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Work Preservation: The Union Struggle Against Technological Innovation

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COMMENTS

Work Preservation: The Union Struggle Against Technological Innovation

Varied judicial applications of the so-called work preservation doctrine without persuasive or consistent analysis make the area one of the most muddled topics in labor relations law. Common law terminology is blended with labor legislation in order to determine the limits of permissible union attempts to preserve job tasks that are threatened by another work group or advancing technology. This comment will discuss the statutory framework relative to work preservation and discuss some of the issues and rationales for the settlement of disputes in the area. Part I will relate to the general background of work preservation and its relationship to the primary/secondary analysis used in determining permissible from impermissible union activity. Part II will focus on the development of the "right to control" test and its use in determining the permissiveness of a union's purported work preservation activity. Part III in turn will take a look at the work preservation agreement and the various factors used by the courts in judging its validity. Part IV will conclude with a discussion of the basic policies that the courts rely on in rendering decisions within the work preservation area.

I. BACKGROUND

A. Prohibited Union Activity

Unions have long used strikes or coercion to achieve their labor objectives. At common law, courts discerned problems when an employee interfered with the trade relations between his employer and third parties.[1] This interference was known as a "secondary boycott" because it gener-

1. *See generally* Note, *Actionable Interference with Business by Organized Labor*, 8 TEMP. L.Q. 245 (1933-34).

ally took the form of coercive pressure directed by the employees against the customers of the employer rather than the employer himself. The employees' objective was to cause the customers to "withhold or withdraw patronage"[2] from the employer. The customers generally succumbed to the pressure out of fear that in failing to do so, loss or damage would be inflicted upon them by the employees or their union.

Secondary boycotts were generally proscribed by the courts; the judges evaluated the legality of a boycott by looking to the object of the boycott and the means used to achieve it.[3] If the desired objective of the activity was perceived by a court as reasonably legitimate on general policy grounds, the court would allow the boycott so long as the means to achieve it were not unreasonable.[4] Labor pressures were therefore kept in check by a rule of reasonableness. In addition, secondary boycotts were held to violate the antitrust laws,[5] a further deterrent to such conduct. This situation continued until 1941 when the Supreme Court held that secondary activity was immunized from application of the antitrust laws and injunctions in *United States v. Hutcheson*.[6] However, this immunity did not last long. In 1947, Congress concluded that the labor unions had abused the immunity from federal court injunctions granted by the Norris-LaGuardia Act[7] and sought to strike a balance between the economic power of unions and employers by prohibiting certain union activities in Taft-Hartley Act[8] sections 8(b)(4)(A) and (B).[9] These sections basically prohibited any activities by employees which had a secondary objective.[10] Unions quickly responded to a perceived loophole in the statutes. The

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2. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466 (1921).

3. *See* 8 TEMP. L.Q. 245.

4. *Id.*

5. 254 U.S. at 478. The complainant was granted an injunction under the Sherman Act as amended by the Clayton Act, Pub. L. No. 212, 38 Stat. 730(1914) (current version at 15 U.S.C. §§ 12-37 (1976)).

6. 312 U.S. 219 (1941).

7. Act of March 23, 1932, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§ 101-115 (1976)).

8. Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136 (1947)(current version at 29 U.S.C. § 158(b)(4)(B)(1976)).

9. F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 123 (1977) [hereinafter cited as BARTOSIC & HARTLEY].

10. Primary activity has as its aim direct pressure by the employee against the employer. *See* United Steelworkers v. NLRB, 376 U.S. 492, 499 (1964)("The primary strike . . . is aimed at applying economic pressure by halting the day-to-day operations of the struck employer"). Secondary activity is pressure brought by an employee unit against an employer with whom the union has no real dispute (secondary employer) in the hopes that the secondary employer will itself pressure the party with whom the union does not have a dispute. "Its aim is to compel him to stop business with the employer in the hopes that this will induce the employer to give in to the employee's demands." IBEW Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).

answer was the negotiation of "hot cargo" clauses.[11] As a result of collective bargaining or other pressures, an employer would agree with a union that he would not require the employees to handle certain goods. By using these clauses, unions could argue that the resulting boycott was voluntarily agreed to by the employer and therefore not caused by the union.

