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Deconsolidating the Work Preservation Doctrine: 
*Dolphin-Associated Transport*

Ted Cassman†

Neither legislative history nor logic supports the conclusion that the work preservation doctrine as developed by the Board and courts corresponds to the primary/secondary distinctions in sections 8(b)(4) and 8(e) of the National Labor Relations Act. Accordingly, the doctrine should be discarded. Unfortunately, the Supreme Court in NLRB v. International Longshoremen’s Association, 447 U.S. 490 (1980), chose to perpetuate that distinction but without any guideline to the Board as to how it should be applied. If the doctrine is not to be wholly rejected, then, the Board and courts should read work preservation broadly to include union efforts to claim work which has “escaped” or which has been transformed by technological innovations.

I. INTRODUCTION

Technological innovation and the displacement of jobs it often entails are intrinsic concerns of organized labor. Unions frequently respond to such threats to their members’ job security by attempting to block the introduction of less labor-intensive production techniques, or where possible, by laying claim to new jobs spawned by innovations. Typically, unions accomplish these objectives by applying pressure or insisting upon a collective bargaining agreement which effectively forecloses the employer from contracting with other businesses to utilize the new production techniques.

When a union employs such tactics, tension arises between two important policies underlying the National Labor Relations Act (the Act). On the one hand, section 7 of the Act guarantees workers the

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1. As Justice Stewart has noted, “In this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability.” Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 225 (1964) (concurring opinion).
2. See, e.g., cases cited in notes 11-67 infra.
right to engage in concerted activity for their mutual aid and protection. This right is generally interpreted as extending to efforts to maintain or to improve job security. On the other hand, union pressures and collective bargaining agreements which are designed to force an employer to cease doing business with a third party come within the literal proscriptions of sections 8(b)(4)(B) and 8(e), and seemingly run contrary to the statutory policy of protecting neutrals from becoming entangled in labor disputes not their own.

Nowhere has the conflict between these competing policies been more sharply presented and more fiercely debated than in connection with the advent of containerization in the shipping industry. The introduction of containers over the last twenty-five years has made it possible to transfer entire vanloads of cargo directly from a truck to a ship, and vice versa. This innovation in shipping procedures eliminated the necessity of loading and unloading each piece of cargo separately (i.e., "break-bulk cargo"). As one might expect, remarkable efficiencies resulted for shippers, with a concomitant decrease in the demand for

4. See note 156 infra.
5. 29 U.S.C. §§ 158(b)(4)(B) and 158(e), respectively. In pertinent part, these statutes read as follows:

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

      (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

   (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person... Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

   (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void...

6. See Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93, 100 (1958).
dockside labor. For example, containerization has been largely responsible for the fact that the total number of longshoremen employed in the Port of New York dropped from 31,500 in 1958 to 13,700 by 1973.

In the mid-1960's the International Longshoremen's Association (ILA) responded to containerization by restricting those instances in which containers could pass through a port without having been "stuffed or stripped" by its members at dockside. Since that time, the validity of the ILA's efforts to reserve container-related work for its members has been repeatedly challenged. Invoking a previously established doctrine that distinguishes union attempts to preserve traditional work (lawful) from attempts to acquire new jobs (unlawful), the Board has consistently focused on the radical transformation of shipping operations which accompanied containerization. Consequently, in each case the Board has held that the ILA's tactics constituted illegal attempts to acquire work.

For the most part the Board's decisions have been enforced by the circuit courts of appeals. However, in an opinion by Judge Skelly Wright, the D.C. Circuit recently declined to enforce two of the Board's rulings in cases arising from the container controversies. Noting a conflict among the circuits, the Supreme Court then granted a writ of

8. Estimates have been made, for example, that "it would take 126 men 84 hours each, or a total of 10,584 man-hours, to discharge and load about 11,000 tons of cargo aboard a conventional ship. The same amount of cargo on a container vessel can be handled by 42 men working 13 hours each or a total of 546 man-hours." Ross, supra note 7, at 400, quoting The Baltimore Sun, March 28, 1969.


10. See text accompanying notes 96-122 infra. "Stuffing and stripping" refers to the loading and unloading of cargo from containers.

11. The first legal challenge to the ILA's "Rules on Containers" came in an antitrust suit. International Container Transport Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2d Cir. 1970). There, denial of defendants' motion for summary judgment was reversed on appeal because the Rules were held to be "within the protection of the labor exemption to the antitrust laws." Id. at 888.


14. ILA v. NLRB (Dolphin-Associated Transport), 613 F.2d 890 (D.C. Cir. 1979), denying enforcement of ILA (Dolphin Forwarding), 236 N.L.R.B. 525, 98 L.R.R.M. 1276 (1978) and ILA (Associated Transport), 231 N.L.R.B. 351, 96 L.R.R.M. 1636 (1977). On appeal, the Board's rulings in Associated Transport and Dolphin Forwarding were consolidated and decided together.
By a five to four split, the Court upheld the decision of the D.C. Circuit in *Dolphin-Associated Transport*, remanding the cases to the Board.  

In this article the author contends that while the Court correctly concluded in *Dolphin-Associated Transport* that the Board's analysis of the container-related cases was misguided, its own opinion betrays a similar misconception of the structure of the Act. The decision implicitly condones the application of sections 8(b)(4)(B) and 8(e) to restrain the power of unions in ways that Congress neither contemplated nor intended. At the same time, the Court's position requires the Board to draw fine legal distinctions between boycotts on the basis of whether their goal is to preserve, recapture or acquire jobs—distinctions which generally lack practical significance, and which must be invoked without any guidance from either the statute or legislative history of the Act. Finally, perhaps the most disturbing aspect of the *Dolphin-Associated Transport* decision is the Court's continued and erroneous assumption that the distinction between work acquisition and work preservation corresponds to the primary/secondary dichotomy which lies at the heart of sections 8(b)(4)(B) and 8(e).  

Unfortunately, the shortcomings of *Dolphin-Associated Transport* reflect the fundamental inadequacies of a doctrine the Court adopted almost twenty years ago. Therefore, a proper examination of the decision must begin with an analysis of the legislative history of sections 8(b)(4)(B) and 8(e) and the caselaw interpreting those statutes.

II

**The Legislative Histories of Sections 8(b)(4)(B) and 8(e)**

Despite the all-encompassing language of section 8(b)(4)(B), the courts never seriously entertained the proposition that the statute proscribed traditional forms of union pressure directed solely at the "pri-

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15. NLRB v. ILA (Dolphin-Associated Transport), 444 U.S. 1042 (1980).
16. NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980). The cases remained consolidated for argument before the Supreme Court. To avoid confusion, the reader may assume that *Dolphin-Associated Transport* refers to the Supreme Court decision unless stated otherwise.
17. As indicated above, this development predates the *Dolphin-Associated Transport* decision and has become firmly embedded in the law. See *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 630-31 (1967) [hereinafter cited as National Woodwork]. See also *Meat Drivers Local 710 v. NLRB (Wilson & Co.)*, 335 F.2d 709 (D.C. Cir. 1964), enforcing in part 143 N.L.R.B. 1221, 53 L.R.R.M. 1475 (1963) [hereinafter cited as Wilson & Co.].
19. Because the Supreme Court has repeatedly recognized that a primary/secondary distinction, roughly corresponding to that which inheres in section 8(b)(4)(B), also exists in section 8(e), this article will concentrate on the legislative history of the former section, with only rare references to the latter. See *Dolphin-Associated Transport*, 447 U.S. at 503-04; NLRB v. Pipefitters, 429 U.S. 507, 517 (1977); *National Woodwork*, 386 U.S. at 620, 635. See also *Lesnick, Job Secur-
mary” employer. That this interpretation conformed to the congressional intent was made unmistakably clear by Senator Taft, a sponsor of the bill which added section 8(b)(4)(A) (the predecessor of section 8(b)(4)(B)) to the Act:

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... All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.

Accordingly, soon after enactment of section 8(b)(4)(A), both the Board and the courts recognized that the statute did not affect the legality of primary strikes.

This is not to suggest that the legislators had a clear understanding of what constituted a secondary (and hence unlawful) strike. Nevertheless, considerable guidance can be gleaned from the relevant statements of the bill’s supporters. For while proponents of section 8(b)(4)(A) were adamant that no secondary boycott was justifiable and that all should be banned, they also uniformly insisted that the bill would not proscribe “direct strikes to settle questions of wages, of hours...
or better working conditions." In addition, the sponsors consistently chose as examples of unlawful conduct those instances involving union pressure upon a neutral employer to gain an advantage in a dispute with a different employer. Thus it is fair to say that current section 8(b)(4)(B) embodies "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 pressures in controversies not their own."

