The Primary-Secondary Distinction
Without the Primary: The New Secondary Boycott Law of Allied
International, Inc. v. International
Longshoremen’s Association*

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In 1982, the Supreme Court held that the refusal by the International
Longshoremen’s Association to handle cargo destined for or arriving from
the Soviet Union violated section 8(b)(4) of the National Labor Relations
Act. The Court’s finding that a primary labor dispute is unnecessary for
such a violation is inconsistent with the language and legislative history of
section 8(b)(4) and with cases construing the section. This finding raises
the problem of a complete ban on union use of economic force to attain
political goals. A preferable approach to the regulation of union political
activity involves using the mandatory-permissive distinction of section
8(b)(3).

I
Introduction

Most work stoppages by American unions originate from what are
traditionally considered economic concerns—dissatisfaction over
wages, hours, and working conditions, campaigns for union representa-
tion, and other day to day labor-management conflicts. American
workers, however, have occasionally refused to work for political rea-
sons, protesting policies ranging from South African racism to Soviet
militarism. The International Longshoremen’s Association (the ILA),
in particular, has challenged the legal boundaries of politically moti-
vated work stoppages. In one of its recent forays, the ILA protested

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views expressed herein are attributable to the author and do not necessarily reflect the views of the
Board.
1. For a detailed discussion of union political activities, particularly by the ILA in the for-
eign policy field, see Comment, Protest Boycotts and Federal Labor Laws: The Russian Trade

Despite its activism in foreign policy, the ILA has been involved in relatively little litigation.
Other than the most recent Soviet trade embargo, the ILA has been involved in litigation resulting
the Soviet Union's invasion of Afghanistan by refusing to handle cargo destined for or arriving from the Soviet Union. Numerous suits were instituted by employers whose businesses suffered during the embargo, raising a novel array of legal questions under the National Labor Relations Act (the Act or NLRA),\(^2\) the Norris-La Guardia Act,\(^3\) antitrust law,\(^4\) and admiralty law.\(^5\) In *Allied International, Inc. v. International Longshoremen's Association*,\(^6\) the Supreme Court settled one of these questions, unanimously holding that the ILA had engaged in an unlawful secondary boycott under NLRA section 8(b)(4).\(^7\)

The Court's application of section 8(b)(4) to political work stoppages marked a new direction in secondary boycott jurisprudence.\(^8\) Formerly, the paradigm for analyzing secondary boycotts was based on

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5. Id.


8. The statute reads as follows:

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

(iii) 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:
economically motivated work stoppages. Such cases typically involved a primary employer and one or more secondary employers. The primary employer was the company with whom the union had an economic dispute, commonly termed the primary labor dispute, and secondary employers were the primary employer’s customers and suppliers. Through strikes or picketing against secondary employers, the union hoped to pressure the primary employer by disrupting business relations between struck secondary employers and the primary employer or between struck secondary employers and other secondary employers who dealt with the primary employer. This weapon against a primary employer typified an unlawful secondary boycott. In contrast were lawful primary strikes and picketing. A union engaged in a primary labor dispute with its employer, for example, could picket its employer’s plant without violating section 8(b)(4) because the picketing would constitute direct pressure on the primary employer. Picketing against secondary employers, however, would be prohibited because it would constitute indirect pressure on the primary employer.

Because a political boycott, such as the ILA embargo, does not involve a primary labor dispute, it is both similar to and distinct from a typical secondary boycott. In a typical secondary boycott, the union’s work stoppage against its employer is not primary activity because the union’s ultimate aim does not concern that employer. Similarly, the ILA’s work stoppage was not primary activity because it sought to further objectives in which the ILA’s employer was unconcerned. But, a typical secondary boycott also involves indirect pressure against another employer over a primary labor dispute. The ILA’s ultimate objective, however, was to protest a sovereign nation’s military policy. In holding that the ILA violated section 8(b)(4), the Supreme Court found that the similarities between economic and political boy-

(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 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

9. The example in the text is a simplified version of a secondary boycott. On more complicated facts, courts have had difficulty discerning whether union tactics were unlawfully directed at secondary employers or lawfully applied against the primary employer. See Lesnick, The Gravamen of the Secondary Boycott, 62 COLUM. L. REV. 1363 (1962) and infra note 32. Nevertheless, the touchstone of a § 8(b)(4) violation was the attempt to influence secondary employers as opposed to dealing with the primary employer directly. See generally S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 428 (1947) [hereinafter cited as NLRB]; Int'l Bhd. of Elec. Workers Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), aff'd, 341 U.S. 694 (1951).
cotts outweighed their dissimilarities. This note argues that the Court erred in finding that a primary labor dispute was unnecessary to a section 8(b)(4) violation. The purpose of the secondary boycott ban was to confine primary labor disputes to the principal parties, the primary employer, and its employees or the union. Since the ILA did not intrude upon a primary labor dispute, the main justification for section 8(b)(4) did not exist in Allied. Indeed, the absence of a primary labor dispute placed the ILA embargo entirely outside the statute’s framework. It was a form of work stoppage that was neither primary nor secondary activity.

The Allied decision is particularly troubling because of its virtually unlimited application to politically motivated strikes and picketing. All such activities are arguably nonprimary and, therefore, unlawful under Allied. To make this finding, a court would not need to face the important First Amendment issues inherent in political activities or the policy questions concerning the proper role of unions in representing employees. Such a blanket ban on political activity is unjustified in the absence of clearer statutory authorization. A more sensitive tool for measuring the Constitutional and policy dimensions of political work stoppages is the mandatory-permissive distinction of section 8(b)(3) of the Act. Use of section 8(b)(3) would not only require courts to more explicitly consider these larger issues, it would also permit employers and employees to resolve political problems without judicial intervention. Although this approach would cause some uncertainty for both the courts and affected parties, it would provide a more complete measure of the right of workers to engage in political activities.

This Note begins by briefly reviewing the course of the Allied litigation. It then examines the three sources of authority underlying the secondary boycott ban—the language of section 8(b)(4), the section’s legislative history, and cases construing it—and assesses the Allied Court’s analysis of each. The Note argues that these three sources of authority actually undercut the result reached in Allied. Although the terms of section 8(b)(4) are silent on the requirements of a secondary boycott violation, the legislative history demonstrates that a primary labor dispute was central to Congress’ understanding of secondary boycotts. Decisions prior to Allied expanded the statute’s reach, but reinforced Congress’ basic approach. The Note concludes by criticizing the limitations Allied placed on union political activity and discussing the advantages of regulating such activities under the mandatory-permissive distinction of section 8(b)(3).

II

THE ALLIED Litigation

The Allied litigation began shortly after the ILA called for a trade embargo against the Soviet Union to protest the Soviet invasion of Afghanistan. When ILA Local 799 complied with its parent’s directive and refused to unload Soviet goods, the local disrupted business relationships stretching from its employer to the Soviet Union. Local 799 ordinarily referred longshoremen to Clark & Son of Boston, Inc., a stevedoring company engaged to unload cargo for Waterman Steamship Line. Waterman, in turn, had contracted with Allied International, Inc., an importer of Soviet wood products, to transport Allied imports to Boston harbor. By refusing to handle Soviet goods for Clark, Local 799 prevented Clark from performing its contract with Waterman, which prevented Waterman from performing its contract with Allied. With its access to the Boston docks restricted, Allied reduced its purchases from the Soviet Union and was in danger of failing to supply its customers. Faced with these business reverses, Allied sued the ILA.  

The company sought damages in federal district court, alleging that the ILA had engaged in a secondary boycott in violation of section 8(b)(4). The district court found section 8(b)(4) inapplicable to the ILA’s conduct and dismissed Allied’s suit on summary judgment. The Court of Appeals for the First Circuit reversed, finding the ILA’s activity squarely within the statute, and remanded for a hearing on damages. The Supreme Court unanimously affirmed.

In a brief opinion by Justice Powell, the Supreme Court flatly rejected the argument that a primary labor dispute was a prerequisite to a secondary boycott violation. The Court first looked to the language of


the statute. Justice Powell stated: "By its exact terms the secondary boycott provisions of section 8(b)(4) . . . would appear to be aimed precisely at the sort of activity alleged in this case." Applying section 8(b)(4) literally, Justice Powell found no exception for political boycotts. The statute prohibited a union from "forcing . . . any person to cease . . . doing business with any other person." The ILA clearly violated this mandate by forcing Clark, Waterman, and Allied to cease doing business with each other and the Soviet Union. It made no difference that this effect was caused by a political dispute with a foreign nation rather than a labor dispute with a primary employer. The Court also measured the ILA embargo against the statute's proviso, which states that section 8(b)(4) shall not be "construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." Because the ILA's goal did not concern Clark, Waterman, or Allied, the union was not engaged in primary activity and was not protected by the proviso.

