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Hot Cargo Agreements in the Construction Industy: The Effect of Acco Equipment

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STUDENT COMMENT

HOT CARGO AGREEMENTS IN THE CONSTRUCTION INDUSTRY: THE EFFECT OF *ACCO EQUIPMENT*

A hot cargo clause may be broadly defined as a provision in a collective bargaining agreement which stipulates that the contracting employer will not conduct business with, nor deal in the goods of, a nonunion enterprise.[1] Section 8(e)[2] of the National Labor Relations Act (NLRA)[3] prohibits the execution of such provisions in all areas of commerce with the exception of the construction and garment industries. While the exemption granted to the garment industry has never been the source of much litigation,[4] the interpretation and application of the construction industry proviso presented difficulties during the years immediately following the enactment of section 8(e) in 1959. One of the controversies concerned the limitations imposed upon the right of labor and management to execute hot cargo agreements. The language of the proviso clearly restricts the subject matter of these clauses to work performed on the site of construction.[5] However, some legislators have suggested that the exemption encompasses agreements relating to work which could have been performed on the jobsite, but which is actually performed

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[1] In the vernacular of organized labor, the subject of hot cargo agreements are goods produced or transported by an "unfair" employer. The term unfair employer refers to either "a struck employer, to an employer whose goods bear no union label, or to an employer whose wages or other working conditions are deemed substandard by the union." BNA, The Labor Reform Law 91 (1951). See also S. Rep. No. 187, 86th Cong., 1st Sess. 79, reprinted in 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 475 (1959) [hereinafter cited as Legislative History].

[2] 29 U.S.C. § 158(e) (1970) 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 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 construction, alteration, painting or repair of a building, structure or other work: *Provided further,* That for the purposes of this subsection . . . the terms "any employer", "any person engaged in commerce or in 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 . . . .

[3] 29 U.S.C. §§ 151-87 (1970).

[4] See ABA, Section of Labor Relations Law, The Developing Labor Law (C. Morris ed. 1971) [hereinafter cited as The Developing Labor Law].

[5] See note 2 supra.

in an offsite industrial plant.[6] The National Labor Relations Board, adopting the view that the plain-face meaning of the statute is controlling, has rejected this expansive reading of the proviso.[7] Another area of dispute involved the right of construction unions to conduct a strike for the purpose of obtaining a hot cargo agreement. In reversing the decisions of the Board,[8] three circuit courts have held that labor could apply concerted pressure in pursuit of such an objective.[9] This conflict was settled by the acquiescence of the agency to the position adopted by the courts.[10]

The resolution of these issues by the judicial and administrative bodies resulted in the development of a stable and predictable body of law. However, this sense of certitude was recently disrupted by the decision in *Operating Engineers, Local 12 (Acco Equipment),*[11] in which the Board held that the construction industry proviso does not encompass an agreement relating to the jobsite repair of heavy duty equipment.[12] Prior to this case, the proscription of section 8(e) did not limit the right of a union to execute an agreement relating to work performed on the site of construction.[13] The Board has now indicated that the *nature* of the jobsite work will determine the applicability of the proviso.

This restrictive interpretation of the exemption urges consideration of the purpose behind the extension of the preferential treatment to the construction industry. In conducting such an inquiry, this comment will seek to delineate the appropriate scope of the

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[6] 105 Cong. Rec. 19785 (1959), reprinted in 2 Legislative History, supra note 1, at 1815 (remarks of Senator McNamara); 105 Cong. Rec. 19809 (1959), reprinted in 2 Legislative History, supra, at 1816 (remarks of Representative Thompson). Senator Kearns expressed the contrary view that the proviso only encompasses agreements relating to work actually performed on the jobsite. 105 Cong. Rec. 20004 (1959), reprinted in 2 Legislative History, supra, at 1861.

[7] Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.), 136 N.L.R.B. 977, 49 L.R.R.M. 1908 (1962). See text accompanying notes 80-83 infra for a further discussion of this issue.

[8] Essex County & Vicinity Dist. Council of Carpenters (Associated Contractors, Inc.), 141 N.L.R.B. 858, 52 L.R.R.M. 1416 (1963), vacated, 332 F.2d 636, 56 L.R.R.M. 2091 (3d Cir. 1964); Orange Belt Dist. Council of Painters No. 48 (Calhoun Drywall Co.), 139 N.L.R.B. 383, 51 L.R.R.M. 1315 (1962), remanded, 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964); Construction, Prod. & Maintenance Laborers Local 383 (Colson & Stevens Constr. Co.), 137 N.L.R.B. 1650, 50 L.R.R.M. 1444 (1962), rev'd, 323 F.2d 422, 54 L.R.R.M. 2246 (9th Cir. 1963).

[9] See circuit court cases cited in note 8 supra.

[10] Building & Constr. Trades Council (Centlivre Village Apts.), 148 N.L.R.B. 854, 57 L.R.R.M. 1081 (1964), remanded with directions to dismiss on another point, 352 F.2d 696, 59 L.R.R.M. 2894 (D.C. Cir. 1965).

[11] 204 N.L.R.B. No. 115, 83 L.R.R.M. 1457 (1973).

[12] Id. at 2, 83 L.R.R.M. at 1458.

[13] In a case involving the identical repair work provision as that in *Acco Equipment,* the Board held that such work can be made the subject of an agreement within the proviso. Operating Eng'rs, Local 12 (B.R. Schedell Contractor, Inc.), 145 N.L.R.B. 351, 54 L.R.R.M. 1391 (1963). Whether or not the theory upon which the charging party prevailed in *Acco Equipment* was presented to, or considered by, the Board in *Schedell* is not clear from the 1963 opinion.

proviso. After an analysis of the judicial and administrative application of the pertinent national labor legislation prior to the amending of the NLRA in 1959, attention will be directed to the congressional debate concerning the adoption of section 8(e). This discussion will demonstrate that the proviso was enacted to provide construction unions with a means to prevent the subcontracting of work to nonunion employers. In the context of this background, the decision in *Acco Equipment* will be discussed, and it will be submitted that the conclusion of the Board in this case is erroneous. Finally, the ramifications of this decision upon the course of future litigation will be examined.

A brief discussion of labor's right to exert concerted pressure upon management is necessary to an understanding of the purpose behind the adoption of section 8(e). Prior to the enactment of the Taft-Hartley Act in 1947, unions could achieve their goals by striking or picketing either of two employers: (1) the "primary" employer, the party with whom the union was actually in dispute; or (2) a "secondary" employer who was neutral to the dispute of the union, but with whom the primary employer maintained a business relationship.[14] By severing relations between these parties, unions hoped that the primary employer would be forced to satisfy their demands.

The relatively weak bargaining position of individual employees in a management-oriented society premised the right of unions to exert pressure upon both the primary and secondary employers.[15] Congress granted this power to encourage the growth and development of organized labor.[16] However, in less than two decades, unions became powerful[17] enough to call crippling strikes

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[14] "Labor dispute," as defined by § 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1970), includes "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 of whether or not the disputants stand in the proximate relation of employer and employee.*" (Emphasis added.) See United States v. Hutcheson, 312 U.S. 219, 231 (1941).

[15] The purpose of the Norris-LaGuardia Act is set forth as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he shall have full freedom of association, self-organization and designation of representatives of his own choosing . . . .

