LABOR LAW—SECONDARY BOYCOTTS IN THE CONSTRUCTION INDUSTRY: WORK PRESERVATION AND THE RIGHT-TO-CONTROL TEST—*Enterprise Association of Steamfitters v. NLRB*, 521 F.2d 885 (D.C. Cir. 1975), *cert. granted*, 96 S. Ct. 1101 (1976).

The extent to which secondary boycott concepts may be applied in a construction industry setting is a question that has consistently evaded resolution. In *Enterprise Association of Steamfitters v. NLRB*,[1] an en banc panel of the United States Court of Appeals for the District of Columbia Circuit split over a perplexing aspect of this question, the "right to control" test.

Enterprise Association, a plumbers union local, established through collective bargaining with Hudik-Ross Company, a heating and air conditioning contractor, a work preservation clause[2] which provided that the union members would cut and thread internal piping " 'by hand on the job.' "[3] The Austin Company, a general contractor, offered a subcontract specifying the use of climate control units manufactured by Slant/Fin Corporation which contained prethreaded and precut internal piping.[4] Although Hudik-Ross was aware of the incompatibility between Austin's specifications and its collective bargaining agreement with Enterprise, it bid on and was awarded the subcontract. When the Slant/Fin units arrived at the

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[1] 521 F.2d 885 (D.C. Cir. 1975) (5 to 4 decision), *cert. granted*, 96 S. Ct. 1101 (1976), *denying enforcement to* 204 N.L.R.B. 760 (1973).

[2] *See* 521 F.2d at 889. A work preservation clause is a negotiated term of a collective bargaining agreement designed to preserve for union members "in a particular collective bargaining unit, the various work assignments that they have traditionally or historically performed and are currently performing." Note, *Work Preservation and the Secondary Boycott—An Examination of the Decisional Law Since National Woodwork*, 21 SYRACUSE L. REV. 907, 907 (1970). For an analysis of the current tactical uses of such an agreement see Comment, *Hot Cargo Agreements in the Construction Industry: The Effect of* ACCO Equipment, 15 B.C. IND. & COM. L. REV. 1292, 1309–12 (1974).

[3] 521 F.2d at 915 (dissenting opinion). The clause provided that all " '[r]adiator branches, convector branches and coil connections shall be cut and threaded by hand on the job.' " *Id.*

[4] *Id.* at 889–90. The specifications required that

" '[t]he unit shall be complete with cabinets, filters, cooling chasis [*sic*], heating coil fans, main water flow and condensate assembly . . . .

. . . .

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

204 N.L.R.B. at 762.

For a diagram illustrating the location of the disputed piping see 521 F.2d at 916 (dissenting opinion).

jobsite, the union's members refused to install them.[5]

Austin then filed a charge with the National Labor Relations Board alleging that an object of the union's refusal to handle the Slant/Fin units was to force Hudik and Austin to cease doing business with Slant/Fin,[6] in violation of the secondary boycott proscription of section 8(b)(4)(B) of the National Labor Relations Act.[7] An administrative law judge issued a cease and desist order, holding that the union activity against Hudik was merely a conduit through which pressure could be exerted against Austin and Slant/Fin.[8]

The Board affirmed the administrative law judge's opinion, basing its decision on the "right to control" test, which focuses upon the party having the power to resolve the dispute by assigning the work in question to the union.[9] Here Hudik did not have the power to

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[5] 521 F.2d at 889–90.

[6] *Id.* at 890.

[7] 29 U.S.C. § 158(b)(4)(B) (1970). Section 8(b)(4)(B), originally designated § 8(b)(4)(A), does not specifically mention the term "secondary boycott." It is universally recognized, however, as a prohibition against that type of activity. *See, e.g.*, Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1364 (1962) [hereinafter cited as Lesnick, *The Gravamen*]; Comment, *Boycotts and Coercion of Neutral Employers Under the Taft-Hartley Act*, 50 MICH. L. REV. 315, 316–17 (1951); Note, *Special Labor Problems in the Construction Industry*, 10 STAN. L. REV. 525, 548 (1958). The section deems it an unfair labor practice for any labor organization

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> . . . .
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> (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 . . . : *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1970).

[8] 204 N.L.R.B. at 765–66. The administrative law judge found Austin and Slant/Fin to be the real targets of the union pressure—"the primary employers." Accordingly, he concluded that the refusal to install the units "was directed at Austin and through Austin at Slant/Fin by the means of applying pressure against Hudik, the secondary employer." *Id.* at 765. *But see* note 11 *infra*.

[9] 521 F.2d at 890–91. Although the Board's opinion never mentioned the right-to-control doctrine by name, the court of appeals read the opinion as a direct application of the test. *Id.* at 890 n.9.

assign the disputed work, *i.e.*, the right to control, since it was bound by the terms of its contract with Austin. The Board reasoned from this finding that the union's pressure on Hudik was actually applied for its effect on Austin, the party that did have the power to assign the disputed work.[10] Such pressure on one party for its effect on another party was, in the Board's opinion, "secondary and prohibited by section 8(b)(4)(B)."[11]

The Court of Appeals for the District of Columbia Circuit rejected the use of the "right to control" test as the sole basis for the finding of an unfair labor practice.[12] A majority of the court held that, upon remand, the Board must look instead to " 'all the surrounding circumstances' " in determining whether the union's objective was proscribed or permissible.[13] If the circumstances show that the union's sole objective was the preservation of work traditionally performed on the jobsite, then the action taken against the subcontractor Hudik should be held to constitute protected, lawful activity outside of the ambit of section 8(b)(4)(B).[14]

The ultimate issue confronting the court in *Enterprise* was whether the Board had correctly diagnosed the union's activity as a secondary boycott. The essence of a secondary boycott is union activity directed against a neutral or "secondary" employer who is unconcerned with a particular dispute, but who is nevertheless forced into the conflict in order to damage the involved or "primary" employer through a loss of business.[15] A variant of the secondary boycott pat-

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[10] 204 N.L.R.B. at 760.

[11] *Id.* (footnote omitted). In light of the Board's approach to the case, the general question of whom the union could have brought pressure against without violating the Act was passed over:

> In view of our finding that [the union's] actions were undertaken for a secondary objective, we find it unnecessary to pass upon the Administrative Law Judge's finding that Austin and Slant/Fin were the primary employers. Hence, we are not deciding herein whether picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity.

Id. at 760 n.1.

[12] 521 F.2d at 904–05.

[13] *Id.* at 904 (quoting from National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644 (1967)) (footnote omitted).

[14] 521 F.2d at 904.

[15] *See, e.g.*, Carpet Layers Local 419 v. NLRB, 467 F.2d 392, 398–99 (D.C. Cir. 1972).

Frankfurter and Greene described the secondary boycott as "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A." F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 43 (1930) (footnote omitted) [hereinafter cited as FRANKFURTER & GREENE]. Another explanation of the term is that which was provided by Judge Learned Hand:

> The gravemen [*sic*] of a secondary boycott is that its sanctions bear, not upon

tern exists in a right-to-control situation. There the subcontractor, although the immediate employer, is considered by the Board to be the neutral party since he lacks the ability to resolve the dispute.[16]

Prior to the pro-labor legislation of the 1930's, the permissible scope of union activity, including the utilization of the secondary boycott as an economic weapon, was limited by judicial injunction.[17] The restraints placed upon the exercise of concerted activity, and consequently upon labor's use of the boycott, were effectively withdrawn by the passage of the Norris-LaGuardia Act in 1932.[18] That Act prohibited the federal courts from issuing injunctions in any "case involving or growing out of a labor dispute."[19] Furthermore, the

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the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

Electrical Workers Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951).

