NOTES

SECONDARY BOYCOTTS UNDER SECTION 8(b) (4) (A) LMRA

Secondary boycotts, as most other forms of organized labor activity, were long condemned by the common law on the basis of such theories as conspiracy and inducing breach of contract.[1] However, the courts were more dilatory in recognizing secondary boycotts as a legitimate labor action than was generally true of primary strikes and boycotts. As late as 1927, the prevailing view in this country was that the secondary boycott could not be lawfully employed in a labor dispute, whatever the methods used and however justifiable the objectives may have been.[2]

The exact definition and true nature of secondary boycotts have been the subject of considerable controversy.[3] Generally, however, the use of any coercive pressures against third persons to force cessation of dealings with the employer with whom the dispute exists is a secondary boycott. The hostile attitude of the courts is largely traceable to their disapproval of any interference with the freedom of action of persons who are thought to be unconcerned with the basic labor dispute.[4] Typical of the types of union conduct which have been condemned as secondary boycotts are: strikes,[5] threats to strike,[6] and picketing[7] of neutral employers doing business with the employer with whom the basic dispute

---

1. For an account of the historical development and application of these theories to labor activities, see GREGORY, LABOR AND THE LAW c. 1-6 (Rev. ed. 1949); 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING c. 1-6 (1940).

2. OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS 658 (1928).

3. See FRANKFURTER AND GREENE, THE LABOR INJUNCTION 42 (1930); MILLIS AND MONTGOMERY, ORGANIZED LABOR 581 (1945); OAKES, *op. cit. supra* note 2, at 602; Barnard and Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 136 (1940); Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341 (1938); Note, 15 GEO. WASH. L. REV. 327 (1947).

4. See MILLIS AND MONTGOMERY, *op. cit. supra* note 3, at 584; 1 TELLER, *op. cit. supra* note 1, § 150.

5. *E.g.*, Bricklayers Union v. Seymour Ruff & Sons, 160 Md. 483, 154 Atl. 52 (1931); A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N.E. 82 (1927); Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997 (1908).

6. *E.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920); Armstrong Cork & Insulation Co. v. Walsh, 276 Mass. 263, 177 N.E. 2 (1931); Purvis v. Local No. 500, 214 Pa. St. 348, 63 Atl. 585 (1906).

7. *E.g.*, Muncie Bldg. Trades Council v. Umbarger, 215 Ind. 13, 17 N.E.2d 828 (1938); Van Buskirk v. Sign Painters, 127 N.J. Eq. 533, 14 A.2d 45 (1940); United Union Brewing Co. v. Dave Beck, 100 Wash. 412, 93 P.2d 772 (1939).

existed; refusing to work on materials destined for[8] or to handle the products of the disputing employer;[9] the use of unfair lists;[10] and refusal to work on the same job with non-union employees.[11]

The opposition to secondary boycotts was effectuated chiefly by means of injunctions, although civil and criminal penalties were also available.[12] Secondary activities which interfered with interstate commerce frequently ran afoul of the Sherman Anti-Trust Act and were enjoinable in the federal courts.[13] Perhaps the peak of judicial restrictions on secondary boycotts was reached in the *Bedford Cut Stone Case,*[14] decided in 1927. The Supreme Court held the Journeymen Stone Cutters Association's refusal to work on building stone, which had been quarried by non-union employees working in opposition to the Association, an illegal restraint of trade in violation of the Sherman Act.

In relatively recent years, many courts have gradually taken the view that secondary union activities should be permitted when justified.[15] This development has not proceeded uniformly among the states and frequently has been achieved by characterizing the conduct in question "primary," rather than "secondary." Factors contributing to this judicial acceptance have been an increasing realization that the so-called neutral third parties often seriously threatened the wages and working conditions of the employees engaged in the secondary boycott, and the belief that the secondary boycott weapon was necessary to enable the unions to counterbalance combined activities of employers in opposition to unions, such as the circulation of blacklists.[16]

Refusals to work on materials furnished by a non-union employer,[17]

---

8. Burgess Bros. v. Stewart, 112 Misc. 347, 184 N.Y. Supp. 199 (Sup. Ct. 1920).

9. *E.g.,* March v. Bricklayers Union, 79 Conn. 7, 63 Atl. 291 (1906); A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N.E. 82 (1927); 264 Mass. 511, 163 N.E. 193 (1928); Purvis v. Local No. 500, 214 Pa. St. 348, 63 Atl. 585 (1906).

10. *E.g.,* Wilson v. Hey, 232 Ill. 389, 83 N.E. 928 (1908); My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721 (1905); Branson v. I.W.W., 30 Nev. 270, 95 Pac. 354 (1908).

11. *E.g.,* Blandford v. Duthie, 147 Md. 388, 128 Atl. 138 (1925); Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works, 92 N.J. Eq. 131, 111 Atl. 376 (1920); W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N.E. 801 (1917).

12. See, generally, FRANKFURTER AND GREEN, *op. cit. supra* note 3.

13. Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Gompers v. Bucks Stove Range Co., 221 U.S. 418 (1911); Loewe v. Lawlor, 208 U.S. 274 (1908). See GREGORY, *op. cit. supra* note 1, c. 8-9.

14. 274 U.S. 37 (1927).

15. See MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 460 (1950); GREGORY, *op. cit. supra* note 1, at 153; Hellerstein, *supra* note 3, at 369.

16. See authorities cited in note 15 *supra*; MILLIS AND MONTGOMERY, *op. cit. supra* note 3, at 369.

17. *E.g.,* J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac.

refusals to work on the job with non-union men,[18] and placing the disputing employer on an unfair list[19] were among the first types of secondary boycott permitted. More recently picketing the product of the primary employer while in the hands of distributors[20] has been recognized as legitimate union conduct by some courts, usually under a "unity of interest" theory.[21] Perhaps even more important than the changing attitude of the courts has been the enactment of the Norris-LaGuardia Act,[22] with many similar state anti-injunction statutes,[23] and the constitutional protection afforded picketing as a form of free speech after *Thornhill v. Alabama.*[24] The Sherman Act no longer constitutes a barrier,[25] and the imposition of civil and criminal penalties is not nearly so effective a preventive as was the injunction.[26]

Unfortunately, this partial immunity from legal prohibitions was accompanied by increasing abuse in the employment of secondary boycotts. Particularly disruptive was their use in furtherance of jurisdic-

---

1027 (1908); State v. Van Pelt, 136 N.C. 633, 49 S.E. 177 (1904); Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917).

