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SECONDARY BOYCOTTS UNDER THE TAFT-HARTLEY ACT

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Among organized labor's most potent economic weapons have been secondary pressures of one kind or another, and these weapons along with the use of the injunction by employers to combat them have been the cause of much controversy in the field of labor law. In the early days of the twentieth century, largely as an outgrowth of the *Debs*[1] case and the *Danbury Hatters*[2] case, the repressive injunction became widely used to counteract union activities. Congress allegedly attempted to grant relief against the indiscriminate use of the injunction in labor disputes by the passage of the Clayton Act[3] in 1914. It seems that an ordinary interpretation of Section 20 of this Act would be that the use of the injunction by federal courts to stop secondary boycotts was outlawed. However, as is well known to lawyers, if not to everyone, words are not always what they seem, or even what they are intended to be, and organized labor's hopes were short-lived. The Supreme Court of the United States in the *Duplex Printing Press Company*[4] case and the *Bedford Cut Stone*[5]

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1. In re Debs, 158 U. S. 564 (1895), in which a federal injunction against unions was allowed.

2. Loewe v. Lawlor, 208 U. S. 274 (1908); Lawlor v. Loewe, 235 U. S. 522 (1915), where it was held that a combination of labor organizations and the members thereof, to compel a manufacturer whose goods were almost entirely sold in other states, to unionize his shops and on his refusal to do so to boycott his goods and prevent their sale in states other than his own until such time as the resulting damage forces him to comply with their demands, is a combination in restraint of interstate commerce within the meaning of the ANTI-TRUST ACT of July 2, 1890 (Sherman Act, 15 U. S. C. §§ 1-7, 1946), and that the manufacturer could maintain an action for triple damages under § 7 of the Act.

3. CLAYTON ANTI-TRUST ACT, 29 U. S. C. § 52 (1946).

4. Duplex Printing Press Company v. Deering, 254 U. S. 443 (1921). For the purpose of compelling a manufacturer of printing presses to unionize its factory in Michigan, in which there had been an unsuccessful strike, and to enforce there the "closed shop", the eight-hour day and the union scale of wages, organizations of machinists with headquarters at New York City, and a larger organization of national scope with which they were affiliated, entered into a combination to interfere with and restrain the manufacturer's interstate trade by means of a secondary boycott, centered particularly at New York City and vicinity where many of the presses were marketed. This manufacturer's customers in and near New York City were warned, with threats of loss and of sympathetic strikes in other trades, not to purchase or install Duplex presses. A trucking company usually employed by customers was notified, with threats, not to haul them. Employees of the trucking company and of customers were incited to strike in order to prevent both hauling and installation. Repair shops were notified not to repair them. Union men were coerced by the threat of loss of their union cards and of being blacklisted as

case held that Section 20 of the Clayton Act did not actually enunciate any new principles with respect to secondary boycotts and injunctions, but was merely declaratory of previously existing law, and in both cases the unions were held to have engaged in illegal secondary boycott activities. After these decisions, organized labor was, in fact, in a much more disadvantageous position than before the passage of the Clayton Act since Section 16 of this Act authorized a private person to obtain the injunction.

Organized labor achieved definite and substantial recognition of its right to engage in secondary boycott activities without fear of injunction with the passage of the Norris-LaGuardia Act[6] in 1932. Also the passage of the Wagner Act[7], by which the National Labor Relations Board came into existence, saw the Federal Government giving assistance to the organizational efforts of labor. After these acts were passed, organized labor enjoyed much freedom of activity, this freedom reaching its zenith in the so-called "free speech" cases, a brief resume of which follows.

Senn v. Tile Layers Protective Union,[8] decided in 1937, was the first case to link picketing with free speech. In 1940, *Thornhill v. Alabama*[9] and *Carlson v. California,*[10] decided on the same day, held that a state statute and city ordinance, respectively, which were so broadly drawn as to prohibit all picketing *per se* were violative of the Fourteenth Amendment which prohibits state action abridging either freedom of speech or of the press. In the case of *American*

"scabs" if they assisted in installing them. All of this seriously interfered with the interstate trade of the manufacturer and caused great loss to its business. The Court held such activities to be a secondary boycott and a combination and conspiracy to restrain interstate commerce against which the manufacturer was entitled to relief by injunction under the Sherman Act, as amended by the Clayton Act.