Unfortunately, the legislative history casts a more ambiguous light on the question of how these two objectives should be reconciled when in conflict. For example, the Senate committee report characterized the scope of section 8(b)(4)(A) as follows:

Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

If the parenthetical phrase following the second clause was not also intended to apply to the first clause, this passage could be construed to mean that all strikes to enforce boycotts should be prohibited, regardless of the union's motives.

However, when proponents of the bill defined what they understood by the term "secondary," they invariably described tactical use of a boycott to achieve objectives unrelated to the working conditions of the striking employees. As one proponent of the bill stated:

A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employers to deal with them, even though the employees of that employer desire to be represented by other unions, or not to be represented at all.

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Supporters of the bill voiced similar refrains again and again. On the other hand, no one ever suggested that the term "secondary" encompassed strikes against a primary employer for better hours, wages or working conditions simply because fulfillment of the union's demands would cause the employer to cease doing business with certain persons. On the contrary, in an exchange with Senator Pepper as to why secondary boycotts should be banned, Senator Taft expressly indicated otherwise:

There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. 31

These statements appear to compel the conclusion that the proponents of the Taft-Hartley Act did not intend to proscribe strikes with primary objectives which nevertheless result in a boycott of another employer. However, several references in the legislative history to the Supreme Court's decision in Allen Bradley Co. v. Local 3, Electrical Workers 32 complicate the matter. In Allen Bradley, Local 3 entered into an arrangement with electrical appliances manufacturers and construction companies by which the latter agreed to buy electrical equipment exclusively from New York City manufacturers. 33 The deal was enforced by a boycott threat from Local 3, which represented the employees of both the manufacturers and construction companies. 34

Standing alone, such an agreement between manufacturers and construction companies would have constituted a blatant restraint of trade in violation of the Sherman Act. 35 However, the union's participation in the plan raised the issue of whether the Norris-LaGuardia Act 36 extended the labor exemption found in the Clayton Act 37 to this kind of arrangement. 38 Answering in the negative and focusing on the evidence of complicity between the union and the employers, the Court held that the labor exemption was not applicable because the union had effectively aided and abetted the employers in their attempts to

31. 93 CONG. REC. 4198 (1947), reprinted in 1947 LEGISLATIVE HISTORY 1107 (emphasis added).
33. 325 U.S. at 798-800.
34. Id.
35. Id. at 800.
38. 325 U.S. at 801-07.
monopolize the electrical appliance industry in New York City. Significantly, though, the Court also noted that "[s]o far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted . . . from the coverage of the Sherman Act." It was the intent of the proponents of the Taft-Hartley Act, clearly expressed in their references to Allen Bradley, that section 8(b)(4)(A) prohibit boycotts similar to those conducted by Local 3 regardless of whether the union was involved in a scheme to restrain trade or was simply acting of its own accord. This, combined with the fact that there was no evidence in Allen Bradley that Local 3 had attempted to influence the labor policies of the boycotted employers, raises the possibility that Congress did in reality wish to ban all boycotts, including those in which the union has no ultimate secondary objectives. However, this conclusion would be erroneous for two reasons.

First, although it is true Local 3 had no complaints with the out-of-state manufacturers, the union did encourage workers who had no dispute with their employers (i.e., the contractors' employees) to enforce a boycott with the object of improving other workers' employment opportunities (i.e., those of the New York manufacturers' employees). Concededly, this was not a classic secondary boycott since the union's objectives did not relate to a dispute with the boycotted employers. Nevertheless, the union's motives were secondary "because the cessation of business was being used tactically, with an eye to its effect on conditions elsewhere." Second, and more important, the references to Allen Bradley in the legislative history reveal that the proponents of the Taft-Hartley Act considered Local 3's boycott to be secondary, in the traditional sense of the word. For example, the Senate committee report stated that section 8(b)(4)(A):

makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3.

This characterization of Allen Bradley entails a classic secondary objective: the boycott was intended to punish the out-of-state manufacturers for failing to recognize Local 3 as the representative of their employees.

39. Id. at 809.
40. Id. (citations omitted).
41. See note 32 supra.
42. Lesnick, supra note 19, at 1017-18.
Senators Taft, Ball and Ellender also made similar summations of the case. Thus, regardless of whether the boycott in *Allen Bradley* technically qualified as secondary, the fact that the bill’s proponents perceived it as such means that their references to the case do not support the contention that section 8(b)(4)(A) was intended to prohibit all boycotts, primary and secondary alike.

What emerges then from the legislative history relating to section 8(b)(4)(A) is a commitment to protecting neutral employers from becoming embroiled in disputes to which they are not parties and over which they have no control, while protecting the right of workers to pressure their employers for better hours, wages and working conditions. Therefore, nothing in this conceptual framework compels the determination that work acquisition is, per se, a secondary objective. To the contrary, a union’s attempt to reach out and acquire new jobs for its members lacks several essential characteristics of a secondary boycott as understood by the proponents of the Taft-Hartley Act.

In the first place, the decision to acquire new work may derive from the very objectives singled out by the Act’s supporters as primary and lawful: better hours, wages and working conditions. This is why the D.C. Circuit long ago recognized that “a union has always been free to bargain for the expansion of the employment opportunities within the bargaining unit.” Consequently, it would be wrong to assume that union attempts to acquire work necessarily lack traditional primary objectives.

Second, the typical work acquisition paradigm omits the element of indirect pressure on third parties that was central to the 80th Congress’ conception of the secondary boycott. In such situations the union makes no demands on and requires no action by anyone except the primary employer. While satisfaction of the union’s objectives may severely affect the job security of *employees* in other units, nowhere did

44. *See* note 32 *supra*.
45. This reading of the statute is consistent with the overall structure of the Taft-Hartley Act. At the same time it enacted section 8(b)(4)(A), Congress addressed several other perceived abuses of union power in the same part of the Act, including strikes and boycotts in jurisdictional disputes, § 8(b)(4)(B), or when another union has been so certified, § 8(b)(4)(C). Like section 8(b)(4)(A), each of these provisions evinces a concern for the employer who is caught between contending forces and who lacks the power to resolve the conflict because either the employer cannot legally satisfy the union’s demands or the union’s demands can only be satisfied by some third party. Or, as Senator Taft stated, “they are strikes which are in effect, attempts to bring indirect pressure on third parties . . . .” 93 CONG. REC. 3838 (1947), reprinted in 1947 LEGISLATIVE HISTORY 1012.
46. *See* notes 85-87 *infra*.
47. *Wilson & Co.*, 335 F.2d at 714, quoting Ebel, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1189-90 (1964). This statement is perhaps more a normative than an accurate description of the caselaw.
48. *See* notes 85-87 *infra*. 
the proponents of the Taft-Hartley Act express the view that this alone would render activity secondary that otherwise would be primary.

Third, and related to both of the first two points, in work acquisition cases the primary employer is not necessarily a helpless neutral trapped between contending forces. Although rival unions may claim the same work, the legal ability of the primary employer to bestow upon the union the jobs it seeks is an important factor in the work acquisition paradigm. When the employer possesses this power, there is no reason to assume that it is a victimized pawn in the union's struggle with third parties. By contrast, if the primary employer cannot possibly comply with the union's demands—i.e., it lacks the "right to control" the work—the likelihood that the union has secondary objectives is increased.\footnote{49} Therefore, lacking independent evidence that the union is attempting to bring indirect pressure against another employer, a strike in this situation should not be included among those which Congress intended to proscribe by the enactment of section 8(b)(4)(A).\footnote{50}

To summarize, the relevant legislative history of the Taft-Hartley Act does not support a black-letter rule distinguishing work preservation from work acquisition. Instead, the history evinces the intent to establish a primary/secondary dichotomy which would not prohibit work acquisition per se.\footnote{51}

Although the moods of the 80th and 86th sessions of Congress were distinctly anti-labor, it is clear that the legislators did not intend to address the issues raised by work acquisition cases through the enactment of sections 8(b)(4)(A) and 8(e).\footnote{52} Nevertheless, the work preser-
vation/acquisition distinction first appeared in a decision almost twenty years ago, and, as *Dolphin-Associated Transport* demonstrates, it has since become a fixture of the caselaw. This tenacity probably derives from at least two sources. First, it is partially an anachronism, a remnant of early decisions which completely ignored the primary/secondary dichotomy in cases involving boycotts. Second, it reflects a conviction held by many courts and commentators that independent policy considerations justify the per se prohibition of work acquisition under current sections 8(b)(4)(B) and 8(e).