The Court found support for its statutory interpretation in the legislative history of section 8(b)(4). Congress' central concern was the protection of neutral parties, "the helpless victims of quarrels that do not concern them at all." Because Clark, Waterman, and Allied did business with the Soviet Union, the ILA sought to use them to protest Soviet military policy. The attendant disruption of the companies' operations was exactly the evil Congress intended to prevent. The Court further found that political boycotts were not exempt from Congress' mandate to protect neutral parties. The views of Senator Taft, co-author of the statute, amply supported this proposition. He said: "Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." In the Court's view, if it accepted the argument that political boycotts were protected, it would "create a large and undefinable exception" to the statute's broad provisions.

Finally, the Court relied on its past decisions in finding the ILA

16. Id. at 218.
17. Id. at 225 (quoting § 8(b)(4)). For full text of statute, see supra note 8.
18. Id. at 219, 224-25
19. For full text of statute, see supra note 8.
20. 456 U.S. at 222-23 n.19.
21. Id. at 225 (quoting H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947), reprinted in 1 NLRB, supra note 9, at 314).
22. Id. at 223.
23. Id. at 225 n.23.
24. 93 CONG. REC. 4323 (1947), reprinted in 2 NLRB, supra note 9, at 1106.
25. 456 U.S. at 225.
embargo unlawful. In *NLRB v. Denver Building Trades Council*, for example, the Court held that Congress' dual objective in passing section 8(b)(4) was the protection of neutral employers and the preservation of primary activity.\(^{26}\) Since the ILA's embargo injured neutral employers and did not constitute primary activity, it was an unlawful secondary boycott.\(^{27}\)

Once the Court found that the ILA had violated section 8(b)(4), it quickly disposed of the union's claim to First Amendment protection for the embargo as political expression. The Court has long held that the secondary boycott ban does not unconstitutionally infringe on free speech.\(^{28}\) Since political and economic boycotts were no different for the purposes of section 8(b)(4), the statutory ban did not infringe on the ILA's First Amendment rights. Indeed, to the Court, it was more rather than less objectionable that the ILA had marshalled its powers "'in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity.'"\(^{29}\) Finding that the ILA had overreached its appropriate representational duties, the Court refused to protect the embargo.\(^{30}\)

III
THE IMPORTANCE OF THE PRIMARY LABOR DISPUTE

A. The Statutory Test

Courts and the NLRB have struggled to understand section 8(b)(4) since its enactment in 1947 as part of the Taft-Hartley amendments to the Act. The inherent problem with the statute stems from the elusive

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\(^{26}\) Id. at 223 n.20 (citing 341 U.S. 675, 692 (1951)).

\(^{27}\) Id.

\(^{28}\) Id. at 226 (citing NLRB v. Retail Store Employees, 447 U.S. 607, 616 (1980)).

\(^{29}\) Id. at 225-26 (quoting the First Circuit's opinion in *Allied*, 640 F.2d at 1378).

\(^{30}\) The Court also rebuffed the union's claim that essential elements of a § 8(b)(4) violation were missing apart from the absence of a primary labor dispute. For example, the ILA claimed that it was not trying to pressure Clark, Waterman, and Allied to cease doing business with the Soviets, but to "simply free ILA members from the morally repugnant duty of handling Russian goods." 456 U.S. at 224. Relying on well established precedent, the Court stated that it was unnecessary to find that the union's sole intention was the disruption of a secondary employer's business relationships. If a boycott could reasonably be expected to injure secondary parties, it was presumed that the union intended to pressure those parties as part of the boycott. Consequently, the ILA's subjective intent did not mitigate the statutory violation. Id. (citing NLRB v. Retail Store Employees, 447 U.S. 607, 614 (1980)). Although the Court's interpretation of § 8(b)(4) on the issue of intent is beyond question, the absence of a primary labor dispute is fatal to the Court's ultimate finding of a violation.

The Court also rejected the ILA's claim that § 8(b)(4) was inapplicable because the boycott was not "in commerce" within the meaning of NLRA §§ 2(6) and 2(7), 29 U.S.C. §§ 152(6), (7) (1977). Id. at 219-222. This topic is beyond the scope of this Note. For a discussion of this holding, see Comment, *NLRB Jurisdiction of Secondary Boycotts: ILA v. Allied International, Inc., A Missed Opportunity for the Supreme Court to Reevaluate Mobile*, 15 N.Y.U. J. INT'L L. & POL. 377 (1983).
distinction between legitimate primary activity and unlawful secondary activity.\textsuperscript{31} This vagueness in the concepts of primary and secondary activity has resulted in a complex and often arbitrary body of law, characterized by commentators as a swamp and a labyrinth.\textsuperscript{32} Secondary boycott jurisprudence is further clouded by the language Congress employed in section 8(b)(4). It has long been recognized that the statute obscures rather than clarifies the meaning of secondary activity.

In a series of cases, the Supreme Court recognized that the statute's express directions were hopelessly overbroad and refused to construe them literally.\textsuperscript{33} The Court found that, on its face, section 8(b)(4) prohibited union activity comprised of the following three elements: “Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person.”\textsuperscript{34} The Court realized that virtually all strikes and picketing, including lawful primary activity, satisfied these elements. For example, in discussing the third element of the statutory test (the union’s object), the Court observed that a union engaged in primary picketing against its employer “hopes . . . that all persons will honor the picket line,” including employees of other employers.\textsuperscript{35} Under the literal terms of the statute, such picketing would be unlawful because one of its aims would be to force the cessation of business between the picketed employer and other persons. The Court concluded that Congress did not intend to prohibit a goal so central to most primary activities and lim-


\textsuperscript{34} United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 98 (1958).

The three-part test was based on the statute as originally passed. The Landrum-Griffin amendments of 1959 changed the test slightly by, for example, prohibiting direct inducements of an employer to cease doing business with another employer as well as inducements of employees to force their employer to cease doing business with another employer. 29 U.S.C. § 158(b)(4)(ii)(B) (1977). These changes did not alter the main elements of the statutory test—union inducement and cessation of business.

ited the statute's application to secondary boycotts. Since section 8(b)(4) does not refer to, let alone define, secondary activity, other sources must be examined to determine whether political boycotts fall within the secondary boycott ban.

Disregarding its past decisions, the Allied Court found that the ILA violated section 8(b)(4) because its object was to force Clark, Waterman, and Allied to cease doing business with each other and the Soviet Union. The Court failed to acknowledge, however, that such an object is common to both primary and secondary activity and that a violation of the statutory test does not by itself establish a secondary boycott violation.

Nor does the Court's reliance on the proviso protecting primary activity resuscitate the statutory test. The Court measured the ILA embargo against the proviso and, finding that the ILA was not engaged in primary activity, concluded that the embargo was not exempt from the broad ban contained in the body of the statute. Since virtually all work stoppages are unlawful under the literal terms of the statute, the Court's approach essentially equates secondary activity with conduct unprotected by the proviso, or non-primary activity. This approach is unrealistic because it places the full burden of defining a secondary boycott upon the proviso.

The proviso was enacted twelve years after the original statute as part of the 1959 Landrum-Griffin amendments to the Act. It consists of a single clause and defines neither primary nor secondary activity. Indeed, it does not even mention the term secondary activity. It is illogical to conclude that such a spare clause, enacted years after the original statute, sets the parameters of unlawful secondary activity. Such a definition depends not on what the proviso declares as unlawful but on what the proviso fails to classify as lawful conduct. Rather than in-

36. *Id.* at 672.
37. *See supra* notes 16-18 and accompanying text.
39. *See supra* notes 19-20 and accompanying text.
40. Cf. Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962). Lesnick generally observed that the primary proviso did not define primary activity and, therefore, did not ease the courts' burden of distinguishing primary from secondary activity. *Id.* at 1395. Although Lesnick did not address the precise question presented here—whether Congress, by enacting the proviso, intended to ban all non-primary activity—his comments about the "picket line crossing" proviso to § 8(b)(4) are illuminating. This proviso states:

That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act...
terpreting the proviso to define a secondary boycott by omission, it is
more reasonable to find that the proviso merely sets an outer limit on
the definition of secondary activity. The proviso insures that the sec-
dary boycott ban, whatever its breadth, will not infringe on lawful pri-
mary activity. Since the body of section 8(b)(4) is unreliable, the
statute does not reveal whether the definition of secondary activity ex-
tends to the outer limit created by the proviso or comprises some nar-
rower conduct. Contrary to the Allied Court's interpretation, the
statute conceivably contemplates three types of work stoppages: un-
lawful secondary activity, lawful primary activity, and activity that is
neither primary nor secondary. Since the statute is unclear on the
scope of these categories, it does not support the Allied Court's finding
that non-primary activity, such as the ILA embargo, is unlawful.