5. Bedford Cut Stone Company v. Journeymen Stone Cutters Association, 274 U. S. 37 (1927), where it was held that a combination or conspiracy of union stone-cutters to restrain the interstate commerce of certain building-stone producers by declaring their stone "unfair" and forbidding members of the union to work upon it in building construction in other states, for which it was extensively bought and used, and thereby coercing or inducing local employers to refrain from purchasing it, was a violation of the anti-trust laws; and the fact that the ultimate object was to unionize the cutters and carvers of stone at the quarries of the producers did not make the combination lawful. The Court also held that a private suit to enjoin a combination violative of the Sherman Act will lie under Section 16 of the Clayton Act, where there is a dangerous probability of injury to the plaintiff, though no actual injury has been suffered.

6. 47 STAT. 90 (1932), 29 U. S. C. A. § 101 *et seq.*

7. NATIONAL LABOR RELATIONS ACT, 49 STAT. 372 (1935), 29 U. S. C. § 151 *et seq.*

8. 301 U. S. 468 (1937).

9. 310 U. S. 88 (1940).

10. 310 U. S. 106 (1940).

Federation of Labor v. Swing,[11] decided in 1941, the free speech doctrine was again declared to limit the right of the states in restricting peaceful picketing.[12] In that case the Court held that the constitutional guarantee of freedom of speech was infringed by the common law policy of a state prohibiting peaceful picketing by labor unions on the sole ground that the controversy was not between the employer and his own employees. This does not mean that a state cannot forbid peaceful picketing at a place having no business connection with the place where the industrial dispute centered.[13] The Supreme Court has also upheld a decree enjoining peaceful picketing where it was carried on for the purpose of coercing the employer to violate a state's anti-trust law.[14] And the fact that there are no criminal sanctions in the law regulating peaceful picketing is not controlling.[15] In other words, the Supreme Court has only identified picketing with free speech and has pointed to the constitutional restraints on the prohibition of picketing *per se*, but it has recognized that a state may by regulations under its police power place reasonable limitations on the right of free speech.

The extent of the freedom of union activity was demonstrated by the *Hutcheson*[16] case, which held that the Sherman, Clayton, and Norris-LaGuardia Acts must be read and construed together, and, so read and construed, the labor union activities enumerated in Section 20 of the Clayton Act are not punishable as criminal under the Sherman Act.

It was thought by many that the pendulum had swung too far on the side of labor, and Congress, yielding to the pressure of widespread public opinion, devised *inter alia* Section 8(b)(4)(A) of the Taft-Hartley Act.[17] All secondary boycott activities by unions in

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11. 312 U. S. 321 (1941).
12. For other applications of the doctrine see Bakery & Pastry Drivers & Helpers Local 802, etc. v. Wohl, 315 U. S. 769 (1942) and Cafeteria Employees Union Local 301 et al. v. Angelos et al., 320 U. S. 293 (1943).
13. "As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." Carpenters and Joiners Union v. Ritter's Cafe, 315 U. S. 722, 727 (1942).
14. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." Giboney v. Empire Storage and Ice Company, 336 U. S. 490, 498 (1949).
15. Building Service Union v. Gazzam, 339 U. S. 532 (1950).
16. United States v. Hutcheson, 312 U. S. 219 (1941).
17. LABOR MANAGEMENT RELATIONS ACT, 1947, 61 STAT. 136 *et seq.* (1947); 29 U. S. C. §§ 141 *et seq.* (Supp. 1950).

those situations otherwise satisfying the interstate commerce requirements of the Act were outlawed. Neither Section 8(b)(4)(A) nor subsections (B), (C), or (D) mention secondary boycotts specifically, but they are commonly referred to as the "secondary boycott sections" of the Act. In fact the wording of the section seems to fit Gregory's[18] definition of a secondary boycott as

> "the refusal by one party to deal with another unless such other will, in turn, refuse to deal with a third — the real object of the first party's animus".

The use of this terminology would appear to be justified from the legislative history of the Act although a literal reading of the sections would seem to outlaw primary as well as secondary activities. Indeed a partisan scrutiny of the legislative history can produce arguments for either view.

The report of the Senate Committee on Labor and Public Welfare[19] gave an example of the type of activity Section 8(b)(4)(A) was intended to prevent: a union strikes or boycotts employer A, a neutral, to force him to cease doing business with employer B. The use of this example evidences a desire to proscribe economic pressure on a neutral employer.