## III
### THE CASELAW

After enactment of section 8(b)(4)(A), the predecessor to section 8(b)(4)(B), the Board and the courts were quick to recognize the importance of the primary/secondary dichotomy in traditional strike situations. The distinction was discarded, however, in cases arising from product boycotts and “refusals to handle.” In these latter instances, the conduct so clearly lay within the literal proscriptions of section 8(b)(4)(A) that union arguments concerning legitimate primary objectives fell on deaf ears. Consequently, early cases generally held that if “an object” of the union’s activity was to cause an employer to “cease doing business” with a third party, then the section was violated without regard for the union’s purpose. In their most limited sense, such a surmise can hardly serve as a basis for the construction of an existing statute ... [I]t would be unfortunate were this Court to attribute to Congress, on the basis of such an opaque legislative record, a purpose to outlaw the kind of collective bargaining and conduct involved in these cases.

386 U.S. at 649-50. Unfortunately, neither Justice Harlan nor any other member of the Court has recognized that this reasoning is equally applicable to work acquisition agreements.

53. *See* Wilson & Co., 335 F.2d at 714. *See also* text accompanying notes 63-78 and 123-50 infra.


55. *See* Carpenters Local 11 (General Millwork), 113 N.L.R.B. 1084, 36 L.R.R.M. 1484 (1955), enforced, 242 F.2d 932 (6th Cir. 1957); Carpenters & Joiners (Wadsworth), 81 N.L.R.B. 802, 23 L.R.R.M. 1403 (1949), enforced, 184 F.2d 60 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951). Both cases involved refusals of construction workers to handle prefabricated goods in order to retain their traditional work.

56. *See* Milk Drivers Local 753, 141 N.L.R.B. 1237, 52 L.R.R.M. 1484 (1963), enforced, 335 F.2d 326 (7th Cir. 1964); Electrical Workers Local 756 (Martin Co.), 131 N.L.R.B. 1010, 48 L.R.R.M. 1172 (1961); Plumbers Local 508 (MacDonald-Scott), 131 N.L.R.B. 787, 48 L.R.R.M. 1132 (1961); Washington-Oregon Shingle-Weavers Council (Sound Shingle), 101 N.L.R.B. 1159, 31 L.R.R.M. 1202 (1953), enforced, 211 F.2d 149 (9th Cir. 1954); Glaziers Local 27 (Joliet Contractors), 90 N.L.R.B. 542, 26 L.R.R.M. 1245 (1950), enforced, 202 F.2d 606 (7th Cir. 1953). In *Joliet Contractors, MacDonald-Scott* and *Martin Co.*, the unions were attempting to preserve unit
In the early 1960’s cracks began to appear in this “literal” approach. While the Board remained satisfied with its “cease-doing-business” test, several circuit courts of appeals began to question whether the policies underlying new sections 8(b)(4)(B) and 8(e) did not require a more sophisticated analysis.\textsuperscript{57} Ironically, this movement probably received impetus from the enactment of the Landrum-Griffin Act, because a literal construction of section 8(e) would have prohibited “no-subcontracting” clauses, including those expressly intended only to preserve traditional jobs for the unit.\textsuperscript{58} Both the Board and the courts perceived such provisions as having legitimate primary objectives, and held the provisions lawful although they necessarily precluded employers from conducting business with subcontractors.\textsuperscript{59} Thus, it was through the subcontracting cases that the primary/secondary dichotomy was first consistently injected into the analysis of alleged boycott cases under sections 8(b)(4)(B) and 8(e).\textsuperscript{60}

Application of the primary/secondary distinction spread rapidly from cases involving “no-subcontracting” clauses to other types of boycott cases. Soon it was established that “union standards” subcontracting clauses were lawful because their effect on third parties was incidental to the unions’ goal of protecting their members’ jobs by removing the economic incentives for “farming out” work.\textsuperscript{61} At the same time and on the basis of similar reasoning, decisions upheld the right of unions to insist upon “work allocation” clauses reserving particular jobs to unit members.\textsuperscript{62} Finally, this trend culminated in cases which recognized that even product boycotts are lawful if undertaken in fur-

\begin{itemize}
  \item \textsuperscript{57} See NLRB v. Operating Engineers Local 325 (Nichols Electric Co.), 326 F.2d 218 (3d Cir. 1964), remanding 138 N.L.R.B. 540, 51 L.R.R.M. 1096 (1962); Retail Clerks Local 770 v. NLRB (Food Employers Council), 296 F.2d 368 (D.C. Cir. 1961), remanding 127 N.L.R.B. 1522, 46 L.R.R.M. 1221 (1960).
  \item \textsuperscript{58} For example, in Food Employers Council Judge Prettyman of the D.C. Circuit, writing for the majority, expressed his belief that “no-subcontracting” clauses, as well as strikes to enforce them, were not prohibited by the Act. 296 F.2d at 370-72.
  \item \textsuperscript{59} See Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534 (D.C. Cir. 1964); Bakery Drivers Local 484 v. NLRB (Sunrise Transp.), 321 F.2d 353, 358 (D.C. Cir. 1963) (dictum); Ohio Valley Carpenters Dist. Council (Cardinal Indus., Inc.), 136 N.L.R.B. 977, 984-86 (1962) (dictum). \textit{Cf.} Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (holding that subcontracting which would replace existing unit jobs is a statutory subject of collective bargaining under section 8(d)).
  \item \textsuperscript{60} In fact, by 1964, one commentator confidently pronounced that where “the exclusive object of a subcontracting clause is protection of primary economic interests of the employees in the bargaining unit as opposed to the application of secondary pressure on a subcontractor . . . the clause falls outside the congressional purpose for section 8(e) and will therefore be exempt from its proscription.” Ebel, \textit{supra} note 47, at 1187-88.
  \item \textsuperscript{61} See Lewis v. NLRB, 350 F.2d 801 (D.C. Cir. 1965); Truck Drivers Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir.), \textit{cert. denied}, 379 U.S. 916 (1964).
  \item \textsuperscript{62} See Wilson & Co., 335 F.2d 709 (D.C. Cir. 1964); Dairy Workers Local 83 (Arthur

Even as the courts embraced the primary/secondary distinction when confronted with purported work preservation, however, they refused to apply the same guidelines to cases in which a union sought nontraditional jobs for its members. For example, in a case arising when the work preservation doctrine was still in its most nascent stages,\footnote{64} the Board held that a strike for a work allocation clause violated section 8(b)(4)(B) on the strength of the trial examiner's finding that the union's objective was not "to hold on to what it has but to prevent [a third-party employer] and its drivers from continuing to work as they have historically."\footnote{65} Significantly, the Board offered no explanation why this consideration was relevant to the issue whether the union's objectives were primary or secondary. Thus, without any substantive analysis whatsoever the Board simply assumed that work acquisition constituted an unlawful, secondary objective.

The Board's identification of work acquisition as a secondary objective went unchallenged by the circuit courts.\footnote{66} However, the doctrine's viability was not firmly established until the Supreme Court gave its imprimatur to the concept several years later in \textit{National Woodwork}, a case arising from a classic work preservation agreement.\footnote{67}

In \textit{National Woodwork}, the Court confronted the question whether work allocation agreements which cause an employer to cease doing...
business with certain parties are nevertheless lawful under sections 8(b)(4)(B) and 8(e) if the union’s objectives relate exclusively to primary concerns. To resolve this issue, the Court reviewed in detail the legislative histories of the Taft-Hartley and Landrum-Griffin Acts. Following an analysis closely paralleling that in this article, the Court determined that the primary/secondary distinction was central to such boycotts. Consequently, the Court agreed with the Board that not every instance of union pressure on an employer to sever business relations with third parties is unlawful. To the contrary, it concluded that sections 8(b)(4)(B) and 8(e) proscribe such activity only if “the tactical object of the agreement and its maintenance is [the boycotted] employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim.”