A conceptualization of secondary pressure can also be arrived at by first considering primary pressure:

Historically, a boycott is a refusal to have dealings with an offending person. . . .

The element of "secondary activity" is introduced when there is a refusal to have dealings with one who has dealings with the offending person.

Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

[16] 521 F.2d at 894. *See* notes 40–41 *infra* and accompanying text.

[17] Secondary boycotts were enjoined on the basis that they constituted combinations in restraint of trade in violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (1970). *See* Loewe v. Lawlor (Danbury Hatters), 208 U.S. 274 (1908); Morse, *Secondary Boycotts*, 6 N.Y.U. CONF. LAB. 329, 330–31 (1953); Note, *Labor's Use of Secondary Boycotts*, 15 GEO. WASH. L. REV. 327, 338–39 (1947).

[18] Act of Mar. 23, 1932, ch. 90, 47 Stat. 70, 29 U.S.C. §§ 101–15 (1970). Congress had intended the Clayton Act, 15 U.S.C. §§ 15, 17, 26 (1970), 29 U.S.C. § 52 (1970), to halt the federal courts' abuse of their injunctive powers. FRANKFURTER & GREENE, *supra* note 15, at 99, 185. This intendment, however, was frustrated by subsequent Supreme Court decisions which narrowly interpreted the Act and thereby negated its value to labor. *Id.* at 168, 175. *See, e.g.*, Bedford Cut Stone Co. v. Stone Cutters' Ass'n, 274 U.S. 37, 50–55 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 468–69 (1921); Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A New Chapter*, 37 CORNELL L.Q. 235, 236–38 (1952) [hereinafter cited as Koretz I]. For an evaluation of the period prior to the passage of the Norris-LaGuardia Act see Milk Wagon Drivers' Local 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102–03 (1940); Comment, *The Labor Management Relations Act and The Revival of The Labor Injunction*, 48 COLUM. L. REV. 759, 760–62 (1948); Note, *Use of the Injunction with Reference to Labor Unions*, 22 NOTRE DAME LAW. 200, 204–06 (1947).

[19] 29 U.S.C. § 101 (1970). The Act also ensured that concerted labor activities would not be enjoined, by broadly delineating the area of a "labor dispute." *See* 29 U.S.C. § 113(a)–(c) (1970). Commentary on the changes wrought by the Norris-LaGuardia Act is provided in ABA SECTION OF LABOR RELATIONS LAW, THE DEVELOPING LABOR LAW,

Wagner Act,[20] passed three years later, affirmatively protected labor's rights to organize and engage in concerted activities, including strikes.[21] The combined effect of these two Acts greatly expanded the unions' ability to exert both primary and secondary pressure, which consequently resulted in abuses.[22]

The case of *Allen Bradley Co. v. Local 3, IBEW*[23] highlighted the need for corrective legislation in the secondary boycott area. In this instance, a New York City electrical union local had joined with general contractors and manufacturers of electrical components in a boycott of all electrical equipment not manufactured within the city.[24] Although the combination was held violative of federal antitrust laws, the Supreme Court made it clear that had the union, "acting alone,"

21–24 (C. Morris ed. 1971) [hereinafter cited as Morris]; Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341, 359–69 (1938); Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 71–76 (1960).

[20] Law of July 5, 1935, ch. 372, 49 Stat. 449, *as amended*, 29 U.S.C. § 151 *et seq.* (1970).

[21] Section 7 of the Wagner Act, 29 U.S.C. § 157 (1970), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

This section was specifically enforced through the provisions of section 8(1) of the Act, *as amended*, 29 U.S.C. § 158(a)(1) (1970):

> It shall be an unfair labor practice for an employer—
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> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .

The Act clearly contemplated labor's use of the strike as a form of economic pressure: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." Wagner Act § 13, *as amended*, 29 U.S.C. § 163 (1970).

[22] *See* Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 285–89 (1960). Labor organizations were able to boycott without fear of proscription by the courts or economic retaliation by their employers, whose actions were now regulated by the Wagner Act. Furthermore, union membership "mushroomed from two million to 15 million in the decade following the passage of the Wagner Act." *Id.* at 285–86.

Senator Taft, who would in 1947 lead an attempt aimed at balancing the rights and duties of labor and management, stated that the Wagner and Norris-LaGuardia Acts had "simply eliminated all remedy against any union." 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1006 (1948) [hereinafter cited as LMRA HISTORY]. Later, when speaking about the proposed section 8(b)(4)(A) of the Taft-Hartley Act, which would make the secondary boycott an unfair labor practice, the Senator noted that "[a]ll this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 CONG. REC. 4198 (1947), in 2 LMRA HISTORY, *supra* at 1106.

[23] 325 U.S. 797 (1945).

[24] *Id.* at 798–800.

effected the same boycott, the activity would have been permissible.[25]

Union conduct such as that in *Allen Bradley*, coupled with numerous other abuses, spurred Congress into arresting the reemergence of the secondary boycott by specifically dealing with it during the passage of the Taft-Hartley Amendments in 1947.[26] Section 8(b)(4)(A) of the amended National Labor Relations Act banned union activity wherever "an object" was "forcing . . . any employer . . . to cease doing business with any other person."[27] This section, which avoided the use of the term "secondary boycott," was nonetheless clearly intended to proscribe such activity and thereby to

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[25] *Id.* at 809.

[26] Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, *as amended*, 29 U.S.C. §§ 141–97 (1970). The *Allen Bradley* case was specifically mentioned in the Senate report accompanying the bill. S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), in 1 LMRA HISTORY, *supra* note 22, at 428. The legislators also expressed concern over other types of union boycotts, such as those undertaken for organizational and jurisdictional (union competition for a particular work assignment) goals. *See* 2 LMRA HISTORY, *supra* note 22, at 1012, 1034, 1524. President Truman, in his 1947 State of the Union Message, also spoke out against the secondary boycott "when used to further jurisdictional disputes or to compel employers to violate the National Labor Relations Act." 93 CONG. REC. 136 (1947). *See generally* Koretz I, *supra* note 18, at 237. These considerations were dealt with in sections 8(b)(4)(B), (C) and (D) of the amendments. *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 625 (1967).

[27] Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 141, *as amended*, 29 U.S.C. § 158(b)(4)(B) (1970). Section 8(b)(4)(A) was later redesignated section 8(b)(4)(B) by the Landrum-Griffin Amendments, Pub. L. No. 86–257, § 704(a), 73 Stat. 542–43 (1959). An often-quoted statement of what activity this section purported to prohibit is that found in the Senate report on the bill:

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

S. REP. No. 105, 80th Cong., 1st Sess. 22 (1947), in 1 LMRA HISTORY, *supra* note 22, at 428. *See, e.g.*, Carpet Layers Local 419 v. NLRB, 467 F.2d 392, 398 (D.C. Cir. 1972).

To enforce the new section 8(b)(4), Congress added section 10(*l*), to the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(*l*) (1970), which provides that an investigating officer shall seek an injunction upon "reasonable cause to believe" the veracity of the secondary boycott complaint. 61 Stat. at 149. The injunction was provided as a remedy because of "the necessity of giving injured third parties" protection against the operation of "secondary boycotts and jurisdictional strikes." S. REP. No. 105, *supra* at 54–55, 1 LMRA HISTORY, *supra* at 460–61. An aggrieved party was also permitted to sue for damages "in any district court of the United States" under section 303(b) of the Taft-Hartley Amendments. 61 Stat. at 159 (codified at 29 U.S.C. § 187(b) (1970)).