B. The Taft-Hartley Approach

1. Congressional Emphasis on Primary Labor Disputes

Because of the unreliability of the statute's terms, the Supreme


Lesnick discusses the views of another commentator, who found that "the very existence of
the proviso indicates that Congress was aware of the far-reaching character" of the statute; other-
wise, "it would not have deemed it necessary expressly to provide an exception in favor of refus-
als to cross primary picket lines." Accordingly, this commentator applied the statutory test
literally and found that all picketing not protected by the proviso was unlawful. 62 COLUM. L.
REV. at 1404 (citing Comment, "Primary" and "Secondary" Labor Action: The Case of the Ne-
glected Proviso, 1 LAB. L.J. 339, 341 (1950)). Lesnick rejected the premise that the proviso mani-
fested "a congressional judgment as to the proper reach of the secondary boycott ban." Id. The
proviso's only purpose was to insure that picket line crossing would not be considered unlawful. It
did not purport to revive the statutory test as a measure of unlawful picketing. Id. at 1407. Simi-
larly, the proviso protecting primary activity merely insures that the secondary boycott ban does
not infringe on primary activity. It does not reflect a congressional judgment that courts should
reverse their previous position and read the body of the statute literally. But see ILA (Ocean
Shipping Serv.), 146 N.L.R.B. 723, 727-28 & n.10, 55 L.R.R.M. (BNA) 1389, 1390 & n.10 (1964),
enforcement denied, 332 F.2d 992 (4th Cir. 1964).

enactment of proviso confirmed that § 8(b)(4) was only designed to prohibit secondary, not pri-
mary, activity).

42. The district court in Allied also interpreted the statute literally, but, unlike the Supreme
Court, found that the ILA embargo was not prohibited. 488 F. Supp. 524, 531 n.5. This approach
is equally incorrect. The district court stated that an element of a violation was the cessation of
business between an employer and "any other person." Since the Soviet Union was not a person,
the court reasoned, the statute did not apply. Presumably, the court construed the term "person"
to mean an entity protected by the Act. The Supreme Court long ago rejected this restriction,
holding that corporate and governmental employers beyond the Act's jurisdiction were nevertheless
"persons" within the meaning of the Act. Plumbers Local 298 v. County of Door, 359 U.S.
(1956).

On the other hand, the statute's use of the term person does not mean that any cessation of
business between an employer and a person is a violation. As discussed in the text, a literal
reading of the statutory elements would ban virtually all strikes and picketing, a consequence
Congress did not intend.
Court has often looked to Congressional intent for guidance in secondary boycott cases.\(^4\) The importance of the statute's legislative history is magnified in the Allied case due to the dearth of significant judicial authority dealing with political boycotts. Of the few cases involving such activities, most did not squarely address the applicability of section 8(b)(4).\(^4\) The remaining decisions have little precedential value.\(^4\) Consequently, the concerns of the statute's authors, as chronicled in the Taft-Hartley debates, weigh heavily in determining the statute's applicability to political boycotts.\(^4\)

The Taft-Hartley debates indicate that the Teamsters' boycotts typified the kind of activities Congress sought to ban. If an employer refused to recognize a campaigning union as the employees' bargaining agent, the union would invoke the support of the Teamsters, who occupied a strong position in the trucking industry. By refusing to carry the recalcitrant employer's goods, the Teamsters prevented trucking companies from transporting materials to or from the employer. The boycott would isolate the employer from its customers and suppliers, thus pressuring the employer to accede to the campaigning union's recogni-

\(^4\) See, e.g., Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 623-25 (1967); United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 99-100 (1958). This Note finds the Supreme Court's interpretation of Congressional intent inapplicable to political boycotts. See infra notes 61-66 and accompanying text. Nevertheless, the Court's frequent reliance on legislative history demonstrates the importance of this history in secondary boycott analysis.


After denying the employer's suit for a contractually based injunction, the United Mine Workers court noted, in dicta, that § 8(b)(4) afforded the employer alternative remedies. 519 F.2d at 1247 n.23. The court did not, however, address secondary boycotts in detail.

A number of cases in which § 8(b)(4) allegations were actually made likewise failed to focus on the present question. These cases found no violation based on an amalgam of theories. See NLRB v. ILA, 332 F.2d 992 (4th Cir. 1964); Danielson v. Fur Dressers Local 2F, 411 F. Supp. 655 (S.D.N.Y. 1975). These cases are discussed in more depth infra notes 74, 84-86, 94 and accompanying text.

\(^5\) See Penello v. ILA, 227 F. Supp. § 10(1) injunction 164 (D. Md. 1964), stayed pending full hearing, unpublished decision (4th Cir.) (stay of § 10(1) injunction against ILA protest of Cuban military policies); ILA (Ocean Shipping Serv.), 146 N.L.R.B. 723, 55 L.R.R.M. (BNA) 1389 (1964), enforcement denied on other grounds, 332 F.2d 992 (4th Cir. 1964) (enforcement denied of finding that ILA protest of Cuban military policies was violative of § 8(b)(4)). The litigation surrounding the ILA's Cuban embargo is discussed infra notes 84-86, 94 and accompanying text.

\(^6\) Although the Landrum-Griffin amendments modified the statute to close certain loopholes, they did not disturb the primary-secondary distinction drawn by the Taft-Hartley Congress. See, Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 623-24 (1967).
Boycotts by other unions took the same form as the Teamsters' tactics. These examples reveal that a primary labor dispute was an essential element of Congress' understanding of secondary boycotts. The primary labor dispute was the focus of the secondary boycott: unions, such as the Teamsters, exerted pressure against secondary employers as a means of gaining additional leverage against primary employers, particularly in disputes over union recognition. This organizing tactic was of such central concern to Congress that the co-author of section 8(b)(4), Senator Taft, remarked that the statute would make it unlawful for a union to engage in an "indirect organizational strike" against a primary employer.

Congress' emphasis on the primary labor dispute is also evident in the reasons it advanced for condemning secondary activity. Although these concerns were reflected in individual members' views, taken together they represent a Congressional balancing of policies. Congress assessed both the harm caused by secondary boycotts and the need for unions to engage in such tactics. Weighing these interests, the majority concluded that primary labor disputes should be resolved by the main combatants alone—the primary employer and its employees or the union.

On one side of the scale, the legislators assessed the costs of secondary boycotts. Their foremost concern was that secondary boycotts interfered with the primary employer's labor relations. Many of the statute's supporters believed secondary boycotts were so powerful that they forced both primary employers and their employees to accept union demands against their will. A prohibition on secondary boycotts would enable primary employers, their employees, and the union to

47. Many Congressmen decried this practice. See, e.g., 93 Cong. Rec. 3533-34 (1947), reprinted in 1 NLRB, supra note 9, at 613-14 (statement of Rep. Hartley); 93 Cong. Rec. at 3954, reprinted in 2 NLRB, supra note 9, at 1012 (statement of Sen. Taft).

Representative Buck gave this example of a Teamsters' boycott:
In California, a small firm manufactured paint with the assistance of three employees. A union agent appeared demanding that the employer sign a closed shop contract forcing these three employees to join the union or be fired. These employees were satisfied with their wages and conditions of employment, did not want to join the union, and the employer on their behalf refused to execute the contract. Thereupon, the plant was picketed and all teamsters in the vicinity were forbidden to haul raw materials or finished products. Faced with no alternative, the employer then signed the contract and each employee paid $75 initiation fee.

93 Cong. Rec. at 3559-60, reprinted in 1 NLRB, supra note 9, at 658-59.

48. See, e.g., 93 Cong. Rec. at 3954, reprinted in 2 NLRB, supra note 9, at 1012 (statement of Sen. Taft); 93 Cong. Rec. at 4255, reprinted in 2 NLRB, supra note 9, at 1056 (statement of Sen. Ellender).

49. 93 Cong. Rec. at 3954, reprinted in 2 NLRB, supra note 9, at 1012. See also 93 Cong. Rec. at 1910, reprinted in 2 NLRB, supra note 9, at 982 (statement of Sen. Morse); 93 Cong. Rec. at 4255, reprinted in 2 NLRB, supra note 9, at 1056 (statement of Sen. Ellender).
settle their differences without interference from outside parties.\textsuperscript{50} Second, Congress was concerned about disruption of business. Secondary boycotts infringed on the primary employer's freedom to buy and sell goods.\textsuperscript{51} They also threatened the economy as a whole because a single primary labor dispute could set off a chain reaction of secondary strikes tying up the entire nation.\textsuperscript{52} Lastly, they upset the operations of neutral secondary employers who were unconcerned in the labor problems of the primary employer.\textsuperscript{53} By confining primary labor disputes to the main combatants, these disruptions would be avoided.

On the other side of the scale, the statute's proponents concluded that a ban on secondary activity would not hinder labor from pursuing its goals. A union could still pressure the primary employer directly by organizing the primary employer's workers and engaging in collective bargaining. This sentiment dovetailed with the majority's main objection to secondary boycotts. Because a union could resolve a primary labor dispute by dealing with the primary employer and its employees directly, Congress saw little reason to allow the union to enlist outside parties to influence the dispute's resolution.\textsuperscript{54}

Because the ILA embargo did not involve a primary labor dispute, it differed from Congress' conception of secondary boycotts in both form and effect. Unlike the objective of traditional secondary activity, the target of the ILA embargo was not a primary employer. Although the ILA sought to influence the Soviet Union's military policy, the union was not using the boycott to gain leverage over Soviet labor rela-

\textsuperscript{50} See, e.g., H.R. REP. No. 245, 80th Cong., 1st Sess. 24 (1947), reprinted in 1 NLRB, supra note 9, at 315; 93 CONG. REC. at 3533-34, reprinted in 1 NLRB, supra note 9, at 613-14 (statement of Rep. Hartley); 93 CONG. REC. at 3559, reprinted in 1 NLRB, supra note 9, at 658-59 (statement of Rep. Buck); 93 CONG. REC. at 3954, reprinted in 2 NLRB, supra note 9, at 1012 (statement of Sen. Taft); 93 CONG. REC. at 4255, reprinted in 2 NLRB, supra note 9, at 1056 (statement of Sen. Ellender); 93 CONG. REC. at 5147, reprinted in 2 NLRB, supra note 9, at 1497 (statement of Sen. Ball).