Unfortunately, for one brief moment the Court’s analysis deviated from this construction of the Act. For in explaining why the references to Allen Bradley in the legislative history of the Taft-Hartley Act did not compel the conclusion that the boycott in National Woodwork was unlawful, the majority opinion temporarily abandoned the primary/secondary distinction. The Court asserted that:

even on the premise that Congress meant to prohibit boycotts such as that in Allen Bradley without regard to whether they were carried on to affect labor conditions elsewhere, the fact is that the boycott in Allen Bradley was carried on not as a shield to preserve the jobs of Local 3 members, . . . but as a sword to reach out and monopolize all the manufacturing tasks for Local 3 members.

Following the Board’s lead, the Court then suggested that perhaps Congress had intended to proscribe boycotts when used as a sword to acquire new work but not when used as a shield to preserve traditional jobs.

This portion of the National Woodwork opinion is disturbing for three reasons. First, as Justice Stewart emphasized in his dissent, the Court ignored the fact that elements of work preservation were present even in Allen Bradley. Second, the Court’s half-hearted assertion that
Congress had meant to distinguish between work acquisition and preservation was unsupported by references to the legislative history and actually contradicted the Court's own analysis of that history. Third, given the Court's prior determination that Allen Bradley was distinguishable within the primary/secondary context, this passage constituted mere dictum. Thus, through a passage that was completely unnecessary to its holding and factually misleading, the Court missed an opportunity to establish a coherent framework for the enforcement of sections 8(b)(4)(B) and 8(e) which was consistent with the relevant legislative histories.  

After the Supreme Court approved the Board’s fashioning of a “sword and shield distinction out of thin air,” the concept soon became firmly ensconced in the caselaw. While this occurred, neither the Board nor the courts ever attempted to reconcile the doctrinal language inherited from National Woodwork (i.e., pressure “tactically calculated to satisfy union objectives elsewhere”) with the preservation/acquisition dichotomy. In fact, by the time of Dolphin-Associated Transport the Court unabashedly assumed congruity between the primary/secondary and preservation/acquisition dichotomies.

Although the Court has not directly addressed the issue, the caselaw suggests two rationales for identifying work acquisition as a secondary objective under sections 8(b)(4)(B) and 8(e). The first can be gleaned from a passage in the Supreme Court’s National Woodwork

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74. The only arguable support in the legislative history of the Taft-Hartley Act for the Court’s sword/shield distinction lies in two references to Allen Bradley which express concern about Local 3’s “power” and its ability to “maintain a tight little monopoly.” See 93 CONG. REC. 4255 (1946), reprinted in 1947 LEGISLATIVE HISTORY 1055-56 (remarks of Sen. Ellender); 93 CONG. REC. 5143 (1946), reprinted in 1947 LEGISLATIVE HISTORY 1491 (remarks of Sen. Ball). However, as mentioned earlier, speakers referred to Allen Bradley in the context of “secondary boycotts” which they had previously defined as attempts to bring indirect pressure on third parties. See text accompanying note 44 supra. Thus, these Senators did not condemn all manifestations of union power, but only those which involve tactical pressure on neutral parties.

75. 386 U.S. at 657 (Stewart, J., dissenting).

76. See Local 743, Carpenters v. NLRB, 553 F.2d 683 (D.C. Cir. 1976), vacated and remanded on other grounds, 430 U.S. 912 (1977); Canada Dry Corp. v. NLRB, 404 F.2d 587 (6th Cir. 1970); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 547 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970). See also notes 13-16 supra.

77. See note 69 supra and accompanying text.

78. That this assumption underlay the Court's decision is clear from the majority's approach to the case. Early in the opinion, the Court noted that sections 8(b)(4)(B) and 8(e) prohibit only "secondary activities whose object is to force one employer to cease doing business with another . . . and agreements with secondary objectives." 447 U.S. at 504 (emphasis added). At the same time, throughout the opinion the case is discussed in the context of the Board's determination that the Rules on Containers "did not preserve traditional work opportunities for employees represented by the union, but sought instead to acquire work they had not previously performed . . . ." Id. at 493. Hence, the case was analyzed by the Court as though the preservation/acquisition distinction corresponded to the primary/secondary dichotomy.
decision. As noted earlier,79 the majority intimated at one point, "Congress may have viewed the use of the boycott as a sword [to acquire work] as different from labor's traditional concerns with wages, hours and working conditions."80 While the significance of this gratuitous statement has never been adequately explained, it could be a judgment that the 80th Congress did not consider the acquisition of non-traditional jobs to be a legitimate primary objective, and that union objectives which do not qualify as primary must necessarily be classified as secondary.81 Accordingly, union attempts to "reach out and monopolize jobs or acquire new jobs when their own jobs are not threatened. . . ." would be secondary and unlawful.82

A second argument for invoking a preservation/acquisition distinction under sections 8(b)(4)(B) and 8(e) is suggested in Chief Justice Burger's dissenting opinion in Dolphin-Associated Transport.83 The Chief Justice opined that the case did not involve a classic labor dispute between workers and management. Instead, he characterized the controversy as one in which a "segment of labor seeks to take work away from another segment, and to impose a 'featherbedding' fine on employers as an enforcement device."84 Implicit in this statement is the perception that the employers were mere pawns in a struggle between contending labor forces. From this perspective, the ILA's boycott constituted tactical pressure on neutral employers to achieve union objec-

79. See text accompanying note 72 supra.
80. 386 U.S. at 630.
81. It should be noted that while legislators, judges and commentators often speak of primary and secondary objectives as though the two categories encompass every conceivable union goal, secondary objectives have never been defined as "those which are not primary," or vice versa. Therefore, a gap may exist between the two concepts into which some types of work acquisition might fall.

For example, there could be instances in which a union's objective in acquiring work appears to relate only to future members of the unit because the present membership enjoys an abundance of jobs. Perhaps this is what Justice Brennan had in mind when he posited the argument that work acquisition differed from "labor's traditional concerns." Id. In such situations one could argue that the union's objectives are not primary because they do not concern the wages, hours and working conditions of the present membership.

There are three answers to this position. First, any arrangement that assures more jobs in the future also improves the job security of the present union members and may well have that objective. Second, the fact that a particular demand reveals "non-traditional primary objectives" does not mean that the union's goals are secondary. See Lesnick, supra note 19, at 1017 n.76. But see Local 1355, ILA (Ocean Shipping Serv., Ltd.), 146 N.L.R.B. 723, 728, 55 L.R.R.M. 1389, 1390 (1964) (boycott on shipping to Cuba held to be secondary because it was not a "traditional primary activity"). Third, the mere possibility that such cases may arise, even assuming they would violate sections 8(b)(4)(B) and 8(e), does not justify a per se rule against work acquisition.

83. 447 U.S. at 524-27 (Burger, C.J., dissenting). This decision is discussed in detail in Section IV infra.
84. Id. at 526 n.1.
tives elsewhere (i.e., to wrest jobs from other workers). This could arguably bring the boycott within those termed "secondary."

However, for the reasons discussed previously, neither of the above rationales for equating the work preservation/acquisition and primary/secondary dichotomies finds support in the legislative history of the Act. 85 By ignoring the role that primary objectives may play in union attempts to acquire new job tasks, these theories are disloyal to the congressional commitment to protect the right of workers to pressure their employers for better hours, wages and working conditions. 86 Similarly, neither approach accords with Congress' concern for the helpless neutral employer or with its preoccupation with indirect pressure to influence persons standing outside the primary employment relationship. 87

These deviations from the congressional design in enacting sections 8(b)(4)(B) and 8(e) are particularly troublesome because of the complexity of the statutory scheme. Administering the primary/secondary dichotomy could never be an easy task, but the adoption of the work preservation/acquisition distinction has only exacerbated matters by requiring an additional inquiry into issues that are divorced from the policies underlying the Act. Moreover, in application, the theoretical distinction between work acquisition and preservation frequently blurs into a nebulous region of "reacquisition." 88 Thus, the discriminations the work preservation doctrine calls for are even more difficult to administer than those which inhere in the primary/secondary dichotomy.

As a consequence, the Board has been forced to decide increasingly complex work allocation cases on an ad hoc basis. Predictably, this piecemeal approach has resulted in a confusing array of Board and circuit court decisions, with little progress toward a coherent doctrine. 89

85. See text accompanying notes 45-51 supra.

86. As the D.C. Circuit acknowledged long ago, "a clause covering non-traditional work may be just as consecrated to the primary objective of bettering the lot of 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." Wilson & Co., 335 F.2d at 714, quoting Ebel, supra note 47, at 1189.

