September 1976

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https://doi.org/10.15779/Z38GG8G

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Work Preservation Boycotts: "The Drawing of Lines More Nice Than Obvious"

Arthur B. Smith, Jr.†

This article examines the development of legal doctrine dealing with the work preservation boycott, a labor tactic wherein union members attempt to protect their jobs and standards of employment from the impacts of technological change. By analyzing a case recently decided by the U.S. Court of Appeals for the District of Columbia, the author illustrates the practical and theoretical problems of applying the legal standards currently accepted in this area. These problems can be traced to an uncertain legislative mandate for regulating work preservation disputes and to the inherently difficult social and economic issues that arise when technology threatens employment. The author concludes with a suggestion for clarifying the law relating to work preservation boycotts, and making it more capable of rational administration.

The distinction between "primary" and "secondary" activity that has developed in interpreting sections 8(b)(4)(B) and 8(e) of the

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1. 29 U.S.C. § 158(b)(4)(B) (1970): "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, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

   Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity,
Labor Management Relations Act (LMRA), is among the most elusive standards for evaluating the lawfulness of union conduct. The roots of the statutory prohibition of "secondary boycotts" lie in the common law labor injunction cases and early Sherman Act decisions, which are now generally discredited. The accelerating pace of technological change and resultant threats to union jobs and standards of employment provide the modern backdrop for continuing controversy about the reach and scope of the prohibition in its present statutory guise.

Work preservation boycotts can be defined as the refusal of union members to handle or otherwise work on or deal with certain categories of products which, because of technological change in their manufacture, have rendered unnecessary or obsolete the performance of traditional tasks. Justice Frankfurter's statement, "[i]mportant as is the distinction between legitimate 'primary activity' and banned 'secondary activity' it does not present a glaringly bright line," applies with special significance to such boycotts. Yet his admonition that "[h]owever difficult the drawing of lines more nice than obvious, the statute compels other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . .

   (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: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section 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: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

4. See cases cited note 18 infra.
the task," seems to have been forgotten in decisions of the National Labor Relations Board (Board) and by courts reviewing the Board's holdings on this issue. The combination of a statute that cannot be literally construed, "otherwise it would ban most strikes historically considered to be lawful . . ." and "a legislative history [with respect to work preservation boycotts] . . . which shows with fair conclusiveness only that Congress was not squarely faced with the problem . . ." has not led to the evolution toward a rational response envisioned by Justice Frankfurter. Instead, it has fostered the development of conflicting pseudo-definitive declarations, embraced in particular situations to justify preconceived notions about the propriety of union activity. Moreover, the recent attempt by Congress to amend section 8(b)(4) to relax restrictions on so-called "common situs" picketing in the construction industry (thwarted by a Presidential veto) would not have altered prohibitions on "common situs" picketing in furtherance of product boycotts; neither the proposed amendment nor its legislative history sheds light on fundamental issues regarding the primary or secondary character of union action to preserve work.

This article will first analyze existing law dealing with work preservation boycotts, illustrating how doctrinal confusion similar to that which permeated judicial decisions on boycotts at common law and under the Sherman Act has reappeared. That confusion is evident in the conflicting opinions offered by the District of Columbia Circuit

6. Id. at 674.
7. Id. at 672.
10. Similar criticism has been leveled against the development of law relating to other types of "secondary boycotts." Lesnick, The Gravamen of the Secondary Boycott, 62 COLUM. L. REV. 1363, 1393 (1962).
11. Technically, a "common situs" is a location where more than one enterprise is conducting business operations. The "common situs" may be owned by one of the enterprises conducting business there or by some other entity. Pursuant to the principles and guidelines for applying section 8(b)(4)(B) developed by Sailors Union of the Pac. (Moore Dry Dock), 92 N.L.R.B. 547 (1950), NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951), and IUE Local 761 v. NLRB, 366 U.S. 667 (1961), picketing at a "common situs" can be limited to minimize its impact on employers or enterprises with which the picketing union does not have a labor dispute.
12. The effect of the proposed amendment to section 8(b)(4) would have been to permit a union in the construction industry to picket an entire "common situs" under certain circumstances, without violating the statutory provisions. See H.R. 5900, 94th Cong., 1st Sess. (1975).
13. President Ford vetoed the measure, which had been combined with a bill designed to alter the structure of bargaining in the construction industry, on January 2, 1976. 12 Weekly Compilation of Pres. Documents at 16-17 (Jan. 5, 1976).
Court of Appeals in a recent case, Streamfitters Local 638 v. NLRB,18 these opinions are considered in the second section of this article. To mitigate uncertainty and potential unfairness resulting from unprincipled application of restraints on union activity, a suggestion is then offered that might simplify the law, and render it more capable of rational administration.16

I

THE GENESIS OF CONFUSION

A. Doctrinal Elements

The work preservation boycott is one form of "product boycott" where union members refuse to handle products manufactured by someone other than their own employer, typically because the manufacturer's employees are not unionized. Prior to the Norris-LaGuardia Act,17 product boycotts were generally condemned by courts construing antitrust statutes and common law.18 The Norris-LaGuardia Act deprived the federal courts of authority to enjoin boycott activities unaccompanied by fraud or violence;19 Justice Frankfurter's opinion for the Supreme Court in United States v. Hutcheson20 removed the federal

16. A trend away from post-1959 Congressional reluctance to tamper with basic labor legislation may have appeared, suggesting the possibility of Congressional intervention. See, e.g., Pub. L. 93-360, 88 Stat. 395 (1974), amending the LMRA in certain respects and extending coverage thereof to "health care institutions." The bills relaxing the prohibition on "common situs" picketing passed both houses of Congress for the first time in 1975, after 25 years of attempts by organized labor to obtain such an amendment. See S. REP. NO. 438, 94th Cong., 1st Sess. 3-28 (1975).
18. Despite the passage of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1970) (section 6) & 29 U.S.C. § 52 (1970) (section 20), which purported to immunize labor disputes from the prohibitions of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970), the Supreme Court determined that product boycotts in the form of union member refusals to handle, work on, or transport material that was manufactured or processed by nonunion labor or that (because of technological change) deprived union members of traditional work constituted an antitrust law violation. Bedford Cut Stone Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 253 U.S. 443 (1921); United States v. Painters Dist. Council, 44 F.2d 58 (N.D. Ill. 1930), aff'd, 284 U.S. 582 (1931). While some state courts created limitations in the comprehensive condemnation of product boycotts under the common law of labor injunctions, the general rule prohibiting such activity remained. See generally F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 42-43 (1930); Annot., 52 A.L.R. 1144 (1928).
20. 312 U.S. 219 (1941). A product boycott or concerted refusal by business groups, without the participation of a labor organization, has remained a restraint of trade prohibited by the antitrust laws. See Radiant Burners, Inc. v. Peoples Gas Light
courts from the business of prohibiting product boycotts pursuant to the antitrust laws. Although some states adopted anti-injunction statutes similar to the Norris-LaGuardia Act, the majority either refused to enact such legislation or did not purport to restrain the issuance of injunctions against product boycotts.\(^\text{21}\) Even in certain states which had enacted comprehensive anti-injunction statutes, product boycotts were declared illegal and enjoineable.\(^\text{22}\) While it was generally assumed that state court decisions outlawing product boycotts remained viable after passage of the Wagner Act,\(^\text{23}\) the Taft-Hartley Act effectively foreclosed state regulation of product boycotts\(^\text{24}\) by proscribing certain union activity.\(^\text{25}\)

Even though state law generally condemned product boycotts at the time of the enactment of Taft-Hartley, few state courts had actually dealt with product boycotts aimed at preserving union members' work against technological advances.\(^\text{26}\) This paucity of judicial precedent suggests that work preservation boycotts may have occurred infrequently prior to 1947 and may explain why the Congressional debates are not particularly helpful in determining whether the Taft-Hartley "secondary boycott" prohibition was intended to encompass them.


\(^{24}\) Jurisdiction over Labor Relations, 46 MICH. L. REV. 593 (1948). See Smith, supra note 23, at 606; Dennis, supra note 22, at 450.


It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce, or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

\(^{26}\) See Hellerstein, supra note 22; Dennis, supra note 22.
1. Taft-Hartley

Opponents of the Taft-Hartley amendments interpreted the provisions of both the Senate bill and the final product of the Conference Committee as banning virtually all boycotts, including many theretofor ruled legitimate. Representative Javits, who opposed the final boycott provisions enacted over President Truman's veto, expressed the opinion that the only boycott contrary to the public interest and legitimately dealt with by statute was that resulting "from a misguided labor union's efforts to keep certain goods out of a market because the labor union fears the effect of new inventions or new methods." Propo-


28. The language in section 12(3) of the House bill had prohibited the "calling, authorizing, engaging in, or assisting" of any "illegal boycott." 1 id. at 78, 204-05, H.R. 3020, 80th Cong., 1st Sess. (1947). An illegal boycott was defined in section 2(14) as:

[a] concerted refusal, or threat of a concerted refusal, by individuals in the course of their employment—

(A) to render services, where an object of the refusal or threat is to force a person to do business or to cease doing business with another person; or

(B) to render services, where an object of the refusal or threat is to force a person to deal with or to cease dealing with a labor organization as the representative of individuals other than themselves; or

(C) to use, install, handle, transport, or otherwise deal with particular articles, materials, or commodities by reason of the origin or proposed destination thereof, or by reason of the character of a prior or proposed future handling thereof, or by reason of the policies or practices of any person (not their employer) having any direct or indirect relationship thereto.

1 id. at 42, 168-69, (H.R. 3020, 80th Cong., 1st Sess. (1947)). A right of action in federal district courts for redress of section 12 violations was provided, and the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970), were expressly declared inapplicable in such suits. 1 id. at 79-80, 206-07, H.R. 3020, §§ 12 (b), (c). In addition, section 301 of H.R. 3020 would have amended the Clayton Antitrust Act, 15 U.S.C. §§ 12-27, 44 (1970), to provide, inter alia, that for the purposes of antitrust law it would not be lawful to impose restrictions or conditions on the purchase, sale, or use of any product, material, or equipment or to engage in any concerted activity declared unlawful by section 12. The anti-injunction provisions of the Norris-LaGuardia Act were again expressly declared inapplicable in antitrust actions to be brought pursuant to those proposed amendments. Although H.R. 3020 passed the House, an entirely different bill passed the Senate. 1 id. at 226-91. That bill incorporated the boycott provisions of S. 1126; with one critical change of phrase (see note 35 infra; compare 1 TAFT-HARTLEY LEGIS. HIST. 240 with 1 id. at 511, H.R. CONF. REP. No. 510) it became the final legislation enacted over President Truman's veto. 1 id. at 923; 2 id. at 1647.

29. 1 id. at 876. These remarks, however, were characterized by the Supreme Court majority in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967) as
ments, on the other hand, stressed the view that inability to distinguish between “good” and “bad” secondary boycotts had led to legislation prohibiting all types,\(^3\) but they did not specifically mention the type of product boycott described by Javits as an example of prohibited conduct. Instead, they cited union refusals to handle or work with products of non-union companies, or of companies recognizing a union not affiliated or associated with the boycotting union as examples of conduct proscribed by the statute.\(^3\)

Despite the fact that the supporters of the Taft-Hartley provisions did not discuss boycotts of prefabricated products or boycotts having work preservation objectives, hostility expressed against the secondary boycott in general, the report on the Senate version of the prohibition,\(^3\) and some of Senator Taft’s remarks in debate suggest an intention to ban all product boycotts, including those enforcing union standards of employment.\(^3\) Opponents of the legislation were convinced that

\(\text{\cite{3} TAFT-HARTLEY LEGIS. HIST. 1106.}\)

\(\text{\cite{31} The primary example of conduct to be prohibited was that of the union in Allen Bradley Co. v. IBEW Local 3, 325 U.S. 797 (1945), refusing to handle products of electrical equipment manufacturers and to work for contractors installing electrical equipment who did not employ members of Local 3. See S. REP. No. 105, 80th Cong., 1st Sess. (1947), 1 TAFT-HARTLEY LEGIS. HIST. 428; 2 id. at 1107-08 (remarks of Sen. Taft). The proponents also mentioned as prohibited by the proposed language refusals by AFL-affiliated unions to handle products manufactured in plants organized by CIO unions, and vice versa. See 2 id. at 1013, 1107-08 (remarks of Sen. Taft); 2 id. at 1056 (remarks of Sen. Ellender). Proponents of the more stringent prohibitions of the House bill cited as examples of conduct sought to be prohibited union refusals to handle or process materials produced by nonunion labor. See 1 id. at 583, 630 (remarks of Rep. Landis); 1 id. at 613-14 (remarks of Rep. Hartley); 1 id. at 658 (remarks of Rep. Buck); 1 id. at 869 (remarks of Rep. Meade). A guiding principle stated by Senator Taft was that “[t]his provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.” 2 id. at 1106.}\)

\(\text{\cite{32} [I]t would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute). S. REP. No. 105, 80th Cong., 1st Sess. (1947), 1 TAFT-HARTLEY LEGIS. HIST. 428.}\)

\(\text{\cite{33} In debate with Senator Pepper, who led the opposition to the Taft-Hartley Amendments, Senator Taft stated that pursuant to the Senate boycott provisions it would be unlawful for a union to agree with an employer on wages for its employees but then to instruct the employees to strike because the employer “happens to be handling some}\)
this would be the result; the Conference Committee's amendment of the Senate bill to provide that a violation would occur where "an object" of union conduct was prohibited, instead of grounding violations on "the purpose" of union activity, buttressed their interpretation.

The Board initially construed the secondary boycott provisions as banning all product boycotts. The first cases reaching the Supreme Court after the enactment of the Taft-Hartley amendments were not concerned with the propriety of refusals to handle products which diminished the work of employees. These opinions, however, did go

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34. The Supreme Court has warned against heavy reliance on the views of opponents to labor legislation, particularly the secondary boycott provisions: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors we look to when the meaning of the words is in doubt." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 n.22 (1956), quoting Schwegemann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1950). But see 2 TAFT-HARTLEY LEGIS. HIST. 1104-08 (remarks of Sen. Pepper); 2 id. at 1367-68 (remarks of Sen. Murray).

35. The phrase "for the purpose of" appearing prior to the prohibitions of the Senate bill was replaced with the phrase "where an object thereof is." Compare 1 id. at 240 with 1 id. at 511. Senator Murray, opposing this Conference Committee change, argued that it would prohibit union conduct if it were proven that any striker harbored an improper motive and would reinstate the Supreme Court's decision in Bedford Cut Stone Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927). 2 TAFT-HARTLEY LEGIS. HIST. 1579. Senator Taft rejected the notion that the section would be violated because of hidden motives of any striker but did not respond to the charge that the statute revived Bedford Stone. 2 id. at 1623. The House conferees stated that their agreement to recede from the provisions of the House bill narrowing the labor antitrust exemption was based on their understanding that "[s]ince the matters dealt with in [section 301 of the House bill dealing with the antitrust immunity] have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." H.R. CONF. REP. NO. 510, 1 TAFT-HARTLEY LEGIS. HIST. 569.

36. United Bhd. of Carpenters, 81 N.L.R.B. 802 (1947), enforced, 184 F.2d 60 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951). The product boycott there consisted of the refusal by union carpenters employed by a general contractor to install prefabricated houses at a construction site. It was mounted because the producer of houses was involved in a dispute with the carpenters union over the terms and conditions of a new collective bargaining agreement covering the producer's employees, and not exclusively as a protest by workers at the job site against the loss of unit work.

37. NLRB v. Int'l Rice Milling Co., 341 U.S. 665 (1951) (attempt to prevent two neutral drivers from crossing picket lines at plant of struck employer and delivering their
beyond a literal reading by limiting application of the statute's prohibitions to secondary activity, and firmly grounded the "primary-secondary dichotomy" as a major element in the law of boycotts. Moreover, the Court's decisions in NLRB v. Denver Building Trades Council and NLRB v. International Rice Milling Co. established two additional doctrines that have contributed to the confusion surrounding application of the statute to union refusals to handle prefabricated products.

In Denver Building Trades, the Court emphasized the importance of the Conference Committee's placement of the phrase "where an object thereof is" prior to the substantive prohibition in the statute. "It is not necessary" the Court held, "to find that the sole object of the strike" is prohibited in order to determine union conduct unlawful. As long as one objective of union conduct is prohibited by the boycott provisions, a violation of the statute has occurred, even though other objectives of the same conduct might be legitimate. In more general terms, the opinion described Congressional intent behind section 8(b)

employer's products); IBEW v. NLRB, 341 U.S. 694 (1951) (strike and picketing at construction project by union representing carpentry subcontractor's employees to force carpentry subcontractor to pressure general contractor into terminating its contract with nonunion electrical subcontractor); Carpenters Local 74 v. NLRB, 341 U.S. 707 (1951) (strike by union employees working on dwelling renovation project to force project owner to cancel supplies contract with nonunion specialty store supplying wall and floor covering); NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951) (strike and picketing by union representing employees of construction project general contractor to force it to cancel electrical subcontract awarded to nonunion firm). For a general discussion of these cases see Koretz, Federal Regulation of Secondary Strikes and Boycotts—A New Chapter, 37 CORNELL L.Q. 235 (1951).