On April 29, 1947, Senator Pepper argued that there were good boycotts and bad boycotts and claimed that the bill covered both the good and the bad, "primary and secondary". In reply, Senator Taft said that the bill covered only the secondary boycott situation and that the broad language was chosen because the drafters found it impossible to distinguish between the various labor practices which interfere with a secondary employer.[20]

The penalties available against unions for violations of these "secondary boycott sections" include:

> (a) The issuance of a temporary injunction from the appropriate district court upon application by the Regional Director of the National Labor Relations Board, on the condition that the Regional Director has reasonable grounds for believing that an unfair labor practice exists. (It is mandatory under Section 10(1) of the Act to seek such a temporary restraining order, if the Regional Director has such reasonable grounds. It is interesting to note in this connection that in cases of em-

18. GREGORY, LABOR AND THE LAW, (Revised Edition, 1949), p. 34.
19. SEN. REP. No. 105, Part 2, 80th Cong., 1st Sess. 19, 20 (1947).
20. 93 CONG. REC. 4197-4200 (1947). Also see 93 CONG. REC. 3838, 4178, 4323, 5014, 6503 (1947).

ployer violations of the unfair labor practices section, it is not mandatory, according to Section 10(j), for the Regional Director to seek a temporary restraining order.)

(b) A cease and desist order may issue from the National Labor Relations Board under Section 10(c) of the Act, and such order is enforceable by the Circuit Court of Appeals under Section 10(e).

(c) A suit for damages by "whoever shall be injured" is provided for under Section 303 of the Act.

It may be some consolation, however small, to the labor organizations that the injunction against labor unions for violation of the secondary boycott provisions of the Act cannot be obtained by private persons.

II.

Although this article will deal more in detail with the broad provisions of Section 8(b)(4)(A),* it is deemed appropriate that some mention be made of the other "secondary boycott sections" of the Act.**

Section 8(b)(4)(B) outlaws secondary activities where the object is to force any other employer to recognize or bargain with an uncertified union.[1] It is difficult to see how it would not also violate

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

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, 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;"

**"(B) 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;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

"(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 in another trade, 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."

1. Construction and General Laborers Union — (Armco Drainage & Metal Products, Inc.), 27 L. R. R. M. 1460 (NLRB 1951).

Section 8(b)(4)(A). For example, X union is uncertified and it induces the employees of Y company (any employer) to refuse to work on materials produced by Z company in order to force Z company (any other employer) to bargain with X union. This is prohibited by Section 8(b)(4)(B). However, is there not also a violation of Section 8(b)(4)(A)? As a practical matter, how will Y's employees affect Z except by forcing Y to cease doing business with Z. It seems to this writer that there are two proscribed objects involved in such cases although one may be only incidental to the other, or merely a means to an end.

Section 8(b)(4)(C) bans primary, as well as secondary, activity which involves encouragement of employee work stoppages in order to force any employer to bargain with a union where another union has been certified. It would seem, however, that a newly certified union is not always protected against picketing of its shop by its rival in the late certification election. The striking union may continue picketing by chaining the purpose to some legitimate object,[2] but the picketing union's purpose would appear to be suspect in such a case.

Section 8(b)(4)(D) reflects the opinion of Congress that jurisdictional disputes should not plague employers. These disputes should be settled by the unions or the government, and provision is made in Section 10(k) requiring the Board to hear and determine such disputes. The Section was primarily designed to protect an employer who is caught in the middle between two unions of his employees engaged in a dispute over who should perform particular work, but it has been applied where the dispute is really between an employer and a union.[3] As a result a violation was found where the union picketed an employer who refused to hire its members to perform functions already assigned to existing employees.

A violation of Section 8(b)(4)(A) produced the first cease and desist order by the National Labor Relations Board against a labor union in the *Schenley*[4] case. In that case the union was engaged in a primary strike against a liquor manufacturer's wholly-owned subsidiary for the purpose of forcing a contract renewal. Allegedly, in order to lend support to the strike, warehouse employees of in-

2. Brown v. Retail Salesman's Union, 26 L. R. R. M. 2225, 89 Fed. Supp. 207 (ND Calif. 1950).
3. Hod Carriers Union — (Middle States Telephone Co.), 26 L. R. R. M. 1553 (NLRB 1950). Teamsters Union — (Direct Transit Lines, Inc.), 27 L. R. R. M. 1316 (NLRB, 1951).
4. In re Wine, Liquor & Distillery Workers Union, Local 1, and Schenley Distillers Corp. (Frankfort, Ky.), 22 L. R. R. M. 1222 (NLRB 1948).

dependent distributor firms handling the manufacturer's products called a work stoppage and refused to handle the manufacturer's products. These employees were members of a "sister" local of the union involved in the manufacturer's dispute.