Those who opposed section 10(*l*) called it "a weakening of the Norris-LaGuardia Act" and stated that "[t]he safeguards against 'government by injunction' which the Norris-LaGuardia Act sought to erect should be preserved." S. REP. No. 105, 80th Cong., 1st Sess., pt. 2, at 19 (1947), in 1 LMRA HISTORY, *supra* at 481.

protect those "wholly unconcerned in the disagreement between an employer and his employees."[28]

Although the legislative purpose was clear, the enacted provision's shortcomings, when read with the remainder of the Act, were also evident.[29] Guidelines were needed to distinguish secondary activity from the other forms of economic pressure guaranteed to labor by the Wagner Act, because even protected, primary activity may have secondary consequences which necessarily affect neutral parties.[30] The determination of when such union activity ceased to be protected pressure and became forbidden pressure with a secondary, illegal object was left to the Board and the courts.[31]

In the construction industry, the problem was initially resolved by giving a nearly literal reading of the "an object" phrase within the statute. For example in *NLRB v. Denver Building & Construction Trades Council*,[32] an association of unions picketed a jobsite where a

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[28] 93 CONG. REC. 4198 (1947) (remarks of Senator Taft), in 2 LMRA HISTORY, *supra* note 22, at 1106. Despite the broad language employed in the statute, the Supreme Court came to recognize that the statute was enacted for the purpose of protecting neutral parties. In the words of Justice Frankfurter:

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

Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93, 100 (1958). *See also* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 624–27 (1967); Local 761, Electrical Workers v. NLRB (General Electric), 366 U.S. 667, 672–73 (1961).

[29] Read literally, section 8(b)(4)(A) would have denied the right to engage in concerted activity protected by sections 7 and 13, since the very acts of striking and picketing are undertaken with an object that persons will cease doing business with the struck employer. *See* Note, *Secondary Boycotts and Work Preservation*, 77 YALE L.J. 1401, 1401 (1968). The Supreme Court recognized early on, however, that an "ordinary strike" would not be outlawed by section 8(b)(4)(A). NLRB v. International Rice Milling Co., 341 U.S. 665, 672–73 (1951). *See generally* Lesnick, *The Gravamen*, *supra* note 7, at 1394. *Rice Milling*, along with other early interpretations, indicates that an immediate attempt was made to separate "permissible primary pressures [from] proscribed secondary action." Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 129 (1959) [hereinafter cited as Koretz II]. The problem has been, however, that the "[c]ourts and the Board have had a hard struggle to give meaning to this policy in concrete cases." Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 85 (5th Cir. 1967) (Wisdom, J., dissenting), *cert. denied*, 391 U.S. 914 (1968).

[30] *See* Local 761, Electrical Workers v. NLRB (General Electric), 366 U.S. 667, 674 (1961); Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732 (1951).

[31] Johns, *Secondary Boycotts and "Hot Cargo" Agreements Under the Taft-Hartley and Landrum-Griffin Amendments to the National Labor Relations Act*, 13 N.Y.U. CONF. LAB. 123, 125 (1960); Note, *supra* note 29, at 1401.

[32] 341 U.S. 675 (1951).

general contractor had engaged a subcontractor who employed non-union men.[33] The Trades Council contended that its object was solely to force the general contractor to unionize the job and that the pressure was, therefore, primary.[34] The Supreme Court, however, found that the union pressure "must have included among its objects" the termination of the subcontract, since the only way the Council's demand could be met was by forcing the subcontractor off the job.[35] Affirming the Board's finding that "an object" of the strike was that of forcing a cessation of business, the Court stated that "[i]t is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract."[36]

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[33] *Id.* at 677–79.

[34] *Id.* at 688. The union also argued that the general contractor and subcontractor be regarded as one entity for purposes of the strike. The Court, however, agreed with the Board's determination that

> the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.

Id. at 689–90.

Congressional attempts at overturning this aspect of the *Denver Building* decision have been regularly, but unsuccessfully, made. *See* Note, *Common Situs Picketing and the Construction Industry*, 54 GEO. L.J. 962, 976–89 (1966). Congress' most recent endeavor was the so-called "Common Situs Picketing Bill," H.R. 5900, 94th Cong., 1st Sess. (1975), which in the words of one of the bill's sponsors, Senator Javits, would have "simply overturn[ed] the Denver Building Trades case in recognition of the economically integrated nature of the construction industry." 121 CONG. REC. S 22138 (daily ed. Dec. 15, 1975). This bill, however, was vetoed by President Ford, partly because of "the possibility that this bill could lead to greater, not lesser, conflict in the construction industry." *The President's Message to the House of Representatives Returning H.R. 5900 Without His Approval*, 12 PRES. DOC. 16, 17 (Jan. 2, 1976).

In industries other than construction, the Supreme Court has recognized that appeals to neutral employees at the same jobsite might be permissible if their "tasks aid the [struck] employer's everyday operations," Local 761, Electrical Workers v. NLRB (General Electric), 366 U.S. 667, 680–81 (1961). This "related-work standard," however, has not been extended to the construction industry. Morris, *supra* note 19, at 632–35. *See* Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 83 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968).

[35] 341 U.S. at 688. While the Court phrased its approach in terms of the search for "an object," what was actually determinative of the violation was the union's means —the strike. It appears that at the core of the continuing controversy over section 8(b)(4)(B) is the question of whether the section mandates a focus upon the union's "means" or upon its ultimate objective. The statute's lack of clarity in this regard is especially damaging for, as Justice (then Professor) Frankfurter pointed out, "[t]he 'end' of labor activities and the 'means' by which they are pursued constitute the chief inquiries of labor law." FRANKFURTER & GREENE, *supra* note 15, at 5.

[36] 341 U.S. at 689 (emphasis in original).

The *Denver Building* Court found an illegal object by focusing on the union pressure. The Court reasoned that the strike against the general contractor, in order to be successful, must necessarily include an illegal object of causing a cessation of business with the non-union subcontractor.[37] Even though the ultimate union object may have been the unionization of the job, the illegal object evidenced by the Trades Council's strike was determinative of a section 8(b)(4)(A) violation.[38]

The Board subsequently adopted the *Denver Building* rationale when construction unions began to enforce bargained-for work preservation clauses. Under this analysis, concededly valid work preservation demands were displaced by a finding that a cessation of business would be necessarily required to satisfy the demand.[39] The key determination—the subcontractor's ability or inability to meet the demand—was arrived at through the application of the right-to-control test.

This test determines the legality or illegality of union conduct in pursuit of a work preservation demand by focusing on the party upon

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[37] *Id.* at 688.

[38] *See id.* at 688–89.

[39] The Board applied this reasoning in its first consideration of the question of a strike brought because of a subcontractor's failure to assign work guaranteed to a union by a collective bargaining agreement. In Local 98, Sheet Metal Workers (Clifton Deangulo), 121 N.L.R.B. 676 (1958), the Board found that the union's refusal to unload prefabricated products, which violated the work preservation terms of the collective bargaining agreement, nevertheless constituted an unfair labor practice. *See id.* at 679–82, 687. That the union's demand was valid was not determinative for it "could only have been met or achieved" by the cessation of business with a neutral party. *Id.* at 684. The Board, finding the union's conduct to be an unfair labor practice, reasoned that

> since the Union's object was a proscribed one, the terms of the statute *make immaterial the nature of the dispute*, or even that a dispute exists with a specific primary employer.

Id. at 685 (emphasis added).

Later work preservation cases utilized the same approach. In Local 5, Plumbers (Arthur Venneri Co.), 137 N.L.R.B. 828 (1962), *modified*, 321 F.2d 366 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963), a work preservation case, the Board stated that

> the only question is whether the *pressure exerted* is primary or secondary; and [in considering whether a violation of section 8(b)(4)(B) occurred] the Union's ultimate goal is *not* a matter for consideration under that section.