38. See Lesnick, supra note 10.
41. 341 U.S. at 689.
42. The Board later expressed the principle in ILA, 137 N.L.R.B. 1178, 1884-85 (1962) (footnotes omitted):

[T]he term "an object" is not limited to the "ultimate" object of the union's conduct, that is, the "concluding state of affairs" sought by the union, but . . . "an object" . . . encompass[es] also "alternative" objects, "conditional" objects and "immediate" objects.

A chronology of organized labor's unsuccessful attempts to overrule the Denver Building Trades decision, at least insofar as it permitted violations of the boycott provisions to be sustained with respect to so-called "common situs" picketing by construction unions at project sites, is contained in H.R. REP. No. 371, 94th Cong., 1st Sess. 4-7 (1975), S. REP. No. 438, 94th Cong., 1st Sess. 20-21 (1975). The proposed amendments to the LMRA vetoed by President Ford, supra note 13, which permitted picketing in certain circumstances by a labor organization directed at an entire construction project, were characterized by supporters as also designed to overrule Denver Building Trades, "its spirit and its progeny." See H.R. REP. No. 371, 94th Cong., 1st Sess. (1975); S. REP. No. 438, 94th Cong., 1st Sess. 10 (1975). It was unclear whether the legislation's drafters intended further to strike at the principle of Denver Building Trades or simply at the result it produced as applied to the particular factual setting of that case.
(4) as "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."\footnote{43}

The *Rice Milling* decision\footnote{44} gave birth to a conflicting proposition: when union conduct at the premises of an "offending" employer pursuant to an otherwise permissible labor dispute has consequences prohibited by section 8(b)(4), no violation has occurred if those consequences are deemed merely the "incidental effects" of lawful activity.\footnote{45} The criteria for distinguishing between an "offending" and "unoffending" (or "neutral") employer or between "impermissible union objectives" and "lawful incidental effects" were not, however, articulated.

Subsequently, in *Glaziers Local 27*,\footnote{46} the Board, apparently for the first time, dealt with union refusal to handle and install technologically advanced products because the products deprived union members of traditional tasks. The cases involved building materials containing glass installed at the manufacturer's factory prior to shipment. The Board majority was hopelessly confused, ultimately disposing of all but one factual question on the ground that mere existence of union bylaws prohibiting installation of preg glazed material and union refusal to provide workers for a job utilizing that type of product did not constitute inducement and encouragement of employees to engage in concerted activity. Nevertheless, invocation of the bylaw prohibition in one factual situation was shown to the Board's satisfaction to involve such inducement and encouragement, resulting in a violation. In contrast, dissenting Board members viewed the object of union activity resisting preg glazed products as "primary," and would have dismissed the entire complaint.

The Court of Appeals for the Seventh Circuit, refusing to set aside the Board's decision, demonstrated even greater bewilderment. It up-

\footnotesize{
43. \textit{341 U.S. at 692.} \\
44. \textit{341 U.S. 665 (1951).} \\
45. Because there was no claim in *Rice Milling* that the union's strike against Rice Milling was a section 8(b)(4) unfair labor practice, the Supreme Court's decision in the case was, outwardly at least, predicated on the ground that the union's inducement of the two truckers not to cross the picket line did not amount to encouragement of a "concerted refusal in the course of their employment to transport . . . any goods . . . or to perform any services," as the prohibition was then phrased. However, in the *Denver Building Trades* decision, issued on the same day as *Rice Milling*, the Court stated the principle behind *Rice Milling* differently: "In that case [Rice Milling] we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike." \textit{Id.} at 687. This broader principle was embraced in *National Woodwork Mfg. Ass'n v. NLRB*, 386 U.S. 612, 626-27 (1967); and in *IUE Local 761 v. NLRB*, 366 U.S. 667, 673-74 (1961). \\
}
held the Board's determination that a violation had occurred on the
ground that the legislative history of the Taft-Hartley amendments, and
the early Supreme Court decisions construing them, demonstrated that
product boycotts were prohibited regardless of whether the union activ-
ity involved was primary or secondary. At best, that was a suspect
reading of the Supreme Court decisions. The court mired itself in a
deeper quagmire, however, by indicating that it disagreed with the
Board's conclusion that the bylaw provision, standing alone, did not
constitute inducement and encouragement of employees. Nevertheless,
the court refused to modify the Board's order because it concluded
that the bylaw provision was not per se illegal, a determination that
seems totally inconsistent with its earlier conclusion that a product boy-
cott involving inducement and encouragement of concerted action was
unlawful regardless of its primary or secondary nature. Not surpris-
ingly, these rulings by the Board and the Court have been consulted in-
frequently for guidance on issues presented by work preservation boy-
cotts.

2. Sand Door

Another doctrine affecting work preservation boycotts resolved
some of the problems raised by Glaziers Local 27; it is derived from
the Supreme Court's decision in Carpenters Local 1976 v. NLRB
(Sand Door). Justice Frankfurter's opinion for the Court represents
an enduring legacy; exposing one of the many "loopholes" in the Taft-
Hartley boycott provisions, his opinion validated a collectively bar-
gained contractual provision prohibiting the company from requiring its
employees to handle "non-union material." Justice Frankfurter
ruled that although the contractual provision was not itself unlawful,
this was no defense to actual union refusal to handle nonunion mate-
rial prohibited by the statute. In other words, Sand Door quashed any
effort to uphold union coercive pressures on the ground that employer
acquiescence in the objective of those pressures removed their "second-
dary" taint. Nonetheless, "voluntary" agreement by an employer to
boycott nonunion goods—enforceable in civil actions dealing with con-
ventional contract breaches—was permissible.

Despite the fears of Taft-Hartley opponents and statements of its
supporters to the effect that all product boycotts had been banned, Jus-
tice Frankfurter identified certain types of secondary activity sanc-
tioned by the statute because of "loopholes" discovered in subsequent
litigation.\textsuperscript{51} He reasoned that "it is clear that no such sweeping prohibition was in fact enacted . . . ."\textsuperscript{52} A considerable gap had developed, therefore, between what the members of the 80th Congress thought they were doing and what the Court ascertained they had actually accomplished.\textsuperscript{53}

3. \textit{Landrum-Griffin}

Congressional deliberation and action in 1959 concerning secondary pressure did not actually restrict the 1947 prohibitions as these affected work preservation boycotts.\textsuperscript{54} If any mood could be ascribed to the Congress in 1959, moreover, it would be one of tightening rather

\textsuperscript{51} In addition to the failure of the Taft-Hartley amendments to declare unlawful agreements to boycott goods for objectives prohibited by section 8(b)(4)(A), other "loopholes" identified in the litigation following enactment were (1) the prohibition on inducement and encouragement of secondary employees required "concerted refusal" to work on the part of two or more employees; (2) there were no prohibitions against union threats and coercion of management officials, other than strikes or picketing; and (3) the prohibitions were limited to those within the statutory definition of "employees." Congressional attempts to close these "loopholes" with the 1959 Landrum-Griffin amendments were not wholly successful. See NLRB v. Servette, Inc., 377 U.S. 46 (1964); text at notes 38-50 supra and 54-58 infra.

\textsuperscript{52} 357 U.S. at 98.

\textsuperscript{53} See Koretz, \textit{Federal Regulation of Secondary Strikes and Boycotts—Another Chapter}, 59 COLUM. L. REV. 125, 126 (1959). In a companion case to \textit{Sand Door, Carpenters Local 11}, 113 N.L.R.B. 1084 (1955), enforced, 242 F.2d 932 (6th Cir. 1957), the NLRB held that refusal of job site carpenters, on instructions of their union's officers, to install doors prehung in door frames at the manufacturer's plant violated then section 8(b)(4)(A). The predicate for the finding of illegality, however, was not that boycotts of prefabricated products, without more, were prohibited but was instead that the boycott was mounted because the door manufacturer's employees were not represented for bargaining purposes by the carpenters' union.

\textsuperscript{54} A major effort in 1959 to overrule \textit{Denver Building Trades} and to enact provisions permitting common situs picketing failed. President Eisenhower proposed that legislation be enacted to permit common situs picketing at construction sites. See 1 NLRB, \textit{Legislative History of the Labor Management Reporting and Disclosure Act of 1959}, at 82 (1959) [hereinafter cited as \textit{Landrum-Griffin Legis. Hist.}], S. Doc. No. 10, 86th Cong., 1st Sess. (1959). Other bills contained provisions permitting common situs picketing. \textit{E.g.}, 1 \textit{Landrum-Griffin Legis. Hist.} at 143-44, S. 748, 86th Cong., 1st Sess. § 503 (1959) (introduced by Sen. Goldwater); 1 id. at 751-52, H.R. 8342, 86th Cong., 1st Sess. § 702(c)(A)(B) (1959) (introduced by Rep. Elliot); \textit{see also} 1 id. at 845-46, H.R. REP. No. 741. However, neither the House-passed Landrum-Griffin bill, H.R. 8400, 1 id. at 619, nor the Senate-passed Kennedy-Ervin bill, S. 1555, 1 id. at 516, which contained no boycott provision whatsoever, \textit{see 1 id. at} 474-76, S. MIN. REP. No. 187, permitted common situs picketing, despite efforts of Senator Goldwater in committee to secure amendments so providing. 2 id. at 1547. The Conference Committee failed to recommend a provision overruling \textit{Denver Building Trades} because the House Parliamentarian ruled that such a provision was not "germane" and could not be considered by the House. In fact, the Conference Committee reaffirmed the vitality of that decision, although a promise to reconsider a common situs picketing bill at the next session of Congress was secured. 1 id. at 943, H.R. REP. No. 1147; 2 id. at 1434.
than relaxing the strictures of the law.\textsuperscript{66} Thus, the question has been hotly debated whether Congress intended through the Landrum-Griffin Act to restrict certain types of union boycott activity traditionally characterized as primary, particularly boycotts of prefabricated materials undertaken for the purpose of maintaining union standards of employment. The elimination of secondary economic pressure and the broad sweep of the literal language of section 8(e)—the hot cargo provision—have led some to conclude that Congress intended to expand the activities banned by the 1947 legislation.\textsuperscript{55} However, specific examples of types of prohibited union objectives provided by the supporters, both with respect to utilization of economic pressure and with respect to contractual arrangements whereby an employer has agreed in advance not to handle goods, were substantially the same as those cited in 1947;\textsuperscript{57} some supporters, as in 1947, again expressed an intention to ban all product boycotts.\textsuperscript{58}

\textsuperscript{55} With the exception of the Kennedy-Ervin bills, S. 505, 1 id. at 29, and S. 1555, 1 id. at 338, which contained no boycott provisions, all the other major bills introduced eliminated in one fashion or another the "loopholes" discovered in connection with the 1947 statute's ban on "secondary" economic pressure. See 1 id. at 143-44, (S. 748, introduced by Sen. Goldwater); 1 id. at 307, (S. 1384, introduced by Sen. McClellan); 1 id. at 255-59 (H.R. 4474, introduced by Rep. Barden); 1 id. at 595-97 (H.R. 7265, introduced by Rep. Kearns); 1 id. at 680-85 (H.R. 8400, introduced by Rep. Landrum); 1 id. at 751-52 (H.R. 8342, introduced by Rep. Elliot); 1 id. at 865 (H.R. 8490, introduced by Rep. Shelley). See also 1 id. at 778-81, 838, 845-47, H.R. REP. No. 74; 1 id. at 474-76, S. MIN. REP. No. 187.


\textsuperscript{57} The bill reported by the House Education and Labor Committee, H.R. 8342, LANDRUM-GRIFFIN LEGIS. HIST. 687, contained a provision banning agreements permitting the refusal to handle goods from struck plants, nonunion plants, or plants where unions other than the boycotting union had been recognized only with respect to common carriers subject to Part II of the Interstate Commerce Act; the object was to correct Teamster abuses in the trucking industry. See 1 id. at 751-52, 778-79. The Kennedy-Ervin bill, S. 1555, was amended on the floor to include an identical provision, 2 id. at 1161-63. The Landrum-Griffin substitute bill in the House, H.R. 8400, however, expanded the prohibition to include all industries and not just common carriers, 1 id. at 683, and this version of the basic prohibition was eventually enacted, 1 id. at 943, H.R. REP. No. 1147. The specific examples of conduct which the supporters sought to include within the scope of this basic prohibition, without regard to activity expressly permitted by the special exceptions for the construction and garment industries, were similar to activities deemed prohibited by the 1947 secondary boycott provisions. See 1 id. at 778-79, H.R. REP. No. 741; 2 id. at 1526 (remarks of Rep. Hoffman); 2 id. at 1568 (remarks of Rep. Griffin); 1 id. at 474-75, S. MIN. REP. No. 187 (views of Sens. Dirksen and Goldwater).

\textsuperscript{58} Examples of conduct to be prohibited given in support of Senator McClellan's "hot cargo" amendment to S. 1555 were substantially similar to those employed in 1947. See 2 LANDRUM-GRIFFIN LEGIS. HIST. 1196 (remarks of Sen. Curtis); 2 id. at 1194 (remarks of Sen. Mundt). However, when speaking in general terms and without reference to specific examples of conduct, the supporters of the McClellan language indicated that
In contrast with 1947, the work preservation boycott was considered at least peripherally in 1959. Representative Alger's bill provided, among other things, that employers could seek injunctions to ban union restrictions on new processes and technological improvements; this legislation was not adopted. Representative Rhodes, supporting the provisions of section 8(e) in the Landrum-Griffin bill which were eventually enacted, did so in part because he construed the language as prohibiting agreements excusing the handling of prefabricated products. Furthermore, after the enactment of the 1959 amendments, Senator McNamara and Representative Thompson inserted in the record identical statements expressing the view that provisions sanctioning a refusal to handle prefabricated pipe on a construction job site would be lawful because of the proviso to section 8(e) exempting agreements restricting contracting or subcontracting of work to be done at the site of construction. The same day, however, Representative Kearns inserted an analysis concluding that such an agreement would violate section 8(e). Although a clause was added to the final version of section 8(b)(4)(B) exempting from its scope a "primary strike" or "primary picketing," and solidifying the "primary-secondary" dichotomy set forth in 1947 as the touchstone of analysis, the opponents of the 1959 boycott and hot cargo amendments were convinced that their reach extended so far as to prohibit all agreements seeking to uphold union standards and preserve jobs by restricting subcontracting.

the scope of its prohibition included an agreement sanctioning any product boycott, regardless of purpose. See 2 id. at 1162, 1194 (remarks of Sen. McClellan); 2 id. at 1197 (remarks of Sen. Curtis). Senator Kennedy opposed the McClellan language partly because it would outlaw agreements which prohibited subcontracting with employers maintaining "substandard" working conditions or paying "substandard" wages. 2 id. at 1195. Although Senator McClellan's proposal was rejected on the floor of the Senate, the thrust was identical to the provision contained in the Landrum-Griffin substitute later enacted. Compare 1. 1384, 1 LANDRUM-GRIFFIN LEGIS. HIST. 328 with H.R. 8400, 1 id. at 683; 2 id. at 1523 (analysis prepared by Rep. Griffin).

59. See H.R. 8003, 86th Cong., 1st Sess. (1959); 2 1959 LEGIS. HIST. 1507-08.

60. 2 id. at 1581.

61. 2 id. at 1815, 1816; for the text of the construction industry proviso, see note 2 supra.

62. 2 LANDRUM-GRIFFIN LEGIS. HIST. at 1861.

63. See 1 id. at 25; 1 id. at 942, H.R. REP. No. 1147.

64. 2 id. at 1428 (remarks of Sen. Morse opposing section 8(e) as eventually enacted because "[i]t would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit"); 2 id. at 1433 (remarks of Sen. Kennedy explaining that the construction industry proviso to section 8(e) would not exempt from the prohibitions of the main clause agreements sanctioning "boycotts of goods manufactured in an industrial plant for installation at the job site... "). To the same effect see 1 id. at 943, H.R. REP. No. 1147; see also 2 id. at 1708 (analysis prepared by Sen. Kennedy and Rep. Thompson). But cf. 2 id. at 1432 (remarks of Sen. Kennedy in response to a question posed to Sen. Goldwater indicating that union "buy American" campaigns seeking to protect union
Whatever inferences with respect to the scope of the prohibition can be drawn from the history of sections 8(b)(4)(B) and 8(e), one result of Sand Door was clearly reversed by the Landrum-Griffin amendments: an agreement permitting union refusal to handle goods produced by a nonunion manufacturer, or by a manufacturer which had recognized a union not affiliated with the boycotting union, was made illegal. The principle articulated by Sand Door, which allowed for the possibility of boycotts by employers on a voluntary basis, did remain viable to some extent; it still applied to agreements subject to the construction industry proviso to section 8(e) whereby construction contractors could agree to use only unionized subcontractors for work done on the jobsite. After reversing its position, the Board determined that union strikes to enforce clauses falling under the section 8(e) construction industry provision nevertheless violate section 8(b)(4)(B); the Board reached that conclusion despite the fact that strikes to obtain identical clauses through collective bargaining were held not to violate section 8(b)(4)(B) or section 8(b)(4)(A), which prohibits economic pressure to secure clauses in violation of section 8(e).