87. It is true that the rationale derived from the Chief Justice's dissent in Dolphin-Associated Transport portrays work acquisition as a struggle between unions with an employer caught in the middle. See text accompanying notes 83-84 supra. But while this is probably an accurate description of many work acquisition cases, it ignores the fact the union's demand may often be directed exclusively at the primary employer and not involve any tactical pressure on third parties. Furthermore, this rationale provides no basis for distinguishing work preservation from acquisition because attempts to preserve work may also entail competing unions' claims to specific jobs, with an employer caught in the middle.

88. See American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d at 551-54. See also Note, Work Recapture Agreements and Secondary Boycotts: ILA v. NLRB, 90 HARV. L. REV. 815, 821-23 (1977) [hereinafter cited as Note, Work Recapture Agreements].

89. Compare Local 742, Carpenters, 201 N.L.R.B. 70, 82 L.R.R.M. 1119 (1973), enforcement
For this reason, it was perhaps inevitable that the Supreme Court would agree to hear a work allocation/boycott case in an attempt to provide guidance to the Board and lower courts.

The Court's opportunity to establish a more administrable doctrine arrived when it granted certiorari in Dolphin-Associated Transport. Ironically, no case demonstrates more cogently the inadequacies and unmanageability of the work preservation/acquisition distinction.

IV
THE DOLPHIN-ASSOCIATED TRANSPORT DECISION

An analysis of the Court's decision must begin, of course, with a review of the complicated facts from which the controversy arose. The following factual description has been taken from Consolidated Express, Inc. (Conex), 90 a case which arose prior to Dolphin-Associated Transport. With only a few minor differences these same or similar events gave rise to most of the litigation challenging the legality of the "Rules on Containers." 91

Containerization, an entirely post-World War II phenomenon, did not account for a significant portion of ocean shipments until well into the 1960's. 92 Given the relatively small role it originally played in overall shipping, the innovation was not immediately recognized by the ILA as a serious threat to longshoremen's jobs. 93 Consequently, in

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91. See cases cited in notes 12-15 supra; notes 100-03 infra and accompanying text. Actually, in one of the cases there was evidence the ILA had endeavored to influence the labor policies of off-pier consolidators. See ILA Local 1575 v. NLRB, 560 F.2d at 445. Even standing alone, such a finding would have established a violation of section 8(b)(4)(B). Nevertheless, both the Board and the First Circuit relied heavily on Conex for their finding of section 8(b)(4)(B) and 8(e) violations.
92. In fact, only 3% of the cargo handled by longshoremen in 1966 was containerized. See Ross, supra note 7, at 398. By 1974 this figure had grown to 40%. See Note, Work Recapture Agreements, supra note 88, at 816.
93. Ross, supra note 7, at 405. At least one visionary (and future president of the ILA) perceived the significance of containerization in the late 1950's. "I believe that the cargo container will be forced on shipping lines through competition . . . it is not too far-fetched to estimate that we stand to lose, in the full force of container use, 8,000 to 9,000 jobs in the New York area alone . . ." Report of Thomas W. Gleason, 39th ILA Convention, at 14-15 (July 13, 1959). Nevertheless, containerization was not a major issue in contract negotiations nor was it the object of a major strike until 1968.
1959 the New York Shipping Association (NYSA) succeeded in getting "the right to use any and all type [sic] of containers without restriction." Even this initial victory, however, did not come without concessions. First, royalties on containers loaded or unloaded off-pier were to be paid into a union trust fund. Second, the stripping and stuffing of containers for members of the NYSA was to be performed exclusively by ILA labor at longshore rates. With minor changes, these provisions remained in effect until 1968.

By 1966, the effect of containerization on longshoremen's job security had become more tangible. Thus, prior to expiration of the 1965 contract the ILA declared that containerization would be one of two dominant issues in the coming negotiations. Despite an extremely generous wage offer by the NYSA, the union insisted on contract provisions designed to soften the effect of containerization on longshoremen's job security. At an impasse, the parties settled into what had become a familiar pattern in east coast ports—prolonged strike, an 80-day Taft-Hartley injunction and return to strike.

When an agreement was finally reached in 1969, it included new "Rules on Containers" which distinguished between two types of containers. "Less than Trailer Loads" or "LTLs" were defined as ship-

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94. Conex, 221 N.L.R.B. at 957, 90 L.R.R.M. at 1656. The NYSA was an association of shipping companies, steamship companies and smaller shipping associations. It engaged in the business of conducting collective bargaining on behalf of its members and entering into collective bargaining agreements covering the employees of its members. Id. at 964, 90 L.R.R.M. at 1660. See also the Board's decision in Associated Transport, 231 N.L.R.B. at 358-66. Most members of the NYSA were shipping companies who owned or leased vessels for transport. In addition, NYSA members maintained pier facilities in the Port of New York where they employed longshoremen represented by the ILA. Conex, 221 N.L.R.B. at 965, 90 L.R.R.M. at 1660. Later, the NYSA became a member of the Council of North American Shipping Associations (CONASA), which in 1970 assumed responsibility for negotiating master contracts with the ILA for all major east coast ports. Id. at 964, 90 L.R.R.M. at 1660. Among the matters CONASA was authorized to negotiate was containerization. Id.

95. Id. at 957, 90 L.R.R.M. at 1656. As the second concession indicates and as the Board noted in Conex, "longshoremen have performed the stuffing and stripping of containers on the piers on behalf of shippers since the advent of containerization." Id. at 959 n.16, 90 L.R.R.M. at 1658 n.16. Although evidence as to the amount of stuffing and stripping performed for the NYSA employers is sparse, the administrative law judge (ALJ) in Conex noted that "NYSA companies did have numerous longshoremen on their payrolls for stuffing and stripping work . . . ." Id. at 973 n.8.

96. Ross, supra note 7, at 405. Although the ILA requested that the container portion of the contract be reopened in 1966, the NYSA "employers were able to restrain their enthusiasm for renegotiations." Id.

97. Id. at 406. The other major issue was all-coast bargaining.

98. Id. at 407.

99. Id. See also Conex, 221 N.L.R.B. at 968-69.

100. The text of the relevant Rules is as follows:

Rule 1.

These provisions relate solely to containers meeting each and all of the following criteria:
ments consolidated into a single container whose cargo belongs to more than one shipper, beneficial owner or consignee. By contrast, "Full Shippers' Loads" or "FSLs" consisted of containers with cargo from one shipper to a single consignee. The new Rules explicitly reserved for ILA members the stripping and stuffing of all LTLs or consolidated containers which were owned or leased by NYSA employers and which originated from or had a destination within 50 miles of the port's center.

The basis for distinguishing between FSLs and LTLs was apparently two-fold. First, because FSLs travel directly from the shipper to the beneficial owner, they were deemed to be the equivalent of a single item of bulk cargo. LTLs, on the other hand, contained cargo which had to be consolidated prior to shipment or deconsolidated before reaching its final destination. The stripping and stuffing of such containers was therefore thought to be analogous to the traditional work that longshoremen had always performed. Second, prior to the mid-1960's off-pier consolidators accounted for an insignificant amount of container shipments. After 1966, however, these operations proliferated and cut sharply into the work available to longshoremen. Thus,

(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.
(b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.
(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of stripping and stuffing applies to such containers. A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor.... Such stuffing and stripping shall be performed on a waterfront facility, pier or dock....

Rule 3. Rules on no avoidance or evasion. ....
(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties.... If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped.

Conex, 221 N.L.R.B. at 969.
101. Id. at 965.
102. Dolphin-Associated Transport, 613 F.2d at 894 & n.22.
103. 221 N.L.R.B. at 965, 969. See also Ross, supra note 7, at 407-08.
104. See Dolphin-Associated Transport, 613 F.2d at 895 n.33. See also Associated Transport, 231 N.L.R.B. at 355, 96 L.R.R.M. at 1639-40 (Fanning, Chairman, dissenting).
105. Dolphin-Associated Transport, 613 F.2d at 895 n.33.
106. For example, of the six consolidators involved in litigation before the Board, four came into existence after 1966 (i.e., San Juan Freight Forwarders, International Container Express, Sea Freight Express and Twin Express, Inc.). See ILA Local 1575 v. NLRB, 560 F.2d at 441; Conex, 221 N.L.R.B. at 972.
LTLs were a conspicuous target for the ILA.