137 N.L.R.B. at 832 (emphasis added).

On review, the Court of Appeals for the District of Columbia Circuit found this "means" approach to be mandated by the Supreme Court's decision in Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958), stating:

> That case teaches us that *regardless* of the legitimacy of the end sought by the union, it cannot engage in secondary pressure to obtain it.

321 F.2d at 370 (emphasis added). *Cf.* note 35 *supra*.

whom pressure is brought to bear.[40] If the party is a subcontractor who has, through contract, lost the power to assign the disputed work, then the union pressure is viewed as being brought for an illegal object: forcing a cessation of business with the party having the power to resolve the dispute. The immediate employer, the subcontractor, is deemed a neutral party in the dispute between the union and those who command the power to assign the work.[41]

The *Denver Building* illegal-object approach remained dominant in the work-preservation area even while the courts and commentators were refining an approach to the overall secondary boycott question which departed from the strictly literal *Denver Building* rationale.[42] This latter analysis was couched in terms of a primary-secondary dichotomy which was built around the proposition that Congress had not intended to interfere with the exercise of traditional primary activity and that unions therefore could lawfully bring primary pressure with ancillary secondary effects if their ultimate goal was permissible.[43]

The right-to-control test was never fully reexamined in light of the new dichotomy. Both the Board and the courts, while acknowl-

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[40] Unlike the secondary boycott, the right-to-control test has been relatively easy to describe:

> The Board's right of control theory is that in a Section 8(b)(4) case where a union is striking or picketing an employer because of the employer's failure to assign certain work tasks, a preliminary inquiry is to be made into the struck employer's legal relations with other employers. If it is found that some other employer has control over the disputed work the matter ends there—the struck employer is a neutral and the strike secondary.

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[41] The pressured employer's inability to meet the union demand is determinative of his neutrality. *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 617 n.3 (1967); George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 326 (4th Cir. 1973); Local 742, Carpenters v. NLRB, 444 F.2d 895, 899 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); Ohio Valley Carpenters Dist. Council v. NLRB, 339 F.2d 142, 145 (6th Cir. 1964).

Judge Prettyman, upholding the right-to-control test, provided a statement of its underlying reasoning when he said: "It is reasonable to hold that the object of the union was not an impossible act but [that it] was the alternative possible." Ohio Valley Carpenters Dist. Council v. NLRB, *supra* at 145.

[42] Note, *supra* note 29, at 1404–05. Professor Lesnick suggested a rationale which he termed a "modified literal approach." This approach would find violative of the Act "[o]nly appeals to secondary employees that do not arise out of acts reasonably appropriate . . . to facilitate appeals to primary employees." Lesnick, *The Gravamen*, *supra* note 7, at 1395. In Local 761, Electrical Workers v. NLRB (General Electric), 366 U.S. 667 (1961), the Supreme Court recognized that appeals to the employees of general contractors who were performing necessary work for the struck employer could be held primary activity. *See id.* at 681–82.

[43] *See generally* Morris, *supra* note 19, at 617–25; Koretz II, *supra* note 29, at

edging that a distinction between primary and secondary activity must be made, refused to consider as primary the pursuit of a work preservation demand against a subcontractor who could not assign the work. Illustrative of the Board's continued dependence upon the illegal-object analysis of *Denver Building* was the case of *Local 1694, Longshoremen (Board of Harbor Commissioners)*.[44] There the union argued that the pressure it brought to bear upon a subcontractor over a work preservation demand was primary activity. The Board found that the legitimacy of this contention "necessarily [was] predicated on the premise that [the subcontractor] was authorized to assign the disputed work."[45] The lack of authorization made the subcontractor a neutral party, and the union pressure against it thus became secondary.[46] Relying on *Denver Building*, the Board found that the union's conduct, "[w]hile 'ultimately' . . . [seeking] only to obtain the disputed work," nevertheless violated the statute because "the *means* adopted by the [union] to achieve this object was to . . . effect a disruption of the business relations of all" the concerned parties.[47]

The Board's right-to-control test met little resistance in the

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129–41 (1959); Note, *supra* note 29, at 1401–09. The primary-secondary dichotomy was given statutory recognition when, in the course of passing the Landrum-Griffin Act, 73 Stat. 541 (1959), 29 U.S.C. § 158 (1970), Congress added a proviso to section 8(b)(4)(B) which stated that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U.S.C. § 158(b)(4) (1970).

[44] 137 N.L.R.B. 1178 (1962), *modified*, 331 F.2d 712 (3d Cir. 1964).

[45] 137 N.L.R.B. at 1181. The collective bargaining agreement between the longshoremen's union and the employers association, of which the struck subcontractor was a member, provided:

> "The Employer-members of the Association agree that they will not directly perform work done on a pier or terminal or contract out such work which historically and regularly has been and currently is performed by employees covered by this agreement . . . unless such work on such pier or terminal is performed by [union members]."

Id. at 1179.

The dispute arose after Norton-Lilly, a member of the association, contracted with the Board of Harbor Commissioners, who assigned the work of moving frozen meat from shipside into storage to the Teamsters Union. *Id.* at 1179–80. The longshoremen's union then claimed the work under the above-mentioned clause. *Id.* at 1181.

[46] *Id.* at 1182. Member Brown, dissenting from this holding, stated:

> In fashioning this novel "right-to-resolve" test, the majority ignores the basic nature of the dispute and makes an incidental factor—the extent to which the struck employer could satisfy the union's demands—the determinative consideration.

Id. at 1191. The court of appeals, however, affirmed the use of the test. *See* NLRB v. International Longshoremen's Ass'n, 331 F.2d 712, 717 (3d Cir. 1964).

[47] 137 N.L.R.B. at 1184–85 (emphasis added).

courts. Every circuit which considered the test acquiesced in the reasoning which supported it,[48] and it was not until the Supreme Court dealt specifically with the work preservation boycott that the courts began to question its validity.

In *National Woodwork Manufacturers Association v. NLRB*,[49] a general contractor, Frouge, was party to a collective bargaining agreement which provided that the union would not handle prefitted doors.[50] The cutting and fitting of doors was work which had traditionally been performed by the union.[51] Despite the agreement, Frouge contracted to use premachined doors on the job, but after the union threatened not to hang them, Frouge agreed to furnish "blank" doors.[52] An association whose membership consisted of prefabricated door manufacturers thereafter charged that the union, by attempting to enforce the work preservation clause, had violated sections 8(b)(4)(B) and 8(e) of the Act.[53] The Supreme Court, in a 5–4 deci-

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[48] *See, e.g.*, American Boiler Mfrs. Ass'n v. NLRB, 366 F.2d 815, 822 (8th Cir. 1966); Ohio Valley Carpenters Dist. Council v. NLRB, 339 F.2d 142, 145 (6th Cir. 1964); NLRB v. International Longshoremen's Ass'n, 331 F.2d 712, 717 (3d Cir. 1964); Local 5, Plumbers v. NLRB, 321 F.2d 366, 369 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963).

[49] 386 U.S. 612 (1967).

[50] *Id.* at 615.

[51] *Id.* at 615–16.

[52] *Id.* at 616. Throughout the dispute, Frouge had the power to control which doors would be selected. The Court noted, therefore, that it was not confronted with the question of

> whether the Board's "right-to-control doctrine—that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand"—is an incorrect rule of law . . . .

Id. at 617 n.3.

[53] *Id.* at 616. The Association charged that the agreement itself was prohibited by section 8(e) of the Act, 29 U.S.C. § 158(e) (1970), which provides in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . to cease doing business with any other person . . . .