29 U.S.C. § 102 (1970).

[16] The Developing Labor Law, supra note 4, at 22-23.

[17] Between 1932 and 1947, union membership increased from three million to fifteen million and collective bargaining agreements governed the rights of labor and management in several major industries. A. Cox & D. Bok, Labor Law 130 (6th ed. 1965).

both during[18] and after[19] World War II. Congress responded to the potentially paralyzing effects of these concerted activities upon the economy by enacting the Taft-Hartley Act.[20] Legislative attention focused upon minimizing "industrial strife which interferes with the normal flow of commerce."[21] Essential to the successful implementation of this policy was the prohibition of secondary boycotts:

> [Congress] aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread and . . . dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods.[22]

Section 8(b)(4)(A)[23] was designed to ban secondary activity.[24] This section prohibited a union from inducing employers to engage in a concerted refusal to work, where an objective of this action was to prevent an employer from conducting business with another employer. The framers of this act did not contemplate the proscription of primary activity;[25] however, the language of this section fails to articulate a workable test for distinguishing between proscribed secondary conduct and permissible primary conduct. Every boycott, whether effectuated by a strike or a picket line, includes a desire to sever relations between the primary and secondary employers.[26] As

[18] Id.

[19] See Reilly, The Legislative History of the Taft-Hartley Act, 29 Geo. Wash. L. Rev. 285, 288 (1960).

[20] Id. at 289. The author states that over 200 bills designed to curb the power of labor were offered during the first week of the congressional session. Id.

[21] 29 U.S.C. § 151 (1970).

[22] Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 100 (1958).

[23] Section 8(b)(4)(A) was amended in 1959 to § 8(b)(4)(B), but its contents remained substantially the same. The original § 8(b) provided:

> 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 . . . where an object thereof is: (A) forcing or requiring . . . any employer or other 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 . . . .

Act of June 23, 1947, ch. 120, § 8(b)(4), 61 Stat. 141.

[24] Under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike no matter how unlawful it may have been at common law. All this provision of the bill [§ 8(b)(4)] does is to reverse the effect of the law as to secondary boycotts.

93 Cong. Rec. 4198 (1947) (remarks of Senator Taft).

[25] See, e.g., NLRB v. Operating Engineers, Local 825, 400 U.S. 297, 302-03 (1970); Local 761, IUE v. NLRB, 366 U.S. 667, 672-81 (1961).

[26] Intended or not, sought for or not, aimed for or not, employees of neutral employers do take sympathetic action with strikers and do put pressure on their

applied to the contents of section 8(b)(4)(A), this realization renders the primary-secondary dichotomy illusory, *i.e.*, since *all* concerted activity has an object of forcing an employer to cease dealing with others, one could interpret section 8(b)(4)(A) as banning *all* boycotts.

In light of this paradox, the Board and the courts did not strictly apply the language of this section. Restrictions upon the seemingly all-inclusive definition of secondary activity were achieved by reference to section 7[27] and section 13[28] of the Act.[29] These sections preserve the right of unions to engage in concerted activity for the purpose of mutual aid or protection. In balancing this power with the provisions of section 8(b)(4)(A), the judicial and administrative bodies have developed broad definitions of primary and secondary conduct: concerted activity which has an object of halting the day-to-day business of the primary employer is not banned by section 8(b)(4)(A).[30] Although this activity has the incidental effect of disrupting the relationship between the primary and secondary employer, such conduct is not tantamount to an unfair labor practice under this section.[31] On the other hand, concerted activity which has an object of disrupting the relationship between the primary and secondary employer is proscribed by section 8(b)(4)(A).[32]

These principles were formulated to conform "with the dual Congressional objectives of preserving the right of labor organizations to bring pressure on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure on controversies not their own."[33] However, as applied to the construction industry, section 8(b)(4)(A) prevented labor from utilizing strikes or picket lines to secure work for their members. In this respect, construction union members were deprived of powers enjoyed by organized labor in other areas of commerce. This disparate treatment derived from the difference between employment practices on a construction project and those which exist in other enterprises.

In a typical business, the entire labor force is hired by a single

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> employers . . . It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment have to enter the premises.

Seafarers Union v. NLRB, 265 F.2d 585, 590-91, 43 L.R.R.M. 2465, 2468-69 (D.C. Cir. 1959), as quoted in Local 761, IUE v. NLRB, 366 U.S. 667, 673 (1961).

[27] 29 U.S.C. § 157 (1970).

[28] 29 U.S.C. § 163 (1970).

[29] Compare NLRB v. International Rice Milling Co., 341 U.S. 665 (1951), with NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

[30] See, e.g., Steelworkers Union v. NLRB, 376 U.S. 492, 499 (1964).

[31] See, e.g., National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627 (1967).

[32] See, e.g., Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 388 (1969).

[33] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

employer.[34] By picketing the situs of the enterprise, organized labor could exert pressure upon an employer to recognize the union[35] as the exclusive bargaining agent of the employees.[36] This conduct is legitimate primary activity[37] provided the union does not induce the employees of a secondary employer to refuse to cross the picket line.[38] After a union has received recognition, the employer cannot avail himself of the lower wage demands of nonunion members. Consequently, union members would not be at a competitive disadvantage in securing employment.

Workers in the construction industry are generally hired by a number of independent employers to whom the general contractor has subcontracted portions of the project.[39] Therefore, in terms of providing employment for its members, the major consideration of unions is not the organization of nonunion subcontractors. Unless the general contractor awards contracts to union crafts, the recognitional and organizational pursuits of labor are futile.

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[34] See H.R. Rep. No. 741, 86th Cong., 1st Sess. 22 (1959), reprinted in 1 Legislative History, supra note 1, at 780.

[35] The right of a union to picket for recognitional purposes derives from § 7 of the Taft-Hartley Act, 29 U.S.C. § 157 (1970). See, e.g., NLRB v. Teamsters Local 639, 362 U.S. 274, 279 (1960). Limitations upon this right were imposed by the enactment of § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970), in 1959. See Meltzer, Organizational Picketing and the NLRB: Five on a Seesaw, 30 U. Chi. L. Rev. 78 (1962), for a comprehensive analysis of the effect of this section.

[36] Section 9(a), 29 U.S.C. § 159(a) (1970) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

The provisions of § 9 permit an employer and a labor organization to recognize the union as the exclusive bargaining agent. However, under § 9(c)(1)(A), 29 U.S.C. § 159 (c)(1)(A) (1970), employees may file a petition to the NLRB challenging the representative capacity of the union. If the employer grants recognition to a union which does not have a majority status, his conduct constitutes an unfair labor practice under § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970). See ILGWU v. NLRB, 366 U.S. 731 (1961).

The adoption of § 8(f), 29 U.S.C. § 158(f) (1970), in 1959 exempted the construction industry from the procedures of § 9(a). This section allows an employer and a labor organization in the construction industry to negotiate a collective bargaining agreement even though the "majority status of such labor organization has not been established under the provisions of § 159 of this title prior to the making of such agreement . . . ." 29 U.S.C. § 158(f) (1970). The final proviso to § 8(f) provides that a representation election may be called at any time to question the union's majority status. See Note, 15 B.C. Ind. & Com. L. Rev. 862 (1974) for an extensive discussion of § 8(f).