There was some evidence that the work stoppage at the warehouse was due, at least partially, to grievances between the warehouse employees and the distributors. On the other hand, it was obvious that one of the objects of such a work stoppage was to force the distributor to cease doing business with the manufacturer and thus bring secondary pressure to bear on the manufacturer to force him to renew the contract with his employees.

The Board held that an objective appraisal of the union's activity at the warehouses indicated that at least one of its purposes, even though not necessarily the principal one, was to engage in a secondary boycott against the manufacturer and that this was all that was required to find a violation under Section 8(b)(4)(A) of the Taft-Hartley Act.

The Court of Appeals for the Second Circuit affirmed the Board's findings,[5] and the Supreme Court of the United States also adheres to this view.[6]

If "an object" were literally interpreted, all strikes would be outlawed. Certainly it is "an object" of very many, if not all, strikes and picket lines to induce a reduction of the struck employer's business by an appeal to customers — "any person" — to cease dealing with the struck employer. However, "an object" of all strikes and picket lines is not to bring secondary pressure on another employer in aid of the employees of the struck employer. Any such pressure is just one of the incidental "effects," not "objects," of a genuine primary strike.

Although many of the decisions involve the question of the free speech aspect of picketing, there have been a number of judicial interpretations of Section 8(b)(4)(A) arising out of petitions to the district courts for temporary restraining orders for alleged violations of the secondary boycott sections of the Act. Some of the district court decisions[7] indicate an inclination to find fewer viola-

5. 25 L. R. R. M. 2137, 178 Fed. 2d 584 (CA 2, 1949).
6. International Brotherhood of Electrical Workers, Local 501, AFL v. National Labor Relations Board, 341 U. S. 694 (1951).
7. Slater v. Denver Building & Construction Trades Council, 22 L. R. R. M. 2565, 81 Fed. Supp. 490 (DC Colorado, 1948); Sperry v. Denver Building & Construction Trades Council, 21 L. R. R. M. 2712, 77 Fed. Supp. 321 (DC Colorado, 1948); Douds v. Metropolitan Federation of Architects, 21 L. R. R. M. 2256, 75 Fed. Supp. 672 (SD N. Y. 1948).

tions of the sections than the National Labor Relations Board. However, the Board has experienced little difficulty in obtaining temporary injunctions against unions in the district courts. Undoubtedly the courts have been influenced by the fact that they need ascertain only that the Board has reasonable grounds for believing an unfair labor practice exists; but it has been held that prior to granting injunctive relief, the district court should inquire into the reasonableness of the charge and evaluate the evidence to determine whether or not the Board has established a *prima facie* case.[8]

To warrant the finding of an unfair labor practice, two factors must combine:

> (1) the alleged activities must have as an object the forcing or requiring any employer "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person," and
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> (2) the activities must constitute a strike or an inducement or encouragement of employees in the course of their employment to refuse "to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services".

The absence of either factor will defeat the charge of a violation of Section 8(b)(4)(A).[9]

There is no violation when the union's request is made to the secondary employer[10] or to supervisors of secondary employers[11] because the section forbids inducement or encouragement only when directed to non-supervisory employees of the secondary employer.

A condition which closely resembles a secondary boycott, but which is, nevertheless, distinct from it, is one which develops from a contractual undertaking between the secondary employer and the aggrieved labor organization. The Board has ruled that "hot goods" contracts are not in conflict with Section 8(b)(4)(A).[12] In so ruling the Board points out that the boycott prohibition does not forbid a union to encourage a secondary employer to stop doing

8. Douds v. Confectionery & Tobacco Jobbers Employees Union, 24 L. R. R. M. 2120, 85 Fed. Supp. 191 (SD N. Y. 1949).
9. Elliott v. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL, 26 L. R. R. M. 2577, 91 Fed. Supp. 690 (WD Mo. 1950).
10. Sealright Pacific, Ltd., 23 L. R. R. M. 1572 (NLRB 1949).
11. Humphrey v. Local 294 Teamsters Union, 25 L. R. R. M. 2318 (ND N. Y. 1950).
12. Teamsters Union (Arkansas Express, Inc.), 27 L. R. R. M. 1077 (NLRB 1950).

business with a struck company. The only ban involves attempts to induce the boycott by urging "employees" of the secondary employer to refuse to process the struck work. Hence a "struck work" clause in a contract between a union and an employer is perfectly legal.