B. Confusion Compounded

1. Union Standards Clauses

In light of early doctrinal confusion, the Board and the courts have had great difficulty with other dimensions of work preservation, includ-

65. For the argument that inferences appropriately drawn from the legislative history reveal that all product boycotts, regardless of purpose, had been banned, see Dannett, supra note 56; Felhaber, Comments, in SYMPOSIUM, supra note 56, at 917-18; Peet, supra note 56. For the contrary argument, see Powell, The Impact of Section 8(e) on Subcontracting Clauses in Collective Bargaining Agreements, in SYMPOSIUM, supra note 56, at 897; Schwartz, Comments, in SYMPOSIUM, supra note 56, at 911-16; Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257 (1959); Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. PA. L. REV. 1000, 1008 (1965).


This result is consistent with the legislative history, 1 LANDRUM-GRIFFIN LEGIS. HIST. 945, H.R. REP. No. 1147; 2 id. at 1433 (remarks of Sen. Kennedy). The Supreme Court in Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 n.14 (1975), however, held that it was unnecessary to decide whether picketing to secure an otherwise
ing "union standards" clauses, "work acquisition," and the possibility of antitrust violations.

The meager and essentially unresolved Congressional debate as to whether sections 8(b)(4)(B) and 8(e) were intended to outlaw union pressure and agreements designed to protect union standards of employment fueled a conflict between the District of Columbia Court of Appeals (represented primarily by Judge J. Skelly Wright) and the Board. The Board construed the boycott prohibitions broadly to include agreement provisions restricting a company's right to deal with another where the purpose was to maintain union standards of employment (a "union standards" clause). In rejecting this view, Judge Wright aligned himself with those who argued that the framers of sections 8(b)(4)(B) and 8(e) never intended to proscribe union efforts to preserve work for a bargaining unit. The test he articulated to define permissible "work preservation" activities arguably extended beyond withdrawing the taint of illegality from union standards clauses and the use of economic pressure to enforce them. That test rested upon a distinction between "union standards" and "union signatory" clauses; it defined agreements and activity not only to preserve jobs lawful subcontracting agreement violated section 8(b)(4)(B). See text at note 94 infra. Determining whether the Court really meant to refer to section 8(b)(4)(A) rather than section 8(b)(4)(B), or whether the Court is suggesting that the prohibitions of section 8(b)(4)(B) are broader than the interpretation embraced by the cases cited above remains for future litigation.

67. A "union standards" clause prohibits or limits an employer's doing business with another employer who does not observe union wages and benefit levels and is executed for the purpose of protecting the bargaining unit by discouraging or eliminating the use of cheaper labor.

68. Meat Drivers Local 710 v. NLRB, 335 F.2d 709, 713-14 (D.C. Cir. 1964). See generally Comment, Subcontracting Clauses and Section 8(e) of the National Labor Relations Act, 62 Mich. L. Rev. 1176 (1964); Lesnick, supra note 65, at 1009-10. The Board's position before its decision in Meat Drivers, 143 N.L.R.B. 1221 (1963), was not clearly articulated, as one commentator implied, Note, Secondary Boycotts and Work Preservation, 77 Yale L.J. 1401, 1404 (1968), because the Board opinions were limited to affirmation of Trial Examiner rulings without detailed explication of rationale. See Plumbers Local 598, 131 N.L.R.B. 787 (1961); IBEW Local 756, 131 N.L.R.B. 1010 (1961). That commentator also errs in characterizing all circuits as arrayed against the Board's interpretation prior to Judge Wright's opinion in Meat Drivers. Note, Secondary Boycotts and Work Preservation, supra at 1404. Indeed, none of the cases cited to support that characterization involved solely resolution of work preservation issues under the 1959 amendments. See Retail Clerks Local 770, 127 N.L.R.B. 1522 (1960), aff'd in part as modified and remanded in part, 296 F.2d 368 (D.C. Cir. 1961) (construing the 1947 provisions); NLRB v. Operating Engineers Local 825, 326 F.2d 218 (3d Cir. 1964), (question was whether pressure to require partial cessation of business constitutes "cease doing business"); NLRB v. Milk Drivers Local 753, 335 F.2d 326 (7th Cir. 1964) (affirming Board finding that contractual provision, as enforced, required subcontractor's employees be members of one particular union rather than another).

69. A "union signatory" clause forbids an employer from contracting or dealing with any person who does not maintain a collective bargaining agreement with the union and thereby tends to encourage or force unionization of nonunion employers even if
for the bargaining unit but also to retain "jobs fairly claimable by the bargaining unit" as permissible. The concept of "fairly claimable" work embraced by Judge Wright hinged on similarity rather than identity of tasks.\textsuperscript{70} Insofar as that criterion would sanction union pressure and agreements for the purpose of securing work performed by employees of other employers, it permitted interference by the boycotting union with conditions of employment established by employers with which the union lacks a bargaining relationship.\textsuperscript{71}

The Board ultimately embraced Judge Wright's distinction between union standards and union signatory clauses\textsuperscript{72} as a governing principle for determining whether union restrictions on company subcontracting practices violated section 8(e).\textsuperscript{73} It did not, at least in its early cases, accept the rationale of the "fairly claimable work" test as the means for identifying a legitimate union standards clause.\textsuperscript{74} Instead, perhaps because its initial position after passage of the Landrum-Griffin amendments permitted contractual restrictions prohibiting all subcontracting of work actually performed by employees on the ground that protecting actual unit work was "primary,"\textsuperscript{75} the Board maintained that section 8(b)(4)(B) and 8(e) were violated when union activity sought to "acquire" work not actually performed by employees in the bargaining unit.\textsuperscript{76} That distinction is repudiated directly by the logic their employees enjoy wages and benefits equivalent to those the union has obtained elsewhere. Thus, such a clause not only protects "union standards" of employment but also furthers the institutional aims of the union by forcing the subcontractor's employees to be union members.

70. See Steamfitters Local 638 v. NLRB, 521 F.2d at 895-97 n.25.


74. See text beginning at note 102 infra.


76. The distinction between work "preservation" and work "acquisition" was noted in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967), discussed at text accompanying notes 80-83 infra, where the Court reserved judgment on the issue whether "workers [who] carry on a boycott to reach out to . . . acquire new job tasks when their own jobs are not threatened by the boycotted product" violate section 8(b)
of the "fairly claimable work" test. Furthermore, the Board asserted that the "work acquisition" test was satisfied whenever union efforts to obtain new work were ultimately for the benefit of its members generally, rather than for the benefit of those in the particular work group exerting pressure or enforcing a contractual restriction. Not clearly articulated, but surely an implied element of this reasoning, was a determination that pressure or an agreement to secure work for a particular group necessarily interfered with traditional employer work assignment practices and with terms and conditions of employment for employees actually performing work that the union sought to acquire.

The Board's original distinction between work preservation and work acquisition was also premised on a relatively narrow definition of what work tasks were preservable. The union could permissibly exert pressure or execute agreements to protect only tasks which union members in a particular work group had been performing on an exclusive basis; the types of products associated with those tasks had to be traditionally and historically handled by the union members.

2. National Woodwork

National Woodwork Manufacturers Association v. NLRB, the seminal Supreme Court opinion on work preservation issues, involved a bargaining agreement which reserved work tasks traditionally and historically performed by members of a carpenter's local union. While the Court determined that both the union's refusal to install doors precut and prefitted for hanging by the door manufacturer and the provision sanctioning that refusal were permissible under sections 8(b)(4) (B) and 8(e), it did not have to choose between the Board's definition of preservable work tasks and Judge Wright's fairly claimable work test.

4(B). 386 U.S. at 630-31. In Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 547, 557 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970), the court also expressly declined to determine whether union pressure to acquire work never traditionally or historically performed by unit employees was permissible. The Board, however, has continued to view pressure to "acquire" work as unlawful, e.g., Asbestos Workers Local 8, 173 N.L.R.B. 330 (1968), enforced sub nom. Preformed Metal Prods. Co. v. NLRB, 413 F.2d 1032 (6th Cir. 1969).

77. See Note, Secondary Boycotts and Work Preservation, 77 Yale L.J. 1401, 1410 (1968); see also Note, supra note 71, at 1305-06.
78. See generally Note, supra note 71, at 1280, 1299-1300, 1306.
80. 386 U.S. 612 (1967).
Although the National Woodwork Court split 5-4 in deciding that "work preservation" boycotts and agreements, however defined, constituted primary activity, there was no disagreement between the majority and the dissent on whether the basic prohibition of section 8(e) had broader scope than that of section 8(b)(4)(B). All concluded that the sections were to be construed in pari passu; the section 8(e) prohibition against agreements to boycott goods and manufacturers was held coextensive with the section 8(b)(4)(B) prohibition against boycotts themselves. The majority and the dissent were divided as to whether all product boycotts had been condemned as secondary and unlawful by the framers of the statute; each side referred to a different aspect of the legislative history. Only Justice Harlan took a broader view; in a separate concurring opinion, he argued that, in the absence of an express Congressional declaration that agreements preserving work were unlawful, the Court should not construe ambiguous statutory language to have that effect. To do so, he concluded, would be to remove arrangements for cushioning the impact of technological change from the permissible area of collective bargaining.

The National Woodwork majority adopted an analytic framework for sections 8(b)(4)(B) and 8(e) whereby the primary-secondary dichotomy would be applied in each case after an evaluation of "all the surrounding circumstances" to determine "whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere . . . [or were] addressed to the labor relations of the contracting employer vis-à-vis his own employees." Among the considerations deemed relevant to this determination by the Court were: (1) the remoteness of the threat of labor displacement resulting from a ban on the product or services; (2) the history of labor relations between the union and the employers to be boycotted; and (3) the economic personality of the industry.

National Woodwork did not resolve the dispute between the Board and Judge Wright concerning the appropriate definition of work preservation; nor did it settle four other critical issues. The first concerns definition of the bargaining unit for which work may be preserved. This matter was confronted peripherally in Houston Insulation Contractors Association v. NLRB, a companion case to National Woodwork in the Supreme Court. There, members of a construction local of the Asbestos Workers refused to handle and install products on a construction job site because other workers employed by their em-

81. Id. at 648-50.
82. Id. at 644-5.
83. Id. at 644 n.38.
84. 386 U.S. 664 (1967).
ployer belonging to a sister local of the same union had been deprived of their traditional work tasks; those tasks had been performed at a shop located apart from the boycotted jobsite. Although the members of the construction local were not attempting to preserve their own work, the Court determined that because the employer employed workers from both locals, members of the construction local were still "primary" employees pressuring the "primary" employer:

A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute or because only engaged in by some of the primary employees, and not the entire group. Since that situation does not involve the employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary and, therefore, not a violation of § 8(b)(4)(B).85

Definition of the appropriate unit for work preservation purposes is, of course, critical because the size of the unit will determine to a large extent the permissible scope of work preservation boycott pressure and agreements.

The Court majority avoided a second issue by reserving judgment on the relevance of an employer's authority or control over a decision to utilize a particular product to a determination of the legality of a work preservation boycott where his employees refused to handle or install that product.86 The Board has formulated a so-called "right to control" test as a shorthand method for dealing with this factor;87 the

85. Id. at 669.
86. Id. at 616. The issue was not before the Court because the employer of the carpenters' union members refusing to install the precut doors possessed and had exercised the authority to use the particular doors in dispute. The dissent in National Woodwork, however, expressing complete disagreement with the Board's handling of work preservation matters, rejected as irrelevant an analysis focusing on which employer made the decision to use a product. Id. at 659 n.15.
87. Although not elevated to the status of a "test" or a "doctrine", the Board prior to the enactment of the Landrum-Griffin amendments first formulated the analysis which would lead to a finding of violation in these circumstances as "powerless to give" the work or "powerless to end the dispute." See Sheet Metal Workers Local 98, 121 N.L.R.B. 676 (1958). See also Steamfitters Local 636 v. NLRB, 278 F.2d 858 (D.C. Cir. 1960). The analysis was refined in a number of cases also involving or resembling jurisdictional disputes between two or more unions. See Carpenters Local 112, 217 N.L.R.B. No. 129, 89 L.R.R.M. 1799 (May 12, 1975); IBEW Local 501, 216 N.L.R.B. No. 73, 88 L.R.R.M. 1220 (Jan. 31, 1975); Carpenters Local 112, 202 N.L.R.B. 974 (1973); Plumbers Local 537, 170 N.L.R.B. 919 (1968), enforcement denied sub nom. Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188 (1st Cir. 1969); IBEW Local 164, 158 N.L.R.B. 838 (1966), enforcement denied, 388 F.2d 105 (3d Cir. 1968); ILA Local 1694, 137 N.L.R.B. 1178 (1962), enforced as modified, 331 F.2d 712 (3d Cir. 1964); Plumbers Local 5, 137 N.L.R.B. 828 (1962), enforced, 321 F.2d 366 (D.C. Cir.), cert. denied, 375 U.S. 921 (1963). The control analysis was also applied after 1959 in cases not involving or resembling jurisdictional disputes, See ILA Local 1066, 137 N.L.R.B. 45 (1962); Ohio Valley Carpenters Dist. Council v. NLRB, 339 F.2d 142 (6th Cir. 1964), and was critical to the Board's determination that the carpenters union had violated the statute by refusing to handle precut and prefitted doors in three factual
test is central to recent decisions and controversy regarding work preservation.

The third issue not expressly resolved in National Woodwork concerns the Sand Door principle; whether, despite the coterminous relationship of section 8(b)(4)(B) and 8(e) prohibitions, economic pressure to enforce a work preservation agreement otherwise valid under section 8(e) could violate section 8(b)(4)(B) if an object of the pressure other than work preservation fell within the prohibition of section 8(b)(4)(B). The Supreme Court's construction—that section 8(e) and section 8(b)(4)(B) were coextensive—appears, logically at least, to require that once a determination is made that an agreement to boycott a product is lawful under section 8(e), pressure to enforce that same agreement and same objective would not violate section 8(b)(4)(B). Yet, Sand Door was not overruled in National Woodwork; indeed the structure and relationship of the construction industry proviso to section 8(e) and section 8(b)(4)(B) have led to determinations that construction unions are prohibited by section 8(b)(4)(B) from engaging in economic pressure to enforce agreement provisions sanctioned by the construction industry proviso. This may express a policy that valid section 8(e) agreements are not to be enforced by economic pressure tactics. At least in the construction industry, according to Sand Door, economic pressure to enforce an otherwise valid work preservation agreement may theoretically be unlawful if some union objective in addition to work preservation—identified, for example, by applying the "right to work" test—Independently but simultaneously contravenes section 8(b)(4)(B).

Fourth, National Woodwork did not depart from the traditional focus in work preservation controversies on the competing interests of unions and employers. The union exerts economic pressure to insure continuation of jobs and employment; the employer may be obligated by economic circumstances to install labor saving products. Not fully articulated in the Court's analysis of the primary or secondary character of economic pressure is what weight, if any, is to be accorded the interests of the manufacturer of labor-saving products and its employees; those interests may be diminished not just temporarily, but perhaps permanently, by inability to sell the product because of a successful union product boycott. Although a boycott for work preservation purposes has been characterized as a "primary" strike, its impact differs funda-

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situations not presented to the Court in National Woodwork itself. See Metropolitan Dist. Council of Phil. (National Woodwork Mfrs. Ass'n), 149 N.L.R.B. 646 (1964), enforced in part and remanded, 354 F.2d 594 (7th Cir. 1965), rev'd on other grounds, 386 U.S. 612 (1967). For further discussion of the "right to control" test see text accompanying notes 134-42 infra.

88. See text accompanying note 94 infra.
mentally from that of the typical primary strike for higher wages. Unlike a strike for higher wages, where a customer may be prevented from purchasing the manufacturer's product during the strike, a successful product boycott restricts the market for the manufacturer's product on a more permanent basis. Acceptance of the boycotting union's demands does not necessarily reopen markets for goods as does resolution of a strike for higher wages. Consequently, the product boycott's market restriction diminishes overall employment opportunities for employees of the product manufacturer, disrupting labor relations there, and correspondingly benefits the boycotting union's general membership.

3. Antitrust Implications

A final problem in determining the proper role of sections 8(b)(4)(B) and 8(e) in connection with work preservation boycotts arises from the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*. There, the Court ruled that the antitrust immunity of labor would not apply to a construction industry agreement which prohibited subcontracting of jobsite work to subcontractors not having bargaining agreements with the plumbers local. The Court concluded that immunity was withdrawn from the subcontracting prohibition because an effort had been made to go beyond legitimate concerns of maintaining union standards of employment on particular job sites. The contractor which was the target of union demands had no bargaining relationship with the union (it was characterized by the Court as a "stranger" contractor); the subcontracting restriction forced the contractor to exclude from all jobsite work a class of subcontractors, some of which, even though having no relationship with Local 100, might adhere to union standards of employment. For the same reasons that it withdrew antitrust immunity, the Court declared that the agreement was not shielded from section 8(e) illegality by virtue of the construction industry proviso.