Despite the clear mandate of the Rules, LTLs which had been stuffed or stripped by off-pier consolidators continued to pass through the ports without being rehandled by longshoremen.\(^\text{107}\) The reason for such casual enforcement of the Rules has been the subject of much controversy.\(^\text{108}\) In any event, ILA members remained dissatisfied with the continuing threat to their job security. Their complaints and insistence that the Rules be honored ultimately led to a mid-contract meeting in Dublin, Ireland, between representatives of the ILA and CONASA employers in January 1973.\(^\text{109}\) There, the conferees amended the Rules to provide for more stringent enforcement. Specifically, the “Dublin Supplement” made it a violation of the Rules for an employer to supply an off-pier consolidator with containers.\(^\text{110}\) Compliance with this new restriction was to be assured by the union’s maintenance and circulation of a list of “untouchable” consolidators and by the threat of large fines against violating employers.\(^\text{111}\)

Shortly after issuance of the Dublin Supplement, several NYSA employers were fined for supplying containers to blacklisted consolidators in violation of the Rules.\(^\text{112}\) At about the same time, these employers announced they would no longer furnish containers to consolidators on the list. Unable to utilize the shipping companies’ transport services and faced with financial disaster, two of the affected

\(^{107}\) Id. at 960, 90 L.R.R.M. at 1659.

\(^{108}\) There was evidence that LTLs from consolidators had slipped through the port by deceptive tactics. Id. at 971 n.4. On the other hand, the ALJ in Conex stated that the “ILA, like the NYSA, was considerably less than vigilant in asserting and insisting upon the ILA’s prerogative in this regard.” Id. at 976.

\(^{109}\) Id. at 969. By this time, CONASA had assumed responsibility for bargaining agreements concerning containers for all major east coast ports. See note 94 supra.

\(^{110}\) The relevant portions of the Dublin Supplement are as follows:

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

Conex, 221 N.L.R.B. at 958, 90 L.R.R.M. at 1657.

\(^{111}\) Id.

\(^{112}\) Id. at 959, 90 L.R.R.M. at 1658.
consolidators responded by filing charges of section 8(b)(4)(B) and 8(e) violations with the Board.113

As noted previously, the rationale behind the Rules' distinction between LTLs and FSLs lay partly in the analogy to bulk cargo.114 Because FSLs, unlike LTLs, require no stripping prior to arrival at the beneficial owner's place of business, they were allowed to pass through the ports without being rehandled by longshoremen. In other words, the Rules treated FSLs as though they were a single piece of cargo. Frequently, however, the truckers who transported FSLs from the pier to the beneficial owner stripped the containers at their terminals within the port areas and prior to delivery of the cargo to its final destination.115 This practice was known as "short-stopping."116

Although the Rules of the 1968 and 1971 agreements referred only to LTLs and consolidated containers, there is evidence that the labor-management committees established to enforce the Rules considered short-stopping of FSLs a violation.117 Nevertheless, the practice was extremely difficult to detect, and prior to 1973 the ILA rarely lodged complaints against trucking companies.118 Again, the Dublin Supplement precipitated events. First, it formalized the ILA's position on short-stopping: FSLs which required stripping before delivery to the beneficial owner would have to be stripped at the pier by longshoremen unless the cargo was to be stored at a warehouse where it would remain for at least thirty days.119 In addition, the provisions prohibiting employers from supplying containers to blacklisted companies made it easier to prevent short-stopping. Consequently, in late 1974 several employers were fined for supplying containers to truckers suspected of

113. Id. Developments at east coast ports other than New York merit some attention. Containerization arrived later and advanced more gradually at the other east coast ports. Consequently, the 1968 Rules were already in effect before containers accounted for a substantial portion of cargo traffic through these ports. This helped to avert many of the difficulties which arose in New York by application of the Rules after off-pier consolidators were already well established. Nevertheless, controversies did occur at ports in Maryland and Virginia when the ILA insisted that the Rules applied to FSLs in certain situations.

These developments are reviewed in detail in the Board's Associated Transport decision, 231 N.L.R.B. at 351, 96 L.R.R.M. at 1636. See also Dolphin-Associated Transport, 613 F.2d at 893-96. As noted in note 14 supra, the Board case referred to as Associated Transport was consolidated with Dolphin Forwarding on appeal. However, Dolphin Forwarding arose in New York from events closely paralleling those of Conex and did not involve the twist in the facts discussed above.

114. See text accompanying notes 104-06 supra.

115. Associated Transport, 231 N.L.R.B. at 362. See also Dolphin-Associated Transport, 613 F.2d at 895.

116. Truckers "short-stopped" containers for various reasons, ranging from convenience to compliance with state road regulations concerning the bulk and weight of vanloads. 613 F.2d at 895.

117. This interpretation was based on the fact that, like LTLs, short-stopped FSLs were stripped prior to arrival at the beneficial owner's premises. Id.

118. Id. See also Associated Transport, 231 N.L.R.B. at 362.

119. Id. at 360.
short-stopping. When the truckers refused to indemnify the employers for the amount of the fines, the latter severed business relations with the former. Again, the boycotted businesses responded by filing section 8(b)(4)(B) and 8(e) charges with the Board.

As noted above, the Board first addressed the legal issues raised by enforcement of the Rules on Containers in Conex. Rejecting the opinion of the administrative law judge to the effect that the Rules constituted legitimate work preservation, the Board held that the ILA had violated sections 8(b)(4)(B) and 8(e). Ever since, the Board has consistently relied upon and followed Conex in every case arising from enforcement of the Rules. Therefore a thorough analysis of the Board's opinion in Conex is necessary to understand the Board's position on the legality of the Rules as well as the position ultimately adopted by the Supreme Court in Dolphin-Associated Transport.

The Board's judgment in Conex that the ILA had violated sections 8(b)(4)(B) and 8(e) was grounded in its determination that the work in controversy was the "LTL container work performed by [the charging parties] at their own off-pier premises." The Board based this conclusion in turn on its characterization of the ILA's traditional work as the loading and unloading of cargo onto ships. By contrast, the consolidators' employees customarily engaged in the work of stuffing and stripping LTLs. From these findings it logically followed that the ILA, in maintaining and enforcing the Rules, sought "to acquire the work which traditionally had been performed by employees in other work units." Thus, the Board concluded that the ILA's tactics did not amount to work preservation within the meaning adopted by the Supreme Court in National Woodwork.

The Board's decision articulated several additional considerations which it believed supported its ruling. First, under the terms of the Dublin Supplement, the Rules applied to LTLs regardless whether the containers were owned or leased by an employer of longshoremen. Asserting that such provisions demonstrated an intent to acquire work over which the relevant employers had no control, the Board reasoned

120. Id. at 363.
121. Id.
122. Id.
124. Id. at 959, 961, 90 L.R.R.M. at 1658, 1600.
125. See cases cited at note 12 supra.
126. 221 N.L.R.B. at 959, 90 L.R.R.M. at 1658.
127. Id. at 959-60, 90 L.R.R.M. at 1658.
128. Id. at 960, 90 L.R.R.M. at 1659.
129. Id., 90 L.R.R.M. at 1659.
130. Id., 90 L.R.R.M. at 1659.
that the provisions could serve no legitimate primary objectives.\footnote{Id. This argument is an expression of the Board's “right-to-control” test. See NLRB v. Pipefitters, 429 U.S. 507, 521-28 (1977). As will be seen, in Dolphin-Associated Transport the Supreme Court expressly reserved this issue for the Board on remand. 447 U.S. at 511-12.}

Second, the Board determined that even if the ILA once possessed valid claims to the consolidating jobs now performed off-pier, the union abandoned its rights by entering into the 1959 agreement and by allowing LTLs to pass through the ports for so many years without major incident.\footnote{221 N.L.R.B. at 960, 90 L.R.R.M. at 1659. Here the Board emphasized the language of the 1959 agreement granting NYSA employers “the right to use any and all types of containers without restriction.” See text accompanying notes 94-95 supra.} Third, the Board perceived “no distinction in the essential character of the work . . . whether it is performed by full-load shippers or by consolidators . . .”.\footnote{221 N.L.R.B. at 961, 90 L.R.R.M. at 1659.} Consequently, if the ILA could legally claim the work presently undertaken at the consolidators' facilities, the Board wondered what would restrain the union from also attempting to capture the stripping and stuffing of FSLs.\footnote{Id. at 961, 90 L.R.R.M. at 1660. The Board's inability to perceive a distinction here derived from its preoccupation with the nature of the work performed by the consolidators' employees. As noted previously, if one focuses on the nature of the dispute from the ILA's perspective, there exists a principled basis which arguably justifies a distinction between FSL-related work and the stuffing and stripping of LTLs. See text accompanying notes 100-106 supra. As will be seen, the Board's concern about the power of the ILA to claim as much container-related work as it desired regardless of the effect on established employment relations elsewhere closely parallels that of the dissent in Dolphin-Associated Transport. See text accompanying note 155 infra.}

Underlying each of these asserted grounds for the Board's decision in Conex was the assumption that the legitimate interest of labor organizations in protecting their members' job security must be balanced against the ability of powerful unions, under the guise of work preservation, to wrest jobs from non-union employees and thereby to disrupt established business operations which have no direct relations with those unions. In addition, the Board's reasoning illustrates that in its view two aspects of the controversies over the Rules tipped this balance in the direction of unwarranted job aggression.