[37] NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

[38] Id. In NLRB v. Teamsters Local 639, 362 U.S. 274 (1960), the Court said: "It seems clear . . . that Congress in the Taft-Hartley Act authorized the Board to regulate peaceful "recognitional" picketing only when it is employed to accomplish objectives specified in § 8(b)(4) . . . ." 362 U.S. at 290.

[39] Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.J. 673, 688 (1951); See H.R. Rep. No. 741, supra note 34, at 22, reprinted in 1 Legislative History, supra note 1, at 780.

However, in exerting pressure upon the general contractor to hire a union rather than a nonunion subcontractor, unions force an employer to cease doing business with another employer. Labor sought to avoid a section 8(b)(4)(A) violation by arguing that the general contractor-subcontractor relationship should be treated as a single legal entity for the purposes of this section.[40] This contention focused upon the proposition that all of the contractors on a construction site are engaged in a joint commercial enterprise. While the employees of each employer perform a designated portion of work, the totality of their efforts culminates in the completion of the project. Stressing the integrated nature of such an undertaking, labor argued that these numerous contractors should not be considered independent, unrelated employers.[41]

The Court of Appeals for the District of Columbia Circuit accepted this theory of "enmeshed employment"[42] in *Denver Building & Trades Council v. NLRB*.[43] This case involved a strike of union crafts occasioned by the hiring of a nonunion subcontractor. Judge Fahy, speaking for the court, declared that the general contractor, having hired the nonunion subcontractor, could not be considered a neutral party to the dispute of the union.[44] Since section 8(b)(4)(A) is designed to proscribe the "conscription of innocent neutrals,"[45] the general contractor could not be protected by this section.[46] The Supreme Court, however, reversed,[47] stating that the alliance of employers in the construction industry did not destroy their status as independent contractors.[48] Therefore, the union, in conducting a strike with an object of forcing a severance of business relations between the general contractor and subcontractor, violated the ban against secondary boycotts.[49]

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[40] See The Developing Labor Law, supra note 4, at 620; Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 87, 66 L.R.R.M. 2712, 2718 (5th Cir. 1967) (Wisdom, J., dissenting). See generally Hearings on H.R. 6411 Before the Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. (1965) [hereinafter cited as 1965 House Hearings].

[41] 1965 House Hearings, supra note 40, at 21.

[42] In a case involving a similar fact situation, Judge Clark, accepting the union's contention, used this phrase to describe the general contractor/subcontractor relationship. Local 501, IBEW v. NLRB, 181 F.2d 34, 41, 25 L.R.R.M. 2449, 2455 (2d Cir. 1950) (dissenting opinion).

[43] 186 F.2d 326, 26 L.R.R.M. 2515 (D.C. Cir. 1950), rev'd, 341 U.S. 675 (1951).

[44] 186 F.2d at 337, 26 L.R.R.M. at 2524.

[45] Id. at 335, 26 L.R.R.M. at 2523. Senator Taft, discussing the purpose of § 8(b)(4)(A), stated: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees." 93 Cong. Rec. 4198 (1947) (emphasis added).

[46] "We think in fact that the picketing must be considered as against the [general contractor] and [subcontractor]—inseparably. . . . The contractor cannot separate itself from the conditions there so as to make the action by the Council against it secondary; nor can the subcontractor." 186 F.2d at 337, 26 L.R.R.M. at 2524.

[47] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

[48] Id. at 689.

[49] It is interesting to note that the Court relied upon the expertise of the Board, id. at 691-92. However, the Board did not exercise jurisdiction over the construction industry until

Theoretically, the damage resulting from the inability of construction unions to exert pressure upon the general contractor could be mitigated by the organization of a substantial number of subcontractors. However, the principle espoused in *Denver Builders* severely restricted the recognitional and organizational powers of labor in the construction industry. Since most crafts hire only a small number of workers, the application of pressure upon the subcontractor seldom produced positive results. While a few of his employees might respect the picket line and refuse to work, the subcontractor could, more often than not, hire enough workers who would disregard the activities of the union.[50] Consequently, rather than apply pressure directly upon the subcontractor, unions erected a picket line around the entire jobsite. This action was designed to elicit the support of the unionized crafts so that a work stoppage could be achieved. The general contractor would then have to discharge the nonunion subcontractor unless the latter acceded to the demands of labor.[51] However, based upon the "separate and neutral employers" principle established in *Denver Builders,* the Court held[52] that such activity constituted a secondary boycott.[53]

1949 in United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N.L.R.B. 802, 804, 23 L.R.R.M. 1403, 1404 (1949). See Comment, Common Situs Picketing and the Construction Industry, 54 Geo. L.J. 962, 966 (1966). It has been suggested by the Secretary of Labor that the treatment of the contractors as independent employers resulted from the unfamiliarity of the Board with the nature of the construction industry. 1965 House Hearings, supra note 40, at 21 (statement of Secretary Wirtz).

[50] Comment, supra note 39, at 688; Local 501, IBEW v. NLRB, 181 F.2d 34, 41, 25 L.R.R.M. 2449, 2455 (2d Cir. 1950) (dissenting opinion).

[51] The argument has been made that picketing which forces the nonunion workers to organize because of a fear of losing their jobs is violative of § 8(b)(1)(A). The Board accepted this reasoning in Curtis Bros., 119 N.L.R.B. 232, 236-37, 41 L.R.R.M. 1025, 1026-27 (1957). The Supreme Court reversed, stating: "§ 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threat thereof—conduct involving more than general pressures upon persons employed by the affected employers implicit in strikes." NLRB v. Teamsters Local 639, 362 U.S. 274, 290 (1960).

[52] Local 501, IBEW v. NLRB, 341 U.S. 694 (1951).

[53] In 1950, the Board delineated four criteria which should be applied to determine the legality of a union's picketing where both the primary and secondary employer occupy a common situs:

> [W]e believe that picketing the premises of a secondary employer is primary if it meets the following conditions: (a) the picketing is strictly limited to the times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Sailors Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547, 549, 27 L.R.R.M. 1108, 1110 (1950).

The Supreme Court did not apply these rules to the picketing conducted by the union in both *Denver Builders* and the *IBEW* case. However, the criteria have received approval from the Court as well as a number of circuits. See Local 761, IUE v. NLRB, 366 U.S. 667, 677 (1961), and cases cited therein.

Initially, the Board adopted the view that the failure of the union to satisfy any one of the criteria became presumptive of illegality. E.g., Machinists Local 889 (Freeman Constr. Co.),

The effect of these decisions upon construction unions was aptly summarized by Judge Clark:

> The [general contractor] hires the [nonunion subcontractor] presumably for the natural reason that he thus obtains a low rate. If he can thus secure low rates as desired and the union is enjoined by act of the federal government from any protesting, he has a tremendous incentive to employ not one, but many a nonunion contractor. And if the union is restricted from doing anything other than picketing the subcontractor, it may be left in a decidedly weak condition.[54]

Moreover, the comparative scarcity of employment opportunities on a jobsite aggravated the difficulties encountered by unions. The availability of construction work is often dependent upon seasonal factors[55] and the duration of a particular project.[56] Since employment is transitory, a single employee might be hired by several employers during the course of a year.[57] Therefore, in the absence of effective power to prevent the subcontracting of work to nonunion employers, union members could not depend upon continuous employment at union wage rates.[58] Despite these problems which are unique to the construction industry, the Court refused to modify the

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120 N.L.R.B. 753, 42 L.R.R.M. 1046 (1958); Local 399, Service & Maintenance Employees (Roberts & Assoc's), 119 N.L.R.B. 962, 41 L.R.R.M. 1228 (1957).