18. *E.g.,* Meier v. Spier, 96 Ark. 618, 132 S.W. 988 (1910); Jetton-Delke Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907); National Ass'n Steamfitters v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902).

19. *E.g.,* Truax v. Bisbee Local, 19 Ariz. 379, 171 Pac. 121 (1917); Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127 (1908); Perfect Laundry v. Marsh, 120 N.J. Eq. 508, 186 Atl. 470 (1936).

20. Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411 (1940); Wagner v. Milk Wagon Drivers Union, 320 Ill. App. 341, 50 N.E.2d 865 (1943); Johnson v. Milk Drivers Union, 195 So. 791 (La. App. 1940); Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937); Alliance Auto Service, Inc. v. Cohen, 341 Pa. 283, 19 A.2d 152 (1941). *Cf.* Weist v. Dirks, 215 Ind. 568, 20 N.E.2d 969 (1939).

21. The "unity of interest" doctrine has been principally developed by the New York courts. A unity of interest is said to exist between two employers when the secondary employer receives an economic advantage through lower prices because of the primary employers labor policies. See Note, 40 MICH. L. REV. 603, 605 (1942). The existence of a unity of interest has been sufficient to justify a secondary boycott of the secondary employer under certain circumstances. Thus, a union seeking recognition from the primary employer may picket the product of the primary employer while in the hands of a distributor, see cases cited in note 20 *supra,* or a dealer who is the recipient of services from the primary employer. People v. Muller, 286 N.Y. 281, 36 N.E.2d 206 (1941). The picketing must be directed at the product, and the secondary employer must be a distributor, and not an ultimate consumer, of the product. Note, 8 U. of CHI. L. REV. 356 (1941). See, generally, Hellerstein, *supra* note 3, at 349.

22. 47 STAT. 70 (1932), 29 U.S.C. § 101 *et seq.* (1946). See Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U.S. 91 (1940); Note, 15 GEO. WASH. L. REV. 327, 338 (1947).

23. Collected and discussed in 2 TELLER, *op. cit. supra* note 1, c. 20.

24. 310 U.S. 88 (1940). See Bakery & Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942). Some state cases have held that state statutes banning secondary boycotts by name are unconstitutional, restricting freedom of speech. *E.g., Ex parte* Blaney, 30 Cal.2d 643, 184 P.2d 892 (1947).

25. U.S. v. Hutcheson, 312 U.S. 219 (1941).

26. See MILLIS AND MONTGOMERY, *op. cit. supra* note 3, at 651.

tional disputes. Many employers were picketed and otherwise boycotted for mere use of materials manufactured by employees who were members of a rival union.[27] Also, the restrictions on employer anti-union activities under the Wagner Act eliminated much of the necessity for countervailing union conduct.[28] Thus, within the last few years, limitations on the use of secondary boycotts have been legislatively imposed by some states[29] and by the Federal Government.

Prior to 1947, the control of secondary boycotts was largely within the province of the states. In that year the Taft-Hartley Act[30] amended the NLRA to include, for the first time, several limitations on the activities of labor unions and their agents.[31] One of the most important of these amendments is Section 8(b)(4)(A),[32] which provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or 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. . . .

This section is almost unchanged from the Bill drafted by the Senate Committee on Labor and Public Welfare.[33] The House Bill[34] contained provisions similar in substance, although differing in form and language. While Section 8(b)(4)(A) nowhere specifically mentions secondary boycotts, it was consistently referred to as the "sec-

---

27. See GREGORY, *op. cit. supra* note 1, at 279-288.

28. See MILLIS AND MONTGOMERY, *op. cit. supra* note 3, at 596.

29. Collected in 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 150 (Supp. 1950).

30. 61 STAT. 136 (1947), 29 U.S.C. § 151 *et seq.* (Supp. 1951).

31. 49 STAT. 449 (1935), as amended, 61 STAT. 141 (1947), 29 U.S.C. § 158(b) (Supp. 1951).

32. 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(4)(A) (Supp. 1951). Hereafter often referred to as "the Section." Section 8(b)(4)(A) also proscribes forcing any employer or self-employed person to join any labor or employer organization. This provision is not directly concerned with secondary boycotts, has never been applied as yet, and will not be discussed further in this note.

33. S. 1126, 80th Cong., 1st Sess. (1947). See SEN. REP. No. 105, 80th Cong., 1st Sess. (Pt. 1) 35 (1947).

34. H.R. 3020 §§ 2(13)(14), 12(a)(3)(A), 80th Cong., 1st Sess. (1947). The House Bill divided secondary boycotts into "sympathy strikes" and "illegal boycotts." See H.R. REP. No. 245, 80th Cong., 1st Sess. 50, 61 (1947).

ondary boycott provision" when discussed in Congress.[35] There is no indication of any congressional intent other than the prohibition of secondary boycotts. The usual "horrible" examples cited by the proponents of the section were the refusal of a local union in New York City to install electrical equipment not manufactured by local companies[36] and the use of secondary boycotts in jurisdictional disputes.[37] However, despite the contention that such boycotts should be distinguished from those instituted to protect wages and working conditions,[38] Congress clearly intended to make secondary boycotts unfair labor practices, without regard to their purpose.[39] It was believed that the area of a labor dispute should be limited to the premises of the employer with whom the dispute existed and that innocent third parties should not be caught in a situation in which they had no direct concern.[40]

Despite relative clarity of the general congressional purpose, loose draftsmanship and the lack of an accepted definition of "secondary boycott" has placed the delineation of the coverage of the Section largely with the National Labor Relations Board, subject to judicial review. The validity of the Board's interpretation and application of the Section was before the Supreme Court for the first time in four recent cases,[41] all written by Mr. Justice Burton and handed down on the same day.

A secondary boycott under the Section necessarily must involve

---

35. "It [the Senate Bill] gives employers . . . rights to invoke the processes of the Board against unions which engage in certain enumerated unfair labor practices, including secondary boycotts . . . ." SEN. REP. No. 105, 80th Cong., 1st Sess. (Pt. 1) 3 (1947). "Under paragraph A [of Section 8(b)(4)] strikes or boycotts, or attempts to encourage such actions, are made violations of the act if the purpose is to force an employer . . . to cease doing business with any other person." *Id.* at 22. For references in debate on the floor of Congress to Section 8(b)(4)(A) as outlawing secondary boycotts, see 93 CONG. REC. 3838, 4198, 4834, 4844, 4845, 4867, 6859, 7529, 7537 (1947). See also H.R. REP. No. 510, 80th Cong., 1st Sess. 43, 72 (1947).