This new interpretation of section 8(e) invalidated theretofore sancrosanct construction industry subcontracting prohibitions, despite the fact that the NLRB had not previously adopted such a view of section 8(e) and notwithstanding the apparent inconsistency between *Connell* and the development of an antitrust immunity for labor developed in the Court's prior cases. The Court characterized the subcontracting provisions at issue as extending beyond legitimate concerns of unions with organizing employees on jobsites and maintaining union standards. Moreover, the subcontracting restriction was held not to


serve the construction industry proviso's policy of permitting unions to negotiate agreements insuring that their members would not be required to work alongside nonunion employees on jobsites. This interpretation of the statute raises the possibility that section 8(e) has broader effect than to interdict agreements whose object is to impose union organization on third parties or to influence the outcome of third party labor disputes. Nevertheless, the precise holding of Connell and its emphasis on the absence of a collective bargaining relationship between the union and the employer from which the subcontracting restriction is sought, in addition to the failure to confine that agreement to specific job sites and the agreement's inconsistency with the policies of the construction industry proviso, does not appear to affect analysis of work preservation agreements between a union and an employer with which it does maintain a bargaining relationship. However, particularly in light of the fact that the refusal to install products in Allen Bradley Co. v. IBEW Local 3, was cited frequently in the legislative history as the paradigmatic example of illegality encompassed by the boycott prohibitions, Connell may suggest new emphasis on a policy of confining economic warfare in the construction industry. It may support determinations that enforcement by boycott action of work preservation agreements concerned with maintaining union standards of employment for a particular work group extends beyond the permissible area of labor-management conflict because such boycotts affect product manufacturers and their ability to offer employment to their own employees, and because successful product boycotts benefit members of the boycotting union beyond those actually refusing to handle the product. The Court's reservation of judgment on whether economic pressure to secure an otherwise lawful section 8(e) agreement in the construction industry violates section 8(b)(4) indicates that the question is open.

91. The Court concluded that the subcontracting prohibition was not consistent with the policy of the construction industry proviso permitting subcontracting restrictions to insure that nonunion and union employees would not have to work side by side on a jobsite. That was because Local 100's subcontracting prohibition dealt with the general contractor's subcontracting policies relating only to plumbing work and did not purport to prohibit subcontracting of other jobsite work to nonunion firms. In other words, the provision itself failed to insure that Local 100 members would be insulated from working alongside nonunion workers. 421 U.S. at 631. Further, the Court declared that to permit Local 100 to negotiate subcontracting restrictions with "stranger" contractors having no bargaining relationship with that union would give construction unions a weapon for organizing the industry that Congress did not intend them to possess. 421 U.S. at 631-32.


93. Id. Furthermore, the product boycott or concerted refusal to deal engaged in without labor participation continues to be considered an unlawful restraint of trade. See note 20 supra.

94. See note 66 supra.
C. "Preservable" Work Tasks and Units for Work Preservation Purposes

Even though economic pressure or agreements obtained for work preservation purposes may be generally permissible primary activity, a union could still be liable under section 8(b)(4)(B) and 8(e) if a narrow concept of "preservable work tasks" or a narrow definition of the work unit for work preservation purposes is adopted. In one sense, the concept of preservable work tasks and the definition of unit for work preservation purposes can be viewed as means to deal with considerations deemed relevant in National Woodwork for distinguishing primary from secondary activity. The idea of preservable work tasks attempts to account for the remoteness of the threat of replacing current functions by introducing a new product or service. Definitions of the unit for work preservation purposes should be consistent with the history of labor relations between the union and employers as well as with the economic personality of the industry concerned. Moreover, the concept of preservable work tasks and the definition of the appropriate unit for work preservation purposes may coalesce. A union's efforts to secure work tasks identical to work tasks its membership performs generally may not be permissible if it seeks to secure that type of work for a unit in which its members have never performed those tasks. In this sense, the definition of unit for work preservation purposes, also identifies tasks deemed "preservable" by looking to the work actually performed by that unit.

1. Work Tasks

As previously noted, the Board's original concept of preservable work tasks was narrow—work tasks had to be exclusively and traditionally performed before efforts to preserve them would be deemed primary. After National Woodwork, the Board determined that a broader definition of preservable work tasks was required. Thus, in the American Boiler Manufacturers Association cases, the Board decided that the concept of preservable work was not limited to work currently, continuously, and exclusively performed by unit employers. Instead, work tasks traditionally and historically performed but subsequently lost or relinquished would be considered preservable work;

95. See text accompanying note 79 supra.
union efforts to “reacquire” or “recapture” work once performed were not prohibited. The Court of Appeals for the Eighth Circuit in *American Boiler Manufacturers Association v. NLRB*, however, limited the Board's action by determining that the union could seek to reacquire only those lost tasks which unit members had performed at the time the work preservation clause protecting them was negotiated. The court relied chiefly on the factual record in *National Woodwork* to justify this conditional approval of the Board's expanded notion of preservable tasks. The court thus declined to rule on the proposition that efforts to reacquire work tasks lost prior to the negotiation of a work preservation clause would be permissible activity; it expressed no view on the Board's general rule that union pressure to “acquire” or “obtain” work fell within the prohibitions of sections 8(b)(4)(B) and 8(e).

A broader preservable work task definition did not, however, mean that the Board had accepted the “fairly claimable work” concept, although the term “fairly claimable work” has been employed as a label by the Board. A close analysis of the leading cases covering several industries reveals that a far more narrow test has in fact been utilized.

In the containerization disputes on both the East and West Coasts, where the longshoremen's unions had negotiated bargaining agreement clauses reserving to longshoremen the work of stuffing (placing cargo into) and stripping (removing cargo from) containers, Board decisions holding those clauses to violate section 8(e) were premised on a narrow definition of preservable work tasks and on a precise classification of tasks as historically and traditionally performed. Although it found that longshoremen, incident to their primary responsibility to load and unload ships, had traditionally performed some stuffing and stripping with containers on piers, the Board determined that their historical and traditional tasks did not include stuffing and stripping done by freight consolidators at off-pier locations. Therefore, clauses attempting to secure such work tasks for longshoremen at the piers constituted work “acquisition” in violation of section 8(e).

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97. 404 F.2d 547 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970).
98. That record demonstrated that at least part of the union objective approved by the Supreme Court had been to reacquire work performed at the time the work preservation clause was negotiated.
100. See text accompanying notes 68-78 supra.
102. ILA, 221 N.L.R.B. No. 144, 90 L.R.R.M. 1655 (Dec. 4, 1975), enforced, 537 F.2d 706 (2d Cir. 1976) (the Board also noted that the union had abandoned its claim to the work in question in 1959). See also ILA Local 846, 225 N.L.R.B. No. 108, 93 L.R.R.M. 1182 (Aug. 31, 1976); ILA Local 1248, 195 N.L.R.B. 273 (1972).
A similar approach is evident in construction industry cases. In *Teamsters Local 282*, the Board declared that work was not "fairly claimable" simply because work tasks claimed required skills identical with or similar to those associated with tasks traditionally and historically performed by employees. Nor did the fact that the work tasks claimed had actually been performed in the past by the boycotting employees necessarily mean that the work was "fairly claimable" if the amount of work performed in the past was not "substantial." Moreover, the Board's decision in *Carpenters Local 742* suggests that union efforts to preserve jobsite work tasks are permissible only if directed at products that can be produced by union members on a job site and that union members have handled and fabricated in the past. Given this concept, refusals to handle and install would not be permissible if directed at products functionally identical to those made by union members on job sites but which, because of technological change, no longer required job site work, or could not be manufactured on job sites by union members in any circumstances.

In *Carpenters Local 742* union members refused to install precut, premachined plastic faced doors carrying a manufacturer guarantee for the life of the building in which installed. Although carpenters had customarily cut and prepared wood doors for hanging, certain tasks performed at the manufacturer's factory which were critical to the guarantee had never been performed on the job site. The Board concluded that job site pressure by the carpenters was not supported by permissible work preservation objectives. The Court of Appeals for the District of Columbia Circuit, applying its "fairly claimable work" test, 106

104. 197 N.L.R.B. 673 (1972).
106. See Southern Cal. Pipe Trades Dist. Council 16, 207 N.L.R.B. 698 (1973), vacated sub nom. Associated Gen. Contractors, Inc. v. NLRB, 514 F.2d 433 (9th Cir. 1975), where, in reversing the Administrative Law Judge, the Board dealt only with the issue of whether the union's conduct amounted to "coercion" within the meaning of section 8(b)(4)(ii) and did not adopt or reject the narrow concept of "preservable" work employed by the Judge. The Court of Appeals, however, concluded that "technologically new" products (surgical scrub sinks), with respect to which union members had never before performed work tasks, could not be the object of economic pressure even though union members had performed work tasks on old style scrub sinks. See also Southern Cal. Pipe Trades Council 16, 207 N.L.R.B. 711 (1973). Compare the position of the District of Columbia Circuit in cases cited note 106 infra.
107. The record also revealed that carpenters had installed the same type of plastic faced door boycotted without protest on another construction project, did not claim the work tasks at issue when they installed metal doors precut and prepared at a factory, and had not negotiated a work preservation clause protecting the disputed tasks. See 201 N.L.R.B. at 70 (1973).
reversed, again criticizing the Board for its narrow definition of work preservation.\textsuperscript{108}

The concept utilized by the Board in \textit{Carpenters Local 742} was also embraced in \textit{Asbestos Workers Local 12}.\textsuperscript{109} There, the disputed work tasks concerned insulating gas turbines; for certain brands of gas turbines those tasks had been performed on the job site by union members. A different brand of gas turbine, with insulation installed at the factory, was specified for installation and was boycotted by the union. The Board rejected the union’s work preservation claim, on a determination that the union’s members had never in the past performed insulation work at the job site on the particular brand of gas turbine and that the union was, therefore, seeking to acquire work tasks historically and traditionally performed at the manufacturer’s factory.

This narrow concept of preservable work tasks apparently does not apply in the retail store industry. There, clauses preserving merchandise racking tasks in connection with products not necessarily identical with those on which racking tasks are presently performed have been held permissible.\textsuperscript{110} The Board has not provided reasons for distinguishing its approach to the issue of product identity in the retail and construction cases.

2. Work Unit

The Board’s definition of the unit for work preservation purposes has been so unsystematic as to render essentially meaningless any concept of preservable work tasks. Despite admonishments by the Court of Appeals for the District of Columbia Circuit,\textsuperscript{111} the Board has not provided guidance on even the elemental issue of whether the unit for

\textsuperscript{108} Carpenters Local 742 v. NLRB, 533 F.2d 683 (D.C. Cir. 1976). The Court also concluded that the Board’s supplemental opinion had again improperly employed the right to control test as the decisive factor in declaring Local 742’s conduct in violation of the statute, and that there was not substantial evidence to support the Board’s determination that an object of the union’s conduct was to achieve goals “elsewhere.” \textit{See also} Carpenters Local 433 v. NLRB, 509 F.2d 477 (D.C. Cir. 1974) (setting aside and remanding a Board order because work in connection with “substitute materials” would be “clearly claimable” for purposes of applying the “fairly claimable work” test).

\textsuperscript{109} 193 N.L.R.B. 40 (1971).

\textsuperscript{110} Retail Clerks Local 648, 172 N.L.R.B. 1711 (1968) and cases cited therein. \textit{But cf.} Retail Clerks Local 770, 218 N.L.R.B. No. 84, 89 L.R.R.M. 1407 (June 19, 1975), where the Board rejected a work preservation defense and ruled that union enforcement of a clause requiring employees of lessees of retail store owners to be covered by the union agreement violated section 8(e) in part because employees of the retail store unit had never performed the type of work performed by employees of lessees.

\textsuperscript{111} \textit{See, e.g.,} Carpenters Local 433 v. NLRB, 509 F.2d 447 (D.C. Cir. 1974); Sheet Metal Workers Local 223 v. NLRB, 498 F.2d 687 (D.C. Cir. 1974); Sheet Metal Workers Local 98 v. NLRB, 433 F.2d 1189, 1197-1200 (Wright, J., dissenting); Lewis v. NLRB, 350 F.2d 801 (D.C. Cir. 1965). \textit{See generally} Note, \textit{supra} note 71, at 1291-97.
work preservation purposes coincides in all cases with what the Board, exercising its authority under section 9 of LMRA, would determine to be an "appropriate bargaining unit" for collective bargaining purposes. Moreover, while it has purported to address considerations deemed relevant by National Woodwork, especially the economic personality of the industry,\footnote{112. See especially cases cited notes 102 & 103 supra.} the Board has not specifically analyzed the unit definition problem in terms of the National Woodwork approach.

Developing standards by which to define the work unit for work preservation purposes is critical, whether those standards are derived from "appropriate bargaining unit" principles or some other doctrine. Unprincipled manipulation of the size of units for work preservation purposes can serve to emasculate the statute. For instance, a broadest available unit concept (the geographical and jurisdictional boundaries of a particular labor organization) might permit employee-members not personally involved in a particular work preservation controversy with a specific employer to engage in pressure to secure or protect work tasks for a group to which they do not belong.\footnote{113. Cf. Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664 (1967). See text accompanying notes 84-85 supra.} Conversely, a decision maker committed to expanding statutory prohibitions with respect to secondary boycotts could effectuate that purpose by confining units for work preservation purposes to their narrowest limits.

Judge Wright has stated that the unit for work preservation purposes should "almost always" be coextensive with the unit for collective bargaining purposes.\footnote{114. Sheet Metal Workers Local 98 v. NLRB, 433 F.2d 1189, 1200 (D.C. Cir. 1970). The bargaining unit involved in the case was a multi-employer unit.} He has also argued that, at least in the construction industry where workers change jobs and employers within a relatively ascertainable geographic area, the work preservation unit should be larger than the bargaining unit; in fact, according to Judge Wright, it should coincide with a larger geographic area, possibly co-terminous with a particular union's geographical jurisdiction.\footnote{115. Id. at 1200 n.9.} By contrast, the Court of Appeals for the Second Circuit, in NLRB v. Maritime Union,\footnote{116. 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 960 (1974). See also Griffith Co. v. NLRB, No. 74-2740 (9th Cir., Nov. 4, 1976).} apparently opted for a narrow definition of the unit for work preservation purposes. It eschewed conclusive reliance on bargaining unit principles to define the work preservation unit, declaring that those principles should not apply where the bargaining unit is many times larger than the actual work force of the employer involved in a work preservation dispute. Although the Senate Circuit was not concerned directly in Maritime Union with choosing between a single employer and a multi-employer unit,\footnote{117. A single employer or single ship unit was determined to be appropriate for work preservation purposes in various decision cases cited supra.}
propounded would appear to favor single employer over multi-employer units for work preservation purposes. Thus, only the actual employees of the employer which allegedly deprived employees of traditional work could use economic pressure tactics. Employees of other employers could not participate in such action because they would not be encompassed by the appropriate unit for work preservation purposes.

The tortured decisional history of the 80 cent clause in coal industry bargaining agreements, whereby the United Mine Workers required employers to pay 80 cents to the union welfare fund for each ton of coal purchased from nonunion subcontractors and 40 cents for each ton purchased from union subcontractors, reveals that the Board does not automatically preclude broad definitions of units for work preservation purposes. Reversing a series of prior decisions declaring the 80 cent clause to violate section 8(e), the Board in *United Mine Workers* determined that the multiplicity of bargaining units in the coal mining industry did not rule out the existence of an industry-wide unit in adjudicating a work preservation dispute.

The construction industry cases demonstrate even more convincingly the importance of the definition of the work preservation unit and the complexity of its ascertainment in the absence of standards. Board bargaining unit determinations in that industry, while helpful, are not dispositive; no one type of unit has been afforded a clear preference. The general principles followed by the Board in construction industry unit determinations appear to favor narrow units for work preservation purposes. Thus, single site bargaining units of all production and maintenance employees working on a project are presumed appropriate. The Board has also declared presumptively appropriate single work preservation purposes by the Board and the Court. The issue was whether that single ship unit could properly include all employees entitled at any time to use the union's hiring hall. The Court, for the reasons stated in the text, rejected that definition of the unit. The Board, adopting the opinion of the Administrative Law Judge, reached the same conclusion in a similar fact situation in *International Org. of Masters*, 220 N.L.R.B. No. 52, 90 L.R.R.M. 1691 (Sept. 8, 1975).