Moreover, mere compliance with the formulated criteria did not necessarily insulate the union from a § 8(b)(4)(A) violation. Circuit courts adopted the view that these tests are of an evidentiary nature, and that the presence or absence of these criteria are not determinative of the legality of the picketing. See NLRB v. International Hod Carriers, 285 F.2d 397, 47 L.R.R.M. 2345 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961); Teamsters Local 859 v. NLRB, 229 F.2d 514, 37 L.R.R.M. 2166 (D.C. Cir. 1955), cert. denied, 351 U.S. 972 (1956); NLRB v. Teamsters Local 968, 225 F.2d 205, 36 L.R.R.M. 2541 (5th Cir.), cert. denied, 350 U.S. 914 (1955). As a result, any indication of a direct appeal to unions rendered the union's activity illegal. See Koretz, Federal Regulation of Secondary Strikes and Boycotts—Another Chapter, 59 Colum. L. Rev. 125, 141 nn. 83-88 (1959), for a listing of the circumstances which the Board used as evidentiary bases of finding § 8(b)(4)(A) violations.

From 1948 through 1959, the application of the *Moore Dry Dock* criteria prevented construction unions from engaging in recognitional and organizational picketing without violating § 8(b)(4)(A). Compare Baltimore Bldg. & Constr. Trades Council, 108 N.L.R.B. 1575, 34 L.R.R.M. 1258 (1954), with the Fourth Circuit's reversal of this decision, Piezonki v. NLRB, 219 F.2d 878, 35 L.R.R.M. 2545 (4th Cir. 1955).

See Lesnick, The Gravamen of the Secondary Boycott, 62 Colum. L. Rev. 1363, 1374-1430 (1962), for an excellent discussion of the application of the *Moore Dry Dock* standards.

[54] Local 501, IBEW v. NLRB, 181 F.2d at 41, 26 L.R.R.M. at 2455.

[55] See W. Haber, Industrial Relations in the Building Industry 95-126 (1930).

[56] H.R. Rep. No. 741, supra note 34, at 19, reprinted in 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 776 [hereinafter cited as Legislative History]; S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), reprinted in 1 Legislative History, supra, at 424.

[57] Note, Developments in the Law—The Taft-Hartley, 64 Harv. L. Rev. 781, 803 (1950); W. Haber, supra note 55, at 50.

[58] Developments in the Law, supra note 57, at 803.

application of section 8(b)(4)(A) to the activities of unions in this area of commerce.[59]

Organized labor, however, did devise a means to circumvent the proscription of this section. Secondary pressure could be exerted by the execution of a hot cargo agreement,[60] a clause which prevented an employer from doing business with a nonunion employer.[61] Consequently, the inclusion of a hot cargo agreement in a contract between a general contractor and labor ensured that jobsite work would be subcontracted exclusively to union employers.

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[59] In other industries, however, the Supreme Court has recognized the validity of picketing an entire situs where more than one independent contractor is conducting business. In Local 761, IUE v. NLRB, 366 U.S. 667 (1961), General Electric conducted operations of a plant, but hired independent contractors to perform a variety of work within the business premises. Seeking to insulate its employees from labor disputes involving these contractors, General Electric erected a separate gate for the exclusive use of the contractors' employees. General Electric and the union which represented its employees became engaged in a dispute; a picket line was erected around all of the entrances to the plant, including the one reserved for use by the contractors' employees. In respect of this activity, the union members employed by the contractors refused to enter the plant. The Board held that an object of the picketing was to force the contractors to sever relations with General Electric. Local 761, IUE, 123 N.L.R.B. 1547, 44 L.R.R.M. 1173 (1959). The Court of Appeals for the District of Columbia Circuit affirmed, 278 F.2d 282, 45 L.R.R.M. 3190 (D.C. Cir. 1960). However, the Supreme Court reversed, stating that the determinative issue is the nature of the work performed by the employees of the independent contractors. 366 U.S. at 680. Picketing is proscribed in those situations where the following conditions exist:

> There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of such a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.

Id. at 681, quoting from Steelworkers Union v. NLRB, 289 F.2d 591, 595, 48 L.R.R.M. 2106, 2109 (2d Cir. 1961).

However, the Board and the courts refused to apply this related work concept to similar situations in the construction industry. In Building & Constr. Trades Council (Markwell & Hartz, Inc.), 155 N.L.R.B. 319, 60 L.R.R.M. 1296 (1965), the nonunion general contractor subcontracted 20% of a project to subcontractors which employed union labor. The union, seeking to become the bargaining representative of the general contractor's employees, picketed all of the entrances to the project. In response to this picketing, the general contractor segregated gates for use by his employees from those used by the subcontractor's employees. Picketing of all the gates continued. The Board, after distinguishing the instant case from *General Electric* on the basis of ownership of the premises around which the picketing took place, said that *Denver Builders* controlled in this situation. Id. at 327, 60 L.R.R.M. at 1299-1300. The Fifth Circuit, enforcing the order of the Board, summarily rejected the union's theory that the work of the subcontractors was related to that of the general contractor: "[W]e need not speculate upon the answer to this question. It is answered authoritatively in *Denver*." Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 83, 66 L.R.R.M. 2712, 2714 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968).

[60] See Teamsters Local 47 (Texas Indus., Inc.), 112 N.L.R.B. 923, 36 L.R.R.M. 1117 (1955).

[61] However, where common carriers are concerned, hot cargo agreements are invalid at their inception. The Board based this decision upon the provisions of § 316 of the Interstate Commerce Act, 49 U.S.C. § 316 (1970), which prohibit a common carrier from contracting away his duty to serve the public. Genuine Parts Co., 119 N.L.R.B. 399, 410-13, 41 L.R.R.M. 1087, 1091-93 (1957).

Initially, the Board[62] and the courts[63] held that labor could strike to enforce these clauses. Although the union members were participating in a concerted refusal to work, the existence of this contract provision constituted a complete defense to an alleged section 8(b)(4)(A) violation.[64] This view prevailed until the decision in *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB (Sand Door)*,[65] where the Supreme Court held that labor and management have the right to execute hot cargo agreements, but that unions could not utilize concerted pressure to secure enforcement.[66]

Congress, however, was dissatisfied with this decision of the Court. Although construction unions had legitimate reasons for demanding the execution of hot cargo agreements, organized labor in other areas of commerce, particularly the trucking industry, utilized these provisions to achieve the organization of enterprises which had previously resisted the appeals of unions. If an employer maintained a nonunion shop, the Teamsters, having executed hot cargo agreements with the trucking concerns, simply refused to transport raw material to, or the finished product from, his place of business. This action caused production to cease and therefore posed a threat to the livelihood of those who were employed by the boycotted enterprise. Rather than face unemployment, the employees chose to organize and recognize the union as their exclusive bargaining agent.[67]

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[62] Teamsters Local 135 (Pittsburgh Plate Glass Co.), 105 N.L.R.B. 740, 32 L.R.R.M. 1350 (1953); Teamsters Local 294 (Conway's Express), 87 N.L.R.B. 972, 25 L.R.R.M. 1202 (1949).