This section was passed, in part, to prevent agreements between a union and an employer whereby the employer would voluntarily agree to cease doing business with other nonunion employers, a so-called "hot cargo agreement." Comment, *supra* note 2, at 1292. The Supreme Court had ruled that the voluntary observance of such an agreement by an employer was not a violation of section 8(b)(4)(A). Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93, 104–05 (1958). *See* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and (8(e)*, 113 U. PA. L. REV. 1000, 1009–15 (1965) [hereinafter cited as Lesnick, *Job Security*]; Comment, *supra* at 1303–04.

A proviso to this section enables construction workers to prevent the subcontracting out of work to nonunion subcontractors. *See* National Labor Relations Act § 8(e), 29 U.S.C. § 158(e) (1970); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1119–20 (1960); Comment, *supra* at 1305–06.

After a detailed analysis of the legislative history of both sections 8(b)(4)(B), and 8(e), the *National Woodwork* Court concluded that 8(e) did not ban the work-preserva-

sion, found neither the agreement nor its enforcement violative of the Act.[54]

Had the Court applied the *Denver Building* rationale to these facts, an unfair labor practice undoubtedly would have been found, since the union's strike necessarily implied an object of forcing Frouge to cease doing business with the manufacturers of prefitted doors.[55] The Court did not address the problem from this perspective. Instead, it favored

> an inquiry into whether, under all the surrounding circumstances, *the Union's objective* was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.[56]

Through the adoption of this analysis, the Court continued the movement away from a literal reading of the statute. At the core of the new analysis was the presumption that a fair application of section 8(b)(4)(B) compelled the drawing of a distinction between primary and secondary objectives.[57] This distinction was necessary because, as the *National Woodwork* majority repeatedly stressed in its opinion, Congress intended "to prohibit only 'secondary' objectives."[58]

In *National Woodwork*, right to control was not an issue since the general contractor had the power to assign the work.[59] Nonetheless, the decision had profound impact on the test. The conflict between the "all the surrounding circumstances" test mandated by *National Woodwork* and the right-to-control test's emphasis on one circumstance was self-evident.[60] In response to this conflict, the circuit courts of appeal began to abandon the *Denver Building* "illegal ob-

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tion agreement between the general contractor, Frouge, and the union. 386 U.S. at 646. For an analysis of the section 8(e) aspects of the Court's decisions see Comment, *"Hot Cargo" Clauses in Construction Industry Labor Contracts*, 37 FORDHAM L. REV. 99 (1968).

[54] 386 U.S. at 646.

[55] The dissenters in *National Woodwork* would have, in fact, found the union conduct illegal through an application of the *Denver Building* analysis. *See id.* at 650–52.

[56] *Id.* at 644 (footnote omitted) (emphasis added). Expounding upon its test, the Court stated that "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *Id.* at 645 (footnote omitted).

[57] *See id.* at 645, where the Court quoted with approval Justice Frankfurter's statement in Local 761, Electrical Workers v. NLRB, 366 U.S. 667, 674 (1961), that " '[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task.' "

[58] 386 U.S. at 620, 622, 625–27.

[59] *Id.* at 616 n.3. *See* note 52 *supra* and accompanying text.

[60] *See* American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556, 561 (8th Cir. 1968).

ject" analysis and emphasize an examination of the union's ultimate objective.[61] By 1973, four circuits had discarded the right-to-control test and substituted an examination of the union's objective through a consideration of all factors relevant to the dispute.[62]

Nevertheless, the Board remained steadfast in its adherence to the control doctrine.[63] It attempted a clear exposition of its continued reliance on the test in *Local 438, Plumbers (George Koch Sons, Inc.)*.[64] In that case the General Electric Company had engaged a contractor, Koch, to provide machinery to be used in its manufacturing process.[65] Since the contract required that certain piping be pretested, Koch fabricated a portion of it to test the system. After testing, Koch subcontracted the final installation of all pipes to Phillips Company, which maintained a work preservation agreement with Local 438, a pipefitters union.[66] When Koch shipped both the pipe he had

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[61] *See* Local 636, Plumbers v. NLRB, 430 F.2d 906, 909 (D.C. Cir. 1970). The Court of Appeals for the District of Columbia Circuit, considering the pressure brought by a union against a subcontractor over a work preservation demand, stated:

> The determination whether a contract clause or union activity is secondary rests on an analysis which focuses on the union's objective . . . . In our view, this analysis requires the conclusion that if the union has negotiated a valid work-preservation agreement with its employer and is enforcing that agreement, the union's activity is primary.

Id. at 910 (footnote and citation omitted). *See also* Local 742, Carpenters v. NLRB, 444 F.2d 895, 901 n.12 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971) ("*National Woodwork* makes the union's 'objective' the keystone of primary-secondary analysis"). *Cf.* note 39 *supra*.

[62] *See* Western Monolithics Concrete Prods., Inc. v. NLRB, 446 F.2d 522, 526 (9th Cir. 1971); Local 742, Carpenters v. NLRB, 444 F.2d 895, 903 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556, 561–62 (8th Cir. 1968); NLRB v. Local 164, IBEW, 388 F.2d 105, 109–10 (3d Cir. 1968). The First Circuit has also questioned the right-to-control test in dictum. *See* Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188, 192 n.10 (1st Cir. 1969).

[63] The District of Columbia Circuit remanded several right to control cases to the Board with directions to consider "all the surrounding circumstances." *See, e.g.*, Local 742, Carpenters v. NLRB, 444 F.2d 895, 903 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); Local 636, Plumbers v. NLRB, 430 F.2d 906, 910–11 (D.C. Cir. 1970). The Board, however, on remand of these cases, would acquiesce in the court's view of the control doctrine only "for the purposes of this case." Local 742, Carpenters, 201 N.L.R.B. 70, 70 (1973); Local 636, Plumbers, 189 N.L.R.B. 661, 661 (1971).

> In Local 742, Carpenters, *supra*, the Board viewed the issue before it as whether the sole object of the [union's] conduct was work preservation or whether . . . such conduct was *at least in some measure* "tactically calculated to satisfy union objections elsewhere."

201 N.L.R.B. at 71 (quoting from 386 U.S. at 644) (footnote omitted) (emphasis added). Framing the issue in this light hardly reflected the court's instructions to consider all the surrounding circumstances on remand.

[64] 201 N.L.R.B. 59, *enforced*, 490 F.2d 323 (4th Cir. 1973).

[65] 201 N.L.R.B. at 59.

[66] *Id.* at 59–60.

fabricated for the tests and non-prefabricated pipe to the jobsite, the union installed only the non-prefabricated pipe, claiming that the pipe Koch had worked on was violative of the work preservation clause.[67]

The Board found the work preservation clause valid, but found the union pressure, brought in an attempt to enforce that clause, to be a violation of section 8(b)(4)(B).[68] This decision was reached by distinguishing *National Woodwork*. The power over the dispute possessed by the general contractor in that case was, the Board asserted, "a crucial factual difference" and therefore "render[ed] *National Woodwork* not dispositive of the situation" where the subcontractor lacked the power to assign the work.[69] The Board further maintained that the *National Woodwork* rationale was applicable only to the validity or invalidity of the work preservation clause itself, and that only this question necessitated an "all the surrounding circumstances" approach, while the question of primary or secondary activity could still be determined by the right-to-control test.[70]

The Court of Appeals for the Fourth Circuit, in *George Koch Sons, Inc. v. NLRB*,[71] agreed with the Board that *National Woodwork* could be distinguished and was therefore not controlling.[72] Finding, as the Board did, that the work preservation clause was valid, the court concluded that activity against Phillips, the subcontractor, was secondary and a violation of the Act.[73] The court, focusing on the union pressure rather than on the objective, reasoned that if "a result" of the activity was to force the subcontractor to cease dealing with the general contractor, "then such enforcement fouls the Act."[74]

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[67] *Id.* at 60.