36. SEN. REP. No. 105, 80th Cong., 1st Sess. (Pt. 1) 22 (1947); 93 CONG. REC. 4199 (1947). This was the situation involved in Allen Bradley Co. v. Local Union No. 3, I.B.E.W., 325 U.S. 797 (1945).

37. "That is an example of the secondary boycott, the A.F. of L. sign hangers union boycotting an employer using certain material because it was made by a CIO union." *Speech of Senator Taft,* 93 CONG. REC. 3838 (1947). See also *Id.,* at 4131, 4199, 7537.

38. This point was made in the President's State of the Union message to Congress, January 6, 1947. 93 CONG. REC. 136 (1947). See also SEN. REP. No. 105, 80th Cong., 1st Sess. (Pt. 2) 1, 19 (1947); H.R. Doc. No. 334, 80th Cong., 1st Sess. 5 (1947).

39. "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts to make them an unfair labor practice." *Remarks by Senator Taft,* 93 CONG. REC. 4198 (1947).

40. See, *e.g., Remarks by Senator Taft,* 93 Cong. Rec. 3838, 4138 (1947).

41. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694 (1951); Local 74, United Brotherhood of Carpenters & Joiners v. NLRB, 341 U.S. 707 (1951).

three parties, although there may be more. These are: the labor organization engaging in the secondary activities, the employer who is subjected to the secondary boycott (the secondary employer), and the employer with whom the basic dispute exists and towards whom the pressure is ultimately directed (the primary employer). Both the primary and the secondary employer may file complaints of illegal secondary action.[42] Section 10(1) of the LMRA requires that investigations of alleged violations of Section 8(b)(4)(A), (B), and (C) be given priority over all other cases.[43] If the investigating official finds reasonable cause to believe that a violation is occurring, he must immediately seek a temporary injunction from a federal district court, pending adjudication by the NLRB. The injunction will be issued by the district judge on a finding of reasonable cause to believe that the union is committing an unfair labor practice.[44] The Supreme Court affirmed the position of the Board that determinations in Section 10(1) actions are not res judicata, even as to the Board's jurisdiction of the complaint under the Act.[45] The proceeding before the court is merely interlocutory, and Congress did not contemplate that it should bar a hearing on the merits by the Board.

Section 8(b)(4)(A), by its terms, is not applicable to all secondary coercive activities. To be illegal, inducements of a strike or concerted refusal to handle must be made to *employees*. Inducements made to an employer,[46] supervisor,[47] or single employee[48] are not covered by the Section. The secondary company must be an "employer" or "person" as defined in the Act,[49] and the offending union must come within the

42. Schenley Distillers Corp., 78 N.L.R.B. 504 (1948).

43. 61 STAT. 146 (1947), 29 U.S.C. § 160(1) (Supp. 1951).

44. Shore v. Bldg. & Constr. Trades Council, 173 F.2d 678 (3rd Cir. 1949); Douds v. International Brotherhood of Teamsters, 85 F.Supp. 429 (S.D. N.Y. 1949); Cranefield v. Bricklayers Union, 78 F. Supp. 611 (W.D. Mich. 1948).

45. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 681 (1951).

46. Santa Ana Lumber Co., 87 N.L.R.B. 937 (1949); *accord,* Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950); Studio Carpenters v. Loews, Inc., 182 F.2d 168 (9th Cir. 1950).

47. Arkansas Express, Inc., 92 N.L.R.B. No. 64 (1951); Conway's Express, 87 N.L.R.B. 972 (1949).

48. Gould & Preisner, 82 N.L.R.B. 1195, 1197 (1949). This point was not among those appealed to the Supreme Court, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

49. Al J. Schneider Co. 87 N.L.R.B. 99 (1949); International Rice Milling Co., 84 N.L.R.B. 360 (1949), *rev'd,* 183 F.2d 21 (5th Cir. 1951). The Board did not appeal this part of the case. NLRB v. International Rice Milling Co., 341 U.S. 665, 668 n.2 (1951). Nevertheless, its position seems preferable to that of the Fifth Circuit. There is no indication that the definition sections were not intended to apply to all provisions of the Act. Furthermore, if they are utilized to limit those sections of the Act benefiting unions, common fairness dictates that they also restrict that part of the Act detrimental to unions. *But see* Note, 64 HARV. L. REV. 781, 808 (1951).

definition of "labor organization."[50] Presumably, a consumers boycott, even by employees, is not proscribed since the concerted refusal to use must be "in the course of their employment."[51] The union conduct must have the object of forcing the secondary employer to cease doing business with another, although this need not be the sole objective.[52] The LMRA is applicable only to those companies and unions whose activities affect interstate commerce.[53] In addition, the Board has established certain minimum requirements as to the size of the companies involved before it will exercise its jurisdiction.[54]

A labor organization institutes a secondary boycott within the meaning of the Act if is strikes or engages in a concerted refusal to handle goods for the secondary employer with an object of forcing the company to cease doing business with another employer. In *NLRB v. Denver Building & Construction Trades Council,*[55] a general contractor for a construction project let a subcontract for electrical work to a company employing non-union workmen. The employees of the general contractor, working on the project, were members of various building trades union locals affiliated with the Denver Council. The Council picketed the project, stating that it was unfair, and informed the general contractor that his union employees would not work on the same job with

50. Di Giorgio Wine Co., 87 N.L.R.B. 720 (1949).

51. *See* NLRB v. Service Trade Chauffeurs, 191 F.2d 65, 68 (2d Cir. 1951). *Cf.* Hoover Co., 90 N.L.R.B. 1614 (1950), *enforcement denied on other grounds,* 191 F.2d 380 (6th Cir. 1951).

52. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688 (1951). The Section was amended in the Conference Committee to substitute "an object thereof is" in place of "for the purpose of" in order to foreclose the possibility that the Section would not be applied because one of the objects of the union activity was lawful. See *Supplementary Analysis by Senator Taft,* 93 CONG. REC. 6859 (1947).

53. The broad extent of the commerce power is re-emphasized in NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 683 (1947). The complainant subcontractor engaged in business only in Colorado. His sole connection with interstate commerce was the purchase from outside the state of some 65% of the approximately $85,000 worth of raw materials used annually. Only $350 worth of materials were used by the complainant on the project where the secondary boycott occurred, and none of this was specifically shown to have been purchased in interstate commerce. This was sufficient to bring the case within the jurisdiction of the NLRB. See Stern, *The Commerce Clause and the National Economy,* 59 HARV. L. REV. 645, 883 (1946), for a complete description of the modern development of the commerce clause. See also Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Fainblatt, 306 U.S. 601 (1939).