119. 188 N.L.R.B. 753 (1971), decision on remand from United Mine Workers, 165 N.L.R.B. 467 (1967), remanded, 399 F.2d 977 (D.C. Cir. 1968). In a section 303 action, however, the Court of Appeals for the Sixth Circuit specifically disagreed with the Board majority's legal theory, concluding that the Mine Workers were liable for damages resulting from strikes designed to force employers to sign new contracts containing the 80 cent clause. *Riverton Coal Co. v. United Mine Workers*, 453 F.2d 1035 (6th Cir. 1972).

employer units composed of a clearly identifiable and functionally distinct group of employees with common interests distinguishable from those of other employees.\textsuperscript{121} In doing so it has rejected contentions that high mobility of the construction industry work force requires establishment of multi-employer units and that the nature of work in the industry—successive operations by distinct groups of employees—demands establishment of all-inclusive units of employees instead of separate distinct craft groupings. Yet, presumptions favoring single site and single employer units can be rebutted. Borrowing from unit determination criteria used generally for ascertaining when multi-employer or area-wide units are appropriate,\textsuperscript{122} the Board has, consistent with

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\textsuperscript{121} Metropolitan Home Bldrs. Ass'n, 119 N.L.R.B. 1184 (1957); Berghuis Constr. Co., 116 N.L.R.B. 1297 (1956); Strong Co., 86 N.L.R.B. 687 (1949); W.B. Willett, 85 N.L.R.B. 761 (1949). However, faced with the need to define another type of appropriate unit, one for holding special union security selections under section 9(e)(1) of the Taft-Hartley Act, which was repealed in 1951 (Act of October 22, 1951, Pub. L. No. 82-189, 65 Stat. 601), the Board's General Counsel attempted to use broad geographic areas roughly equivalent to the territorial jurisdiction of each council of the AFL-CIO Building and Construction Trades Department or the territorial scope of employer organizations which traditionally had bargained with construction unions. The General Counsel's position was based on the mobility of employees and the instability of individual employers' payrolls, reasons that were not deemed sufficient to make multi-employer units presumptively appropriate. See Denham, \textit{Taft Act's Impact on the Construction Industry}, 21 L.R.R.M. 44 (1948). Confronted with the issue of whether a single-project unit of one employer or an employer-wide unit encompassing many projects should be established, the Board has usually chosen the larger employer-wide unit, primarily because construction employers typically use employees on several projects—thus employees on all projects share a community of interest. Nello L. Teer Co., 162 N.L.R.B. 1175 (1967); Rexach Constr. Co., 161 N.L.R.B. 1269 (1966); Daniel Constr. Co., 133 N.L.R.B. 264 (1961), appeal dismissed for lack of jurisdiction, 341 F.2d 805 (4th Cir.), cert. denied, 382 U.S. 831 (1965), supplemental decision, 161 N.L.R.B. 52 (1966); Edward A. Taylor Co., 123 N.L.R.B. 1692 (1959). Cf. Central N.M. Chapter, National Elec. Contractors Ass'n, 152 N.L.R.B. 1604, 1608 (1965); see also South Prairie Constr. Co. v. Operating Engineers Local 627, 44 U.S.L.W. 3668 (U.S. May 19, 1976) (per curiam). Prior to its decision in Del-Mont Constr. Co., 150 N.L.R.B. 85 (1954), discussed note 122 infra, the Board confined the presumptive appropriateness of single employer units to all-inclusive overall units of all construction employees of a contractor or to separate “traditional craft groups" of employees, determining in the latter situation that laborers, operating engineers, and certain types of ironworkers were not craft groups. See, e.g., Sioux Falls Bldrs. Ass'n, 143 N.L.R.B. 27 (1963); Broomall Constr. Co., 137 N.L.R.B. 344 (1962); Daniel Constr. Co., 133 N.L.R.B. 264 (1961); Greene Constr. Co. & Tecon Corp., 133 N.L.R.B. 152 (1961); K.P. Olinger, 129 N.L.R.B. 560 (1960); Truss-Mart Corp., 121 N.L.R.B. 1430 (1958); John F. Humphrey, 100 N.L.R.B. 511 (1952).

\textsuperscript{122} The general test for multi-employer status is whether the members of the employer group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and whether the union representing their employees has been notified of the formation of the employer group and the delegation of bargaining authority to it and has entered negotiations with the group representative. Weyerhaeuser Co., 166 N.L.R.B. 299 (1967), enforced sub nom. Woodworkers W. States Regional Council 3 v. NLRB, 398 F.2d 770 (D.C. Cir. 1968). In Van Eerden Co., 154 N.L.R.B. 496, 499 (1965), the Board stated that the ultimate ques-
industry practices, determined\textsuperscript{128} and approved\textsuperscript{124} multi-employer and area units for collective bargaining purposes. However, geographical scope of bargaining units in the construction industry is confined by the Board’s rule that a unit is not appropriate if predicated exclusively on the union’s geographic jurisdiction.\textsuperscript{128}

In addition to following a narrow concept of preservable work tasks in Teamsters Local 282,\textsuperscript{128} the Board identified a number of work units, each of these coinciding with the parties to either a multi-employer bargaining agreement or an individual employer bargaining agreement. All bargaining agreements for these units contained the

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\textsuperscript{128} In determining that separate craft units would be appropriate, even on a multi-employer basis, the Board reasoned that the degree of functional integration in the industry was fundamentally different from that employed in industrial plants. Heating, Piping & Air Conditioning Contractors, 110 N.L.R.B. 261 (1954); Plumbing Contractors Ass’n, 93 N.L.R.B. 1081 (1951). Beginning with Del-Mont Constr. Co., 150 N.L.R.B. 85 (1964), the Board began to relax its requirement that a “traditional craft group” exist before separate unit status would be recognized. In determining a separate unit of operating engineers to be appropriate, it ruled that only a “clearly identifiable and functionally distinct group with common interests which are distinguishable from those of other employees” need be shown to support a claim for separate unit status. \textit{Id.} at 87. Rejecting the contention that sharing of duties with other noncraft employees precludes recognizing separate groups, the Board continued the trend toward further fragmentation of units in R.B. Butler, Inc., 160 N.L.R.B. 1595 (1966) (separate unit of laborers); B.W. Constr. Co., 161 N.L.R.B. 1600 (1966) (laborers); Hydro Contractors, Inc., 168 N.L.R.B. 105 (1967) (laborers); Hychem Constr., 169 N.L.R.B. 274 (1968) (pipefitters); New Enterprise Stone & Lime Co., 172 N.L.R.B. 2157 (1968) (heavy equipment operators, mechanics, and oilers); W.P. Butler Co., 214 N.L.R.B. No. 91, 87 L.R.R.M. 1538 (Nov. 19, 1974) (heavy equipment operators).


\textsuperscript{126} 197 N.L.R.B. 673 (1972).
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same disputed work preservation clause seeking to require construction contractors to utilize Local 282's members, instead of subcontractor or supplier employees, to drive suppliers' trucks entering or leaving worksites and to drive subcontractors' trucks delivering and jockeying materials, tools, and personnel to and on jobsites. Even though it identified a number of separate bargaining units, the Board couched its discussion of the legality of the disputed work preservation clause in terms of a single unit incorporating the multi-employer and single employer bargaining agreements involved in the case. Although a work preservation unit of this scope resembles the area-wide work preservation unit which Judge Wright would apparently endorse—and would be inconsistent with bargaining unit determination principles in pure form—the Board provided no reasons for this choice. Clearly, however, the unit chosen in the work preservation analysis was not the broadest one available—a unit equated with the geographic and occupational scope of the local union exerting economic pressure. Furthermore, the broad unit concept employed did not save the union from violating the statute. Because the Board adopted a narrow view of preservable work tasks and found that the particular truck driving tasks the union sought for its members had not traditionally been performed to a substantial degree in the past by employees in the broad work unit, union efforts represented impermissible work acquisition for the benefit of its members generally, rather than to protect employees in the work unit.

A work preservation unit of similar scope and breadth, encompassing all employees of members of a multi-employer bargaining unit as well as those of all individual contractor signatories to the multi-employer bargaining agreement, was embraced by Board Member Jenkins concurring specially in Teamsters Joint Council No. 42 and Operating Engineers Local 12. In those cases, a Board majority upheld—as permissible work standards clauses—bargaining agreement provisions forbidding employers to engage any subcontractor delinquent in payments to fringe benefit funds maintained and administered jointly by the union and signatory employers. Those clauses also made general contractors liable for the delinquencies of their subcontractors. The majority opinion of Members Fanning and Penello, however, refused to adopt Member Jenkins' definition of the unit for work preservation purposes and avoided resolving that issue. In contrast, the dissenters, Chairman Miller and Member Kennedy, concluded that the

127. The inclusion in a multi-employer bargaining unit of employers who merely adopted or simply signed the multi-employer agreement or one identical to it would not comport with the cases cited note supra.
appropriate unit was neither multi-employer nor area-wide but was instead coextensive with separate and individual employer units.\textsuperscript{130}

3. \textit{Problems at the Unit-Task Nexus}

Insofar as bargaining unit principles used by the Board in the construction industry bear on definition of the unit for work preservation purposes, the potential is greatly increased for confusion in assessing work preservation claims. First, the Board gives separate bargaining unit status for groups of employees who do functionally distinct work that includes tasks shared with other equally identifiable and distinct groups. This policy exacerbates the problem of ascertaining whether a valid work preservation claim is proffered when a group adversely affected by the introduction of a technologically advanced product is actually deprived of work tasks shared with other groups. Second, apparent rejection of single employer and single project units and acceptance of multi-employer and area-wide units as appropriate for work preservation purposes may expand the allowable scope of economic pressure in work preservation disputes beyond that permitted in other types of construction industry controversies governed by section 8(e) and 8(b)(4)(B). Analytically, work preservation agreements do not involve directly the construction industry proviso to section 8(e). Nevertheless, because it allows maintenance of otherwise illegal agreements when confined to the site of construction, the proviso defines a unit smaller in scope than a multi-employer or area-wide unit that may still pursue legitimately concerns involving the labor policies of employers with whom it has no bargaining relationship.\textsuperscript{131} Solely in terms of defining a relevant work unit, there is no reason that work preservation claims accepted by construction companies should affect other employees and employers by reducing the market for the manufacturers' products, circumventing the policy embodied by the proviso in connection with other kinds of union efforts affecting labor-management relations of employers not their own.

Furthermore, not only does the Board's approach to defining the unit in the construction industry and elsewhere for work preservation purposes lack ascertainable standards, but an area-wide unit definition such as that utilized in \textit{Teamsters Local 282} conflicts with the Board's narrow concept of preservable work tasks. Insofar as a narrow concept of preservable work tasks is designed to minimize the disruptive effects of work preservation boycotts and agreements on third parties, it squares with the central purpose of sections 8(b)(4)(B) and 8(e).

\begin{thebibliography}{99}
\bibitem{130} 212 N.L.R.B. at 321, 344.
\bibitem{131} See Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975), discussed at text accompanying notes 89-93 \textit{supra}.
\end{thebibliography}
Thus, broad unit definitions which potentially permit wider intrusions into the labor relations of third parties make little sense. Yet when the analysis of unit for work preservation purposes and the analysis of preservable work tasks are made identical for the sake of simplicity, the conflict between a broad definition and a narrow concept leads, at the worst, to unprincipled and unreasoned results and, at best, to more confusion in an already troubled area of the law.

The Supreme Court's decision in *Houston Insulation* suggests a possible solution to the morass surrounding the specification of the unit appropriate in examining work preservation issues. First, the way in which the parties have organized their bargaining relationships is not the sole determinant of the work preservation unit. In *Houston Insulation*, the Court sanctioned the combination of two separate bargaining units into one to enable sister locals to pursue work preservation objectives. Second, this combination of separate bargaining units was permitted because both units dealt with a single employer which had deprived one unit of traditional work tasks. In other words, the unit for work preservation purposes in *Houston Insulation* encompassed only the employer which had taken the action allegedly depriving a union's members of work tasks.132

II

WORK PRESERVATION BOYCOTTS AND THE DENVER-SAND DOOR ANALYTICAL FRAMEWORK

Under the analytical framework established by *Denver Building Trades* and *Sand Door*, sections 8(b)(4)(B) and 8(e) may be violated even when union pressure is aimed at work preservation. Where another objective of the union's effort is independently prohibited—for example, when a construction union attempts to force a general contractor to adhere to a clause in its bargaining agreement prohibiting subcontracting of work to be performed at the construction site to anyone without a union contract—permissible work preservation goals do not exonerate the union.133

132. Despite the veto of the bill relaxing prohibitions on "common situs" picketing, discussed at text accompanying notes 12-14 *supra*, it can be argued that Congress desired a narrow definition of the unit for work preservation purposes because the bill refused to permit "common situs" picketing and joint employer status to be conferred on all job site employers in connection with a product boycott dispute on a job site.

133. See Carpenters Local 644, 200 N.L.R.B. 1056, 1060-61 (1972), enforced, 533 F.2d 1136 (D.C. Cir. 1975); Carpenters Local 948, 188 N.L.R.B. 483, 486-87 (1971); Cement Masons Local 812, 182 N.L.R.B. 928 (1970). See also cases cited note 66 *supra*. Where the union's work preservation activity does not coincide with attempted enforcement of a secondary subcontracting clause, one court has ruled, contrary to the Board, that no violation had been proven. Local 433, Carpenters, 202 N.L.R.B. 297 (1973), *enforcement denied*, 509 F.2d 447 (D.C. Cir. 1974). For further amplifi-
A. Right to Control

The development by the Board of the "right to control" test was apparently designed around this framework. According to this test, even if the purpose of a union boycott against a product is to preserve unit work, it is prohibited where the pressured employer has no decision-making authority or control regarding the use and installation of the boycotted product. In such cases, the Board has drawn the inference that the union has pursued the prohibited objective of forcing the employer to procure a change in product choices made by another party. Although its reasoning is not clearly articulated, the Board...
evidently deems this objective prohibited by the statute because it has “cease doing business” effects on the pressured employer and the party requiring use of the disputed product; ultimately, if successful, the boycott would affect employment opportunities and the labor relations of the product manufacturer.

Prior to National Woodwork, the appellate courts accepted the Board's use of the control test; thereafter, however, they accused the Board, first, of applying the analysis mechanically in order to find a violation in every case where the pressured employer lacked decision-making authority regarding the disputed product, and, second, of refusing to assess all the other “surrounding circumstances” as required by National Woodwork. Judge Wright, speaking again for the Court of Appeals for the District of Columbia Circuit, was particularly critical of the Board's use of the control analysis in Plumbers Local 636 v. NLRB. There, the Board had assessed the critical appellate decisions and nevertheless chose to adhere to the repudiated course of analysis “until the Supreme Court explicitly decides to the contrary.” In Carpenters Local 742 v. NLRB, Judge Wright described “[t]he legal effect of the Board's test [as allowing] an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it.”

He characterized the control analysis as a “Cinderella-like transforma-
tion of an obviously involved party into a neutral bystander [which] is rather incredible."\textsuperscript{142}

1. Reordering Contractual Obligations

Using "right to control" to infer an independent prohibited objective on the part of the union mounting the boycott in cases where work preservation objectives are also present has distorted objective assessment in two distinct ways. First, when the control test is invoked to support a decision to prohibit a product boycott for work preservation purposes, the party possessing control over the critical decision would, by implication, be a permissible object of union pressure.\textsuperscript{143} Although doctrines other than the control test might preclude such a result,\textsuperscript{144} the Ninth Circuit in \textit{Western Monolithics Concrete Products, Inc. v. NLRB}\textsuperscript{145} nevertheless had to reject a Board decision in part because it applied the test to sanction pressure against a party having authority to mandate use of disputed products but having no bargaining relationship or work preservation agreement with the union. Second, the factual patterns to which the control analysis has been applied have come to be viewed not solely in terms of prohibited or permissible union objectives, but more as presenting problems of establishing priorities among the contractual obligations assumed by the construction contractor. Typically, the construction contractor is obligated contractually both to the union to preserve unit work and, at the same time, to the developer to utilize or install a labor saving product. Determining the

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} In \textit{Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975)}, discussed in text accompanying notes 89-93 \textit{supra}, the Supreme Court ruled that labor unions would be denied the nonstatutory exemption from the federal antitrust laws set forth in \textit{Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965)}, and would be held to be in violation of section 8(e) of the NLRA, where the construction union exerts economic pressure resulting in subcontracting agreements that are neither within the context of the specific union-employer relationship nor limited to any particular job site. The Court's discussion of the section 8(e) issue was without the benefit of a Board decision, because the NLRB General Counsel had refused to issue a complaint alleging section 8(e) and 8(b)(4)(B) violations against the same union conduct when directed at another general contractor working the same geographic areas as Connell. \textit{See Steamfitters Local 638 v. NLRB, 521 F.2d 885, 913 n.21 (D.C. Cir. 1975) (Bazelon, J., concurring).} The decision not to issue a complaint may have been based on the General Counsel's determination that the control analysis would have resulted in a conclusion that pressure on the general contractor having control over subcontracting decisions would be permissible.

\textsuperscript{144} The Supreme Court's determination in \textit{Connell} that the existence of a collective bargaining relationship between the union and the pressured employer is relevant to an assessment of activity prohibited by section 8(e), and derivatively by section 8(b) (4)(B), suggests that union pressure against an employer not involved with the union in a bargaining relationship, but possessing control, would be unlawful. \textit{See Steamfitters Local 638 v. NLRB, 521 F.2d 885, 897-98 n.29 (D.C. Cir. 1975) (Wright, J.).} A contrary inference may be drawn from the control analysis.
priority of conflicting contractual claims provides automatically an answer to the question whether the employer was "neutral" or "unoffending." The Board and courts have not disagreed on this point where there is evidence that the contractual obligation to use a labor-saving product involved subterfuge or collusion to take advantage of the control test. In that situation, it has been held that the employer was not "neutral" or "unoffending." In the absence of collusion, however, the problem has been reduced to a question of the timing of the conflicting obligations. If the contractual work preservation obligation was entered into before the contractual obligation to install labor-saving products, the former would take priority over the latter and would not give rise to an independent objective prohibited by the statute because of the contractual obligation to install labor-saving products.