\textsuperscript{51} See, e.g., 93 CONG. REC. at 3533-34, reprinted in 1 NLRB, supra note 9, at 613-14 (statement of Rep. Hartley); 93 CONG. REC. at 3954, reprinted in 2 NLRB, supra note 9, at 1012 (statement of Sen. Taft).

\textsuperscript{52} See, e.g., 93 CONG. REC. at 3542, reprinted in 1 NLRB, supra note 9, at 630 (statement of Rep. Landis); 93 CONG. REC. at 4323, reprinted in 2 NLRB, supra note 9, at 1107 (statement of Sen. Taft).

\textsuperscript{53} See, e.g., H.R. REP. No. 245, 80th Cong., 1st Sess. 24 (1947), reprinted in 1 NLRB, supra note 9, at 315; 93 CONG. REC. at 4323, reprinted in 2 NLRB, supra note 9, at 1106 (statement of Sen. Taft).

\textsuperscript{54} Senator Morse stated this proposition succinctly:
By this device [secondary boycotts], labor unions attempt to organize employer A by bringing economic pressure to bear on employer B. It seems to me that with the democratic election machinery of the Wagner Act, and with the provisions according federal protection to employees in their efforts to organize, it is no longer legitimate for labor to engage in this type of conduct.

93 CONG. REC. at 1910, reprinted in 2 NLRB, supra note 9, at 982. See also 93 CONG. REC. at 4323, reprinted in 2 NLRB, supra note 9, at 1107 (statement of Sen. Taft).
tions. Nor were Clark, Waterman, and Allied primary employers. They were the means by which the ILA pressured the Soviet Union; the ILA sought no labor objective from these companies.

In the absence of a primary labor dispute, the balance of policies supporting the secondary boycott ban falls apart. Congress' main concern in passing section 8(b)(4) was to insulate the process by which primary employers resolved their labor problems. The ILA embargo, in contrast, did not threaten the integrity of this process because the embargo did not involve a primary labor dispute. Congress also believed that the opportunity to pressure the primary employer directly compensated unions for the loss of the secondary boycott weapon. The ILA, in contrast, was left with no opportunity to organize, bargain, or refuse to work in support of its objectives after the prohibition of its embargo. The Allied decision prohibited the ILA from pressuring the Soviets indirectly by refusing to work for companies doing business with them. And, the ILA could not have organized Soviet workers and bargained with the Soviet Union directly because of the obvious practical and legal barriers to such an effort. Although the ILA could have used other tactics to express its views, such as lobbying or leafletting, these devices would not have been comparable to the arsenal of organizing and bargaining tools Congress envisioned unions would have against the primary employer.\footnote{The First Circuit in Allied suggested that these forms of pressure were an adequate alternative to the use of economic weapons. 640 F.2d at 1378-79. Accord ILA (Allied Int'l, Inc.), 257 N.L.R.B. 1075, 1085 n.45, 108 L.R.R.M. (BNA) 1033, 1042 n.45 (1981).}

The remaining Congressional concern, disruption of business, was one of a number of reasons for the statute's passage. Although the ILA embargo certainly interfered with the businesses of Clark, Waterman, and Allied and may have threatened to set off strikes by sympathetic unions, the application of section 8(b)(4) in the absence of the other Congressional policies distorts Congressional intent. Moreover, if business losses were used as the main criteria for applying the statute, virtually all work stoppages would be anathema. A major primary strike in a critical industry, such as oil, would not only injure the primary employer, but also gravely affect commerce in general and individual employers unconcerned in the primary strike. Since Congress did not intend to ban all work stoppages in passing section 8(b)(4), the business disruption caused by the ILA embargo was insufficient justification for finding a secondary boycott violation.

\section*{2. The Allied Court's Overemphasis on Neutral Employers}

By focusing on isolated parts of the legislative history, the Allied Court overlooked the importance of the primary labor dispute to Con-
gress' understanding of secondary boycotts. For example, the Court relied on Senator Taft's statement that there was no difference between "different kinds of secondary boycotts." To the Court, this remark proved that the statute banned political as well as economic boycotts.66 The Court took this remark out of context. Senator Taft was responding to an attempt by the statute's opponents to limit the secondary boycott ban to specified objects, such as secondary pressure to compel primary employers to violate the Act. The statute's opponents believed that other types of secondary boycotts should remain lawful.67 Senator Taft, in concluding that all secondary activity should be banned, did not imply that secondary boycotts were anything other than a means of pressuring primary employers over labor disputes.

The Court's perception of Congressional policies also rested on isolated portions of the debates. The Court found that Congress' dual purpose in enacting section 8(b)(4) was the protection of neutral employers and the preservation of primary activity.68 In so finding, the Court committed two analytical errors. First, the Court overemphasized Congressional concern for neutral employers. This concern was a small part of the overall balance of policies prompting the statute's passage, and the Court failed to realize that Congress' other policies were not implicated in the absence of a primary labor dispute.69 Second, the Court misconstrued the import of Congress' desire to preserve primary activity. The Court concluded that this policy indicated Congress' intention to ban all non-primary strikes and picketing. The Court's interpretation emphasized the union's relationship to secondary employers. The issue was whether the union was engaged in a primary labor dispute with its employer; the absence of a primary labor dispute indicated that the union was not engaged in primary activity and, therefore, was in violation of section 8(b)(4). Under this view, there are two kinds of work stoppages. A work stoppage that does not qualify as a primary strike is automatically a secondary boycott. Congress' focus, in contrast, was on the object of the boycott, the primary employer, rather than on the employers the union used to effect the boycott. The issue to Congress was whether a union's work stoppage against its employer was in aid of a primary labor dispute with another employer. The presence of a primary labor dispute was the indicator of

56. See supra notes 23-24 and accompanying text.
57. See, e.g., 93 Cong. Rec. at 4155, 4324, reprinted in 2 NLRB, supra note 9, at 1047, 1109.
58. See supra notes 21-22, 26-27 and accompanying text.
59. Clark, Waterman, and Allied might not even be considered neutral employers within the Congressional scheme. In the Congressional discussion, "neutral" meant neutral in relation to another's labor dispute. A neutral employer should not have its own labor relations complicated and burdened by the labor problems of another employer. Congress thus sought to insulate neutrals from the burden of other employers' labor problems, not to protect them from all activities that do not directly concern them.
a secondary boycott. The approach of the Court and Congress preserved primary activity. Congress' approach, however, did not equate non-primary activity with secondary activity. Instead, it allowed the possibility of three types of work stoppages. If a union's work stoppage against its employer aided a primary labor dispute with that employer, it was primary activity; if the same work stoppage aided a primary labor dispute against another employer, it was secondary activity; and if the work stoppage was unrelated to a labor dispute with any employer, it was logically neither primary nor secondary activity.60

3. Misapplication of Precedent Involving Economic Boycotts

Other courts have also found that Congress' main concern in enacting section 8(b)(4) was the protection of neutral employers.61 The short response to these interpretations is that, like the Allied decision, they misread Congress' intentions. However, the apparently large divergence between this Note's analysis of Congressional intent and several judicial interpretations requires a more detailed response.

In a case involving an economic boycott, courts have commonly focused on the neutral secondary employer rather than the primary employer, because it makes for a clearer inquiry. Typically, the union has a dispute with a primary employer over an economic matter, such as union representation. While under such circumstances it makes little difference whether the focus is placed on the primary employer or the secondary employer, the easier inquiry is to assess the union's relationship to the secondary employer. The sole issue in such an inquiry is whether the secondary employer has a primary labor dispute with the union. If no labor dispute exists between these parties, a strike against the secondary employer necessarily intrudes upon a primary labor dispute with another employer.

In contrast, if the focus is on the primary employer the inquiry is more complex. It must first be determined whether the union has a labor dispute with the primary employer. This determination may prove difficult if the union's recognition campaign is in its early stages

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60. The Court also believed that it would create a "large and undefinable exception" to the secondary boycott ban if it protected political boycotts. See supra note 25 and accompanying text. The Court failed to perceive the similarity between its approach and Congress' approach. Both depended on the definition of a primary labor dispute. To the Court, a § 8(b)(4) violation occurred if the union was not involved in a primary labor dispute; to Congress, a violation occurred only if a primary labor dispute existed and the union placed indirect pressure on it. Although Congress' approach created an exemption for political boycotts, this exemption rested on the same inquiry as the Court's finding of a violation and was thus not undefinable.

and there is little evidence of an ongoing dispute with the primary employer. It must then be established that the union's strike against the secondary employer is not in aid of a labor dispute with that employer.