54. These requirements, couched mostly in terms of dollar volume annually of interstate business, are set out in 15 NLRB ANN. REP. 5 (1950). See Note, 64 HARV. L. REV. 781, 785 (1951). In secondary boycott cases, the dollar volume of interstate business of the primary employer and of the secondary employer to the extent affected by the secondary boycott may be added together, if neither alone is enough to meet these jurisdictional requirements. Jamestown Builders Exchange, 93 N.L.R.B. No. 51 (1951). See also Paul W. Speer, Inc., 94 N.L.R.B. No. 95 (1951); Screw Machine Products Co., 94 N.L.R.B. No. 234 (1951); General Seat & Back Mfg. Corp., 27 L.R.R.M. 1583 (1951). And see Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951).

55. 341 U.S. 675 (1951).

the non-union men. The picketing was found to be a signal for the Council's affiliated unions to strike, under its by-laws, and the union employees of the general contractor walked off their jobs at the project. Therefore, both the Council and the affiliated union violated the Section; having struck the general contractor with whom no legitimate dispute existed to force cancellation of the contract with the subcontractor.

Since Section 8(b)(4)(A) expressly proscribes strikes and concerted refusals to handle materials or perform services for secondary employers, and because secondary strikes and product boycotts were generally illegal at common law,[56] there is little doubt that Congress intended that they be covered by the Section. Although no case involving a concerted refusal has come before the Supreme Court, they have been forbidden by the Board.[57] Some difficulty has been experienced in determining the object of the union's action. Thus, refusing to work on the same job with non-unionized employees has been a traditional labor protest.[58] However, frequently this policy can only be effectuated by the union members refusing to work for their employer. When two employers are involved, the only recourse of the struck employer is to discontinue dealing with the non-union employer, so as to remove the non-union employees from the job. Thus, the refusal to work with non-union men, under such circumstances, must have an object of forcing the secondary employer to cease doing business with the employer of the non-union employees.[59]

Engaging in a strike against or a concerted refusal to handle for a secondary employer is normally executed by a union representing the employees of the secondary employer. On the other hand, inducing or encouraging the employees of a secondary employer to strike or engage in a concerted refusal to handle ordinarily is committed by the labor organization involved in the dispute with the primary employer. If the union representing the secondary employees instructs its members to carry out the inducements of the primary union, then both unions may violate Section 8(b)(4)(A).[60] These inducements usually take the form of a picket line, although they may consist of unfair lists or some

56. See 1 TELLER, *op. cit. supra* note 1, § 103.

57. Schenley Distillers Corp., 78 N.L.R.B. 504 (1948), *enforced sub nom.*, NLRB v. Wine, Liquor, & Distillery Workers, 178 F.2d 584 (2d Cir. 1949). *Cf.* NLRB v. United Brotherhood of Carpenters & Joiners, 184 F.2d 60 (10th Cir. 1950).

58. See NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951) (dissenting opinion).

59. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688 (1951).

60. Di Giorgio Wine Co., 87 N.L.R.B. 720 (1949); Howland Dry Goods, 85 N.L.R.B. 1937 (1949), *enforcement denied in part on other grounds sub. nom.*, NLRB v. Service Trade Chauffeurs, 191 F.2d 65 (1951).

other form of communication with the secondary employees. Whether the inducements involve violence, or threats of violence, is immaterial insofar as Section 8(b)(4)(A) is concerned.[61]

Contentions that the Section could not constitutionally be applied to prohibit peaceful picketing in furtherance of a secondary boycott were rejected in *International Brotherhood of Electrical Workers v. NLRB*.[62] The progressive encroachments during the last few years on the *Thornhill v. Alabama*[63] doctrine, that picketing is a method of speech,[64] provided precedent for the Court in its summary disposition of the free speech argument. It was only necessary to state the obvious conclusion that since the states could constitutionally ban picketing in pursuit of an illegal objective,[65] Congress could do likewise.

Several trial examiners[66] considered inducements in the form of speech, even if not constitutionally protected, to be exempted from the operation of Section 8(b)(4)(A) by Section 8(c).[67] The latter Section provides that the expression or dissemination of views shall not constitute evidence of an unfair labor practice in the absence of threat of reprisal, or force, or promise of benefit. Thus, it was thought that peaceful picketing, unfair lists, and other communications could not be evidence of engaging in a secondary boycott. However, both the NLRB and the Supreme Court rejected this approach in favor of giving full effect to Section 8(b)(4)(A).[68] This appears to be in accordance with the spirit of the Act, although severely limiting the literal meaning of Section 8(c).[69] There is no indication that Congress intended to immunize

---

61. NLRB v. International Rice Milling Co., 341 U.S. 665, 672 (1951).

62. 341 U.S. 694 (1951). Suggestions that the Section violates the Fifth and Thirteenth Amendments have been summarily rejected by the lower courts. NLRB v. United Brotherhood of Carpenters & Joiners, 184 F.2d 60 (10th Cir. 1950); NLRB v. Local 74, United Brotherhood of Carpenters & Joiners, 181 F.2d 126 (6th Cir. 1950); NLRB v. Wine, Liquor, & Distillery Workers, 178 F.2d 584 (2d Cir. 1949).

63. 310 U.S. 88 (1940).

64. See Armstrong, *Where Are We Going With Picketing?*, 36 CALIF. L. REV. 1 (1948); Comment, 49 MICH. L. REV. 1048 (1951); Note, 16 U. OF CHI. L. REV. 701 (1949); Note, 98 U. OF PA. L. REV. 545 (1950). For some views on the merits of this doctrine, see Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037 (1943); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513 (1943); Teller, *Picketing and Free Speech: A Reply*, 56 HARV. L. REV. 532 (1943).

65. Building Service Employees v. Gazzam, 339 U.S. 532 (1950); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950); Gibboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

66. See, *e.g.*, Samuel Langer, 82 N.L.R.B. 1028, 1045 (1949); Sealright Pacific, Ltd., 82 N.L.R.B. 271, 288 (1949).

67. 61 STAT. 142 (1947), 29 U.S.C. § 158(c) (Supp. 1951).

68. International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694 (1951).

69. See Note, 44 ILL. L. REV. 401 (1949).

peaceful picketing in conjunction with a secondary boycott, greatly reducing the effectiveness of the prohibition of secondary activities. Section 8(c) was included in the Act primarily for the purpose of safeguarding the right of employers to discuss with their employees labor-management problems.[70] In addition, the Court placed reliance upon the fact that no similar provision was applicable to Section 303,[71] which was intended to be identical in coverage with Section 8(b)(4).