[68] *Id.* at 63.

[69] *Id.* at 61.

[70] *Id.* at 62–63. The Board characterized its approach as being two-pronged, focusing on

> (1) whether under all the surrounding circumstances the union's objective was work preservation and then (2) *whether the pressures exerted* were directed at the right person, i.e., at the primary in the dispute.

Id. at 64 (emphasis added). The Board concluded that "this approach fully conforms with *National Woodwork*." *Id. Cf.* 386 U.S. at 644.

[71] 490 F.2d 323 (4th Cir. 1973).

[72] *Id.* at 327.

[73] *Id.* at 328.

[74] *Id. George Koch* was followed by the Ninth Circuit in Associated Gen. Contractors, Inc. v. NLRB, 514 F.2d 433, 437–38 (9th Cir. 1975). That court, in finding that "*National Woodwork* must be limited by the right-to-control doctrine," *id.* at 438, ignored an earlier Ninth Circuit decision which had come to the opposite conclusion. In Western Monolithics Concrete Prods. v. NLRB, 446 F.2d 522, 526 (9th Cir. 1971), the

The issue presented in *Enterprise* was identical to that which had caused the circuits to split: whether section 8(b)(4)(B) mandates the finding of an unfair labor practice when a union attempts to enforce a bargained-for work preservation clause against an employer who is obligated by contract to act at variance with its terms.[75] The *Enterprise* court, declining to adopt the *George Koch* rationale, held that no violation occurs where evidence drawn from all the surrounding circumstances leads to the conclusion that the union's "sole objective" is the preservation of traditional work.[76]

The Board, in its third post-*National Woodwork* appearance before the District of Columbia Circuit concerning right to control,[77] argued that it had utilized the test simply to create "a rebuttable presumption that the coerced employer is a neutral."[78] This recasting of the control doctrine as a prima facie test was rejected by the *Enterprise* court, "given the virtual impossibility of proving the *lack* of the imputed secondary objective."[79] Apparently, the only source of rebuttal proof available to a union would be that drawn from all the surrounding circumstances, yet the Board had already indicated in *George Koch* that it would not consider such factors dispositive of the issue of secondary activity.[80] It was evident, therefore, that the test was indeed of a "per se" rather than a "presumptive" nature.[81]

After highlighting the defective aspects of the Board's rebuttable presumption argument, the court attacked the contention that the *Denver Building* rationale was dispositive of the case at bar. The

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court had concluded on the basis of *National Woodwork* that right to control "cannot be the sole determinative factor" in a strike over work preservation.

[75] *See* 521 F.2d at 888.

[76] *Id.* at 889, 904.

[77] The right-to-control test had previously been at issue in Local 742, Carpenters v. NLRB, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971), and Local 636, Plumbers v. NLRB, 430 F.2d 906 (D.C. Cir. 1970). *See also* Local 433, Carpenters v. NLRB, 509 F.2d 447 (D.C. Cir. 1974).

[78] Brief for Respondent at 12–13, Enterprise Ass'n of Pipefitters v. NLRB, 521 F.2d 885 (D.C. Cir. 1975) [hereinafter cited as Brief for Respondent].

[79] 521 F.2d at 890 n.9 (emphasis in original).

[80] *See* Local 438, Plumbers, 201 N.L.R.B. 59, 64, *enforced sub nom.* George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973). The Board's argument in *Enterprise* did note that the presumption created by the right-to-control test would be overcome if the employer's lack of control over the work was "the result of its own efforts to instigate the subcontracting to another." Brief for Respondent, *supra* note 78, at 14. It was completely silent, however, on how the presumption could be rebutted absent such a showing. The dissenters in *Enterprise* accepted the Board's "prima facie" theory, but likewise did not offer any suggestion as to how the inference would be overcome. *See* 521 F.2d at 931.

[81] *See* 521 F.2d at 890 n.9.

Board argued that under *Denver Building*, Local 638's action must be invalidated since its "ultimate objective of work preservation . . . could only be attained" through a termination of the contract between Slant/Fin and Austin.[82] Even on the supposition that a cessation of business was a necessary step to the achievement of the union's goal, the *Enterprise* majority would still characterize the termination as an ancillary effect of lawful, primary activity.[83] The court, however, was not convinced that the termination of the contractual relationship was a requisite step in achieving the union's goal. It found, rather, several alternatives whereby the union pressure would have been alleviated without causing a cessation of business.

Hudik, the subcontractor, could have sought a compromise whereby the union would receive extra payments if it installed the Slant/Fin units;[84] or, the parties could have submitted their dispute to arbitration.[85] Hudik could also have avoided its dilemma by simply refraining from bidding on the conflicting subcontract.[86] In the face

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[82] *Id.* at 902.

[83] *See id.* at 903 & n.44. The majority recognized that Hudik "might prefer to terminate its subcontract with Austin or pressure Austin to change its specifications." *Id.* at 900. This action, however, would not be prohibited since

> as the *National Woodwork* Court teaches, in enacting the proviso to Section 8(b)(4)(B) Congress made it clear that [such activity] is not proscribed by Section 8(b)(4)(B) if the employer struck is not an innocent neutral to the union's dispute.

Id. at 900–01 (footnote omitted).

[84] *Id.* at 899 & n.34. The court also advanced the feasibility of alternative bargaining solutions. For example, it suggested that following the original acceptance of the collective bargaining agreement, the union might relent on the enforcement of the clause in return for additional fringe benefits. *Id.* at 899 n.34.

[85] *Id.* The court cited with approval an arbitration system which had been devised by a council of unions and a trade association of employers in California. *Id.* This procedure allowed the union to require that the employer discontinue the disputed work for 72 hours, while the claim was investigated by the arbitrators. After the 72-hour period work would be resumed, even if the investigation had not been finished. The arbitration board was empowered by the contract to "make an award . . . which 'it may deem appropriate.'" Associated Gen. Contractors, Inc. v. NLRB, 514 F.2d 433, 435–36 (9th Cir. 1975).

[86] The majority saw this alternative as acceptable, noting that if Hudik and other subcontractors refused to bid, the union's goal would be served since contractors would, in the future, not require specifications which subcontractors were unable to bid upon. 521 F.2d at 806 n.25. The dissent, however, viewed the acknowledged effect that a refusal to bid by subcontractors would have on general contractors as direct evidence of the secondary nature of the union activity taken against the subcontractor. *See id.* at 928, 934.

A recent commentator has suggested that the antitrust laws might well be violated by a refusal of a defined group of subcontractors to bid on projects which contain specifications contrary to union work preservation guarantees. Leslie, *Right to Control:*

of these alternatives, Hudik could not be considered "a neutral bystander innocently caught up in" a dispute, and the *National Woodwork* court had made it clear that only neutral parties were protected by section 8(b)(4)(B).[87]

Furthermore, the majority reasoned that *National Woodwork* compelled an examination of all the surrounding circumstances in determining the legality of the union's goal.[88] Thus, if the union's single objective was the satisfaction of a valid work preservation demand by a non-neutral, involved employer, then the Act would not prohibit activity against that employer in pursuit of that demand.[89] The right-to-control test, in the court's opinion, did not properly focus upon the ultimate objective, but concentrated instead upon the single factor of control.[90]

Based on this analysis, the majority summarized the right-to-control test as "a continuing inducement for employers to violate their bargaining agreements."[91] Such inducement was provided by the "safe harbor" of neutrality on the one hand and, as the majority asserted, the inability of the union to bring suit for breach of contract on the other.[92]

A Study in Secondary Boycotts and Labor Antitrust, 89 HARV. L. REV. 904, 914–20 (1976).