The emphasis on priority of contractual obligations is misplaced for at least two reasons. First, the question of "neutrality" for statutory purposes has never been considered dependent on or in any way related to breach of contract. Although a party's contractual obligations frequently affect its position regarding other unfair labor practices, breach of contractual obligations by an employer is not a defense to otherwise prohibited union conduct and does not make an employer any more or less "neutral" with respect to union boycott objectives. Contract breaches can, of course, be remedied in ordinary civil proceedings. Second, even in the absence of a work preservation clause in a collective bargaining agreement, "neutrality" determinations have been made based on the priority of obligations. In *Carpenters Local 742* the contractor's obligation to install prefabricated products was inferior to its obligation to preserve unit work, even though no work preservation agreement existed. The timing of conflicting contractual obligations is essentially irrelevant to the question of neutrality if, as appears to be Judge Wright's view, work preservation obligations are superior regardless of source.

2. A Partial Reassessment

In 1973, the Board undertook a reassessment of the control

145. 446 F.2d 522 (9th Cir. 1971).
148. See cases cited notes 66 & 133 supra.
test.\textsuperscript{151} In \textit{ Plumbers Local 438}\textsuperscript{152} the Board steadfastly refused to discard the control analysis, but did reduce its importance to the level of “one of the surrounding circumstances” in a product boycott dispute. Declaring that it had never applied the test mechanically, the Board promised that in the future it would articulate more carefully its reasoning whenever application of the control analysis required finding a violation. Nevertheless, the analytical framework for the control analysis remained the same: control is a factor to be examined independent of the assessment of a union’s work preservation claims; absence of control supports an inference that a prohibited objective exists.\textsuperscript{153}

The Fourth Circuit’s opinion\textsuperscript{154} enforcing the Board’s order in \textit{ Plumbers Local 438} was the first appellate decision after \textit{ National Woodwork} to endorse the control analysis. The court did not, however, expressly validate the analysis. Instead, after recognizing the test and noting that the Supreme Court in \textit{ National Woodwork} had neither mandated nor precluded its application,\textsuperscript{155} the Fourth Circuit confined its decision to the issue of whether the pressured employer—a subcontractor—had intentionally entered into an arrangement depriving it of control. Because the project owner in \textit{ Koch} had imposed on the general contractor the requirement that a particular labor saving product be installed, and the general contractor in turn had imposed that requirement on the subcontractor, the court was satisfied that the subcontractor had not intentionally deprived itself of control. The fact that the union was aware of the subcontractor’s predicament at the time the project construction contracts were executed helped reinforce this view; the court affirmed the Board’s conclusion that, as a consequence, the union’s objective in refusing to handle the product was “elsewhere” and prohibited.\textsuperscript{156}

In \textit{ Koch}, the court did not have before it a fact pattern in which the pressured subcontractor dealt directly with the party possessing control over the product decision. Given the court’s careful emphasis on whether the pressured subcontractor had negotiated with the party pos-

\begin{itemize}
  \item \textsuperscript{151} In June 1972, the Board scheduled oral argument on the control issue in two cases: Plumbers Local 438, 201 N.L.R.B. 59 (1973), \textit{enforced sub nom.} George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973), and Carpenters Local 742, 201 N.L.R.B. 70 (1973), \textit{on remand from} 444 F.2d 895 (D.C. Cir. 1971).
  \item \textsuperscript{152} 201 N.L.R.B. 59 (1973), \textit{enforced sub nom.} George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973).
  \item \textsuperscript{153} \textit{Id.} at 64.
  \item \textsuperscript{154} George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973).
  \item \textsuperscript{155} \textit{Id.} at 327.
  \item \textsuperscript{156} The Board’s opinion had also suggested that the absence of control in the pressured subcontractor would have insulated it from a refusal to bargain charge if it had resisted union requests for bargaining concerning an agreement requiring the employer to acquire work over which it lacked control. 201 N.L.R.B. at 63 n.22 (1973). The appellate court did not reach this issue.
\end{itemize}
sessing control, it can be argued that the result might have been different had the subcontractor been directly involved with the owner. Although the court's approach may minimize the risk of collusion among contractors and project owners aimed at invoking the control analysis, it is difficult to relate that concern to the question whether the pressured subcontractor intentionally deprived itself of control. A party can intentionally deprive itself of control by contracting directly with the party possessing control or by contracting with some intermediary which has also been deprived of control. In any event, the Fourth Circuit's decision remains important in that the court did not question the way in which the Board used the control analysis: to infer a prohibited objective independent of a permissible union work preservation objective.157

Beyond generating such problems, the Board's treatment of the control issue as a factor independent of the merits of a work preservation claim has also obscured what may be the actual rationale of these cases. When a contractor has been deprived of control over the decision to use certain products, Board decisions are akin to determinations that work tasks associated with those products are not "preservable" because the employer never possessed authority to assign the work tasks to the union members.158 This notion of limiting the preservable work concept to those work tasks over which the boycotted employer has control also finds expression in jurisdictional dispute cases where work preservation claims are frequently raised but never regarded as defenses.159 Of course, if the work tasks which the union seeks to secure for its members are not preservable, then its efforts are regarded as calculated to satisfy union objectives elsewhere—"secondary" and automatically proscribed by the statute.

157. In Associated Gen. Contractors, Inc. v. NLRB, 514 F.2d 433 (9th Cir. 1975), the Ninth Circuit joined the Fourth Circuit in endorsing the control analysis in principle. Although AGC presented a fact pattern similar to that presented to the Fourth Circuit—the pressured subcontractor having contracted with a party deprived of control by a project owner—the Ninth Circuit's opinion, short on analysis generally, did not indicate that this similarity was the reason that the control test was endorsed.

158. In at least one case, Teamsters Local 216 v. NLRB, 520 F.2d 172 (D.C. Cir. 1975), a contractor's ability to perform the claimed work was held to be at the root of the "preservable work tasks" concept. There, the District of Columbia Circuit agreed with the Board that work tasks that a contractor is not equipped to perform, and has never performed, are not "preservable" for the contractor's unit employees, even if the bargaining agreement contains job classifications covering those tasks.

159. Work preservation claims broader than seeking reemployment of employees terminated for lack of work have been rejected as defenses in jurisdictional dispute proceedings. E.g., I.A Local 1332, 215 N.L.R.B. No. 150, 88 L.R.R.M. 1109 (Dec. 16, 1974); Teamsters Local 85, 208 N.L.R.B. 1011 (1974); Carpenters Local 433, 207 N.L.R.B. 63 (1973); Carpenters Local 433, 202 N.L.R.B. 293 (1973); Plumbers Local 322, 200 N.L.R.B. 857 (1972); Sheet Metal Workers Local 28, 194 N.L.R.B. 79 (1971).
The control analysis used in this manner is tautological. Moreover, when control over the decision to utilize a particular product is relevant to the merits of a work preservation defense, the concept of "preservable" work and the definition of unit for work preservation purposes, as they have been developed by the Board in other cases, come into conflict. Declaring work tasks not "preservable" if the employer has no control over the decision which deprives its own employees of them, leads to results that contradict the Board's narrowest "preservable work" concept, which permits pressure and agreements pertaining to work traditionally and historically performed regardless of whether the employer presently possessed control. Similarly, if the absence of control by the pressured employer is critical to the merits of a work preservation claim, the unit for work preservation purposes must logically be confined to the employer of the workers adversely affected. While such a definition of the unit may conform to the policies underlying the boycott provisions, it is more restricted than the unit for work preservation purposes utilized in, for example, Teamsters Local 282.

B. Steamfitters Local 638: Another Look at Basic Doctrine

A shift in emphasis with respect to the framework supporting the control analysis is illustrated by Steamfitters Local 638 v. NLRB. There, the District of Columbia Circuit, sitting en banc, again rejected the Board's application of its control test in a 5-4 decision. Unlike the typical "control" case, the prefabricated labor-saving products in Local 638 were not required by an architect or project owner; instead they were specified for installation by the general contractor and engineer, the Austin Company, which also served as designer for the project. The subcontract for heating, ventilation, and air conditioning work was awarded to Hudik-Ross Company; it required installation of air conditioning units purchased by Austin and manufactured by Slant/Fin Corporation. Internal piping for the main water flow and condensate assembly was to be cut, threaded, and installed at Slant/Fin's factory prior to delivery. Such a procedure was a prerequisite to fulfilling the additional specification that the manufacturer guarantee the units for one year after installation.

160. See text accompanying notes 72-79 supra.
161. See text accompanying notes 131-32 supra.
162. See text accompanying note 104 supra.
164. In addition to preparing the design specification, Austin, as general contractor for the project, employed laborers, carpenters, bricklayers, cement finishers, ironworkers, and operating engineers on the job; it subcontracted electrical, plumbing, sprinkler, heating, ventilation, and air conditioning work to various subcontractors. 521 F.2d at 915 (MacKinnon, J., dissenting).
165. The specification provided, in relevant part:
Hudik-Ross was aware of the specifications at the time it submitted its bid and was awarded the subcontract. Although Austin employed no steamfitters and had not executed a collective bargaining agreement with Local 638, the Hudik-Ross agreement with Local 638 required that internal piping of the type utilized in Slant/Fin's units be cut and threaded by hand on the job. To comply with project specifications, Hudik-Ross would have to limit its steamfitter employees to installing the Slant/Fin air conditioning units and cutting and threading pipe to connect the units to the basic piping running throughout the building. The steamfitters would not be permitted to perform final assembly tasks on internal parts of the air conditioning units. If, on the other hand, the collective bargaining agreement was followed, these tasks would be performed on Slant/Fin units by dismantling each unit after delivery to the job site, tearing apart the internal piping supplied by the manufacturer, reconstructing and refrabricating that piping, and reassembling the complete unit.

Local 638 instructed its members employed by Hudik-Ross to refuse to install the Slant/Fin air conditioning units, even after being advised that the units were preassembled and pretested at the factory, guaranteed by the manufacturer, and purchased by Austin, not Hudik-Ross. Although Local 638 members had performed internal pipe cutting, threading, and assembly on other air conditioning units at other construction projects, those brands did not contain features that Austin considered critically important in making a business judgment to specify the Slant/Fin units.

1. **NLRB Ruling**

The Administrative Law Judge adhered to the view that the right to control issue was relevant to the merits of a work preservation defense. He was able to declare the provision requiring on-site cutting

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Furnish at the jobsites Slant/Fin Climate Command Air Conditioners. The unit shall be complete with cabinets, filters, cooling chassis, heating coil fans, main water flow and condensate assembly . . .

The main flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer . . .

Manufacturer shall furnish a written guarantee for a period of one year after completion of installation . . .

Steamfitters Local 638, 204 N.L.R.B. 760, 762 (1973).

166. Rule IX of the collective bargaining agreement provided:

Radiator branches, convextor branches and coil connection shall be cut and threaded by hand on the job in accordance with Rule V. [Rule V provides that work in the union's jurisdiction must be performed in units of two; i.e., two steamfitters or a steamfitter and an apprentice.]

Id.

167. See 521 F.2d at 916-17 (MacKinnon, J., dissenting).
and threading of pipe to be a permissible work preservation clause by construing it to apply only to work assignments relating to pipe within Hudik-Ross’ control. That determination, in turn, supported his conclusion that Local 638’s refusal to handle the units constituted a use of Hudik-Ross as an “instrumentality or means” of exerting pressure against Slant/Fin and Austin, the parties with whom Local 638 had its “real problem and dispute.” Buttressing the claim that the “real problem and dispute” concerned Austin and Slant/Fin, the Judge argued that since Local 638 had completely organized the local labor market, the boycott would be totally effective in preventing installation of Slant/Fin’s air conditioning units; Slant/Fin would be forced to withdraw the product from the area and Austin would be prevented from specifying those units in the future. There could be no other object for union pressure, the Judge reasoned, because if the work preservation claim were accepted at face value, Local 638 would be satisfied if Hudik-Ross had never sought, been awarded, or accepted the subcontract. That position, however, would be contrary to the interests of Local 638’s members; it deprived them of subcontract work not associated with precut and threaded pipe.

A Board panel consisting of Chairman Miller and Members Jenkins and Kennedy agreed with the Judge’s conclusion that Local 638 violated section 8(b)(4)(B) by pressuring Hudik-Ross to assign work it was powerless to assign, but utilized the control analysis in its more conventional framework. The Board conceded that an objective of Local 638’s conduct was to preserve work traditionally performed by Hudik-Ross’ employees and guaranteed them by a valid work preservation clause. The Board’s conclusion that the statute had been violated stressed, as a factual matter, a threat by one of Local 638’s agents to Austin that Hudik-Ross would not be allowed to install the air conditioning units; and, legally, the Board’s prior decisions in Plumbers Local 636 and Carpenters Local 742. Significantly, however, the Board responded to the distortion in analysis that had troubled the Ninth Circuit in Western Monolithics; the Board retreated from its decision in that case, characterizing Austin and Slant/Fin as “neutral

168. Although stated to be “not a major basis” supporting the Judge’s “saving” construction of the clause, “shall be cut and threaded by hand on the job,” a distinction was drawn between the “will not handle” provision of the work preservation clause in National Woodwork—which the Administrative Law Judge interpreted as applying to all premachined doors, regardless of which entity retained “control” over the decision to specify them—and the provisions of Rule IX, which were construed as not extending to the treatment of pipe within the control of some party other than the one employing the boycotting employees. See 204 N.L.R.B. at 763.

169. Id. at 764.

170. Id. at 760.
employers" but refusing to decide whether economic pressure directly against those firms would have been permissible.

2. The District of Columbia Circuit Decision

The essence of Judge Wright’s opinion for the court of appeals majority was that, as it had done previously in *Carpenters Local 742* and *Plumbers Local 636*, the Board improperly employed the control analysis as a *per se* test and failed to consider "all the surrounding circumstances." Departing from the facts of the case and responding explicitly to the conflict among the circuits, Judge Wright also concluded that the Fourth and Ninth Circuits had erred in finding violations of the statute in *George Koch Sans, Inc. v. NLRB* and *Associated General Contractors v. NLRB (AGC)*. The Board's contention in *Local 638*, as well as in *Koch* and *AGC*, that it had applied the right to control analysis as a rebuttable inference of an illegal secondary objective was dismissed by Judge Wright on the ground that the inference was merely the same *per se* test by another name: that is proving lack of imputed secondary objective once the inference had been made would be a "virtual impossibility."

While the fact that the Board had failed to evaluate "all the surrounding circumstances" would have been sufficient to dispose of the case, Judge Wright went further. Expanding on his opinions in *Plumbers Local 636* and *Carpenters Local 742*, Judge Wright argued that the right to control test was inconsistent with the requirements of *National Woodwork*. He challenged use of the control analysis in any circumstance where a contractor violated a valid work preservation

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171. *Id.* at 760 n.1.
172. 490 F.2d 323 (4th Cir. 1973).
173. 514 F.2d 433 (9th Cir. 1975). Judge Wright characterized the grievance arbitration procedure negotiated by the parties in *AGC* to deal with work preservation disputes—whose invocation was ruled illegal by the Ninth Circuit—as the "paradigmatic voluntary vehicle for peacefully settling work preservation disputes." 521 F.2d at 899 n.34. Also see text accompanying notes 176-79 infra.
174. Judge Wright also chided the Board's counsel for advancing the notion that the control analysis was employed as an inference, characterizing it as a post hoc rationalization of agency action not employed by the Board itself and not, therefore, normally maintainable before an appellate court. Judge Wright deemed it useful to reject the idea, however, because the Board might rely on it in the next right to control case and in the interest of bringing right to control litigation to an early conclusion. 521 F.2d at 890 n.9.
175. The majority opinion dismissed the contention that the Board had actually evaluated all the surrounding circumstances in arriving at its conclusion. The court noted that despite the Board's affirmance of the Administrative Law Judge's "rulings, findings and conclusions," the Judge had not evaluated those circumstances. Further, the court pointed to the Board's heavy reliance on its decisions in *Plumbers Local 636* and *Carpenters Local 742*, both of which had previously been determined by the court majority to have employed the test improperly. 521 F.2d at 888-89, 904.
clause by undertaking work requiring use of labor-saving products. Thus, Hudik-Ross could not be a neutral bystander because it had violated the valid work preservation clause in its collective bargaining agreement with Local 638. Although the court directed the Board on remand to reconsider the Administrative Law Judge's determination that the work preservation clause would never be breached with respect to work tasks over which Hudik-Ross had no control, Judge Wright actually rejected the contention that work tasks are not preservable if the employer lacks authority to assign them. He arrived at this conclusion by two different lines of reasoning; similar to the framework posited by the Administrative Law Judge, both approaches hold the control factor relevant to the merits of the work preservation issue. First, Judge Wright found that Hudik-Ross was not actually powerless to resolve the dispute; it could provide additional pay to compensate the employees for lost work, or it could submit that issue to arbitration. The boycott objective would not be work preservation only if the union refused to accept additional compensation for lost work or refused to arbitrate, because unions "presumably seek agreements to preserve for their members the work they have traditionally performed in order to maintain the income level of the members." This conception of power to resolve a dispute, however, ignores the nature of competitive bidding practices; an accepted bid for installation of labor-saving products would not provide the subcontractor with funds for payment of additional wages. Moreover, there was no evidence showing that Local 638 would have been content with premium pay for work on prefabricated products. Negotiations for additional pay may not be a realistic alternative for a pressured subcontractor, even if the boycotting union would be satisfied with premium pay, because the only possible response to a demand for higher wages under a fixed price subcontract may be to cease doing business with the product manufacturer.