[63] Rabouin v. NLRB (Conway's Express), 195 F.2d 906, 29 L.R.R.M. 2617 (2d Cir. 1952).

[64] The Board adopted the position that the strike conducted by the union did not constitute a secondary boycott because the employers had "consented in advance" to boycott the nonunion company. As a result of this consent, the element of forcing or requiring an employer to discontinue business with others was absent. *Conway's Express*, 87 N.L.R.B. at 982, 25 L.R.R.M. at 1207. See Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 104-05 (1958).

[65] 357 U.S. 93 (1958), aff'g 241 F.2d 147, 39 L.R.R.M. 2428 (9th Cir. 1957), enforcing 113 N.L.R.B. 1210, 36 L.R.R.M. 1478 (1955).

[66] Although recognizing that § 8(b)(4)(A) did not constrain a secondary employer from voluntarily refusing to deal with a primary employer, the Court said:

> [I]t seems probable that the freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and policy. Such a choice, free from prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement between the parties.

357 U.S. at 105. Since an employer cannot exercise this freedom of choice when faced with a work stoppage, unions cannot induce their members to engage in a concerted refusal to work upon an employer's breach of the agreement. 357 U.S. at 107.

[67] S. Rep. No. 187, supra note 56, at 79, reprinted in 1 Legislative History, supra note 56, at 475; H.R. Rep. No. 741, supra note 34, at 21, reprinted in 1 Legislative History, supra, 779.

Congress feared that the *Sand Door* decision would not prevent unions from utilizing secondary pressures to accomplish the organization of nonunion employers. Since hot cargo agreements could still be executed, a failure of the employer to comply with this provision might result in a suit for breach of contract.[68] The prospect of having to pay damages was likely to compel the employer to boycott the unorganized enterprise.[69] Furthermore, noncompliance with the agreement could result in the presentation of uncompromising demands by the union in the negotiation of the next collective bargaining agreement.[70] In addition, unions might contend that the employer's breach of the provision terminated the collective bargaining agreement, enabling the union to present demands for a new contract.[71]

In order to close the loophole that the *Sand Door* decision had created, Congress enacted section 8(e),[72] which prohibits the execution of hot cargo agreements in all areas of commerce with the exception of the construction and garment industries.[73] The legislative history concerning the exemption of the construction industry is rather sparse. According to Senator John Kennedy, cosponsor of the bill in the Senate, the proviso was necessary to "avoid serious damage to the pattern of collective bargaining in [this] industr[y]."[74]

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[68] The question of judicial enforcement was left open by the Court in *Sand Door*, 357 U.S. at 108. A contract action would be brought under § 301(a) of the Taft-Hartley Act, which provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this Act . . . may be brought in any district court of the United States . . . ." 29 U.S.C. § 185(a) (1970). See Jones, Specific Enforcement of "Hot Cargo" Provisions in Collective Bargaining Agreements by Arbitration and Under Section 301(a) of the Taft-Hartley Act, 6 U.C.L.A. L. Rev. 85 (1959).

[69] See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634 (1967); 105 Cong. Rec. 3951 (1959), reprinted in 1 Legislative History, supra note 56, at 1007 (remarks of Senator McClellan).

[70] See Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 272 (1959); Comment, The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L. Rev. 724, 741-42 (1960); Note, 42 Marq. L. Rev. 245, 249 (1958).

[71] 105 Cong. Rec. 16590 (1959), reprinted in 1 Legislative History, supra note 56, at 1708 (remarks of Senator Kennedy and Representative Thompson).

[72] In National Woodwork Mfrs. Ass'n, 386 U.S. 612 (1967), the Court stated: "Throughout the committee reports and debates on § 8(e), it was referred to as a measure designed to close a loophole in § 8(b)(4)(A) of the 1947 Act." Id. at 634. See, e.g., S. Rep. No. 187, supra note 56, at 78-79, reprinted in 1 Legislative History, supra note 56, at 474-75; H.R. Rep. No. 741, supra note 34, at 20-21, reprinted in 1 Legislative History, supra, at 778-79.

[73] The garment industry was exempted from the proscription of § 8(e) because of problems which were entirely unrelated to those encountered by the construction industry. The ban against hot cargo agreements was extended to the garment industry in order to combat sweatshop conditions which prevailed in the shops. By requiring jobbers to subcontract work to contractors meeting union standards, this condition could be rectified. See Lithographers Local 78 v. NLRB, 301 F.2d 20, 49 L.R.R.M. 2869 (5th Cir. 1962).

[74] 105 Cong. Rec. 17899 (1959), reprinted in 2 Legislative History, supra note 56, at 1432 (remarks of Senator Kennedy).

The only inferences which may be drawn from this statement are that Congress recognized that hot cargo provisions were prevalent in the construction industry and an integral factor in the negotiation of new collective bargaining agreements.

However, other portions of the legislative history do indicate that Congress extended preferential treatment to the construction industry because of the difficulties encountered by unions in preventing the subcontracting of work to nonunion employers. Following the decision in *Denver Builders,* President Eisenhower appealed to Congress to correct the inequities that had resulted from the application of section 8(b)(4)(A) to the activities of construction unions.[75] In a message to the Senate,[76] the President recommended the amendment of this section "to make clear that secondary activity is permitted . . . under certain circumstances against secondary employers engaged in work at a common construction site with the primary employer."[77] Congress responded to this proposal by exempting the construction industry from the proscription of section 8(e).[78] Inasmuch as this provision represents congressional action upon a specific recommendation of the President, the conclusion that the exemption was granted to counter the effect of *Denver Builders*[79] seems warranted.

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[75] In a Special Message to the Congress on Labor-Management Relations, the President stated: "I recommend that the act be clarified by making it explicit that concerted action against . . . an employer on a construction project who, together with other employers, is engaged in work on the site of the project, will not be treated as a secondary boycott." Eisenhower, Public Papers of the Presidents 41 (1954).

A similar appeal was made in 1958. Eisenhower, Public Papers of the Presidents 123 (1958).

[76] Message from the President, S. Doc. No. 10, 86th Cong., 1st Sess. (1959), reprinted in 1 Legislative History, supra note 56, at 80.

[77] Id. at 3, reprinted in 1 Legislative History, supra note 56, at 82.

[78] Senator Dirksen, a member of the Senate Conference Committee, stated: "The proviso also excepts from the hot cargo ban and section 8(b)(4) agreements relating to contractors on the same project. This change in the present law, which corrects an inequity against labor, was recommended by President Eisenhower." 105 Cong. Rec. 17334 (1959), reprinted in 2 Legislative History, supra note 56, at 1383.

[79] Allowing the construction industry to execute hot cargo agreements relating to jobsite work remedied labor's problems in preventing the subcontracting of work to nonunion subcontractors. However, in other respects, the principle of *Denver Builders* was still effective. Therefore, a union which became involved in a dispute with a subcontractor concerning wages, hours or working conditions was relatively powerless to exert pressure upon the offending employer.