III.

Prior to the Taft-Hartley Act, the courts developed the "totality of conduct"[1] doctrine that statements by employers in order to be protected by the First Amendment to the Constitution of the United States must neither constitute threats nor promises, and that conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Wagner Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally (or by writing) by the employer may no more be disregarded than pressure exerted in other ways.

This doctrine has been carried over after the passage of the Taft-Hartley Act and applied in a number of cases,[2] and this was no doubt what Congress intended since Senator Taft said in the Senate debates that all Section 8(c) did was to freeze into law the present rule of the Supreme Court (totality of conduct).[3] Probably the most realistic suggestion as to the intent of Congress in writing Section 8(c) is that it was inserted at the behest of industry to permit management to discuss conditions of employment with its employees. Therefore, with the intent of Congress reasonably clear that it sought to prohibit Section 8(b)(4)(A) boycotts at any cost, and that Sec-

1. International Ass'n of Machinists v. Labor Board, 7 L. R. R. M. 282, 311 U. S. 72 (Sup. Ct. of U. S. 1940); Valley Mould & Iron Corp. v. N. L. R. B., 7 L. R. R. M. 524, 116 Fed. 2d 760 (CCA 7 1940); Labor Board v. Virginia Electric & Power Co., 9 L. R. R. M. 405, 314 U. S. 469 (Sup. Ct. of U. S. 1941); N. L. R. B. v. Continental Oil Co., 19 L. R. R. M. 2224, 121 Fed. 2d 120 (CA 10 1947).

2. N. L. R. B. v. Gate City Cotton Mills, 21 L. R. R. M. 2695, 167 Fed. 2d 647 (CA 5 1948); N. L. R. B. v. Kropp Forge Co., 25 L. R. R. M. 2219, 178 Fed. 2d 822 (CA 7 1949); and other cases.

3. Senator Taft in opening the debates in the Senate declared that the provision guaranteeing free speech to employers "carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into law itself, rather than to leave employers dependent on future decisions." 93 CONG. REC. 3952 (Apr. 23, 1947). The section itself reads: "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

tion 8(c) was not specifically designed to protect picketing, the Supreme Court in the *I.B.E.W.*[4] case held the specific provision of Section 8(b)(4)(A) predominates over the general provisions of Section 8(c).

Apparently, free speech is not the controlling factor where the tangible objective of a striking labor organization is contrary to law and under such circumstances illegal picketing may properly be enjoined. The "totality of conduct" doctrine was developed as an aid in determining whether speech by the employer was for an unlawful purpose (coercion or restraint of his employees); it would seem to be equally applicable in determining whether speech by the union was for an unlawful purpose (inducing or encouraging, etc.).

The Supreme Court in the *International Rice Milling Company*[5] case held that inasmuch as Section 13 of the Act provides that nothing in the statute shall be construed so as to impede the right to strike, all other parts of the Act, including the secondary strike ban of Section 8(b)(4), should be interpreted to diminish the right to strike only if there is a specific provision to that effect. Since there is no specific provision in Section 8(b)(4) banning primary picketing for recognition, such picketing is not unlawful under that section. Also the fact that a union uses violent, rather than peaceful, picketing or other means to "induce or encourage" action by employees of a neutral employer does not, in itself, make the union's activities unlawful under the secondary strike ban of Section 8(b)(4), because that provision is directed against the object of a union's "inducement or encouragement" rather than against the means used to accomplish it.

Picketing at the premises of a primary employer is traditionally recognized as primary action even though it is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. The test of legality of picketing under this section is that enunciated by the National Labor Relations Board in the *Pure Oil*[6] and *Ryan Construction*[7] cases. In the former, the union was engaged in a dispute with the Standard Oil Company and placed pickets at the Standard Oil Company's dock, the effect of which was to dissuade Pure Oil Company employees from unloading and removing the oil destined for the Pure Oil Company. The Board

4. I. B. E. W. Local 501, AFL v. N. L. R. B., 341 U. S. 694 (1951).
5. N. L. R. B. v. International Rice Milling Co., 341 U. S. 665 (1951).
6. Oil Workers International Union, Local 346 CIO (The Pure Oil Company), 24 L. R. R. M. 1239 (NLRB 1949).
7. United Electrical, Radio & Machine Workers of America (Ryan Construction Corp.), 24 L. R. R. M. 1424 (NLRB 1949).