A literal application of Section 8(b)(4)(A), encompassing all inducements to employees of secondary employers, would seemingly include some union action which has traditionally been considered primary, *i.e.*, coercive activities principally directed at the employer with whom a basic labor dispute exists.[72] When a union pickets an employer in the course of a primary dispute, necessarily, one of its objects is to induce the employees of other companies to refuse to cross the picket line and enter the premises of the primary employer. As a result, the secondary employers may be forced to cease doing business with the primary employer for the duration of the picketing. Indeed, the Fifth Circuit adopted this interpretation, stating that the terms of the Section made no distinction between primary and secondary picketing.[73]

The Supreme Court reversed the Fifth Circuit in *NLRB v. International Rice Milling Co.*[74] The Teamsters Union established a picket line around a mill operated by Kaplan Rice Mills in an attempt to obtain recognition as bargaining agent for certain Kaplan employees. Two employees of a customer of Kaplan, dispatched in a truck to pick up a cargo of grain, refused to cross the picket line. The Court found no violation of Section 8(b)(4)(A) since the union's conduct did not amount to an inducement or encouragement of a *concerted* refusal to handle by the customer's employees. The opinion emphasized that the

---

70. See *Speech by Senator Taft*, 93 CONG. REC. 6443 (1947); *Supplementary Analysis by Senator Taft*, 93 CONG. REC. 6859 (1947); GREGORY, *op. cit. supra* note 1, at 429.

71. 61 STAT. 158 (1947), 29 U.S.C. § 187 (Supp. 1951). This section permits suits in the federal district courts to recover damages caused by unfair labor practices.

72. See Petro *'Primary' and Secondary Labor Action*, 1 LAB. L.J. 339 (1950); Petro, *Taft-Hartley and the Secondary Boycott*, 1 LAB. L.J. 835 (1950). Professor Petro contends that the literal meaning of Section 8(b)(4) should be qualified only to the extent permitted by the proviso attached to it. This proviso directs that the section shall not be construed to make unlawful a refusal by any person to enter upon the premises of any employer, other than his own, if the employer is being struck by a representative of his employees who he is required to recognize under the Act. However, the proviso has never been construed or applied and appears to be an inconsistent remnant of an earlier draft of the Act. It exempts only a refusal by a person, and not refusals by a union or its agents to whom the Section applies. See Tower, *The Puzzling Proviso*, 1 LAB. L.J. 1019 (1950).

73. International Rice Milling Co. v. NLRB, 183 F.2d 21 (1951).

74. 341 U.S. 665 (1951).

sole inducement was a request to the driver of a single truck not to cross the picket line; that there was no attempt to induce more widespread activity; and that the picketing was limited to the premises of the primary employer. Furthermore, the legislative history and Section 13 of the Taft-Hartley Act indicated that Congress did not intend to restrict primary strikes under Section 8(b)(4)(A) merely because of incidental secondary consequences.[75]

The *Rice Milling* decision leaves considerable doubt concerning the permissible extent of primary picketing under the Section. No definite criteria for determining when picketing induces concerted action were established. The Court noted, however, that ". . . inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees."[76] Presumably, the union must seek an active agreement by the secondary employees, or their representatives, not to cross the picket line before there would be an inducement of concerted action.[77] Even so, a concerted refusal to handle, induced by primary picketing, is not *per se* an unlawful secondary boycott under the *Rice Milling* case. The Court merely stated that the absence of any inducement to concerted activities was sufficient to decide that case. Furthermore, the Court partially relied upon the congressional intent not to interfere with primary strikes but only to prohibit secondary boycotts under the Section. The NLRB, in first establishing a dichotomy between primary and secondary action, has based none of its decisions on the presence or absence of an inducement to concerted action. Rather, it has depended almost entirely upon legislative history.[78] Generally, the Board has considered any union inducement which invites conduct by the secondary employees only on the premises of the primary employer to be primary and, thus, permissible under Section 8(b)(4)(A).[79]

Primary union activity which is aimed at the employer with whom the dispute exists, and which affects other employers only incidentally,

---

75. Section 13 provides that the Act shall not be construed so as to effect the right to strike in any way except as is specifically provided therein. 61 STAT. 151 (1947), 29 U.S.C. § 163 (Supp. 1951).

76. 341 U.S. 665, 671 (1951).

77. For an excellent discussion of concerted activities under Section 7, see Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

78. See Grauman Co., 87 N.L.R.B. 755 (1949); Schultz Refrigerated Services, 87 N.L.R.B. 502 (1949); Ryan Construction Co., 85 N.L.R.B. 417 (1949); International Rice Milling Co., 84 N.L.R.B. 360 (1949); Pure Oil Co., 84 N.L.R.B. 315 (1949).

79. See Interborough News Co., 90 N.L.R.B. 2135 (1950). See also cases cited in note 52 *supra*.

should be lawful even though it induces a concerted refusal by secondary employees.[80] Admittedly, any distinctions that may be drawn between primary and secondary action will, to some extent, be artificial and arbitrary since there is no sharp natural break between the two.[81] Any union activity which interferes with the operation of a primary employer is almost certain to cause some inconveniences to other employers doing business with the primary employer. Nevertheless, in order to conform with "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own,"[82] some line must be drawn. The most logical place to make this division, under the circumstances, is to permit union activity which is principally intended to publicize to the primary employees and to the public generally the existence of the labor dispute. Union conduct which has as its main purpose the inducement of employees of secondary employers to strike or engage in a concerted refusal to handle would be illegal under the Section. The determination of whether union activity is primary or secondary would therefore be essentially a factual question and should be left to the trial examiners and the Board, unless clearly arbitrary or unsupported by substantial evidence.

Whatever the test, the location of the union conduct is generally the most important single factor in determining whether it is primary or secondary.[83] Picketing the secondary employer is clearly a violation of Section 8(b)(4)(A).[84] The resulting extension of the area of the labor dispute was one of the abuses sought to be prevented, and the picketing directly affects the secondary employer and his employees. Similarly, the placing of the secondary employer on an unfair list for

---

80. In NLRB v. Service Trade Chauffeurs, 191 F.2d 65, 67 (2d Cir. 1951), the *Rice Milling* decision was interpreted to mean ". . . that a union may lawfully inflict harm on a neutral employer, without violating § 8(b)(4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business."