Subsections 702(c) and (d) of H.R. 8342, 86th Cong., 1st Sess. (1959), were formulated to "overrule the *Denver Building Trades* case in all its applications. [It] permit[s] picketing in the construction industry at the site of a labor dispute without regard to the effect upon the employees of the other contractors working on the same project." H.R. Rep. No. 741, supra note 34, at 22, reprinted in 1 Legislative History, supra note 56, at 780. However, H.R. 8400, which did not contain a construction site picketing provision, was passed by the House.

Since 1959, several legislative proposals for a construction site picketing provision have been discussed by both houses of Congress. However, no such legislation has been enacted. See Comment, Common Situs Picketing and the Construction Industry, 54 Geo. L.J. 962 (1966), for a discussion of these bills. See generally 1965 House Hearings, supra note 40.

Any further doubts as to the purpose behind this enactment are dispelled by an examination of the limitations placed upon the right of the construction industry to execute hot cargo agreements. The proviso itself contains the language that these provisions may only be executed regarding "work to be done at the site of construction."[80] In the House Conference Report, the House Managers stated: "It should be particularly noted that . . . the proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite."[81] The Board adopted this qualification in *Cardinal Industries, Inc.*,[82] a case involving the validity of a clause which permitted a contractor to use prefabricated materials produced off the jobsite only if manufactured by a union company. The union's contention that the proviso encompassed work which was not, but which could have been, performed at the jobsite was rejected without reference to the underlying purpose of the exemption.[83] Nevertheless, the effect of this decision illustrates the objective of Congress in granting a qualified right to execute hot cargo agreements. The union apparently desired the inclusion of such a clause in the collective bargaining agreement to prevent the subcontracting of jobsite work to an offsite company. However, labor did not need a hot cargo agreement to prevent the subcontracting of work to a nonunion employer in this situation. Such a result could be satisfactorily attained by organization of the prefabricator, who was subject to the exertion of concerted pressure. Consequently, the basis for allowing hot cargo clauses in the construction industry was absent. A decision to permit the execution of such an agreement in these circumstances would have unjustifiably allowed a union to exert secondary pressure upon a nonunion enterprise.

Thus, the limited right of the construction industry to execute hot cargo agreements embodies a congressional desire to satisfy the special needs of the construction industry as well as the demands of commerce. The adoption of section 8(e) ensured employers the freedom to decide whether or not to boycott a primary employer.[84] In preserving the "intelligent exercise of such a choice . . . Congress . . . hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited."[85] The proviso did permit organized labor in the construction industry to

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[80] 29 U.S.C. § 158(e) (1970).

[81] H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), reprinted in 1 Legislative History, supra note 56, at 943. See also 105 Cong. Rec. 16415 (1959), reprinted in 2 Legislative History, supra note 56, at 1433 (remarks of Senator Kennedy).

[82] 136 N.L.R.B. 977, 49 L.R.R.M. 1908 (1962), enforced, 339 F.2d 142, 57 L.R.R.M. 2509 (6th Cir. 1964).

[83] The Board based the decision upon the plain-face meaning of the proviso and remarks of Congressmen regarding its scope. 136 N.L.R.B. at 988.

[84] See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634 (1967).

[85] Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 105-06 (1958).

frustrate this goal, but only to the extent that was necessary to compensate the unions for their inability to exert concerted pressure upon the general contractor.

In light of this background, the validity of the Board's decision in *Acco Equipment* can properly be evaluated. The first part of the discussion will examine the propriety of the abridgement of the unqualified right to execute hot cargo agreements relating to jobsite work. Secondly, the impact of this decision upon labor-management relations in the construction industry will be discussed.

In 1969, the International Union of Operating Engineers, Local 12 (Operating Engineers), executed two master agreements with the Associated General Contractors of America (Contractors), both of which contained an identical provision concerning the repair of heavy duty machinery, such as shovels, cranes and tractors, purchased during the term of the contract. The parties agreed that the employees of the equipment dealer could perform repairs on the site of construction for the duration of the warranty period provided by the purchase agreement. After expiration of this period, either employees covered by the contract or employees of an employer who had an "appropriate agreement" with the union were to perform these repairs. Various Contractors violated this provision, subcontracting post-warranty repair work to Acco Equipment, a dealer who employed nonunion labor. Pursuant to another provision of the master agreements, Operating Engineers exacted fines from these Contractors.

In response, Acco Equipment instituted an unfair labor practice proceeding against Operating Engineers, alleging, *inter alia*,[86] that the execution of the repair work provision violated section 8(e) of the NLRA. The Administrative Law Judge, finding that the construction industry proviso does not encompass such an agreement, sustained this allegation. Basing his conclusion on the difference between the servicing of machinery and work which is typically performed on the jobsite, the Judge made the following observations: (1) the repair of equipment does not have to be done at the jobsite, but can be performed in the shop of a dealer; (2) repairmen do not perform building or construction work; (3) the equipment which is serviced does not become part of the finished building; and (4) the

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[86] Acco Equipment also alleged that the exaction of fines by Operating Engineers violated § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1970), which provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents . . .
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object 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 . . . .

Both the Administrative Law Judge and the Board sustained this allegation. 204 N.L.R.B. No. 114, at 2 (1973).

repairmen are not regularly employed construction workers, but are sporadically dispatched to the jobsite whenever necessary.[87]

The Board, without elaborating upon these findings, adopted the determination of the Administrative Law Judge as the proper conclusion of the law.[88] Member Fanning dissented on the grounds that the plain-face meaning and the legislative history of section 8(e) indicates that an agreement relating to the jobsite repair of equipment is protected by the proviso.[89]

In reaching this result, neither the Board nor the Judge directed attention to the reasons behind the enactment of the proviso, but rather emphasized the definition of the word "work" as used in section 8(e). It is submitted that such an analytical approach defeats the congressional purpose in granting preferential treatment to unions in the construction industry. The drafters of the proviso did not distinguish between the type or nature of the work involved in the various tasks on a jobsite. The imposition of restrictions upon the word "work" would have been self-defeating. *All* union crafts could not utilize concerted pressure to prevent the subcontracting of work to nonunion employers. In terms of this problem, the only appropriate limitation upon the right to execute hot cargo agreements relates to the situs, rather than to the nature, of the work. Based upon this reasoning, the determinative factor in evaluating the applicability of the proviso should be whether the subject of the agreement is work that *is* performed on the jobsite.

Such an analysis rejects the proposition that the proviso encompasses only those agreements which relate to work that cannot be performed outside the geographical boundaries of the jobsite. This assertion is contrary to the conclusion of the Administrative Law Judge in *Acco Equipment*.[90] The Judge's determination was based upon the decision of the Board in *Island Dock Lumber, Inc.*,[91] a case involving the delivery of ready mix cement to a construction site by nonunion drivers. These drivers, in addition to transporting the material, actually mixed and poured the liquid cement while on the jobsite. The Teamsters alleged that the contractor, in allowing the work to be performed on the site, violated an agreement whereby all onsite work was to be performed by members of the Local.

The Board in *Island Dock* pointed out that "though the mixing may have taken place on the site, it equally could have taken place off the site . . . . [T]he mixing is not necessarily 'work to be done at

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[87] 204 N.L.R.B. No. 114, at 30-31 (opinion of the Administrative Law Judge).

