL. REP. (54 L.R.R.M.) 1165, 1168 (Oct. 14, 1963).

¹¹⁹ Laborers Union, Local 383 v. NLRB, 2 LAB. REL. REP. (54 L.R.R.M.) 2246 (9th Cir. Oct. 14, 1963); *Cuneo 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).

¹²⁰ See, e.g., *NLRB v. Local 825, Operating Engineers*, 2 LAB. REL. REP. (55 L.R.R.M.) 2112 (3d Cir. Jan. 20, 1964); *Lebus v. International Union of Operating Engineers*, 188 F. Supp. 392 (E.D. La. 1960); *Local 825, Int'l Union of Operating Engineers*, 140 N.L.R.B. 458 (1963).

¹²¹ *Local 48, Sheet Metal Workers Int'l Ass'n v. Hardy Corp.*, 218 F. Supp. 556, 561-62 (N.D. Ala. 1963). *But see* *Orange Belt Dist. Council v. NLRB*, 2 LAB. REL. REP. (55 L.R.R.M.) 2293 (D.C. Cir. Feb. 10, 1964).

¹²² *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958).

¹²³ See note 1 *supra*.

¹²⁴ Comment, 38 N.Y.U.L. Rev. 97, 109-10 (1963).

these clauses are fully enforceable by the union. Because the language of this proviso is clear and its scope limited, little case law has developed in this area. The constitutionality of the proviso has been challenged on the ground that it creates an arbitrary classification, but the courts have felt that the history of the industry and its highly integrated nature provide a rational basis for this special treatment.¹²⁵

IV. CONCLUSION

The expansive interpretation of the language of section 8(e) has not been conducive to the proliferation of "loopholes" through which the subcontracting clause can escape an unintended extinction. Furthermore, although an imperfect pardon for the bona fide subcontracting clause has been fashioned by the Board, it has been quickly revoked when a clause is suspected of being used as a vehicle for effectuating secondary objectives. Therefore the task which confronts contemporary draftsmen of subcontracting clauses is to avoid being misunderstood. Although this is relatively easy when drafting an unqualified prohibition on subcontracting, management frequently finds such a clause intolerable. Thus, at present the real desideratum is a subcontracting clause whose integrity is unimpeachable, yet which is sufficiently flexible in its application to accommodate the requirements of both labor and management.

Although these criteria might possibly be met by carefully worded versions of several of the clauses already discussed, it is submitted that a "share the savings" subcontracting clause holds out particular promise of satisfying all requisites. This type of clause requires the employer to share with his employees whatever savings are realized from subcontracting. The primary objectives of such a clause are apparent. It decreases the employer's incentive to subcontract to the extent that he has to surrender the savings to his employees, thereby increasing the likelihood that the work will remain in the bargaining unit. In addition, the profit received by the bargaining unit employees can partially compensate them for loss of work should the employer still decide to subcontract. On the other hand, the clause is incapable of being used to effectuate a secondary objective because it leaves the employer free to deal with any person he wishes, and, as long as he retains some part of the realized savings, he will deal with those subcontractors who are most economical, regardless of whether the union has a current dispute with them or not. Even if the union were to demand the entire realized saving, this would only leave the employer with an indifferent attitude toward subcontracting, and it would not influence his choice of subcontractors should he nevertheless decide to subcontract the work. Finally, such a clause means greater profits to be shared by labor and

¹²⁵ NLRB v. Amalgamated Lithographers, Local 17, 309 F.2d 31, 45 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); Brown v. Local 17, Amalgamated Lithographers, 180 F. Supp. 294, 305-06 (N.D. Cal. 1960).

management because it gives the employer freedom to make his managerial decisions on a cost analysis basis. Thus, a "share the profits" clause may be used as a highly flexible vehicle for compromising management's desire for profit with the union's desire for security during that difficult transitional period which accompanies a basic re-allocation of work.

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