81. See GREGORY, *op. cit. supra* note 1, at 125.

82. Quoted from NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

83. "The limitation of the complaint to an incident in the geographically restricted area near the mill [the premises of the primary employer] is significant, although not necessarily conclusive." NLRB v. International Rice Milling Co., 341 U.S. 665, 671 (1951). See NLRB v. Service Trade Chauffeurs, 191 F.2d 65 (2d Cir. 1951); 15 N.L.R.B. ANN. REP. 138 (1950).

84. International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694 (1951); NLRB v. United Brotherhood of Carpenters & Joiners, 184 F.2d 60 (10th Cir. 1950); *accord*, Printing Specialties Union v. LeBaron, 171 F.2d 331 (9th Cir. 1948).

his continuation of business dealings with the primary employer is an unlawful secondary boycott.[85]

The Board has permitted some union inducements which have occurred other than on the premises of the primary employer. Thus, it was not a violation of the Section to send "hot cargo" letters to employees of a secondary employer.[86] In *Interborough News Co.*,[87] the Board found no secondary boycott when agents of the union visited the secondary employer's premises and orally requested his employees not to deliver newspapers published by the secondary employer to the primary employer's newsstands. These exceptions have been rationalized by the Board on the ground that the union solicited action by the secondary employees to take place only on the premises of the primary employer. Also, "hot cargo" letters were said to be traditional primary action. However, the fact remains that in each case employees of a secondary employer were directly and specifically encouraged to engage in a concerted refusal to work for their employer, thereby seeking to force a cessation of business with another employer. This encouragement occurred on or near the premises of the secondary employer and could not have been chiefly for the purpose of publicizing the disagreement with the primary employer to the primary employees or to the public generally. Furthermore, it would seem to be immaterial to the secondary employer whether the solicited secondary action occurs on his own premises or on the premises of the primary employer. The effect is the same in either event. Hence, these activities seem closely analogous to picketing of the secondary employer and should have been prohibited as secondary boycotts under Section 8(b)(4)(A).

However, activities which take place off the premises of the primary employer, but which are not directed at the employees of particular secondary employers, should be permitted. Thus, placing the primary employer on an unfair list is not a secondary boycott,[88] unless used as a signal for a strike or concerted refusal to handle by the employees of another employer.[89] The use of unfair lists in this manner is ordinarily

85. NLRB v. United Brotherhood of Carpenters & Joiners, *supra* note 84.

86. Moore Dry Dock Co., 92 N.L.R.B. No. 93 (1950); Pure Oil Co., 84 N.L.R.B. 315 (1949). These letters usually request that shipments of the products of an employer not be handled by other union members, the products being "hot" because of a dispute between the producer and his employees.

87. 90 N.L.R.B. 2135 (1950).

88. Kimsey Mfg. Co., 89 N.L.R.B. 1168 (1950); Santa Ana Lumber Co., 87 N.L.R.B. 937 (1949); Grauman Co., 87 N.L.R.B. 755 (1949), *overruling*, Osterink Construction Co., 82 N.L.R.B. 228 (1949).

89. Western, Inc., 93 N.L.R.B. No. 40 (1951). The union telephoned the employees of distributors of Western's products, notifying them that Western had been placed on the unfair list.

a means of publicizing the existence of a labor dispute to union members generally and is not aimed at the employees of any particulars secondary employer. Other means of publicizing a dispute to the primary employees or the public at large, such as advertisements, rallies, and speeches should also be considered to be primary, rather than secondary, boycotts.

Similarily, Section 8(b)(4)(A) would not seem to preclude picketing and other inducements which occur only on or near the premises of the primary employer and which are directed at the primary employer. Primary picketing was never considered to be a secondary boycott at common law,[90] and there is no evidence in the legislative history of an intention to include it within the prohibitions of the Section. Picketing is a fundamental adjunct to the right to strike, which the Taft-Hartley Act specifically reaffirms in Section 13. It is the principal means whereby the union publicizes the existence of a dispute with the employer both to the primary employees and to the public at large.[91] However, a showing that the picketing is used as a signal for a concerted refusal to handle or a strike by secondary employees, as when there has been a prearranged agreement with the secondary employees to refuse to cross the picket line, should convert the picketing into a secondary boycott. Perhaps it would be preferable to bar the enforcement of the agreement rather than the picketing since the former is the actual inducement to the secondary boycott. This would permit the continuance of the picketing for lawful purposes. Nevertheless, the usual practice has been to order the picketing to be ceased when it becomes a part of a course of illegal conduct.[92]

The *Rice Milling* case would permit most primary picketing limited solely to the premises of the primary employer, even if Section 8(b)(4)(A) should not be construed to permit all primary picketing which is directed principally at the primary employer and employees, as has been suggested. As the Court pointed out, union inducements reaching individual employees of neutral employers only as they happen to approach the primary employer's place of business generally does not, and is not intended to, induce concerted action.[93] But, as frequently is the case, more than one company may engage in business at the same general location. Picketing of one of the companies in furtherance of a primary

90. 1 TELLER, *op. cit. supra* note 1, § 111; Barnard and Graham, *supra* note 3, at 141.

91. See 1 TELLER, *op. cit. supra* note 1, §§ 109, 110.

92. See Western, Inc., 93 N.L.R.B. No. 40 (1951). Analogous is the rule that picketing, which would otherwise be constitutionally protected from restraint, may be enjoining in its entirety when it becomes intertwined with an aura of violence. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

93. See note 76 *supra* and accompanying text.

strike may well result in a refusal of all of the employees of the secondary employer to cross the picket line without further inducement on the part of the striking union.

The NLRB considers picketing of the dual situs to be lawful primary action if clearly directed at the primary employer. It has been immaterial whether the primary or the secondary employer is the owner of the situs, or whether they are doing business with one another.[94] This is in accordance with the suggested distinction between primary union activities with incidental secondary effect and those aimed at employees of a particular secondary employer or employers. The conflicting congressional purposes of permitting primary union coercion, while forbidding that which is brought to bear through the medium of neutral third parties, are especially difficult to reconcile in this situation. Picketing of the primary employer may interrupt the entire business of a secondary employer on the premises. If the two employers are doing business with one another, the pressure is increased on the primary employer. Nevertheless, the mere presence of another employer on the same premises should not, in itself, deprive a union of the right to picket in conjunction with a strike against the primary employer. However, the picketing should be required to be conducted in such a manner as to interfere as little as possible with the secondary employer's affairs. Thus, the placards carried should reveal that the picketing is directed only at the primary employer, and any prearranged agreements for the secondary employees to respect the primary picket line would be persuasive evidence of an intent to institute a secondary boycott.