Courts have also focused on the secondary employer because the justification for banning a strike is better highlighted. As the initial victim of a strike, the secondary employer is often the party who files charges against the union. The secondary employer's injuries provide a palpable justification for applying section 8(b)(4) since an unchecked strike could completely shut down its operations. Under those circumstances, there is little need for a court to extend its inquiry beyond Congressional concern for neutral employers. Since the primary employer is often not a party to the suit, it does not have counsel present to assert its injuries to the court. In addition, at the time of suit, there may be no injury to the primary employer for the court to redress. Although the secondary employer immediately feels the effects of a strike, the primary employer may not suffer substantial injury until a number of secondary employers cease doing business with it. By filing suit quickly, the secondary employer forecloses the possibility of a successful secondary boycott and thereby shields the primary employer without explicit judicial acknowledgment of such protection. Similarly, the danger of a chain reaction of sympathy strikes is automatically averted by the secondary employer's successful suit. There is also no need for the court to assess whether the union has an adequate opportunity to pursue its goals. The very existence of a primary employer enables the union to engage in direct pressure tactics and prevents the union from arguing that this aspect of the Congressional rationale is absent from the case.

Considering that analysis of the secondary employer's status presents fewer conceptual problems and more dramatic injuries, it is understandable that courts have frequently emphasized Congressional concern for neutral employers. In cases involving economic work stoppages, such an interpretation is unobjectionable because it implicitly accounts for the overall purposes of the secondary boycott ban. But, it must be recognized that this approach is merely a shorthand method of addressing secondary boycott problems. The presence of the full range of Congressional policies remains the measure of the statute's applicability to a given set of facts. Its presence, although not explicitly addressed in many instances, indicates that Congress' goal of insulating the labor relations of different employers is effectuated by banning the particular activity.

Although the shorthand approach of focusing on secondary employers is appropriate for economic work stoppages, it cannot be en-

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62. For further discussion of the difficulty of determining the presence of a labor dispute between the union and primary employer, see infra note 72.
grafted upon cases involving political strikes and picketing. Such cases do not involve a primary labor dispute and do not implicate the policies underlying section 8(b)(4). Consequently, focusing on the allegedly neutral employer obscures the dissimilarities between economic and political strikes and distorts the purposes of the statute.

The Allied Court's reliance on *NLRB v. Denver Building Trades Council* illustrates the error of applying the shorthand approach developed in economic contexts to political problems. In *Denver Building*, the union picketed its employer, a general contractor, to demand an all union construction crew. The Court held that the union violated section 8(b)(4) because it had tried to force the general contractor to cease doing business with a non-union subcontractor. The Court stated that Congress' dual objective was to preserve primary activity and protect neutral employers. Finding that the union's dispute was not with the general contractor, the Court concluded that the general contractor was a neutral employer and the picketing was unlawful. Based on *Denver Building*, the Allied Court concluded that all non-primary activity was unlawful under section 8(b)(4) because it injured neutral employers. The Allied Court failed to appreciate the implicit importance of the primary labor dispute in *Denver Building* and the inapplicability of that decision's analytical approach to cases involving political activities.

Notwithstanding the *Denver Building* Court's focus on the general contractor, it is clear that the case involved a primary labor dispute and implicated the full range of Congressional policies. The primary labor dispute was between the union and the subcontractor over the use of non-union labor. The threatened injury to the subcontractor was the union's interference in its labor policies and the loss of its contract with the general contractor. The picketing could also have set off a chain reaction of sympathy strikes in support of the aggrieved union. Lastly, the union had the opportunity to pressure the subcontractor directly, despite the ban on picketing against the general contractor. Under those circumstances, the determinative factor was not that the union's picketing was non-primary and injured neutral employers. Rather, the picketing was unlawful because it constituted secondary pressure in aid of a primary labor dispute and thereby implicated the full range of Congressional policies, including protection of neutral employers. Contrary to the Allied Court's interpretation, the case reaffirmed the importance of a primary labor dispute to the application of section 8(b)(4) and did not support a ban on activities, such as the ILA em-

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63. *See supra* notes 26-27 and accompanying text.


65. Although the *Denver Building* Court did not use the primary labor dispute as the touchstone for applying § 8(b)(4), it recognized that the union's primary dispute was with the subcontractor over the use of non-union labor. *Id.* at 688.
bargo, that involve no primary labor dispute.66

C. Redefining the Primary Labor Dispute

Although there have been few cases dealing with political boycotts, courts have occasionally addressed the primary labor dispute's significance in the context of economic work stoppages. These decisions provide an additional source of authority for assessing the role of a primary labor dispute in political contexts.

Congress viewed the object of a secondary boycott as an ongoing conflict between the primary employer and a union, such as a recognition campaign at the primary employer's plant. In two lines of cases—union solidarity efforts and inter-union disputes—the courts expanded the traditional object of a secondary boycott to other conflicts involving primary employers. Although the union solidarity and inter-union dispute cases expanded the definition of a primary labor dispute without sufficient consideration of the full range of Congressional concerns, they nevertheless reaffirmed the importance of the primary labor dispute in secondary boycott analysis.

1. Union Solidarity Efforts

NLRB v. Washington-Oregon Shingle Weavers’ District Council (Sound Shingle)67 is representative of the union solidarity cases. In Sound Shingle, the Shingle Weavers union worked for a shingle processor, Sound Shingle Co., which had contracted to process shingles for a non-union shingle manufacturer, North Shore Shingle Co. Because North Shore used non-union labor, the Weavers refused to work on its goods.68 Charged with a section 8(b)(4) violation, the union argued it had not engaged in a secondary boycott because it was not currently seeking recognition from North Shore. The Court rejected the union's argument, broadly holding that a dispute with the boycott's object was unnecessary to a violation of the statute. Congress' main purpose was to project neutral employers, and Sound Shingle was neutral in the union's objections to North Shore's work practices, whether or not North Shore was currently embroiled in a labor dispute.69

Despite the Court's broad statement that a primary labor dispute was unnecessary to a section 8(b)(4) violation, Sound Shingle did not undermine Congress' emphasis on the primary employer. The Weavers' boycott differed from the classic Teamsters' tactic because it was

[Notes]

66. The Court's reliance on United Bhd. of Carpenters v. NLRB was similarly flawed. 456 U.S. at 223 n.20.
67. 211 F.2d 149 (9th Cir. 1954).
68. Id. at 150.
69. Id. at 152.
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not in aid of an active organizational campaign against a primary employer. Rather, the Weavers had a standing objection to working on non-union goods. Evidence was introduced that the union, in fact, had an ongoing organizational campaign at North Shore's plant, but the Court accepted the union's denial of the evidence for purposes of argument. The absence of a current dispute did not mean that there was no primary labor dispute of any kind, however. It only indicated that the concept of a primary labor dispute included any union objections to a primary employer's labor relations, whether or not the subject of current demands against the primary employer. Thus, the primary labor dispute in Sound Shingle was the union's displeasure with North Shore's work practices. The Weavers' refusal to work for its employer, like the Teamsters' boycotts, penalized a primary employer for the conduct of its labor relations. Although the Weavers were not seeking an immediate advantage, such as recognition, their refusal to work constituted indirect pressure in aid of a labor dispute with North Shore.

Sound Shingle's expansion of the primary labor dispute concept did not alter the policies underlying the secondary boycott ban. Although the Court focused on the effect the Weavers' action had on neutral employers, the decision effectuated virtually the full range of Congressional policies. Congress' foremost concern was to insulate a primary employer's labor relations from outside pressure. A traditional secondary boycott, because it intervened in an ongoing labor controversy, may have been more intrusive than the Weavers' boycott. But, the Weavers' refusal to work also intruded upon North Shore's labor relations by penalizing the company for the use of non-union labor. Congress' goal of protecting commerce and the businesses of primary and neutral employers was apparent on the Sound Shingle

70. Id.
71. See Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. PA. L. REV. at 1016.
72. Although the absence of an ongoing primary labor dispute did not change the Congressional form of secondary boycotts, it did make the statute more difficult to apply. In the absence of an ongoing primary labor dispute, there is less tangible evidence of the union's goal in engaging in a work stoppage. Consequently, it becomes difficult to discern whether the union's object is to lawfully pressure its own employer or unlawfully pressure another employer. For example, in Sound Shingle, the union's goal was arguably to preserve jobs at Sound Shingle's plant. The union's objection was not to North Shore's work practices under those circumstances, but to Sound Shingle's subcontracting of shingle work to another company. See Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 113 U. PA. L. REV. at 1005, 1015-16. If the union's goal was work preservation, its work stoppage was aimed at its employer and was lawful primary activity. See, e.g., Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967).
73. In focusing on neutral employers, the Court relied on the same isolated comments in the legislative history as did the Allied Court. 211 F.2d at 152. Although this interpretation is understandable given the nature of economic boycotts, it does not accurately reflect Congress' reasons for enacting § 8(b)(4). See supra notes 61-66 and accompanying text.
facts as well. The Weavers’ refusal to work disrupted North Shore’s business, threatened to set off a chain reaction of sympathy strikes, and interfered with Sound Shingle’s freedom to contract with non-union companies. Lastly, the existence of a primary employer enabled the union to pursue its objectives despite the prohibition of its boycott. The union could have directly pressured North Shore by organizing its workers and engaging in collective bargaining.