[87] 521 F.2d at 894–95.

[88] *Id.* at 901.

[89] *Id.* at 903–04. The court recognized that "a strike may have more than a single objective and may [therefore be illegal] if even one objective is a prohibited secondary one." *Id.* at 903 (footnote omitted). As a result, the court rejected the board's contention that the *Enterprise* test converted the search for illegal, secondary activity into a consideration of only "whether the *principal* object of the union is secondary." *Id.* n.44 (emphasis in original).

The *Enterprise* test, the court asserted, set up a presumption that when a union was attempting to enforce a valid work preservation clause, its activity was primary. This presumption, however, would be overcome if the union's action was "tainted by secondary objectives." As examples of such "tainted" goals, the court noted that if a union pressured the general contractor as well as the subcontractor, the activity would be secondary since the general contractor would presumably be a neutral unconcerned with his subcontractors' bargaining arrangements with the union. Another example would be a situation where a union "discriminates in its work preservation tactics on the basis of the organizational status of the manufacturer." *Id.* at 904 n.44.

[90] *See id.* at 893–94, 901.

[91] *Id.* at 901.

[92] *Id.* at 901 n.37. The creation of the "safe harbor" was reinforced by the fact that once the Board had made its finding that the subcontractor was a neutral, secondary employer in the dispute, it would consistently postpone consideration of the question of whether the union could pressure the resultant primary employer, the general contractor. *See, e.g.*, Local 1066, Longshoremen (Wiggin Terminals), 137 N.L.R.B. 45, 48 (1962); Local 5, Plumbers (Arthur Venneri Co.), 137 N.L.R.B. 828, 832 n.5 (1962), *modified*, 321 F.2d 366 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963). For the Board's ruling

The four dissenting members of the court sharply disagreed with the majority over this question. In an opinion by Judge MacKinnon,[93] the dissent argued that the union would be free to pursue a contractual remedy for violation of its work preservation clause, since passage of section 8(e) had not foreclosed "the notion that certain types of contractual provisions might be enforceable by lawsuit but not by economic action."[94] Under the dissent's reasoning, the work preservation clause could operate via a suit in contract against the subcontractor where "he might agree to pay to the union . . . the value of traditional work he cannot assign to his employees."[95] The majority dismissed this argument by reasoning that such a suit could not be maintained since, as a matter of statutory construction, what was illegal under section 8(b)(4)(B) of the Act was also illegal under section 8(e), and therefore unenforceable.[96]

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in *Enterprise* see note 11 *supra* and accompanying text. *See also* 521 F.2d at 897 n.29; Lesnick, *Job Security*, *supra* note 53, at 1038 nn.158 & 160.

The Board did finally attempt to resolve this question in Bricklayers' Local 8, 180 N.L.R.B. 43 (1969), *enforcement denied sub nom.* Western Monolithics Concrete Prods., Inc. v. NLRB, 446 F.2d 522 (9th Cir. 1971). In that decision, the Board ruled that picketing a general contractor who possessed the power to control the work assignments was permissible, even though the general contractor had no bargaining relationship with the aggrieved union. *See* 446 F.2d at 525. Board Member Brown, dissenting in part, succinctly noted the results of this conclusion:

> By constructing a rationale with a "right-to-control" theory as its core, the majority thus prohibits a union from picketing an employer over the terms and conditions of employment of that employer's own employees, while it permits the Union to picket another entity whose employees and employment conditions are not involved in the controversy.

180 N.L.R.B. at 44. The court of appeals agreed with Member Brown's assessment and set aside the decision, stating that an application of the right-to-control test would lead to an "anomalous result." 446 F.2d at 525.

[93] 521 F.2d at 914. Judge MacKinnon was joined by Judges Tamm, Robb, and Wilkey. *Id.*

[94] *Id.* at 938.

[95] *Id.* at 940. The dissent would apparently require the subcontractor to make up the union's lost benefits through a contract suit rather than through an out-of-court negotiation of a compromise, as the majority suggested. *See id.* Upholding the right-to-control test under these circumstances represents, however, a Pyrrhic victory for the subcontractor since he is still obligated to provide some form of compensation for the lost work.

[96] *Id.* at 901 n.38. The majority quickly disposed of the contention that a remedy in contract might still exist after a section 8(b)(4)(B) violation when it stated that:

> It is sufficient to observe that the suggestion—that an agreement to preserve work from *nonjobsite* prefabrication is legal and enforceable in court even though it obligates the employer to do that which the union could not exert economic pressure to force the employer to do—is completely untenable in light of the congressional overruling of *Sand Door* by the passage of § 8(e) and the *National Woodwork* Court's formulation of the *in pari materia* relationship of §§ 8(e) and 8(b)(4)(B).

Id. (emphasis in original).

The dissenters also found other grounds for disagreement. They argued that *National Woodwork* was not dispositive of the right-to-control situation, since there the Court was faced only with "a *primary* boycott" of the party having control over the dispute.[97] They also accepted the Board's redesignation of the test as prima facie,[98] arguing that both the administrative law judge and the Board had in fact examined all the surrounding circumstances in reaching their decision.[99] Application of the prima facie test, in the dissenters' view, has the advantage of mandating a finding that the union's pressure is permissible whenever it could be shown that the employer's lack of control was due to " 'his own efforts to instigate the subcontracting to another.' "[100] Finally, the dissent saw the Board's control test not as a simplism, but as encompassing considerations of both the legal and practical aspects of the power to resolve the dispute. Under this formulation, the dissent asserted that the Board had studied the individual subcontractor's actual "ability to effect changes in or exert influence upon the construction policies of those parties who specify the use of prefabricated products," before finding secondary pressure.[101]

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[97] 521 F.2d at 920 (emphasis in original). The discretion possessed by the general contractor in *National Woodwork* made the union boycott primary and wholly different from the union action taken in *Enterprise*. *Id.*

[98] *Id.* at 931. The dissent recognized that if the right-to-control test were actually applied in a per se manner it "might well violate the stricture of *National Woodwork* that the focus of a union's action must be determined from all the surrounding circumstances." *Id.*

[99] *Id.* at 928–31. The dissent found several circumstances examined below. First, the administrative law judge had reached the conclusion that the work preservation clause at issue was not intended to encompass work over which Hudik lacked control. *Id.* at 927–28. Second, the dissent pointed to the administrative law judge's reference to "the dearth of nonunion labor in New York City," the site of the project. *Id.* at 929. This absence of nonunion labor would make a refusal to handle Slant/Fin units most effective, forcing general contractors and engineers to cease specifying the units in their projects. *Id.* at 929–30. Finally, Judge MacKinnon noted that the union had approached Austin with its refusal to handle the Slant/Fin units, demonstrating "that Austin was the true object of the boycott." *Id.* at 930.

The dissent's assertion that other circumstances beyond who had the power to control were considered is curious in view of the Board's own admission in *Koch* that its approach had been to analyze only the validity of the work preservation clause itself under all the surrounding circumstances. *See* Local 438, Plumbers, 201 N.L.R.B. 59, 64, *enforced sub nom.* George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973). *See* notes 64–70 *supra* and accompanying text.

[100] 521 F.2d at 931 (quoting from Brief for Respondent, *supra* note 78, at 5 n.4).