held that the picketing was primary although one of the effects of such picketing is to persuade others to cease doing business with the struck employer and by its very nature will inconvenience those who customarily do business with the struck employer. The Board said that Section 8(b)(4)(A) of the Act was aimed at secondary and not primary action. This appears to be true from the legislative history of the Act.[8] In the *Ryan Construction* case, *supra,* the Board held that there was no violation of the Section by picketing a gate which had been cut through a fence on premises where employees were on strike to provide ingress for employees of a contractor engaged in constructing an addition to the struck plant, although an object of the picketing was to enlist the aid of the contractor's employees as well as that of employees of all other customers and suppliers of the employer, because the picketing in this case was wholly at the premises of the primary employer with whom the union was engaged in a labor dispute.

The Board is evidently committed to the view that primary picketing, that is, picketing at the premises of the employer with whom there is a labor dispute, is not a violation of the section. In the *International Rice Milling Company* case, *supra,* the Board held that there was no violation when the union attempted to prevent a truck from entering the employer's mill during a strike by the pickets asking the driver not to go in with the truck and upon his refusal and driving in anyway, hurling rocks at the truck as it proceeded to the mill. The union's activities arose out of primary picketing at the employer's mill and were carried out in the immediate vicinity of the mill. The Supreme Court in sustaining the Board against the Court of Appeals for the Fifth Circuit placed considerable emphasis on the fact that the union activities in this instance were aimed at inducing or encouraging "individual" rather than "concerted" action by the employees of the neutral employer.

While it is true that normally the situs of a labor dispute is the premises of the primary employer, there are cases in which the situs

8. Senator Taft said of the Section: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees . . . under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 CONG. REC. 4323 (Apr. 29, 1947). Senator Taft also stated that primary strikes over terms and conditions of employment were "entirely proper" and "throughout this bill are recognized as completely proper strikes". 93 CONG. REC. 3950 (Apr. 23, 1947).

of the dispute may not be limited to a fixed location; it may be ambulatory. Thus in the *Schultz*[9] case, the Board held that the truck upon which a truck driver worked was the situs of a labor dispute between the union and the owner of the truck. The union in that case was careful to identify the picketing in time and place with the actual functioning of the primary employer's trucking operations by limiting such picketing to the immediate vicinity of Schultz's trucks, the situs of the labor dispute. The pickets followed the trucks and picketed them while they were unloading at the customer's place of business, and when the trucks left, the pickets stopped picketing. The picketing was held to be primary.

In the *Sterling Beverages*[10] case the facts were: Sterling Drug distributed Ruppert beer in Massachusetts. Sterling drivers, who were members of a Massachusetts local of the Teamsters, picked up their loads at Ruppert's brewery in New York City. New York Local 807 of the Teamsters advised Sterling that it claimed jurisdiction over certain of the driving done in New York City and that its members should be employed to do such work. Sterling refused to comply with the request. Pickets were set up by Local 807 at the entrances to the loading platform. The Board found a violation of Section 8(b)(4)(A) but based the decision principally on the grounds that some picketing was carried on when no Sterling trucks were at the loading dock, thereby distinguishing it from the *Schultz* case. The Board said, "The line must be drawn somewhere, and this is where we draw it". Although this would seem to imply that no violation would have existed had the picketing been contemporaneous with the presence of the Sterling trucks, the Board in such a case could find a violation of Section 8(b)(4)(D) as it found in the *Direct Transit Lines*[11] case.

In the *Sailor's Union of the Pacific*[12] case the ambulatory situs doctrine was extended somewhat. In that case, the union had a labor dispute with a shipowner. There was no dispute with the owner of the shipyard. The shipowner had a contract with the shipyard whereby the shipowner could put a crew aboard to train them during the last two weeks of overhaul and also to load stores.

9. Teamsters Union, Local 807 (Schultz Refrigerated Service, Inc.), 25 L. R. R. M. 1122 (NLRB 1949).
10. Teamsters Union, Local 807 (Sterling Beverages, Inc.), 26 L. R. R. M. 1213 (NLRB 1950).
11. Truck Drivers & Chauffeurs Union (Direct Transit Lines, Inc.), 27 L. R. R. M. 1316 (NLRB 1951).
12. Matter of Sailors' Union of the Pacific (AFL) and Moore Dry Dock Co., 27 L. R. R. M. 1108 (NLRB 1950).