First, with the advent of containerization much of the work involved in loading and unloading ships was transformed into the stuffing and stripping of containers. While conceding that these novel shipping procedures had substantially reduced the demand for workers to load and unload ships, the Board focused on the fact that the new jobs engendered by containerization differed significantly from the work that longshoremen had traditionally performed. From this perspective, the ILA was not trying to preserve its members' historical work but rather to capture jobs which longshoremen had never performed.\footnote{Id. This characterization of the dispute is not immune from attack. As noted previously, longshoremen have performed stripping and stuffing work “since the advent of containerization,”}
Second, by 1973, when the Dublin Supplement issued, off-pier consolidators already accounted for a large portion of container shipments. This meant that the ILA's goals could only be satisfied by disrupting the consolidators' businesses and thereby taking over "the work traditionally performed off the pier by employees outside the longshoremen unit . . ."\[136\] Taken together with the transformation of shipping procedures which accompanied containerization, the severe displacements which would result from enforcement of the Rules were enough to convince the Board that the ILA's tactics did not come within the work preservation doctrine.\[137\]

A divided panel of the Second Circuit enforced\[138\] the Board's order in *Conex* but the court's decision turned exclusively on the Board's determinations that the "work in controversy" was the off-pier consolidation of containers and that the Rules were therefore an attempt to acquire work which had never previously belonged to longshoremen.\[139\] The court was "not similarly impressed with the N.L.R.B.'s other reasons for its order, such as the alleged abandonment by I.L.A. of its claims."\[140\] For this reason, in subsequent cases arising from enforcement of the Rules, the Board has relied on *Conex* for the proposition that the "work in controversy" differs from that which longshoremen have historically performed.\[141\] Similarly, argument before the circuit courts has focused on the validity of that proposition,\[142\] and this is the question which ultimately confronted the Supreme Court in *Dolphin-*
In *Dolphin-Associated Transport*, the Supreme Court held that the Board's approach to defining the work in controversy in the cases arising from enforcement of the Rules was erroneous as a matter of law:\textsuperscript{144}

By focusing on the work as performed after the innovation took place, by employees who allegedly have displaced the longshoremen's work, the Board foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to play any part in the loading and unloading of containerized cargo.\textsuperscript{145}

This approach, the Court emphasized, would force organized labor to meet efficient innovations with intransigence because union attempts to accommodate the changes while claiming for their members as much of the new work as possible might well constitute illegal work acquisition. Thus, the majority disagreed with the Board's conclusion that the fact that truckers' and consolidators' employees, not longshoremen, had traditionally stripped and stuffed containers was controlling.\textsuperscript{146} In the Court's view, the traditions of the truckers and consolidators were irrelevant.\textsuperscript{147} Instead, the legality of the Rules turned on "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation . . . ."\textsuperscript{148}

Similarly, the Court had little difficulty in dismissing the Board's concerns with regard to the disruptive effects that enforcement of the Rules had on the employees of the consolidators and truckers. "The effect of work preservation agreements on employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreements . . . ."\textsuperscript{149} Consequently, the fact that attainment of the ILA's objectives necessarily required the transfer of jobs from the employees of consolidators and truckers to longshoremen did not affect the legality of the Rules.\textsuperscript{150}

Finally, the majority summarily rejected the contention that its holding would free the ILA to pursue containers all around the country and to claim the right to strip and stuff them.\textsuperscript{151} This assertion was

\begin{itemize}
\item \textsuperscript{143} 447 U.S. 490 (1980).
\item 144. *Id.* at 512-13. The Court remanded the case to the Board for findings on the right-to-control issue, among others.
\item 145. *Id.* at 508.
\item 146. *Id.* at 507-08.
\item 147. *Id.*
\item 148. *Id.* at 510.
\item 149. *Id.* at 507 n.22.
\item 150. *Id.*
\item 151. *Id.* at 510 n.24. If read literally, this aspect of the Court's opinion seems disingenuous, implying as it does that the issue is whether the ILA could claim the right to perform the work "far
groundless, according to the Court, because that work "would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis." Conspicuously absent from the opinion, however, is an explanation, derived from either the statutory language or legislative history of the Act, as to how that situation would differ from the case before the Court or why it would not lend itself to an identical analysis. In other words, having accepted the premise that workers may force their employer to cease doing business with a third party if their objective is to acquire work spawned by a technological innovation which is functionally and historically related to their traditional work, it behooved the Court to outline the limits of that doctrine and to explain how those limits would further the policies underlying sections 8(b)(4)(B) and 8(e). This the majority failed to do.

Concededly, the opinion's language concerning the need to examine the "historical and functional relationship" between the new work and the old may have been intended to serve this purpose. Perhaps this language referred to the "fairly claimable" standard that the Board and courts have applied in several work preservation cases. Nevertheless, even if this is a correct interpretation of the opinion, the fact remains that the Court did not support its position with appropriate references to the statutory language or legislative history and thus did not provide the Board with guidance as to how the doctrine should be administered.

The dissenting opinion seized upon this omission as a manifestation of the majority's unwillingness to accept the logical implications of its holding. For example, given the rationale of the majority's holding, apparently nothing would prevent the ILA from deleting the 50-mile limit from the Rules so that all stripping and stuffing of LTLs would have to be performed by longshoremen at the dock. In re-

inland" (i.e., to organize workers at the consolidators' facilities). Clearly, if the ILA ever invoked the Rules toward that end, its objectives would be secondary and violative of section 8(b)(4)(B). See ILA Local 1575 v. NLRB, 560 F.2d at 445. See also Dolphin-Associated Transport, 447 U.S. at 527-28 (Burger, C.J., dissenting) and text accompanying notes 133-34 supra and 156 infra. 152. 447 U.S. at 510.

153. That a doctrinal statement should have been forthcoming is demonstrated by the Court's decision not to reverse the Board outright. Instead, the majority insisted that the "question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand." Id. at 511 n.26. Thus it was incumbent upon the Court to present guidelines, based on the policies underlying sections 8(b)(4)(B) and 8(e), to aid the Board in its subsequent deliberations.


156. Id. The dissent, however, was not entirely justified in crying "foul," because it too neglected to support its argument with references to the congressional intent as expressed in sections 8(b)(4)(B) and 8(e) or in the legislative history. Moreover, the dissent compounded this mistake
sponse, the majority argued that such criticism misconstrued the significance of its opinion by ignoring the Court's decision not to reverse the Board outright, but instead to remand for further proceedings. In other words, by determining only that the Board's analysis of the case was misguided and by refusing to render a final decision on the merits, the majority evidently believed that it had successfully evaded the thrust of the dissent's argument.

Perhaps the majority was correct in this. After all, the overriding concern of the dissenting opinion was that the Court's decision would bestow unbridled power upon unions to block efficient business innovations. Nevertheless, the majority's evasive tactics also revealed the fundamental weakness of its position. For, rationalizations aside, the Court knew that any attempt to define the work preservation/acquisition distinction would be vulnerable to attack as a deviation from the statutory scheme that Congress had intended to enact. And rather than confront such criticism, the Court chose to toss the dilemma back to the Board. Thus, the unmistakable lesson of Dolphin-Associated Transport is that the Board must continue to administer the work preservation doctrine without recourse to the relevant legislative histories for guidance and without meaningful enlightenment from the Supreme Court.

V

POLICY CONSIDERATIONS

Over the years, at least four commentators have expressed doubt whether the work preservation/acquisition and primary/secondary dichotomies correspond to one another. As one writer asserted, "[i]f the unit grows stronger and can move into new productive stages, or if technological change requires employee retraining, nothing in the pri-

by espousing a doctrine that would emasculate important section 7 rights. For, as the majority understood, a rule of law that restrains unions from claiming work which is engendered by technological innovation and which displaces the traditional work performed by their members would hamper union efforts to accommodate change and would thereby impair the ability of workers to act collectively to protect their job security. 447 U.S. at 511. Therefore, not only did the dissenting opinion fail to demonstrate how its position was supported by policies underlying the statutes, but it also omitted any attempt to rationalize the severe impact that its proposed ruling would have on workers' section 7 rights. See, e.g., id. at 526 n.2.