[101] 521 F.2d at 933 (footnote omitted). Given the nature of the construction industry in New York City, the dissent found that subcontractors such as Hudik had little meaningful input into job specification decisions, and therefore should not be penalized "for conflicts beyond their control." *Id.* at 932 n.71.

Thus, although stated in terms of the validity of the test, the essential difference between the majority and the dissent is the characterization of the subcontractor in a right-to-control situation. The majority views the subcontractor as an involved, primary party, whereas the dissent characterizes him as an innocent bystander, caught between the competing demands of the union and those who control the work.

Under the decision in *Enterprise*, the pressured party's right to control assignment of the disputed work would be relegated to consideration among several other factors in determining whether the pressure is permissible. Important among the surrounding circumstances to be considered would be the union's disinclination "to permit its members to install the prefabricated units even if they were paid for the work they lost by the prefabrication."[102] Also to be weighed are those criteria delineated in *National Woodwork*, such as the likelihood that the use of the prefabricated materials would actually have displaced union jobs, the history of the bargaining relationship between the parties, and " 'the economic personality of the industry.' "[103]

The *Enterprise* court, therefore, remanded the case to the Board, instructing that it may consider the right to control as one of the factors in determining the primary or secondary nature of Local 638's action. The court cautioned, however, that the Board could not consider that criterion "to the total exclusion of the circumstances which the *National Woodwork* Court" had recognized as relevant.[104] Whether this approach comports with section 8(b)(4)(B) has yet to be finally decided, since the Board's petition for a writ of certiorari has been granted by the Supreme Court.[105] On review, the Court will have the choice of several well-delineated theories upon which to base its decision.

It can accept the Board's rationale, developed through *George Koch* and unsuccessfully urged in *Enterprise*, that only the validity of the work preservation clause need be measured against all the surrounding circumstances, while the right-to-control test can be used to establish a rebuttable presumption that the subcontractor is a neutral. This formulation, based essentially upon the Supreme Court's early *Denver Building* conceptions of secondary activity, would ap-

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[102] *Id.* at 899.

[103] *Id.* at 905 n.47 (quoting from 386 U.S. at 644 n.38).

[104] *Id.* at 904–05.

[105] 96 S. Ct. 1101 (1976).

pear effectively to prohibit strikes against subcontractors over work preservation demands.[106] If the Court adopts this analysis, it should provide an alternative means for the union to enforce its work preservation agreements. Presumably this would necessitate recognition of a contractual action against the subcontractor.[107]

Another alternative open to the Court is that which was suggested by Judge Bazelon in his concurrence in *Enterprise*. In his opinion, the Board's attempt to analyze the work-preservation job action from the standpoint of whether the union intended its effect elsewhere is fruitless.[108] Since a successful strike against an employer having the right to control and one against an employer without the right to control both have the same ultimate effect—a cessation of business with the prefabricating manufacturer—Judge Bazelon queried: "Why is it that the union does not 'intend' the secondary effects in the first situation but does in the second?"[109]

Instead of attempting to determine the union's intent, he would apply a test based upon the underlying policies of the nation's labor acts. This test would measure "the *substantive desirability* of the union's bargaining objective" to determine whether that objective should be protected or prohibited.[110] Judge Bazelon saw several advantages in the application of this test. First, it would avoid the continued wrangling over union intent which focuses "on subtle questions of evidence while the central questions of the desirability of the objective as against its adverse effects [are] submerged."[111] Second, by so treating the question, Congress would be confronted with a clear and uncluttered judicial position which it could then acquiesce in or overrule by legislation.[112] Finally, he saw such an approach as

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[106] *See* Note, *supra* note 29, at 1405; note 109 *infra*.

[107] The Court could find that although a union's economic pressure violates section 8(b)(4)(B), a suit for breach of contract under 29 U.S.C. § 185(b) (1970) is not precluded. *See* notes 94–96 *supra* and accompanying text.

[108] 521 F.2d at 908.

[109] *Id.* at 907. The Board's reliance on the "an object" dicta from *Denver Building* would, in Judge Bazelon's opinion, outlaw all strikes, since "[a] union always intends that employers other than the immediate employer will be pressured by its strikes or job actions." *Id.* at 906.

[110] *Id.* at 911–12 (emphasis in original).

[111] *Id.* at 912.

[112] *Id.* Judge Bazelon saw this function as a proper institutional position for the judiciary to assume:

> The history of legislative-judicial-administrative dialogue is most impressive in those situations in which the judiciary considers the legality of a particular bargaining objective after the parties and the Labor Board have formulated the issue and either applies existing legislative policy to that objective or in effect "remands" the issue to Congress for action.

Id. (footnote omitted).

being consonant with Congress' true intent when it enacted section 8(b)(4)(B) while simultaneously leaving sections 7 and 13 in full effect.[113]

A third option open to the Court would be to apply the *National Woodwork* reasoning as interpreted by the *Enterprise* majority. This would entail abandoning the control doctrine and replacing it with an analysis of all the surrounding circumstances, with a view toward determining whether the union's objective is primary or secondary. The adoption of such an approach would have the effect of placing building trades unions on an equal footing with industrial unions as to their ability to pressure closely connected third parties.[114] Furthermore, solitary reliance upon the confusing concept of control would no longer be compelled. The variance between the *Enterprise* majority's and the dissent's conceptualizations of how the Board employs this doctrine demonstrates the need for a more workable, concretely defined standard.[115]

Continued dependence upon the right to control should also be foregone because it rests on an apparently improvident initial premise: that the only possible solution to a work preservation conflict is to present to the union the exact work which it demands. The existence of such an alternative solution as arbitration is discounted, even though compensation for the lost work is presumably as acceptable a solution as a return of the lost work itself. The control test ignores the possibility of arbitration and proceeds effectively to thwart it by recognizing the subcontractor, a potential bargaining party, as a neutral rather than as an answerable entity. On the other hand, an all the surrounding circumstances analysis would foster arbitrability, since subcontractors would no longer be assured of a finding of an unfair labor practice against the union.

The established principle that Congress intended to protect only neutral parties by section 8(b)(4)(B) does not go far toward resolving the work preservation question, since in actuality both the subcon-

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[113] *Id.*

[114] It is now settled that industrial unions may exert pressure on neutral employers whose functions are closely integrated with those of the primary employer. *See* Steelworkers Union v. NLRB (Carrier Corp.), 376 U.S. 492, 498–99 (1964); Local 761, Electrical Workers v. NLRB (General Electric), 366 U.S. 667, 682 (1961).

[115] The Board is apparently content with the utility of the control test, and has maintained the position that

> until the Supreme Court explicitly decides to the contrary, the Board will continue to use the 'right to control' test in appropriate circumstances in determining whether an unlawful secondary boycott exists.

Local 636, Plumbers, 177 N.L.R.B. 189, 190 (1969), *enforcement denied*, 430 F.2d 906 (D.C. Cir. 1970) (footnote omitted).

tractor and the general contractor exhibit a significant degree of involvement.[116] Rather than twist obviously involved parties into a convoluted primary-secondary model, the better analysis would appear to be one which focuses upon the union's objective. The right to control, while still relevant as a factor in ascertaining the union's ultimate goal, is nevertheless an overly simplistic formulation, and should no longer remain the decisive consideration in a conflict over work preservation.

John Michael Esposito

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[116] The general legislative silence in this area and the dangers of attributing too much significance to that silence were pointed out by Justice Harlan in a memorandum opinion filed in the *National Woodwork* decision:

> We are thus left with a legislative history which, on the precise point at issue, is essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem [of work preservation]. In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of the boycott as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of such an opaque legislative record, a purpose to outlaw the kind of collective bargaining and conduct involved in these cases.

386 U.S. at 649–50.