At the time the picketing at the entrance to the shipyard was begun, ninety per cent of the conversion job was completed. The Board held that there was no violation of Section 8(b)(4)(A) because the secondary employer (shipyard) was harboring the situs (the ship) of a dispute between the union and the primary employer (shipowner). The Board attached considerable weight to the contract giving the shipowner the right to train crews and to load stores and was careful to point out that it was not holding that a union which has a dispute with a shipowner over working conditions of seamen aboard a ship may lawfully picket the premises of an independent shipyard to which the shipowner has delivered his vessel for overhaul and repairs; but that it was only holding that if a shipyard permits the owner of a vessel to use its dock for the purpose of readying the ship for its regular voyage by hiring and training a crew and by putting stores aboard ship (all of which the Board said was just as much part of the normal business of the ship as the voyage itself), then the union may lawfully picket the entrance to the shipyard to advertise its dispute with the shipowner. The following conditions have been laid down by the Board for picketing at a secondary employer's site to qualify as primary:

(1) the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises;

(2) at the time of the picketing the primary employer is engaged in its normal business at the situs;

(3) the picketing is limited to places reasonably close to the location of the situs; and

(4) the picketing discloses clearly that the dispute is with the primary employer.

The acute problem of applying the "primary situs" test has reached its peak in the building trades disputes. The Court of Appeals for the Second Circuit, in a decision upheld by the Supreme Court, ruled in the *I.B.E.W.* case, *supra,* that picketing against the job when a third party subcontractor has been allowed to employ non-union labor on the same premises is also secondary picketing of the principal contractor under the meaning of Section 8(b)(4)(A). The case did involve picketing when none of the non-union subcontractor's men were on the job, but this would not appear to be a valid distinction because under the same state of facts, except that the non-union men were on the job, the Supreme Court reversed the Court of Ap-

peals for the District of Columbia in the *Denver Building Trades*[13] case. In that case the Court of Appeals had held that the picketing of the project, which is picketing of the contractor as well as the subcontractor against whom the union had a grievance, was not secondary picketing. In reversing the Court of Appeals, the Supreme Court placed considerable emphasis on the fact that at least one object, although not necessarily the only object, of the picketing was to force the general contractor to cease doing business with the subcontractor.

A safe assumption is that one of the purposes of prohibiting a secondary boycott is to localize the labor dispute. In the building trades cases the conflict is localized at the site of the construction, and when the non-union subcontractor is working on the job, it seems to this writer that the general contractor could be said to be housing the situs of the non-union subcontractor and that the picketing is directed at him at the only place where such would be effective. Perhaps a better solution is to regard the "job" itself (since all concerned have the same place of business) as the object of the union's activity and with which it has the dispute and that as long as the union has a labor dispute with anyone working on the job,[14] the union's activity is protected.

Just who is a primary employer and who is a secondary employer will probably remain in the realm of conjecture, for by the very nature of the construction trade it would be extremely difficult to determine the extent either employer was concerned with the employees of the other in many factual situations. The two employers are so enmeshed in carrying out the job that it would not be unfair to the employers to permit the employees of either to demonstrate lawfully against the whole project when one of the employers on that project has been unfair.

IV.

The "unity of interest" doctrine[1] developed by the New York Court of Appeals is predicated in the main upon the close economic relationship between the primary employer and the secondary employer whose relationship (at least in a quasi-legal sense) is that

13. N. L. R. B. v. Denver Building & Construction Trades Council, 341 U. S. 675 (1951).

14. This should be distinguished from a case involving a supplier whose employees do not work on the job, which appears to be clearly an unfair practice. N. L. R. B. v. United Brotherhood of Carpenters, 184 F. (2d) 60 (CA 10 1950), *certiorari denied* 341 U. S. 947 (1951).