Often, an employer's operations are not fixed at any one location. A typical example is the trucking industry, where the greater portion of the business is transacted in temporary stops on the premises of other employers. Effective picketing of the primary employer is usually feasible only while his trucks are present on the premises of his customers. The Board has ruled that such picketing is permissible primary action if properly limited.[95] The actual situs of the dispute with the primary employer and the place of employment of the primary employees are said to be at the location of the truck. The picketing must be strictly confined to those instances when the employees of the primary employer are engaged in their normal employment while on the premises of the

94. Moore Dry Dock Co., 92 N.L.R.B. No. 93 (1950); Ryan Construction Co., 85 N.L.R.B. 417 (1949); Pure Oil Co., 84 N.L.R.B. 315 (1949); *accord,* Deena Artware, Inc., 86 N.L.R.B. 732 (1949).

95. Moore Dry Dock Co., 92 N.L.R.B. No. 93 (1950); Schultz Refrigerated Services, 87 N.L.R.B. 502 (1949). See Johns, *Picketing and Secondary Boycotts Under the Taft-Hartley Act,* 2 LAB. L.J. 257, 266 (1951); Note, 64 HARV. L. REV. 781, 801 (1951).

secondary employer; it must be reasonably close to the location of the primary employer's operations; it must clearly disclose that the dispute is with the primary employer; and probably it must be the only available effective means of bringing direct pressure on the primary employer.[96]

Although the "roving situs" doctrine was approved by the Second Circuit as being in conformity with the four Supreme Court decisions on Section 8(b)(4)(A),[97] its validity seems questionable. A widespread extension of the area of the dispute becomes possible, and the picketing occurs entirely on or near the premises of the secondary employer. Hence, only the employees of the particular secondary employer and the primary employees present are likely to come in contact with the picket line. At best, it seems that roving picketing should be lawful only in those situations where the primary employees can be reached in no other manner.[98] The fact that it was possible to reach the primary employees by picketing the primary employer's premises would be compelling evidence that the roving picketing was intended primarily to induce the secondary employees to strike or engage in a concerted refusal to handle.

The construction industry presents some unique problems in this area. Often three or more employers may be affected: the owner, the general contractor, and one or more subcontractors. The general contractor and subcontractors are on the premises only temporarily, with their headquarters usually situated elsewhere. Further complications arise from the general practice of the building trades unions, reinforced by provisions in their constitutions and by-laws, to respect the picket lines of their sister unions and to refuse to work on the same job with non-union men.[99]

Picketing directed at the entire project, because of a dispute with only part of the employers present, is definitely a secondary boycott

---

96. Kanawha Coal Operators Ass'n, 94 N.L.R.B. No. 236 (1951); Sterling Beverages, 90 N.L.R.B. 401 (1950); cases cited in note 95 *supra*. *Cf.* Santa Ana Lumber Co., 87 N.L.R.B. 937 (1949). But, if the trucks are operated by an independent contractor engaged in business with the primary employer, then it would be a secondary boycott to picket the trucks. *Cf.* Sealright Pacific, Ltd., 82 N.L.R.B. 271 (1949).

97. NLRB v. Service Trade Chauffeurs, 191 F.2d 65 (2d Cir. 1951). The court reversed in part the decision of the Board in Howland Dry Goods, 85 N.L.R.B. 1037 (1949), and remanded the case for findings of fact pertinent to the question of whether the roving situs doctrine could appropriately be applied. The union had picketed the premises of customers of the trucking company, with whom the primary dispute existed. Since the Board had not formulated the roving situs doctrine at the time the case was first decided, it made no findings bearing on whether the picketing had been directed at the primary employer and whether it was limited to the times that the primary employer's trucks were present.

98. See Note, 64 HARV. L. REV. 781, 802 (1951).

99. The problems of the construction industry under the Taft-Hartley Act are extensively treated in Comment, 60 YALE L.J. 673 (1951).

within the meaning of Section 8(b)(4)(A).[100] Such picketing necessarily is directed at all the employees working on the project, including those of secondary employers. However, in *International Brotherhood of Electrical Workers v. NLRB,*[101] the Court, while finding a secondary boycott, noted that the picketing had not been directed at the subcontractor with whom the dispute existed. Apparently, this has also been true in the other construction industry cases where a secondary boycott has been found.[102] There is no manifest reason why the same principles should not be applicable to the construction cases that are followed in other instances involving a dual situs, including the "roving situs" doctrine. Indeed, the situs of the dispute would usually seem to be more definitely located at a construction project than at the location of a truck in a trucking industry case. A contractor may well be engaged at the project for a considerable period with his employees spending all their working hours at its location. Therefore, it would be only at the project that they could be reached by picketing. However, the prevalence of agreements to respect one another's picket lines among the construction unions, and the fact that they ordinarily operate in unity through local councils, should make it easier to prove that the picketing was merely a signal for the secondary employees to strike, as in the *Denver Council* case.

Under certain circumstances, labor activities which ordinarily would constitute a secondary boycott have been held not violative of Section 8(b)(4)(A). Thus, the Board has refused to prohibit a boycott of a secondary employer who is not a "neutral" in the dispute between the union and the primary employer.[103] Its position has been based upon the legislative history.[104]

Section 8(b)(4)(A) is not inherently limited to boycotts of neutrals. Moreover, if carried to its logical extreme, the effectiveness of the Section would be destroyed. Few, if any, employers are completely neutral in regard to labor disputes of other employers with whom they

100. International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694 (1951); Local 74, United Brotherhood of Carpenters & Joiners, 341 U.S. 707 (1951).

101. 341 U.S. 694, 699 (1951).

102. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); Local 74, United Brotherhood of Carpenters & Joiners v. NLRB, 341 U.S. 707 (1951); Roane-Anderson Co., 82 N.L.R.B. 679 (1949); Montgomery Fair Co., 82 N.L.R.B. 211 (1949).

103. Irwin-Lyons Lumber Co., 87 N.L.R.B. 54 (1949); Conway's Express, 87 N.L.R.B. 972 (alternative holding); *accord,* Douds v. Metropolitan Federation of Architects, 75 F.Supp. 672 (S.D. N.Y. 1948).