The most unusual element in Sound Shingle was not the absence of a current dispute with North Shore, but the foreign citizenry of the company. A Canadian based business, North Shore was presumably not the subject of Congressional solicitude. Consequently, disruption of the primary employer’s operations was arguably not of concern in Sound Shingle, and the sole evil of the boycott was the injury to neutral employers and commerce in general. Given that the Weavers could have proceeded against North Shore directly, these business losses were arguably unjustified, and the Court correctly found a section 8(b)(4) violation.

The opportunity to organize and bargain with North Shore was a critical factor, however, because it counterbalanced the Weavers’ loss of the boycott weapon. If, for example, Canadian law prohibited union activity, the Weavers would have no opportunity to organize or bargain in Canada. In the absence of a primary employer accountable for its labor policies, there would be no primary labor dispute. The target of the Weavers’ objections would not be North Shore for its use of non-union labor, but the Canadian labor laws overarching the company’s practices. Those circumstances would be more akin to the ILA embargo than to a secondary boycott. As in Allied, banning the Weavers’ strike would only further Congress’ concern for commerce in general and neutral employers. As discussed previously, the goal of protecting business does not justify a section 8(b)(4) violation once this goal is untethered from Congress’ overall approach to secondary boycotts.

2. Inter-Union Disputes

The inter-union dispute cases worked a similar, though somewhat more drastic, change in secondary boycott analysis. The main inter-union dispute cases arose out of a single controversy and resulted in

74. Cf Danielson v. Fur Dressers Local 2F, 411 F. Supp. 655 (S.D.N.Y. 1975). In Danielson, a union that worked for an American skin processor refused to work on skins imported from an Argentinian company because, under Argentinian law, a minimum of 80% of exported skins had to be pre-processed. The Court found that the union’s dispute was with Argentinian law, not the Argentinian company, and held that such a dispute was protected by the first amendment as international lobbying. The first amendment’s application to political work stoppages is discussed infra note 93 and accompanying text. The point here is that the Danielson Court recognized that boycotts can be aimed at laws controlling company actions rather than the company itself.

75. See supra text following note 55.
two court of appeals decisions under the same caption, *National Maritime Union v. NLRB (NMU).* In the NMU cases, Cambridge Carriers, Inc., bought the S.S. Maximus and hired NMU to work the ship. Marine Engineers Beneficial Association (MEBA) had a collective bargaining agreement with the former owner of the S.S. Maximus, and when NMU replaced MEBA, MEBA lawfully picketed the ship. In retaliation, NMU picketed various piers where MEBA was employed. When longshoremen refused to cross NMU picket lines, a number of MEBA’s employers successfully brought section 8(b)(4) charges against NMU before the NLRB. The Courts of Appeals for the District of Columbia Circuit and Second Circuit enforced the NLRB’s orders, emphasizing that Congress sought to protect neutral employers and commerce in general. It was immaterial whether business was disrupted by a union dispute with a primary employer or by an inter-union dispute. It was sufficient that NMU’s actions drew other businesses into a labor controversy originating at Cambridge Carriers’ premises.

Like *Sound Shingle*, the NMU decisions modified the definition of a primary labor dispute. The NMU’s picketing differed from traditional secondary picketing because its object was not to pressure an employer. Rather, NMU’s dispute was with MEBA over control of the S.S. Maximus’ work. By finding a section 8(b)(4) violation on these facts, the courts expanded the concept of a primary labor dispute to include inter-union battles as well as primary employer-union conflicts. Cambridge Carriers, however, remained the primary employer, although it was not the object of NMU’s displeasure. As the D.C. Circuit recognized, Cambridge Carriers was the “orbit of conflict,” the “employer in whose labor relations . . .” the dispute arose. By picketing neutral employers, NMU sought to gain leverage in a labor dispute arising at another employer’s premises. This framework of analysis retained the essence, if not the letter, of Congress’ emphasis on the primary employer’s labor relations.

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77. NMU (Delta Steamship Line), 147 N.L.R.B. 1328, 56 L.R.R.M. (BNA) 1412 (1964); NMU (Houston Maritime Ass’n), 147 N.L.R.B. 1243, 56 L.R.R.M. (BNA) 1410 (1964); NMU (Weyerhaeuser Lines), 147 N.L.R.B. 1317, 56 L.R.R.M. (BNA) 1397 (1964). *Weyerhaeuser Lines* was not appealed.
78. 346 F.2d at 416-19; 342 F.2d at 542-44. The D.C. Circuit was mainly concerned about neutral employers, whereas the Second Circuit was concerned about commerce in general.
79. 346 F.2d at 417.
80. Faced with a case similar to NMU, Judge Learned Hand found that Congress did not intend § 8(b)(4) to prohibit union pressure on another union. The object of a secondary boycott was to place indirect pressure on an employer, not another union. *Douds v. ILA*, 224 F.2d 455, 459-60 (2d Cir.), cert. denied, 350 U.S. 873 (1955). Although Judge Hand’s decision was more faithful to the traditional form of secondary boycotts, both NMU decisions misunderstood his interpretation and rejected it. 346 F.2d at 419; 342 F.2d at 544-45. *See also* NLRB v. Twin City
In modifying the definition of a primary labor dispute, the NMU courts only focused on Congressional concern over the disruption of business. Although Congress' entire balance of policies was evident in NMU, the decisions diluted individual policies within the balance. NMU arguably effectuated Congress' main goal of insulating the primary labor dispute because it protected one of the primary parties to the dispute, MEBA. Yet, an important aspect of this policy was not implicated because the usual object of secondary pressure, the primary employer, was not injured. Cambridge Carriers was not the target of NMU's picketing, and its relations with its employees, represented by NMU, were not disrupted. Similarly, the NMU facts did not fully implicate the second of Congress' concerns, the effects of a secondary boycott on business. One aspect of this policy was to protect the primary employer's business; in NMU, NMU's picketing of MEBA's employers did not affect Cambridge Carriers' operations. Lastly, Congress envisioned that a union would be able to directly pressure the boycott's target as a substitute for secondary activity. NMU retained some organizing and bargaining weapons to maintain control over the S.S. Maximus' work because it could have pressured Cambridge Carriers to resist MEBA's claims. But, since NMU's dispute was with a union and not an employer, it lost the opportunity to collectively bargain or strike against its primary adversary over control of the S.S. Maximus' work.

NMU may have stretched section 8(b)(4) beyond its intended reach. There were fewer evils than in a traditional secondary boycott and a greater need for NMU to picket MEBA's employers as a means of pressuring MEBA. Nevertheless, even under NMU's attenuated concept of a secondary boycott, let alone the slight modifications under Sound Shingle, the ILA embargo was not a section 8(b)(4) violation. The embargo's target was not a primary labor dispute because the ILA did not actively dispute or object to any aspect of a primary employer's labor relations. Consequently, the embargo did not intrude upon the resolution of a primary labor dispute. Further, after the embargo's prohibition, the union had no opportunity to use any organizing or bargaining weapons in aid of its objectives. The sole Congressional policy applicable to the embargo was the disruption of business. As discussed

Carpenters Dist. Council, 422 F.2d 309 (8th Cir. 1970) (picketing by reason of inter-union dispute held to be secondary boycott).

81. 346 F.2d at 416 n.8; 342 F.2d at 543-44. As discussed supra notes 61-66 and accompanying text, this interpretation is inaccurate.

82. NMU could have tried to organize MEBA's professional staff and engage in collective bargaining with MEBA through these employees. But this tactic would have brought NMU no closer to the subject matter of its dispute with MEBA, control of the S.S. Maximus' work. The dispute between NMU and MEBA would have been of no concern to the professional staff's employment relationship with MEBA, and it would have been unrealistic for NMU to have considered this option to pressure MEBA.
previously, this policy is a tenuous ground for singling out the ILA embargo as an unlawful secondary boycott. 83

3. The Cuban Boycott

One other case, Penello v. ILA, also sought to redefine the primary labor dispute. 84 One of the few decisions involving a political work stoppage, Penello announced a completely unrealistic theory for analyzing secondary boycott allegations. There, the ILA refused to work on ships doing business with Cuba in response to the stationing of Soviet missiles on Cuban territory. When ILA Local 1355 refused to unload the Tulse Hill’s cargo, the ILA was sued by the local’s employer, a stevedoring company, and the Tulse Hill’s owner, Ocean Shipping Service. In a preliminary injunction hearing, the district court concluded that Ocean Shipping Service was the primary employer because the ILA’s aim was to force Ocean to cease doing business with Cuba. 85 The stevedore was the secondary employer because the ILA forced the stevedore to cease doing business with Ocean. In short, the ILA forced the stevedore to cease doing business with Ocean to pressure Ocean to cease doing business with Cuba. 86 Applying this theory to the Allied facts, Allied would be the primary employer, and Clark and Waterman would be secondary employers. The ILA’s primary goal would be to force Allied to cease doing business with the Soviet Union.