1. See Auburn Draying Co. v. Wardell 124 N. E. 97 (N Y. 1919); Goldfinger v. Feintuch, 11 N. E. 2d 910 (N. Y. 1937).

of principal and agent. In *Douds v. Metropolitan Federation of Architects,*[2] the United States District Court for the Southern District of New York, undoubtedly influenced by this doctrine, refused to grant the Board's Regional Director an injunction against an engineers' union which sought, by picketing, to encourage employees of a subcontractor to engage in a strike in order to compel the subcontractor to refuse to do engineering work for the primary employer. The Court rested its decision on the ground that the subcontractor was not engaged in "doing business" with the contractor within the meaning of Section 8(b)(4)(A). There, the subcontractor was engaged in selling services of its employees to the contractor (primary employer), who supervised the subcontractor's employees' work which had substantially increased by reason of a strike against the contractor. Under such circumstances the Court concluded that the subcontractor was not a neutral but rather an ally of the contractor and that it was the subcontractor's activity as an ally which directly provoked the union's picket action. The Board has limited the doctrine to the precise facts of *Douds v. Metropolitan Federation of Architects, supra,* or where the secondary company is substantially owned, controlled, and operated by the primary employer.

The result of the district court decision is an equitable one because otherwise the struck manufacturer might be able to subcontract his regular work and break a strike by his employees. It would seem that in such a case it should make no difference that the primary employer did not actually supervise the subcontracted work since the subcontractor would, in effect, be little more than a professional strikebreaker and hence hardly a neutral. It is interesting to note in this respect that Senator Taft is willing to legalize a refusal to handle "struck" work.[3]

The district court rule is no doubt the expression of a determination not to go beyond the purpose of protecting innocent third parties. If this rule is to be followed, it will be very difficult to determine whether or not the secondary employer is truly a disinterested third party, because he is seldom wholly disinterested; therefore, the degree of interest will have to be the determining factor.

2. 75 F. Supp. 672 (S. D., N. Y. 1948); 21 L. R. R. M. 2256.
3. 95 CONG. REC. 8709 (June 30, 1949). During debates on Senate Bill 249, Senator Taft said: "I may say that one of the changes we are making in the law is to remove the ban on the secondary boycott in a case where there is a strike in one plant and then the work is transferred to another plant, because we feel that in that case the men who are striking should be able to picket the second plant in order that the men there may not work on the work on which the men in the first plant were refusing to work".

The rule is also indicative of a widespread opinion that there should be an "area of economic conflict" within which a union could engage in a secondary boycott without interference by injunction. It would not be desirable, however, for court decisions allowing the use of secondary boycotts on one theory or another to become substantial because it would serve in the main to antagonize and furnish ammunition to those critics of the courts whose line of attack is centered around the tendency of the courts to legislate. It would be the same thing in which the courts indulged after the passage of the Clayton Act (on the other foot, of course), and such actions by the courts encourage neither respect nor confidence.

A wiser course is for the Act to be strictly applied so that the injustices will become readily apparent (although it is admitted that this is small consolation to those who suffer the immediate injustice) so that the legislative branch of the government will take corrective action, under the pressure of enlightened public opinion, by amending the Act. Such amendment should recognize and provide for an "area of economic conflict" where resort to the secondary boycott could be had. A fair test of the union's right to so act would be the degree of interest between the primary and secondary employers, the means used by the union, and the object.

Many believe that the secondary boycott is essentially unjust because of the pressure being brought to bear on allegedly innocent third parties. However, if the situation is examined in the light of our complex industrial economic system, it will be seen that mere primary pressure by a labor group against its immediate employer is neither always effective nor possible, particularly when there is widespread unemployment. Oftentimes resort to the use of the so-called secondary boycott is the only possible means through which the union can reach the employer. It would not be unfair to permit unions to refuse to handle "struck" work and to protect union wages by refusing to work on jobs hiring non-union labor. On the other hand, the use of the secondary boycott does not seem to be justified in jurisdictional disputes (Section 8(b)(4)(D)), or when it is used to compel an employer to bargain with one union when that employer is required by Board order or certification to bargain with another union (Section 8(b)(4)(C)).

By the broad language of the Norris-LaGuardia Act, the courts were prohibited from taking jurisdiction in labor disputes. This was a direct attempt by Congress to prevent the courts' avoiding the intent of Congress through interpretation as they did with the

Clayton Act. As a result the purpose of the union activity became practically immaterial insofar as the Federal Courts' power to enjoin that activity was concerned. However, the framers of the Taft-Hartley Act have completely eliminated the secondary boycott from labor's arsenal, thereby seriously crippling organized labor's power to reach certain employers. It is suggested that neither view is correct but rather that a workable solution to the problem lies somewhere between the extremes of the excessive liberality of pre-Taft-Hartley days and the blanket prohibitions of the Taft-Hartley Act.