157. Id. at 511 n.26.
158. The Board has already recommenced the task. On remand from the Supreme Court, the Board determined that complaints against the NYSA and the ILA should again be processed. At the Board's behest, a preliminary injunction forbidding implementation of the Rules was then issued by a district court pursuant to section 10(1) of the Act. This order was affirmed on appeal to the Third Circuit. See Parscarelli v. NYSA, 650 F.2d 19 (3d Cir. 1981).
159. See Ebel, supra note 47, at 1189-90; Lesnick, supra note 19, at 1022-25; Note, Work Recapture Agreements, supra note 88, at 821 n.34; Note, Secondary Boycotts, 77 YALE L.J. 1401, 1410-12 [hereinafter cited as Note, Secondary Boycotts].
mary/secondary rationale justifies forbidding the union to claim and preserve the jobs." Nevertheless, perhaps because the doctrine has been so unanimously embraced by the Board and the courts, some of these commentators have argued that the prohibition of work acquisition under sections 8(b)(4)(B) and 8(e) is justified by independent policy considerations.

Three of the policy concerns expressed by the commentators merit discussion. First, it has been suggested that work acquisition is more likely to disguise secondary objectives than is work preservation. "The discernment of the actual objectives . . . 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." However, while it may be true that attempts to acquire work carry a significant potential for abuse, there is no reason to doubt the Board's ability to detect unlawful objectives. The Board has proved ingenious at devising "litmus tests" in other contexts to resolve difficult fact situations. Moreover, where there is evidence of an outstanding dispute between the union and a secondary employer or of demands by the union upon a third party, the Board's task will be an easy one. But, where no such evidence exists and where the union's demands relate exclusively to the concerns of the unit, there is no reason to assume ulterior motives of a secondary nature.

Second, some commentators have argued that the policies favoring the inclusion of union attempts to preserve work in the collective bargaining rubric are less cogent in the case of work acquisition. They assert that because "work acquisition, by definition, concerns jobs unrelated to those performed by the unit," the relationship between job security and the subject matter of the dispute is more attenuated than in work preservation. As the cases arising from the ILA's Rules on Containers demonstrate, however, many instances exist of purported work acquisition in which job security is clearly the motivating factor in the boycott. In addition, even if one assumes that workers who

161. See Ebel, supra note 47, at 1189; Note, Work Recapture Agreements, supra note 88, at 824-25.
162. Ebel, supra note 47, at 1189.
163. One such test is whether the primary employer has the right to bestow upon the union the work that it demands. See note 49 supra. Another involved the question whether the unit members are capable of performing the claimed work. Where they are not, the Board's skepticism in the face of asserted primary objectives may be justified. See Asbestos Workers, 139 N.L.R.B. 688, 701 (1962).
164. See, e.g., ILA Local 1575 v. NLRB, 560 F.2d 439 (1st Cir. 1977).
165. See Note, Work Recapture Agreements, supra note 88, at 824-25.
166. See also Wilson & Co., 143 N.L.R.B. 1221, 53 L.R.R.M. 1475 (1963). Like the cases arising from enforcement of the Rules on Containers, Wilson & Co. involved a union's attempt to claim work which had displaced the members' traditional job tasks. However, better job security
attempt to preserve traditional work are more likely to be facing immediate and serious threats to their job security than are workers who claim new job tasks, this would not justify a per se condemnation of work acquisition under sections 8(b)(4)(B) and 8(e). For, as discussed, these statutes do not call upon the Board to determine whether the union has adopted the most rational or efficient means of attaining its goals. Nor do they require that the union's demands be exactly commensurate to a perceived threat. Instead, the relevant question is whether the union's objectives relate solely to the working conditions of its members vis-à-vis the primary employer. Where this is the case, the policies which justify work preservation as a lawful activity under sections 8(b)(4)(B) and 8(e) are equally compelling for work acquisition.\textsuperscript{167}

Third, a few commentators have been impressed with the fact that significant secondary effects usually accompany work acquisition:

\begin{quote}
[W]hile clauses covering only traditional work tend to stabilize the work distribution by preserving the status quo, clauses covering non-traditional work tend to... create attendant problems of unemployment and readjustment for employees and communities losing their traditional work.\textsuperscript{168}
\end{quote}

The response to any suggestion that work acquisition should therefore be prohibited by the Act comes from the Supreme Court itself: "[H]owever severe the impact of primary activity on neutral employers, it [is] not thereby transformed into activity with a secondary objective."\textsuperscript{169} Thus, the disruptive effects of work acquisition are irrelevant to the lawfulness of that activity under sections 8(b)(4)(B) and 8(e).

Finally, there are convincing policy reasons why work acquisition should not be a per se violation of the Act. As Dolphin-Associated Transport recognized, viable options for unions in the face of changed circumstances and technological innovation will ultimately inure to the benefit of both employees and management.\textsuperscript{170} Moreover, the ability of organized labor to accommodate changes in a constructive manner will be further enhanced if it is not relegated exclusively to the position of passive respondent but can also anticipate and, in some circumstances, help formulate policies regarding potential job opportunities for the unit. Of course, to the extent that management perceives these initiatives as infringing upon its prerogatives or as otherwise contrary

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\textsuperscript{167} See Note, Secondary Boycotts, supra note 159, at 1410-12.

\textsuperscript{168} Ebel, supra note 47, at 1189.

\textsuperscript{169} National Woodwork, 386 U.S. at 627.

\textsuperscript{170} 447 U.S. at 507-10.
to its interests, it will resist them. Nevertheless, while the Act has been construed to place some issues outside the perimeter of mandatory bargaining, more and better job tasks for the unit is not among them.172

This is not to suggest that the ability of unions to bargain for work opportunities that differ from the membership's traditional job tasks will never be abused. In some instances, aggressive unions may successfully claim work that an objective observer would describe as belonging traditionally and equitably to other employees. However, the potential for union overreaching was addressed by the 80th and 86th sessions of Congress.173 The fact that these enactments prohibited specific manifestations of union power only to a limited extent does not free the Board and the courts to fashion doctrines which expand the scope of the statutes and which curtail the power of organized labor in ways that Congress did not intend. It is simply not the proper function of the judiciary to ignore Congress' circumspect approach to regulation of the balance between labor and management.174

VI
Conclusion

As noted previously, the chore that was thrust upon the Board and the courts by enactment of sections 8(b)(4)(B) and 8(e) is not an easy one. If nothing else, the preceding review of the legislative history of the Taft-Hartley Act and the subsequent caselaw demonstrates that the distinction between primary and secondary activities has always been ambiguous and uncertain. Nevertheless, as Justice Frankfurter once commented, "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task."175

By embracing the work preservation doctrine, the Board and the courts have created a novel distinction compelled neither by the relevant statutes nor by legislative histories. For this reason, the doctrine should be discarded. However, given the doctrine's lengthy history, the courts almost certainly will not abandon it altogether. If this is correct, the Board and the courts should broadly define work preservation to include union efforts to claim work that has "escaped" or jobs which

171. See Local 2265, Carpenters (Mill Floor Covering, Inc.), 136 N.L.R.B. 769, 49 L.R.R.M. 1842 (1962), enforced, 317 F.2d 269 (6th Cir. 1963), where the union's insistence that the employer contribute to an industry promotion fund was held not to be a mandatory subject of bargaining over which the union could lawfully strike.

172. See Dairy Workers Local 83 (Arthur Elias), 146 N.L.R.B. 716, 55 L.R.R.M. 1393 (1964), where the union's insistence that its members deliver milk to a newly opened retailer was held to be lawful.

173. See, e.g., Lesnick, supra note 19, at 1025 n.104.

174. See id. at 1025. See also NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 500 (1960); Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93, 99-100 (1958).

have been transformed by innovations so that deviation from the congressional design will be minimized.

Finally, whatever direction the courts do take, there can be no doubt that the question whether the work preservation/acquisition distinction should continue to be applied merits serious discussion. Unfortunately, as long as the Board and the courts cling to the erroneous assumption that that distinction corresponds to the primary/secondary dichotomy, the debate will remain hopelessly sidetracked.