[88] Id. at 1, 83 L.R.R.M. at 1458.

[89] Id. at 2, 83 L.R.R.M. at 1458.

[90] Id. at 34-35 (opinion of the Administrative Law Judge).

[91] Teamsters Local 294 (Island Dock Lumber, Inc.), 145 N.L.R.B. 484, 54 L.R.R.M. 1421 (1963).

the site within the meaning of section 8(e).' "[92] While this statement seemingly supports the position of the Board in *Acco Equipment,* the fact situation in the two cases is distinguishable to the extent that reliance upon *Island Dock* is ill-founded. Liquid concrete is a material purchased by the contractor, the delivery of which is not complete until the substance has been poured into molds on the jobsite.[93] A step in the delivery process of the finished product is the mixing operation.[94] Since the construction industry proviso does not exempt agreements which relate to material delivered to the jobsite,[95] the Board held that the Teamsters could not demand that the mixing be performed by members of the Local.

On the other hand, the performance of post-warranty repair work unequivocally occurs after delivery is completed. Therefore, the rationale of *Island Dock* is clearly inapplicable to the facts of *Acco Equipment.* Neither precedent, legislative history or the plain-face meaning of the proviso support the proposition that the subject of hot cargo agreements in the construction industry must relate to work which, of necessity, can only be performed on the jobsite. When juxtaposed to the purpose of Congress in exempting the construction industry from the proscription of section 8(e), this assertion validates the conclusion that the decision in *Acco Equipment* is erroneous.

One can only speculate in forecasting the effect of *Acco Equipment* upon the course of future litigation. As stated by Member Fanning in his dissent, the Judge "struck out in all directions" to restrict the scope of the exemption.[96] Yet, the factors which persuaded the Judge were not synthesized into a set of guidelines which would aid in assessing the legality of these agreements.[97] After reading the decision, one does not know whether the proviso encompasses agreements relating to work which can *only* be performed on the jobsite; whether the product of the work *must* become part of the finished building; or whether the work *must* relate to construction or installation. Since an absence of any of these factors affects the scope of the exemption, *Acco Equipment* is subject to a range of interpretations. For the purposes of discussion, an examination of a narrow and a broad reading of these criteria will delineate the spectrum of possible consequences deriving from this decision.

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[92] Id. at 490, 54 L.R.R.M. at 1424.

[93] See Teamsters Local 559 (Connecticut Sand & Stone Corp.), 138 N.L.R.B. 532, 51 L.R.R.M. 1092 (1962).

[94] 145 N.L.R.B. at 491, 54 L.R.R.M. at 1424.

[95] See text accompanying note 81 supra.

[96] 204 N.L.R.B. No. 114, at 2, 83 L.R.R.M. at 1458.

[97] In the "Envoi" section of his opinion, the Administrative Law Judge did delineate the factors which should be considered in determining the validity of a hot cargo agreement. 204 N.L.R.B. No. 114, at 40-41 (opinion of the Administrative Law Judge). The Board refused to comment upon these criteria, and specifically rejected this section of the Judge's opinion as the basis of its decision. 204 N.L.R.B. No. 114, at 1, 83 L.R.R.M. at 1458.

Narrowly construed, *Acco Equipment* indicates that work which is unrelated to the actual construction of a building cannot be the subject of a hot cargo agreement. Under this interpretation, the proviso encompasses agreements relating to tasks which are performed on the site of construction and which physically contribute to the erection of the structure. Since the application of these standards would not substantially limit the scope of the exemption, such an interpretation of the Board's decision would have a minimal effect upon the disposition of future cases.

However, if read in a broader light, this decision indicates that the test for determining the legitimacy of a hot cargo agreement would be whether or not the work could be performed off, as well as on, the jobsite. This standard renders the legality of such an agreement a function of the technological advances achieved in the automation of construction work. With the development of modernized techniques of fabrication, many tasks which formerly could only be performed on the jobsite can now be accomplished in an industrial plant.[98] Acceptance of this interpretation of *Acco Equipment* would substantially limit the scope of the proviso, and would therefore prevent a number of construction unions from utilizing hot cargo agreements to counter their inability to exert concerted pressure upon the general contractor.

However, even such a restrictive interpretation of the proviso does not unduly hamper union pursuit of employment opportunities for their members. Many of the tasks formerly encompassed by this exemption could still be protected by the execution of a work preservation agreement.[99] Under such a clause, the general contractor cannot subcontract work which had been traditionally[100] performed

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[98] Packaged boilers with trim piping attached were introduced and used in the St. Paul area before 1941. By the mid-1940's, ten per cent of the boilers being installed were of the packaged variety. Their use increased rapidly, and by 1963, had risen to sixty five per cent of all boiler installations.

American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 547, 549, 69 L.R.R.M. 2851, 2852 (8th Cir. 1968). Query: Would fabrication work of this nature qualify as basically offsite work? In addition, one commentator has argued that fabrication is a service rather than work. See Previant, The New Hot Cargo and Secondary Boycott Sections: A Critical Analysis, 48 Geo. L.J. 346, 357 (1959), in which the author contends that hot cargo clauses relating to fabrication are not banned by § 8(e), with or without the proviso, because the proscription of this section does not encompass agreements involving the purchase of a service.

[99] In National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1966), the Supreme Court held that this subcontracting clause is not violative of § 8(e) provided that all of the surrounding circumstances of the case indicate that the union's objective was the preservation of work. Id. at 644. In assessing the legality of work preservation agreements, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis à vis* his own employees." Id. at 645. If a finding is made that the union demanded the inclusion of such a clause so as to satisfy its objectives elsewhere, i.e., organization of a nonunion enterprise, then labor and management have violated § 8(e). Id. at 644.

[100] The Supreme Court has not defined the meaning of "traditional work." However, the Court of Appeals for the Eighth Circuit has interpreted this phrase as including "work which unit employees have performed or are performing at the time they negotiated a work-

by employees covered by the collective bargaining agreement. In addition, the general contractor can be dissuaded from awarding contracts to nonunion employers by the execution of a "union standards"[101] clause. An agreement of this nature provides that work can be subcontracted only to those employers which observe the equivalent of union wages, hours, and conditions of employment.[102] The successful negotiation of such a provision prevents a nonunion subcontractor from taking advantage of the potentially lower wage demands of his employees. Therefore, the labor policies of the various employers will not be determinative in the computation of bids for the general contractor. To this extent, an economic parity between all subcontractors is achieved, and union employers are not disadvantaged in acquiring contracts for construction work.

In light of the availability of these alternatives to the execution of hot cargo agreements, the necessity for the construction industry proviso is cast in doubt. Not only do work preservation and union

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preservation clause." American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 547, 552, 69 L.R.R.M. 2851, 2854 (8th Cir. 1968), modifying 167 N.L.R.B. 602, 66 L.R.R.M. 1098 (1967), cert. denied, 398 U.S. 960 (1970).

[101] A union standards clause should be distinguished from a "union signatory" clause. Under the latter, the general contractor is restricted to subcontracting to employers which have an appropriate agreement with the union (the post-warranty repair clause in *Acco Equipment* is of such a nature. See 204 N.L.R.B. No. 114 at 1, 83 L.R.R.M. at 1457). With the exception of those agreements which are encompassed by the construction industry proviso, union signatory clauses are violative of § 8(e). See further discussion in note 102 infra.