Second, and perhaps more important, Judge Wright determined that Hudik-Ross did have power to resolve the dispute by refusing to

176. 521 F.2d at 895-97 n.25.
177. 521 F.2d at 899. There was, however, no evidence that Local 638 had demanded additional compensation or asked that the issue be submitted to arbitration. See 204 N.L.R.B. at 761-62.
178. In vacating and remanding the Board's supplemental opinion in Carpenters Local 742, Judge McGowan embraced the proposition that Local 742's willingness to accept premium wages for installing labor saving products was indicative of the fact that Simmons, the pressured contractor, had "power" to resolve the dispute and demonstrated that the union's objectives were directed at Simmons and not "elsewhere." Carpenters Local 742 v. NLRB, 533 F.2d 683 (D.C. Cir. 1976). Although Local 742's willingness to accept premium pay to install the premachined doors distinguishes the case from Steamfitters Local 638 where there was no record evidence that Local 638 would have been satisfied, id. at 694 n.19, Judge McGowan, like Judge Wright before him, did not consider whether a demand for premium pay in these circumstances is in essence no different from a demand to cease doing business with the product manufacturer.
bid on the air conditioning subcontract; it did not have to place itself in the position of violating a work preservation clause. On this point, Judge Wright specifically rejected the Administrative Law Judge's conclusion that Hudik-Ross' refusal to bid on an air conditioning contract would be contrary to the interests of Local 638's members. He concluded instead that such refusal would serve work preservation goals by increasing the risk that engineers and general contractors would receive no bids if they specified installation of labor-saving products prohibited by work preservation clauses.  

In any event, according to Judge Wright it was improper to characterize boycotts aimed at banishing air conditioning units containing precut and threaded pipe as work acquisition; such a description rested upon a concept of "preservable" work narrowly confined to tasks once actually performed by the employer's employees. That concept is at complete odds with the "fairly claimable" work test, which depends only on similarity rather than identity of work tasks.

In the alternative, even under the Board's analytical framework, with "control" assessed as evidence of an objective independent of work preservation, Judge Wright denied that a violation had been proven. To support that determination, Judge Wright rejected the Board's argument, based on Denver Building Trades, that a violation occurred because "an" objective of Local 638 was to force Austin to cease doing business with Slant/Fin.

First, Judge Wright reemphasized that Hudik-Ross was not powerless; it could have offered to pay Local 638's members additional wages, complying with union demands without disrupting relationships between Austin and Slant/Fin. Second, the Board's argument in connection with Denver Building Trades conflicted with the Supreme Court's decision in National Woodwork. This did not mean, however, that Denver Building Trades and National Woodwork are inconsistent, when read more carefully than was done by the Board. In Denver Building Trades, Judge Wright pointed out, the Supreme Court had been careful to observe that the union pressure was only part of a long standing labor dispute with the particular subcontractor; therefore all the surrounding circumstances had been assessed as National Woodwork required.  

Second, although Judge Wright expressly refrained from repudiat-

179. Compare 521 F.2d at 895-97 n.25 with 204 N.L.R.B. at 764.  
180. 521 F.2d at 895-97 n.25; accord, Carpenters Local 742 v. NLRB, 533 F.2d 683 (D.C. Cir. 1976).  
181. 521 F.2d at 902-07. But contrast this view with the discussion in text accompanying notes 177-78 supra.  
182. Id. at 903.  
183. See id. at 893 n.15.
ing the Denver-Sand Door analytical framework, he declared that it had no application to cases such as Local 638 where the product boycott was a response to the breach of a valid work preservation clause.\(^{184}\) His interpretation begins with the claim that, according to National Woodwork, employer violation of a valid work preservation clause does not render secondary union pressure seeking to enforce that clause.\(^{185}\) Judge Wright also defines the problem presented in Local 638 as a contract dispute between Hudik-Ross and the union.\(^{186}\) Indeed, he interpreted the bargaining agreement as permitting strikes in response to contract violation by Hudik-Ross.\(^{187}\) He concluded that, while a contractual provision cannot usually immunize an employer or union from an unfair labor practice charge, there was no justification for converting a dispute over a valid contract provision, whereby Local 638 had been granted a right to strike, into an unfair labor practice proceeding. To do so would demean the collective bargaining process which is the cornerstone of labor relations in the United States. . .

. . . If employers do not want work preservation clauses to cover prefabricated units, they should not sign bargaining agreements with such clauses unless they so state. And when an employer gets himself into a bind, as did Hudlik-Ross, . . . [h]aving the Board bail him out is to demean the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements.\(^{188}\)

\(^{184}\) Id. at 903. Judge Wright did not expressly repudiate the concept that only an object prohibited by the statute need be identified to support a violation. See id. at 903-04 n.44. However, he determined that it had application to only two types of factual situations, setting forth two hypothetical cases where it would apply to invalidate a union's conduct. The first involved direct pressure against a general contractor to terminate a contract with a manufacturer of prefabricated products because a subcontractor had breached a valid work preservation clause in accepting the work. The second concerned discriminatory enforcement of a work preservation clause by a union engaging in economic pressure against only those manufacturers of prefabricated products which were, for example, not unionized. Id.

\(^{185}\) Id. at 895-97 n.25.

\(^{186}\) Id. at 895 n.23.

\(^{187}\) Article II of the agreement provided that strikes or lockouts are prohibited, but only "so long as this agreement and the rules hereto attached are conformed to by both parties." Id. at 895 n.23.

\(^{188}\) Id. at 897, 901. Elsewhere in his opinion, Judge Wright made the same point: If Hudik-Ross desires protection from work preservation pressures in the future, it need only negotiate an agreement that incorporates a no-strike provision and that stipulates that such disputes will be submitted to arbitration. . . . If the employer seeks to exclude certain instruments from the union's armamentarium, the collective bargaining process accords him an adequate and appropriate mechanism for doing so.

Id. at 899 n.34.
Given that conclusion, Judge Wright found entirely untenable the Board's argument that a civil suit by the union for breach of contract was not foreclosed by its theory that economic pressure to enforce a valid work preservation clause violated section 8(b)(4)(B). Reasoning that the prohibitions of section 8(6)(4)(B) and 2(e) are *in pari materia*, he contended that such a suit was precluded if the control analysis revealed that a boycott would be illegal.\(^{189}\)

This implies that the holding of *National Woodwork*, defining the relationship between section 8(b)(4)(B) and 8(e), repudiated the *Denver-Sand Door* framework in situations where unions impose boycotts to enforce work preservation clauses.\(^{190}\) Nevertheless, Judge Wright refused to discard the *Denver-Sand Door* framework in work preservation disputes; he recognized that impermissible objectives linked with legal actions would sometimes violate the statute.\(^{191}\)

Since Local 638's conduct was characterized as primary activity, any adverse effect on Austin and Slant/Fin would merely be a permissible incidental or ancillary adjunct to lawful action.\(^{192}\) Because Judge Wright had previously concluded that Hudik-Ross was not an innocent bystander in the dispute and that Local 638's demands could be met by Hudik-Ross without affecting Austin or Slant/Fin, whatever changes resulted in their contractual relationships could not be attributed to secondary pressures.

Despite this apparent lack of concern that the statute in such circumstances did not protect a manufacturer from the consequences a product boycott would have on job opportunities for its employees, Judge Wright argued that the right to control test led to irrational results. Although the Board had specifically refused to rule on the issue of direct pressure against Austin and Slant/Fin, and although the court did not reject the right to control test because of this particular point,\(^{193}\) Judge Wright contended that the end result would be anomalous, no matter what the control analysis dictated with respect to pressure mounted directly against Slant/Fin and Austin. By one interpretation, Local 638 would be permitted to pressure Austin and Slant/Fin directly, but would be forbidden to place identical pressure on them indirectly through coercion of Hudik-Ross. If, however, direct union

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189. *Id.* at 901-02 n.38.
190. *Id.*
191. See discussion at note 184 *supra*.
192. 521 F.2d at 900 n.36.
193. Judge Wright discounted the occasion on which Local 638's agent informed Austin that Hudik-Ross would not be permitted to install the air conditioning units as simply information to the general contractor regarding matters which Hudik-Ross should have disclosed and not as evidence of impermissible pressure. Nevertheless, he indicated that the Board could consider the issue on remand. *Id.* at 900 n.36.
pressure against Slant/Fin and Austin were impermissible,\textsuperscript{194} section 8(b)(4)(B) would not permit the union to pressure any employer involved in the dispute.

Perhaps the most vulnerable part of Judge Wright's opinion is the implicit contention that the statute must be construed to permit the union to impose a product boycott against some party.\textsuperscript{195} It is by no means clear why such a result is necessary, unless of course the prohibitions of sections 8(b)(4) and 8(e) are interpreted as narrowly as possible to permit all product boycotts except those designed to extend union organization or to enhance union power in a labor dispute with a third party. Although most commentators argue that such a construction of the statute is required,\textsuperscript{196} the legislative history considered as a whole does not provide definitive support for that view.\textsuperscript{197}

In sum, Judge Wright's holding for the majority was that "where there is a valid work preservation provision in a collective bargaining agreement and where a union refuses to acquiesce in an employer's violation of that agreement, it is reasonable to assume that the employer can comply in accordance with his prior commitment to his workers and that, absent more evidence than mere stoppage of work, the union's objectives are legitimate and the refusal to install the prefabricated materials is lawful."\textsuperscript{198} Judge Wright conceded that this formulation meant that union conduct would "not often" be prohibited when the union's principal objective is work preservation.\textsuperscript{199} The case was remanded and the Board was directed to assess "all the surrounding circumstances," including the right to control issue and whether the work preservation clause covered work over which Hudik-Ross had been deprived of power to assign. The court made specific suggestions to consider the "substance, history, and motivation" of the particular dispute,\textsuperscript{200} "not only the situation the pressured employer finds himself in but also how he came to be in that situation,"\textsuperscript{201} and whether Local 638 could permissibly picket Austin and Slant/Fin if prohibited from pressing Hudik-Ross.\textsuperscript{202}

\textsuperscript{194} The implication from Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975), is, however, that regardless of the control test, pressure directed at employer with whom a union had no bargaining relationship would be prohibited. See note 144 supra.

\textsuperscript{195} See 521 F.2d at 897-98 n.29.

\textsuperscript{196} See, e.g., Lesnick, supra note 65.

\textsuperscript{197} See text accompanying notes 56 & 65 supra.

\textsuperscript{198} 521 F.2d at 904 (emphasis in original).

\textsuperscript{199} Id. at 903-94 n.44.

\textsuperscript{200} Id. at 905 n.47. This assessment would include consideration of whether Local 638 was attempting to organize Slant/Fin's employees. Id. at n.46.

\textsuperscript{201} Id. at 896 n.25. Stated another way, the Board was directed to reconsider whether Hudik-Ross "knowingly entered" into the subcontract with Austin for the sole purpose of contravening the work preservation clause.

\textsuperscript{202} Id. at 900 n.36 & 903-04 n.44.
3. Another View

Although agreeing generally with the "bulk of [the court's] reasoning" and specifically with that portion of the opinion rejecting exclusive reliance on the control analysis to support a section 8(b)(4)(B) violation where the employer had breached a valid work preservation clause, Chief Judge Bazelon declared that his analysis made it unnecessary to consider the effect of the Denver-Sand Door analytical framework on the Board's application of the right to control test. In his view, the right to control analysis was defective in trying to distinguish between prohibitions of section 8(b)(4) and permissible economic pressure in terms of a union's secondary or unlawful "intent". As Judge Bazelon restated the Board's argument, "[i]f a union has an 'intent' to achieve the secondary effects occasioned by its strike otherwise protected by Sections 7 and 13, then it follows that the union has engaged in an 8(b)(4) 'secondary boycott.'" Nonetheless, the objectives of every strike or job action "include a desire to influence others from withholding from the employer their services or trade." "Intent" reasoning, taken literally, would outlaw all strikes; it therefore fails to distinguish between primary and secondary activity. "A union always intends that employers other than the immediate employer will be pressured by its strikes or job actions." Judge Bazelon also contended that the Board's attempt to limit the "intent" analysis to controversies involving right to control issues was no less realistic, particularly in view of the fact that the analysis would then apply only to the construction industry. He rejected claims that the Board's experience with such situations supported its conclusion that a union is unconcerned with secondary effects on a manufacturer when the union's employer has the right to control a decision to use labor saving products, but vitally interested in secondary effects when such control is lacking.

Judge Bazelon characterized the Board's right to control test as an administrative repeal of the right to strike protected by sections 7 and 13, a test that would "re-introduce the labor injunction through the fragile vehicle of sections 8(b)(4) and 10(1)." Agreeing with Judge Wright's assessment of the coterminous relationship between

203. Id. at 905.
204. Id. at 906.
205. Id. at 905 (footnote omitted) quoting IUE Local 761 v. NLRB, 366 U.S. 667, 673 (1961).
206. Judge Bazelon identified Lesnick, supra note 65, as the leading academic formulation of the "intent" test. 521 F.2d at 906 n.5.
207. Id. at 906.
208. Id. at 908.
section 8(b)(4)(B) and 8(e) prohibitions, Judge Bazelon concluded further that the Board must either outlaw union boycott activity completely or declare it entirely immune from statutory prohibition. The notion that a valid work preservation clause could not be enforced by boycott activity and that the union's only remedy for breach of a contract provision was a civil suit for damages was also dismissed as inconsistent with the relationship between the two statutory provisions. Acceptance of such a notion would, in Judge Bazelon's opinion, substitute for sections 8(b)(4)(B) and 8(e) a compulsory arbitration scheme, centering on independent resolution by the Board of work preservation disputes, without express congressional sanction. In sum, as "there is no distinction between economic pressure against an immediate employer who does have the right to control and one who does not that is relevant to the purposes of § 8(b)(4). . . . National Woodwork requires us to reverse the Board's action as arbitrary and as inconsistent with the Act."211

4. Dissent

Judge MacKinnon wrote a lengthy dissenting opinion, joined by

210. Judge Bazelon identified "two areas in which the Board and the courts have with some exactitude delineated the scope of § 8(b)(4)." 521 F.2d at 910. The first is where a union seeks to obtain a concession for a specific group of employees from an employer with whom it has no bargaining relationship under the NLRA relating to those specific employees. Such pressure conflicts with a number of policies embodied in the NLRA: free choice of the affected employees regarding their own bargaining representative; the employer's potential or actual duty to bargain with its own employees; the union's duty to represent those employees. In this situation, the union's activities are viewed essentially as directed toward recognition, but without conforming with the NLRA provisions governing recognitional activity. See, e.g., Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

The second type of activity generally accepted as prohibited by sections 8(b)(4) and 8(e) concerns union attempts to obtain from its immediate employer an agreement to or practice of refusing to handle non-union goods or to work on jobs where non-union workers will be present. This proscription also conforms to the basic policies of the NLRA, according to Judge Bazelon, because the NLRA is neutral toward unionization and protection of employee freedom of choice is compromised by agreements and practices restricting use of non-union goods. 521 F.2d at 911.

211. Id. at 910. Although concluding that his analysis exonerated the union from a charge of coercion within the meaning of section 8(b)(4)(ii), Judge Bazelon reserved decision on whether his reasoning applied to union inducement of employees to withhold services within the meaning of section 8(b)(4)(i). Id. at 913-14 n.22. In addition, Judge Bazelon contended that his view of the relevance of control correlated with labor antitrust doctrine which, in his analysis, makes union pressure to secure mandatory bargaining exempt from antitrust regulation.

The Connell case may have shattered the correspondence between antitrust and labor law postulated by Judge Bazelon. See text accompanying notes 89-93 supra. Indeed, Judge Bazelon attempted to harmonize Connell with his views concerning the boycott provisions by declaring that Connell only extends anti-trust remedies to third parties when the Board's General Counsel refuses to issue a section 8(b)(4)(B) or 8(e) complaint. 521 F.2d at 912-13 n.21.
three other members of the court. He disagreed with the majority's assessment that the control test used by the Board was inconsistent with National Woodwork. In addition, he argued that the majority had unduly restricted the scope of section 8(b)(4)(B) by failing to apply the Denver-Sand Door analytical framework properly.

Judge MacKinnon's conclusions rested on four basic propositions. First, he declared it was not contrary to the "spirit" of the statute to conclude that Local 638's conduct was proscribed. Second, Judge MacKinnon accused the majority of constructing a "straw man" by criticizing the Board's use of a per se right to control analysis. According to Judge MacKinnon, the Board had not employed the control analysis as a per se principle with respect to Local 638's conduct; in fact, it had never purported to do so in other cases. Third, National Woodwork did not provide a basis for finding that all attempts to preserve traditional work by striking the immediate employer are permissible; rather, it stands for the very opposite conclusion. Finally, even in terms of an analysis that labeled "primary" all union pressure in support of work preservation claims, the union's activity remained "secondary" because, by pressuring with respect to work that Hudik-Ross originally neither possessed nor controlled, Local 638 was forcing the immediate employer to acquire work for its employees.