This approach is patently in error. The ultimate object of the ILA’s displeasure in Penello was Cuba, and the union voiced its objections by pressing the stevedore and Ocean to cease doing business with that country. By focusing on one link in the chain of employers leading to Cuba, the Penello court ignored the union’s ultimate objective. Similarly, in Allied, Clark, Waterman, and Allied were the means

83. See supra text following note 55.

The First Circuit in Allied cited both Sound Shingle and the NMU decisions for the proposition that a primary labor dispute was not required for a section 8(b)(4) violation and that political boycotts, such as the ILA embargo, were, therefore, secondary boycotts. 640 F.2d 1368, 1378. See also ILA (Allied Int’l, Inc.) 257 N.L.R.B. 1075, 1078 & n.15, 108 L.R.R.M. (BNA) 1033, 1036 & n.15 (1981). As the foregoing discussion demonstrates, Sound Shingle and NMU did not abandon the requirement of a primary labor dispute, and the court’s reliance on these cases was misplaced.

84. 227 F. Supp. 164 (D. Md. 1964), stayed pending full hearing, unpublished decision (4th Cir.).

85. Charges were also filed with the NLRB over the ILA’s Cuban boycott. See ILA (Ocean Shipping Serv.), 146 N.L.R.B. 723, 55 L.R.R.M. (BNA) 1389 (1964), enforcement denied on other grounds, 332 F.2d 992 (4th Cir. 1964). The Board’s theory was similar to the Allied approach and need not be repeated. In denying enforcement, the Fourth Circuit advanced a number of constitutional and statutory arguments. For further discussion of the constitutional dimension of political boycotts, see infra note 94 and accompanying text. The Fourth Circuit’s statutory analysis is not relevant here.

by which the ILA voiced its objections to Soviet military policy. As the Allied Court recognized, the ILA had no dispute with these companies or any other employer. There simply was no primary labor dispute in Penello or Allied, and this fact undermined the basis for applying section 8(b)(4).

IV
THE NEW LAW OF SECONDARY BOYCOTTS

A. Allied’s Implications for Political Activity

If Allied’s deemphasis of the primary labor dispute could be confined to the specifics of the ILA embargo, the decision could be dismissed as an isolated reaction to a unique and difficult set of facts. What is disturbing about the Court’s approach is that it forebodes a complete ban on labor’s use of collective bargaining and economic weapons, such as strikes and picketing, in pursuit of political objectives. The prospect of such a ban is apparent from the facts in Allied. The ILA cannot organize or bargain with the Soviets directly and cannot pressure the Soviets indirectly by refusing to work for companies doing business with them. Moreover, the ILA cannot bargain with companies to cease handling products bound for or arriving from the Soviet Union because NLRA section 8(e), in essence, prohibits a union and an employer from voluntarily agreeing to engage in a secondary boycott. While section 8(b)(4) prohibits a union from using economic force against secondary employers as a means of pressuring the primary target, section 8(e) prohibits a union from reaching a voluntary agreement with secondary employers to achieve the same effect. Allied, therefore, seems to establish that section 8(e) prohibits the ILA from bargaining with Clark, Waterman, and Allied to cease dealing with the Soviets.

The use of economic weapons and collective bargaining in pursuit of other kinds of political goals seems to be similarly affected by the Allied decision. For example, suppose a truckers’ union refuses to work for its employers to protest a new federal tax or set of regulations governing their industry. Under the Allied’ approach, the union may well be in violation of section 8(b)(4). Its goal, to protest federal policies, does not concern its employers’ labor relations, and the employers are, therefore, neutral in the union’s objections to federal policies. Accordingly, the strike constitutes an unlawful secondary boycott because it injures neutral employers.

It seems strange to call such a strike a secondary boycott of the federal government since it is not a boycott of federal goods or services

87. 456 U.S. at 222-23.
88. See supra note 55 and accompanying text.
SECONDARY BOYCOTT LAW

and does not cause a cessation of business between the trucking companies and the federal government. Rather, by tying up the nation’s freight system, the truckers hope to pressure the federal government to rescind the objectionable laws. The effect on the boycott’s object seems irrelevant under the Allied formula, however. Under Allied, the issue is whether the union is engaged in primary activity against its employer. The Court was unconcerned with the identity of the boycott’s object and was presumably unconcerned with the way in which pressure on neutral employers affected the boycott’s object. 90

Once the strike is considered a secondary boycott, section 8(e) further prohibits the truckers from bargaining with their employers to shut down operations as a means of protesting the federal government’s actions. Finally, the truckers cannot directly pressure federal lawmakers by organizing federal employees to bargain with or refuse to work for the government. Apart from the practical problems of mobilizing the federal workforce on behalf of truckers, this activity probably constitutes a violation of sections 8(b)(4) and 8(e). Federal regulation of the trucking industry does not concern the labor relations between federal administrators and their employees. Consequently, the employees are not engaged in primary activity and the government is neutral in the efforts of its employees to assist truckers by changing trucking policies. 91 Again, it seems peculiar to call a strike by the federal government’s own employees a secondary boycott since a boycott typically involves a refusal to work on another business’ goods. Nevertheless, Allied arguably prohibits this conduct since the employees are not engaged in primary activity.

To take another example, suppose a union pressures its employer to cease investing employee pension funds in companies that operate in South Africa. Under Allied, this pressure may well violate section 8(b)(4). Since the politics of pension fund investment do not concern the employer’s labor relations, the union is not engaged in primary activity and is prohibited under section 8(b)(4) from pressuring its employer to discontinue investments in politically objectionable sources. Further, section 8(e) prohibits the union from bargaining on such questions. As a result, the union and its members can neither bargain nor

90. Indeed, on different facts, the NLRB has found that a cessation of business between the neutral employer and the primary employer was not a prerequisite to a secondary boycott violation; any disruption of a neutral employer’s business was sufficient to trigger the statutory ban. See Int’l Ass’n of Iron Workers (Miller and Solomon Constr. Corp.), 195 N.L.R.B. 1063, 79 L.R.R.M. (BNA) 1615 (1972).

91. In addition, federal employees have no right to strike, 5 U.S.C. § 7116(b)(7) (1982), and their bargaining rights are limited to subjects concerning the employees’ working conditions. 5 U.S.C. §§ 7103 (12), (14), 7117(a) (1982). Thus, even if the efforts by federal employees do not violate §§ 8(b)(4) and 8(e), the truckers are still effectively foreclosed from directly pressuring the federal government through the federal workforce. Cf. supra note 55.
use economic force to express their political views regarding the investment of their own pension funds.

The potential reach of the *Allied* decision is particularly troubling because the Court failed adequately to address the larger policy questions underlying union political activity. In *Allied*, the ILA claimed first amendment protection for the embargo as political expression. Once the Court found the ILA's activity within the reach of section 8(b)(4), it summarily disposed of the union's Constitutional claim. Relying on well established precedent dealing with economically motivated boycotts, the Court held that the secondary boycott ban did not unconstitutionally infringe on free expression. By equating political and economic work stoppages for the purposes of section 8(b)(4), the Court obscured the first amendment content of the ILA's activity.

Courts have long recognized that union activity, particularly picketing, implicates first amendment interests. The expressive aspects of picketing are inevitably combined, however, with non-speech, or conduct, elements unprotected by the first amendment. In the typical case involving economic goals, picketing is subject to regulation because the non-speech elements of the union's activity predominate. Political activity by workers arguably deserves greater first amendment consideration because its purpose is distinctively expressive. It is a means by which unions and their members express their political views; it is not undertaken simply for economic gain. Consumer boycotts provide a ready analogue. If a consumer boycott is induced for economic profit—to increase a company's market share, for instance—it constitutes a tortious interference with business. If, on the other hand, the same consumer boycott is undertaken for political reasons, courts balance the first amendment rights of the protesters against the injuries suffered by the boycotted business. Although such an approach is inevitably imprecise, it acknowledges that political boycotts have a greater degree of expressive content and, in some instances, merit first amendment protection. Under the *Allied* approach, all political work stoppages, whatever their expressive content, apparently constitute unlawful secondary boycotts.

92. See supra note 28 and accompanying text.

Lower courts have recognized that politically motivated strikes are distinctively expressive. See NLRB v. ILA, 332 F.2d 992, 999 (4th Cir. 1964); Danielson v. Fur Dressers Local 2F, 411 F. Supp. 655, 658-59 (S.D.N.Y. 1975). Relying on cases dealing with economic strikes, the First Circuit in *Allied* rejected the Fourth Circuit's view that politically motivated strikes were protected by the first amendment. 640 F.2d at 1378-79. As discussed in the text, the First Circuit's approach, like the *Allied* analysis, obscured the differences between political and economic activities.
Moreover, inherent in union political activities are difficult policy and labor law questions about the appropriate role of unions in representing their members. Since section 8(b)(4) squarely banned the ILA embargo, the Allied Court saw little reason to ponder whether the ILA’s political activities advanced the interests of its members. In a passing reference, the Court blandly characterized the ILA’s aim as “a random political objective far removed from . . . the realm of legitimate union activity.” The union activities described in the preceding hypotheticals, and other non-primary political efforts, would presumably receive the same blunt-edged treatment.