104. "This provision [§ 8(b)(4)(A)] makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees." *Remarks of Senator Taft,* 93 CONG. REC. 4198 (1947) (emphasis added).

have business relations.[105] Any advantages gained by the union could well reflect in higher prices to, or reduced purchases from, the secondary employers. And, from the viewpoint of the union, those employers who continue to transact business with the primary employer during a strike are aiding the latter to resist the union's demands.[106]

As Congress doubtless did not intend that the Section be so emasculated, a considerable interest in the labor relations of the primary employer is necessary before a secondary employer becomes an "ally" of the primary employer. The Board has required that there be substantial ownership or managerial control between the two companies.[107] The Supreme Court indicated, in the *Denver Council* case, that the connection between the two employers must be closer than that of independent contractors. A contractor-subcontractor relationship was not sufficient to make the Section inapplicable even though the contractor exercised some control over the operations of the sub-contractor.[108]

In *Conway's Express*,[109] the NLRB held that a union and employer, in their collective bargaining agreement, may reserve to the union the right to refuse to handle the goods of other employers who are engaged in a labor dispute. The agreement was said not to be opposed to the policy of the Act, and a refusal to handle in conformance with the agreement does not violate Section 8(b)(4)(A), as the secondary employer has consented to the refusal.[110] There is no apparent reason why the secondary employer should not be bound by his prior assent to the secondary boycott. However, the primary employer should not likewise be precluded from instituting a complaint because of the contract provision between the secondary employer and the union, unless the Section was enacted solely for the protection of secondary employers and did

105. See GREGORY, *op. cit. supra* note 1, at 123; Barnard and Graham, *supra* note 3, at 154; Hellerstein, *supra* note 3, at 354.

106. There is even less of a "neutral" relationship in the construction industry than is true of industry generally. Ordinarily, much of the actual work is done by subcontractors under the overall supervision of the general contractor. The use of subcontractors employing non-union labor at lower wages will often result in a direct financial benefit to the general contractor. In the rapidly shifting employment picture of the construction industry, the existence of this incentive to indirectly employ non-union men poses a serious threat to the existence of the building trades unions. See Denver Bldg. & Constr. Trades Council v. NLRB, 186 F.2d 326, 336 (1951); MILLIS AND BROWN, *op. cit. supra* note 15, at 468; Note, 60 YALE L.J. 673, 684 (1951).

107. See cases cited in note 75 *supra*.

108. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 689 (1951).

109. 87 N.L.R.B. 972 (1949).

110. The union relies upon such an agreement at its own risk, even if it acts in good faith. Should the Board find that the alleged illegal activity is not permitted by the agreement, then it will order the activity to be ceased as an unlawful secondary boycott if the other necessary factors are present. Western Express, 91 N.L.R.B. No. 45 (1950).

not also have the purpose of shielding primary employers from the economic pressures caused by secondary boycotts. Since the primary employer is sufficiently interested to be entitled to lodge a complaint against a secondary boycott,[111] it does not appear that the secondary employer and the union could bargain away this right.

It is apparent that the Taft-Hartley Act has largely denied to unions the use of an important weapon in labor-management bargaining; that of secondary pressures brought to bear on the primary employer through the medium of third parties. The Board and the courts have conscientiously attempted to effectuate the objectives of Congress. A few secondary union activities are not proscribed by the Act; especially direct approaches to the secondary employer rather than his employees and boycotts of employers closely connected with the primary employer. However, strikes and concerted refusals to handle by the employees of a secondary employer with an object of forcing the employer to cease doing business with another is clearly an unfair labor practice. The status of inducements to strike or engage in a concerted refusal to handle for the secondary employer is less certain, but probably such inducements must be principally directed at the employees of the secondary employer before they constitute an unlawful secondary boycott. In most instances, picketing of the primary employer, and other traditional primary activities, are permissible under Section 8(b)(4)(A) despite incidental secondary effects. Whether union conduct is aimed principally at the primary employer and employees or at the employees of secondary employers is fundamentally a factual question. Important indications of the purpose of the union activity are its location, the availability of other adequate means of publicizing the dispute to the primary employees and the public, and the existence or absence of prior agreements with the secondary employees concerning their reaction to the activity.

In view of the importance of factual determinations in the secondary boycott cases, it is perhaps significant that the Supreme Court upheld the NLRB in all four decisions arising under the Section, emphasizing that "the Board's interpretations of the Act and the Board's application of it in doubtful situations are entitled to weight."[112] Indeed, the Court came close to adopting the approach of *NLRB v. Hearst Publications*[113] in results, although careful not to ascribe to it in language. Since the

111. Schenley Distillers Corp., 78 N.L.R.B. 504 (1948).

112. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

113. 322 U.S. 111 (1944). The *Hearst* case held that administrative interpretations of a statute as applicable to a particular set of facts are conclusive on the courts if they have a rational basis and warrant in the record. See Davis, *Scope of Review of Federal Administrative Action,* 50 COL. L. REV. 559, 569 (1950). See also, Gray v. Powell, 314 U.S. 402 (1941).

resolution of most of the problems under the Section are so dependent on the facts in each case, there is every reason to accept the decisions of the Board unless clearly arbitrary or unsupported by substantial evidence. This should be an important factor when future orders of the Board under Section 8(b)(4)(A) are reviewed by the courts.

INCREASING LAND ALIENABILITY THROUGH RE-RECORDING ACTS—THE INDIANA STATUTE

The usefulness of land as a commercial commodity depends upon the degree of title alienability which can be assured landowners. Impediments to ease of conveyance arise largely from the fact that there may exist in the same parcel of land various interests, both possessory and non-possessory, present and future. This multiple ownership creates complexity of land titles and the possibility of conflicting claims, with resulting deterrents to alienability. The risks, perhaps, are unsubstantial while the parties originally involved are still alive. However, the passage of time eliminates witnesses, dims recollections, and destroys useful records, rendering the deterrents more serious by aggravating the task of resolving conflicts. Moreover, interests originally substantial may themselves become nominal. Yet, if their unimportance cannot readily be determined, alienability of valid claims will effectually be deterred.

Largely within the last decade eight states have undertaken to eliminate much of the needless complexity surrounding land titles, and thus to encourage their free alienability, by enacting legislation requiring periodic re-recording of interests in land. Indiana's statute, dating from 1947, was the sixth to be enacted. These statutes may descriptively be termed "re-recording acts," although *re*-recording is a misnomer since their compass extends to interests not within the purview of the traditional recording system. The impact of this legislation on the problem of title alienability can be extensive and salutary. In order to assess its full significance, however, it is desirable to examine the limited effectiveness of orthodox methods previously available to eliminate deterrents to alienability, and then to observe the manner in which the re-recording acts supplement these devices.

Several traditional methods exist by which clouds on title may be defeated. Three of these—recitals in deeds, affidavits, and curative acts—correct formalistic defects in land records. Recitals and affidavits are mainly evidentiary devices to shift the burden of proof to the challenging party. For example, recitals in a deed that it was signed and sealed