Analyzing the "spirit" and legislative history of the statute's boycott provisions, Judge MacKinnon concluded that the object of Local 638's activity fell into the same mold as the pressure exerted by the union in the Allen Bradley case; that case had been cited repeatedly as the prime example of the type of product boycott outlawed by the boycott provisions. He contended further that the Board and the Administrative Law Judge had examined "all the surrounding circumstances" mandated by National Woodwork; the Board had analyzed the contractual relationships between the contractors and had considered the locus of "practical" control over the decision making process, and had evaluated specification and contracting practices in the construction industry, as well as the nature and extent of the union's control over the labor market. Judge MacKinnon emphasized that, according to the Administrative Law Judge's evaluation, "practical" control over design specifications in the New York construction industry did not reside in subcontractors; indeed, they lacked meaningful input into specification

212. Id. at 919-21.
213. Id. at 931-32.
214. Id. at 920.
215. Id. at 921.
216. Id. at 923-25. See note 31 supra.
The economics of the industry and the realities of its position gave the subcontractor no discretion whatsoever in establishing design specifications for projects on which it submitted bids. Thus, even though he conceded that Hudik-Ross was not a neutral in the sense that it was uninvolved with or unaffected by a work preservation dispute, Judge MacKinnon determined that an employer which simply bids on a contract containing specifications that conflict with a work preservation agreement is not truly “offending.”

Moreover, in Judge MacKinnon’s view, consideration of the effects of the union’s monopoly position in the labor market is essential to a sophisticated assessment of “all the surrounding circumstances.” Because that monopoly position can result in a total ban on certain labor-saving products, it is a relevant factor in determining the objective of a union boycott. Judge MacKinnon rejected Judge Wright’s assertion that alternatives were available to eliminate the dilemma facing Hudik-Ross: refusal to bid on subcontracts requiring breach of work preservation agreements would be economically disastrous; negotiating a wage adjustment prior to commencing work with labor-saving products would be an unnecessary step, since the union had an adequate remedy in the form of a suit for breach of contract. In sum, Judge MacKinnon concluded that the Board’s control analysis shows that a party lacking control is not truly “offending”; such a result is justified because subcontractors should not be penalized for circumstances rooted in industry structure and for union monopoly of the labor market.
III

Resolution of Work Preservation Disputes in the Absence of Definitive Standards

The opinions in Local 638 illustrate the enormous difficulty of rationally deciding work preservation boycott cases. Judge Wright appears to reject the Denver-Sand Door analytical framework when economic pressure is used to enforce work preservation clauses; in essence, he concludes that a contractor's lack of control is not probative of the union's objective where a work preservation clause exists. Judge Bazelon's opinion manages to avoid the problem of the Denver-Sand Door analytical framework by adopting the view that, as a matter of policy, the statute's boycott prohibitions cover subcontracting restrictions only when those restrictions or efforts to enforce them are aimed at furthering union organizing efforts or at strengthening a union position in a labor dispute with another employer. Yet, that posture also seems to repudiate the Denver-Sand Door analytical framework by refusing to concede that, in circumstances where a contractor lacks control, economic pressure to enforce a valid work preservation clause could have an independent objective prohibited by the statute.

By contrast, Judge MacKinnon characterizes the union boycott as work acquisition because the work tasks involved in the case were not within Hudik-Ross' power to assign. Thus, he appears to adopt that overly restrictive concept of "preservable" work and that narrow definition of unit for work preservation purposes which conflict with Board principles developed in other cases.225

The statute and its legislative history provide support for all three approaches in Local 638. Moreover, attempts to appeal to the "spirit" of the statute may be essentially fruitless.226 The precise holding in Connell may not define work preservation boycotts and agreements as section 8(e) violations, but it does suggest an expansion of section 8(e) prohibitions and, derivatively, those of section 8(b)(4)(B). Even the direction in National Woodwork to assess the section 8(a)(5) bargaining obligation, and not to interpret section 8(e) as invalidating clauses over which parties could be ordered to bargain, may not support a narrow construction of the statute in connection with work preservation boycotts directed against an employer lacking control over the work tasks the union wants assigned to its members. Indeed, in Koch227 the Board embraced a restrictive conception of "preservable" work tasks.

225. See text accompanying notes 95-129 supra.
226. See text accompanying note 212 supra.
There, tasks over which the employer had been deprived of control were not preservable since an employer without control over work tasks "[can] not [be] ordered to bargain over that which it never had." Following this analysis to its conclusion, neither the policy developed in connection with section 8(e) nor that associated with section 8(a)(5) would be offended by a determination that a contract provision authorizing a union to claim work tasks over which the employer lacked control was not a valid work preservation clause.

Viewed solely from the perspective of section 8(a)(5) however, the Board's narrow concept of "preservable work tasks" is troublesome. While the principle that an employer does not violate section 8(a)(5) by refusing to bargain over a clause seeking to acquire work from outside the bargaining unit is not controversial, the limitation on mandatory bargaining subjects imposed by the narrow concept of "preservable work tasks" conflicts with the liberal sweep sometimes accorded an employer's bargaining obligation in connection with management decisions that diminish or eliminate work tasks and affect the integrity of a union's wage structure. Recently, the Board restricted the scope of the employer's bargaining obligation by exempting management decisions to close down or sell a portion of a business enterprise and terminate its operations. The question, therefore, boils down to whether the Board's determination in Koch, that the subcontractor

228. Id. at 63 n.22.
229. Such a clause, if executed, would violate section 8(e) on the authority of the Board's precedents. See cases cited note 76 supra. Moreover, labor policy generally has frowned upon union attempts to require bargaining affecting labor conditions outside the unit with respect to which the union has secured representation authority. See Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); United Mine Workers v. Pennington, 381 U.S. 657 (1965).
230. See Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965), where the Supreme Court, although refusing to exempt automatically any subject matter classified as a mandatory subject of bargaining from antitrust laws, applied the labor antitrust immunity to a marketing hours restriction because of the "intimate" relationship between the restriction and working hours of employees, normally a bargainable subject; Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959), where the Supreme Court determined that federal labor policy precluded application of state antitrust laws to a minimum rental agreement covering leased owner operated trucks agreed to between an employer and a union because the rental scheme was designed to protect negotiated wage scales and employment opportunities.
231. See Summit Tooling Co., 195 N.L.R.B. 479 (1972), enforced, 83 L.R.R.M. 2044 (7th Cir. 1973); General Motors Corp., 191 N.L.R.B. 951 (1971), petition for review denied sub nom. United Automobile Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1972). But see Royal Typewriter Co., 209 N.L.R.B. 1006 (1974), enforcement denied in pertinent part, 92 L.R.R.M. 2013 (8th Cir. 1976), where the Court rejected the Board's determination that the decision to close one plant of a multi-plant enterprise was a mandatory subject of bargaining. Of course, even though an employer may not be obligated to bargain about the decision to close down, it would be obligated to bargain about the effects of such a decision on employees. See Summit Tooling Co., supra.
would not be obligated to bargain concerning work tasks over which it lacked control, means that the decision to enter into a contractual arrangement depriving the employer of control over assignment of work tasks can be equated with decisions to sell or terminate a portion of business operations.

Although the issue is not free from doubt, a substantial argument can be made that decisions by subcontractors to bid on jobs where they will be deprived of control over the assignment of certain work tasks are part and parcel of the responsibility for determining the nature of an enterprise, its organizational structure, and its allocation of resources and capital. An employer has no obligation to bargain regarding those subjects.282 Thus, holding that work preservation boycotts and agreements directed against an employer lacking control over work tasks were illegal under sections 8(b)(4)(B) and 8(e) would certainly not contradict section 8(a)(5) policies if an employer remained obligated to bargain about the effects of such a decision on unit employees.

A. Two Alternative Solutions

No matter how the controversy concerning the scope of sections 8(b)(4)(B) and 8(e) is resolved, the greatest shortcoming of the existing analytical framework will remain. Sections 8(b)(4)(B) and 8(e) are blunt instruments; they result in either a prohibition of union conduct or a conclusion that boycott pressure is not impermissible. The sections are not available as mechanisms for weighing the interests of the product manufacturer and its employees, in an unrestricted market for labor-saving products, against those of the boycotting employees in protecting traditional work tasks from diminution.

1. Arbitration

One alternative approach to work preservation boycotts might be to construe sections 8(b)(4)(B) and 8(e) as not proscribing union economic pressure against labor saving products regardless of the existence of a valid work preservation clause. Under this approach, because refusal to handle such products after being instructed to do so would establish a dispute cognizable under conventional grievance arbitration procedures,283 the contractor could secure injunctive relief


233. A claim by a group of employees that an employer’s assignment of tasks contravenes a work preservation clause would fall within the coverage of a conventional grievance arbitration procedure which subjects thereto “any dispute involving the meaning, interpretation or application of this agreement.” E.g., The Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 238 n.3 (1970).
against the economic pressure pending resolution of the controversy, under the authority of *The Boys Markets, Inc. v. Retail Clerks Local 770*.

This approach has two disadvantages. First, although a work preservation dispute may be regarded as an employee protest against employer actions depriving them of work, combined with a grievance concerning a management order to obey, the dispute may also be characterized as an employer grievance against employees, protesting their contention that the bargaining agreement sanctions refusal to handle labor saving products. As an employer grievance, the dispute might be excluded from arbitral consideration if the arbitration clause does not cover employer grievances against employees. Moreover, if a particular type of dispute is excluded from a collective bargaining agreement grievance arbitration mechanism, a *Boys Markets* injunction will not be granted.

Second, even if the grievance-arbitration mechanism encompasses employer grievances against employees, arbitration concerning a work preservation dispute would typically include as parties only the pressured contractor and the boycotting union, unless the other concerned contractors and the product manufacturers agreed to be parties and to be bound by the arbitration results. While arbitration has been viewed as useful "therapy" in situations where some interested parties are missing, the absence of other concerned contractors and the product manufacturer in a work preservation arbitration may place the arbitrator in the same position the Board often finds itself under sections 8(b)(4)(B) and 8(e)—with a case not in a posture allowing a reasoned and comprehensive resolution of the controversy.

2. *Jurisdictional Dispute Procedures*

There is a mechanism available in the Act for placing work preservation boycott cases in a posture that would facilitate more reasoned

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234. 398 U.S. 235 (1970). There, the Court ruled that upon satisfaction of ordinary principles of equity, injunctive relief against a strike concerning a matter subject to a contractual grievance arbitration procedure could be obtained pursuant to section 301 of the Labor Management Relations Act, despite the anti-injunction provisions of the Norris-La Guardia Act. Moreover, H.R. 5900, 94th Cong., 1st Sess. (1974)—passed by both Houses of Congress, and vetoed by the President, notes 12-14—specifically codified *Boys Markets* in connection with "common situs picketing" disputes.


236. See Associated General Contractors v. Illinois Conf. of Teamsters, 454 F.2d 1324 (7th Cir. 1972).

assessments and more sensible resolutions by the Board. Work preservation boycotts, where extension of union organization is not at issue, are one manifestation of attempts to accommodate technological change. Among the many functions served by the Act’s jurisdictional dispute machinery is that of dealing with problems of technological change that affect relations among two or more groups of employees.

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It shall be an unfair labor practice for an employer—

. . .

(4)(i) to engage in, or 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—

. . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or trade, in another craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.]

Section 10(k), 29 U.S.C. § 160(k) (1970) provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods of the dispute. Upon compliance with the parties to the dispute with the decision of the Board or upon such voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

indeed, many work preservation boycotts protesting diminution of work tasks have also been handled through the jurisdictional dispute mechanism. The essential nature of disputes between two groups of employees for a work assignment involves the assessment of competing work preservation claims asserted by both groups.

Use of the jurisdictional dispute framework to analyze work preservation issues would focus attention on the actual tensions created between job site employees and product manufacturer employees. In addition, the factors traditionally examined by the Board in a jurisdictional dispute—the skills and work involved, Board certifications, company and industry practice, agreements between unions and between employers and unions, arbitration awards, employer assignment and the efficient operation of the employer's business—seem to lend meaning to the ambiguous term "all the surrounding circumstances" embraced by the Supreme Court in National Woodwork.

The Board has ruled that a jurisdictional dispute may arise when work is claimed by a union and by an unrepresented group of employees. Moreover, the jurisdictional dispute mechanism has been made available when disputed work has been subcontracted by one employer to another, and when economic pressure is utilized to force the work done by employees of one employer to be assigned to employees of another. Whether the scope of the jurisdictional dispute mechanism can or should be used in all these contexts is uncertain; there are disagreements within the Board as well as between recent Board majorities and one court of appeals. Thus, even though a particular work dispute may contain elements on which the Board has relied in the past to extend the jurisdictional mechanism, recent Board majorities have refused to hold that the statute's jurisdictional dispute provisions are


244. See NLRB v. Operating Engineers Local 825, 400 U.S. 297 (1971); IBEW Local 3, 141 N.L.R.B. 888 (1963).

245. ILWU, 208 N.L.R.B. 986 (1974); Sheet Metal Workers Local 28, 196 N.L.R.B. 1065 (1972); IBEW Local 145, 188 N.L.R.B. 255 (1971); ILA Local 19, 151 N.L.R.B. 89 (1965); Plumbers Local 761, 144 N.L.R.B. 133 (1963); IBEW Local 3, 141 N.L.R.B. 888 (1963); Theatrical Employees Local 862, 137 N.L.R.B. 738 (1962); Sheet Metal Workers Local 48, 119 N.L.R.B. 287 (1957).
applicable to controversies where the controversy mainly involves a violation of a collective bargaining agreement and where a decision regarding disputed work tasks will also determine that they be performed in one work location rather than another.\footnote{246}

The argument against extending the jurisdictional dispute provisions to cover work preservation boycotts—and, correspondingly, against construing sections 8(b)(4)(B) and 8(e) as not prohibiting such economic pressure—is that the statutory framework would be distorted. Because work preservation disputes can be viewed as primarily contractual in nature, the Board would, therefore, be utilizing the jurisdictional dispute machinery to arbitrate contractual disputes between an employer and a union. On the other hand, emphasizing the contractual dimension of work preservation product boycotts between one employer and one union ignores the fact that they also implicate a competing group of employees—those of a product manufacturer—who have a claim to the work assignment.\footnote{247} Moreover, the Board extends the jurisdictional dispute mechanism to situations quite similar to (and in a few instances indistinguishable from) work preservation boycott cases. Requiring the Board to interpret contractual provisions binding one employer and one union should not be an impediment to extension of the jurisdictional dispute mechanism to work preservation product boycotts; the Board is clearly empowered to construe contractual obligations when necessary to decide unfair labor practice cases and performs that function routinely in assessing the merits of rival claims to the same work.\footnote{248}

Although the jurisdictional dispute mechanism has been criticized for producing unprincipled decisions, for being hampered by intolerable delays, and for unduly favoring employer interests in work assign-

\footnote{246. Plumbers Local 36, 219 N.L.R.B. No. 129, 90 L.R.R.M. 1201 (Aug. 6, 1975); ILWU Local 26, 210 N.L.R.B. 574 (1974) (Chairman Miller dissenting); Web Pressmen’s Union No. 7, 209 N.L.R.B. 320 (1974) (Chairman Miller and Member Kennedy dissenting); Teamsters Local 107, 134 N.L.R.B. 1320 (1961). \textit{Cf.} ILWU Local 8, 185 N.L.R.B. 186 (1970), where the Board’s determination that no jurisdictional dispute existed was vacated by the court of appeals in Waterway Terminals Co. v. NLRB, 467 F.2d 1011 (9th Cir. 1972), and where the court’s view of the case was accepted by the Board in ILWU Local 8, 203 N.L.R.B. 861 (1974) and in ILWU, 208 N.L.R.B. 986 (1974).

247. Technically, the interest that the product manufacturer’s employees have in an unrestricted market for the products they manufacture may not rise to the level of a competing “claim” for a work assignment as that concept is presently used in jurisdictional dispute cases. \textit{See, e.g.}, IBEW Local 25, 211 N.L.R.B. 256 (1974); \textit{cf.} IBEW Local 24, 207 N.L.R.B. 337 (1973); IBEW Local 1228, 205 N.L.R.B. 1022 (1973). \textit{See generally} Atleson, \textit{The NLRB and Jurisdictional Disputes: The Aftermath of CBS}, 53 Geo. L.J. 93, 100-08 (1964).


249. \textit{See} cases cited note 239 supra.
ments, there has been general agreement that the criteria utilized by the Board could, if properly administered, produce just resolution of disputes. It is precisely because the existing scheme for dealing with work preservation boycotts has not produced standards for resolving disputes concerning use of labor-saving products that extension of a mechanism with standards relevant to parallel issues may be considered an improvement over the present state of affairs.

B. Conclusion

The failure of Congress to confront the problem of work preservation boycotts and to provide guidance for resolving disputes concerning labor-saving products has encouraged a decisional history remarkable in its lack of uniformly accepted standards for regulating use of economic pressure to resist technological change. Until Congress deals specifically with labor's right to apply economic pressure to banish labor-saving products, it has been suggested here that, because work preservation disputes contain many elements of jurisdictional disputes and appear amenable to resolution under the standards developed for evaluating those disputes, extension of the jurisdictional dispute framework to controversies concerning labor-saving products may provide a basis for more rational adjudication than has appeared under the approach now used.