B. The Mandatory-Permissive Distinction

Since Congress did not consider, let alone prohibit, political strikes in passing section 8(b)(4), courts should engage in a more far-ranging inquiry into the nature and effects of politically motivated strikes and picketing before declaring them illegal. An approach better suited to this endeavor is the mandatory-permissive doctrine of NLRA section 8(b)(3). Section 8(b)(3) imposes upon unions and employers the duty to bargain over mandatory subjects and allows them to back their respective positions with economic force, such as strikes and lockouts. On non-mandatory, or permissive, subjects of bargaining, the union and employer may make proposals, but they are not required to bargain and may not use economic force to support their positions. Subjects qualify for mandatory treatment if they concern the employees’ “wages, hours, and other terms and conditions of employment.” On issues that do not squarely fall within these areas, courts further inquire into the issue’s relationship to the purposes of the Act and its significance to the interests of labor and management. For example, courts consider whether imposing a bargaining obligation will further the peaceful settlement of industrial disputes. They also assess past industrial experience to determine how vital the subject is to the parties.

To find the ILA in violation of section 8(b)(3), a court would prob-
ably not need to engage in such an extensive inquiry. The ILA's work stoppage against its employer, Clark, did not concern the employees' wages, hours, and terms or conditions of employment and, therefore, constituted unlawful economic force in support of a permissive subject of bargaining. But other political activities, such as the truckers' protest discussed above, might be more vital to workers' interests. This assessment would depend on the then current value that labor, management and society in general placed on the issue and would require courts to engage in more extensive balancing to determine the union's right to bargain and consequent right to use economic force. In contrast is the virtually automatic ban on political strikes under section 8(b)(4) and the coordinate ban on bargaining under section 8(e).

The balancing approach of section 8(b)(3) is also evident in the availability of preliminary injunctive relief. Under NLRA section 10(j), an employer may petition the NLRB for an injunction against a strike in violation of section 8(b)(3). If the NLRB finds an illegal strike, it may in its discretion seek an injunction in federal district court. The district court, in turn, not only determines whether the union has violated section 8(b)(3), but also whether the equities of the situation warrant an injunction. In contrast are the injunction procedures for section 8(b)(4). Under NLRA section 10(1), the NLRB must seek an injunction upon finding a violation, regardless of the injury to the employer or the importance of the strike to the union. Further, courts appear to presume an injunction is warranted merely upon a showing that a secondary boycott violation has occurred. These blunt-edged procedures are ill-suited to the task of assessing the interests of labor and management in political controversies.

In addition to enabling courts to assess the issues involved in union political activities, application of section 8(b)(3) would allow a union and its employer to decide themselves how to handle political problems. First, through collective bargaining, the union and employer

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101. See supra text accompanying notes 90-91.
103. See generally R. GORMAN, supra note 98, at 289.
105. See generally R. GORMAN, supra note 98, at 289.
106. Eliminating § 10(1) relief would not leave employers defenseless against political strikes. In addition to § 10(j) injunctions, injunctive relief is available in limited situations under LMRA §§ 206 through 210, 29 U.S.C. §§ 176-80 (1977). Under these procedures, the President of the United States may obtain a temporary injunction if the strike affects a substantial part of an industry and imperils the national health and safety. Unlike the virtually automatic injunctive relief available under § 10(1), invocation of these emergency provisions would require serious consideration of the actual injuries caused by political strikes. By placing stringent restrictions on the availability of emergency relief, Congress indicated that, in most instances, businesses and consumers must endure the consequences of labor-management conflicts. See Lesnick, The Gravamen of the Secondary Boycott, 62 COLUM. L. REV. at 1411.
could decide whether or not to provide a damage remedy against the union for using economic force in pursuit of political goals. Ordinarily, the NLRB will not award an employer damages for a union's violation of section 8(b)(3).\textsuperscript{107} But, under LMRA section 301,\textsuperscript{108} an employer can bring a damage action against a union for breach of contract. Through a collective bargaining agreement prohibiting work stoppages, the union and employer would establish a damage remedy in the event of a political strike.\textsuperscript{109} In contrast, the damage remedies for section 8(b)(4) violations are beyond the control of the union and its employer. Under LMRA section 303,\textsuperscript{109} "[w]henever shall be injured in his business or property" by a violation of section 8(b)(4) may sue for damages. This extraordinary remedy, unavailable for any other violation of the Act, allows companies foreign to the union's employment relationship to obtain damages against the union.\textsuperscript{111}

Second, application of section 8(b)(3) would allow the union and its employer to bargain over political issues. Although such bargaining would not be mandatory, willing unions and employers could decide to cease dealing in politically objectionable goods and services. In contrast, under the \textit{Allied} approach, section 8(e) seems to prohibit any agreements on subjects unrelated to the labor relations between unions and employers.

This ban on bargaining may be the most untoward consequence of the \textit{Allied} decision. Congress' main goal in passing section 8(b)(4) was to allow employers to adjust differences with their employees or the union without interference from outside parties. Yet, by holding that political activities, such as the ILA embargo, were unlawful under section 8(b)(4), \textit{Allied} authorized courts to find a variety of political issues to be illegal subjects of bargaining. Since Congress did not intend this result, it was incumbent upon the Court to more explicitly weigh the significance of union political activities. Section 8(b)(3) would have been an appropriate vehicle for this endeavor and would have better preserved the voluntarism of labor-management relations.

\textsuperscript{107} See generally R. GORMAN, \textit{supra} note 98, at 287.
\textsuperscript{109} A no-strike clause, however, might not empower an employer to bring a private action for injunctive relief against a political work stoppage. \textit{See} Jacksonville Bulk Terminals, Inc. v. ILA, 457 U.S. 702 (1982).
\textsuperscript{111} Furthermore, damage liability is virtually automatic under \textit{Allied}. In \textit{Allied}, the district court dismissed the employer's damage suit on the ILA's motion for summary judgment, and an evidentiary hearing on the merits was not held. Nevertheless, the First Circuit, with the Supreme Court's subsequent approval, remanded the case to the district court for a hearing on damages alone.
V

CONCLUSION

With its decision in *Allied*, the Supreme Court embarked on a new course in secondary boycott jurisprudence. Formerly, the guiding purpose of the secondary boycott ban was to confine labor disputes to the primary combatants—the primary employer and its employees or the union. Under this approach, union pressure on a primary labor dispute was critical to a finding of a secondary boycott violation.

Although there was no primary labor dispute in *Allied*, the Court held that the ILA embargo violated section 8(b)(4) of the Act. In the Court’s view, the statute’s main purpose was to protect neutral employers; whether or not the ILA sought to influence a primary labor dispute, its embargo injured neutral employers and thus ran afoul of the statute’s proscription. As argued in this Note, the Court misinterpreted the sources of authority underlying the secondary boycott ban. Although the literal terms of section 8(b)(4) do not address the scope of the ban, the legislative history indicates that Congress viewed a primary labor dispute as essential to a secondary boycott and passed section 8(b)(4) to effectuate a far broader range of interests than the protection of neutral employers. Secondary boycott cases prior to *Allied* also emphasized the importance of a primary labor dispute, although they expanded its original parameters.

By abandoning the requirement of a primary labor dispute, the Court apparently extended the statutory ban to all politically motivated strikes and picketing. Every employer is arguably neutral in the political endeavors of its employees or the union and is, therefore, entitled to the statute’s protection. The *Allied* decision also forebodes a complete ban on the use of collective bargaining in pursuit of political objectives since section 8(e) of the Act, in essence, prohibits a union and employer from implementing a secondary boycott through a voluntary agreement. This blunt-edged approach gives insufficient consideration to the important first amendment questions raised by political activities and to policy questions concerning the proper scope of union representation of members’ interests.

A better tool for dealing with these issues is the mandatory-permissive distinction of section 8(b)(3) of the Act. Under that section, courts would inquire whether the issue underlying a strike concerns “wages, hours, and terms and conditions of employment”—the mandatory subjects of bargaining. If the issue is only a permissive subject of bargaining, then the union’s use of economic force to achieve its goal would constitute an unfair labor practice. In making the mandatory-permissive determination and considering sanctions for the unlawful use of economic force, courts would have to weigh the inter-
ests of labor and management. Further willing employers and employees or unions could lawfully agree to cease dealing in politically objectionable goods and services.

Although Allied threatens workers with stiff sanctions for political work stoppages, recent events demonstrate that such activities will, nevertheless, occur. The Soviet Union's downing of a Korean passenger plane sparked numerous protest boycotts of Soviet goods and services. Employers and consumers, state and national governments, domestic and foreign unions all used the economic weapons at their disposal to protest the Soviet action. Courts will undoubtedly have additional opportunities to examine the Allied decision and assess whether it permits exceptions, or whether it strictly prohibits workers from withholding their labor in furtherance of political goals.