[102] Initially, the Board held that all contract clauses which limit the subcontracting of work either to union employers or to employers which satisfy union terms and conditions of employment are illegal under § 8(e). Teamsters Local 710 (Wilson & Co.), 143 N.L.R.B. 1221, 53 L.R.R.M. 1475 (1963), enforced in part, set aside in part and remanded in part, 335 F.2d 709, 56 L.R.R.M. 2570 (D.C. Cir. 1964); Teamsters Local 413 (Patton Warehouse, Inc.), 140 N.L.R.B. 1474, 52 L.R.R.M. 1252 (1963), enforced in part and set aside in part, 334 F.2d 539, 55 L.R.R.M. 2878 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964); Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.) 136 N.L.R.B. 977, 49 L.R.R.M. 1908 (1962), enforced, 339 F.2d 142, 57 L.R.R.M. 2509 (6th Cir. 1964).

However, the Court of Appeals for the District of Columbia Circuit disagreed with this interpretation of § 8(e), holding that union signatory clauses, see note 101 supra, are invalid, but that union standards clauses are valid. Teamsters Local 413 v. NLRB (Patton Warehouse), 334 F.2d 539, 55 L.R.R.M. 2878 (D.C. Cir. 1964), enforcing in part and vacating in part 140 N.L.R.B. 1474, 52 L.R.R.M. 1252 (1963), cert. denied, 379 U.S. 916 (1964); Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964), remanding 139 N.L.R.B. 383, 151 L.R.R.M. 1315 (1962). The court said that a clause which is " 'germane to the economic integrity of the principal work unit', and seek[s] 'to protect and preserve the work and standards the [union] has bargained for' " is valid. *Orange Belt*, 328 F.2d at 538, 55 L.R.R.M. at 2296. However, if a finding is made that such a clause was demanded so that union objectives with another employer could be fulfilled, § 8(e) has been violated. Id., 55 L.R.R.M. at 2296; Building & Constr. Trades Council v. NLRB, 328 F.2d 540, 55 L.R.R.M. 2297 (D.C. Cir. 1964), enforcing in part 139 N.L.R.B. 236, 51 L.R.R.M. 1294 (1962). The Board accepted this view in Teamsters Local 107 (S. & E. McCormick, Inc.), 159 N.L.R.B. 84, 62 L.R.R.M. 1224 (1966), vacated and remanded sub nom. A. Duie Pyle, Inc. v. NLRB, 383 F.2d 772, 65 L.R.R.M. 3107 (3d Cir. 1967), cert. denied, 390 U.S. 905 (1968).

standards clauses effectively restrict the right of a general contractor to subcontract work, but unlike hot cargo agreements, neither of these provisions permit the union to achieve the secondary objective of forcing a nonunion subcontractor to change his labor policy. Evaluated in this context, an argument that limitations should be placed upon the scope of the proviso does have merit.

Nevertheless, judicial and administrative implementation of such a policy could have a damaging ancillary effect. Labor's power to enforce a hot cargo agreement is limited to institution of judicial procedures,[103] while work preservation[104] and union standard[105] clauses are enforceable by resort to concerted action. Therefore, by forcing construction unions to execute the latter subcontracting clauses, the Board and the courts would, in effect, be encouraging the outbreak of strikes in the construction industry. In this situation, the injury to the business of neutral employers, a concomitant of any strike,[106] could be greatly multiplied—those subcontractors engaged in work which demands the completion of a previous portion of the project might not be able to proceed because of the domino-like effect of a work stoppage in an earlier stage of production.

The legislative history of the 1959 amendments to the Taft-Hartley Act does not indicate that Congress considered this factor in prohibiting self-enforcement of hot cargo agreements. When considered in terms of the policy of minimizing industrial strife so as to increase the free flow of commerce,[107] it seems that the scope of the proviso should not be limited. However, legislative scrutiny must also concentrate upon the effect of these agreements upon nonunion employers. The inclusion of such a provision in the collective bargaining agreement executed by labor and the general contractor compels nonunion subcontractors to organize. Although toleration of this undesirable consequence might have been justified when the proviso was enacted, the validity of such condonation is suspect in

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[103] The Board and the courts have adhered to the *Sand Door* mandate that strikes to enforce hot cargo agreements are illegal. Essex County & Vicinity Dist. Council of Carpenters v. NLRB, 332 F.2d 636, 56 L.R.R.M. 2091 (3d Cir. 1964); Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964); Building & Constr. Trades Council (Centlivre Village Apts.), 148 N.L.R.B. 854, 57 L.R.R.M. 1081 (1964), remanded on other grounds, 352 F.2d 696, 59 L.R.R.M. 2894 (D.C. Cir. 1965).

In addition to judicial enforcement, unions may enforce a hot cargo agreement by arbitration procedures and court enforcement pursuant to § 301. See note 68, supra; Sheet Metal Workers, Local 48 v. Hardy Corp., 332 F.2d 682, 56 L.R.R.M. 2462 (5th Cir. 1964).

[104] Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664 (1967); National Woodworkers Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 547, 69 L.R.R.M. 2851 (8th Cir. 1968), modifying 167 N.L.R.B. 602, 66 L.R.R.M. 1098 (1967), cert. denied, 398 U.S. 960 (1970).

[105] See cases from the Court of Appeals for the District of Columbia Circuit cited in note 102 supra.

[106] "Some disruption of business relationships is the necessary consequence of the purest form of primary activity." NLRB v. Operating Engineers, Local 825, 400 U.S. 297, 304 (1971). See note 26 supra and accompanying text.

[107] 29 U.S.C. § 151 (1970).

light of the alternative contract provisions which unions can employ to restrict the subcontracting of work. It is apparent that the time has arrived for Congress to reevaluate the necessity of hot cargo agreements in the construction industry. In 1959, congressional concern focused upon the inability of construction unions to prevent the subcontracting of work to nonunion employers; presently, legislative attention must be directed toward weighing the effect of these agreements upon nonunion employers against the impact that the deletion of the proviso would have upon commerce.

CONCLUSION

The construction industry was exempted from the ban of section 8(e) because of the inability of organized labor to prevent the subcontracting of jobsite work to nonunion employers. Since all unions were prohibited from exerting concerted pressure upon the general contractor to hire a union subcontractor, the proviso should encompass agreements relating to any tasks performed on the jobsite, regardless of the nature of the work involved. Therefore, *Acco Equipment*'s nullification of the right of the construction industry to execute hot cargo agreements involving the jobsite repair of heavy duty equipment frustrates the congressional objective in adopting the exemption.

Although neither the statutory language nor the legislative history of section 8(e) support the position of the Board in *Acco Equipment*, perhaps a narrow, restrictive interpretation of the proviso should be encouraged. By articulating such a view, the administrative and judicial bodies might spur Congress to reconsider the propriety of extending preferential treatment to the construction industry. The inclusion of either a work preservation clause or a union standards clause in the collective bargaining agreement would provide unions with viable alternatives to the execution of hot cargo agreements. When examined in this light, it is quite possible that the legislators will conclude that the construction industry proviso is an unnecessary appendage to the body of section 8(e).

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