In 1959, the status of these clauses was changed when the Supreme Court held that a hot cargo clause was no longer a defense to an alleged secondary boycott.[12] The Court found that it was permissible to negotiate a hot cargo clause and that an employer could voluntarily comply with it. However, a union could not use secondary activity such as a refusal to handle in order to obtain compliance with the clause. Congress quickly responded to prevent even voluntary compliance with such clauses by adding amendments to section 8(b)(4)(B).[13] Section 8(e) of the Landrum-Griffin amendments[14] made it an unfair labor practice for a union and an

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11. *See* BARTOSIC & HARTLEY *supra* note 9 at 138.

12. Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958).

13. 29 U.S.C. § 158(b)(4)(B) (1976), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
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> (B) forcing or requiring any persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

14. Labor Management Reporting and Disclosure (Landrum-Griffin Act) of 1959, § 704(b), 29 U.S.C. § 158(e) (1976). Section 8(e) [29 U.S.C. § 158(e)] provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . .

employer to enter into an agreement which had as its object any of the activities proscribed by section 8(b)(4)(B). Also, the proviso added to section 8(b)(4)(B) seemingly manifested a congressional intent that primary activity was not to be prohibited.[15] Therefore, evaluation of the legality of union pressure depends on whether the activity causing the pressure may be characterized as "primary or secondary."[16]

B. Primary/Secondary Distinction

Applying the statutes to labor problems has been difficult due to the seemingly precise language used in the Act. Section 8(b)(4)(B) cannot be read literally or "it would ban most strikes historically considered to be lawful."[17] The words "secondary boycott" do not appear in the statute, but rather the law is stated in terms of means to achieve certain objects. Courts looked to the history of secondary activity and found that judicial construction of the legislation required a balancing of "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."[18] Therefore, in *NLRB v. International Rice Milling Co.*,[19] the Supreme Court refused to read section 8(b)(4)(B) as banning strikes against a primary employer which also had an impact on neutral employers. The same is true of section 8(e). The Court in *National Woodwork Manufacturers Association v. NLRB*[20] found that section 8(e) does not prohibit agreements addressed to primary work unit activity and, furthermore, the incidental secondary effects resulting from this primary activity are not prohibited.

The words "primary" and "secondary" have become only labels of convenience. Permissible union activity has come to be known as primary while prohibited activity is found to be secondary.[21] The problem is in determining when the activity is permissible. Resolution of this issue usually depends on the objective sought to be achieved by the labor activity.

C. Work Preservation in General

Union activities directed toward work preservation generally enjoy the

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15. *See* note 13 *supra*.
16. *See* note 10 *supra*.
17. Local 761, International Union of Elec. Workers v. NLRB (General Electric), 366 U.S. 667, 672 (1961).
18. NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 692 (1951).
19. 341 U.S. 665 (1951).
20. 386 U.S. 612 (1967).
21. *Id.* at 620.

favored status of primary activity.[22] Therefore, activities or agreements designed to achieve this purpose would be permissible. The problem exists in determining when the objective is in fact work preservation. The rationale for treating work preservation as primary activity is based on the idea that unions should be able to protect members' jobs when they are threatened by changing technology.[23] At the same time, unions should not be allowed to acquire new work they never performed. If work acquisition was allowed it would permit the union unjustly to take jobs away from those currently doing the work.

The fundamental factor in a decision on the permissibility of activities or agreements allegedly aimed at work preservation is the presence of this work acquisition objective.[24] If acquisition of new work is in fact the objective, the activity aimed at that objective is secondary. It is sometimes difficult for the courts to distinguish between work preservation and work acquisition and many problems often arise in the gray area which may best be termed as work reacquisition.[25] Whether the work is termed "preservation" or "acquisition" depends on the resolution of several questions: What is the work sought to be preserved? Does the employer have power over the work sought to be preserved? How is the work itself sought to be preserved? The question of the employer's power will be addressed in section II while the other two questions are reserved for discussion in section III.

II. Importance of Section 8(b)(4)(B)

A. Section 8(b)(4)(B) and Determination of Work Preservations Objectives

The logical starting point in any discussion of work preservation would be to decide whether there was a valid work preservation agreement. This issue will be discussed in part III. However, a union does not always need an agreement in order for its activity directed at work preservation to be permissible. Assuming there is no agreement or a valid one, the next step would be to determine whether the union activity with alleged secondary effects has a valid work preservation purpose. Section 8(b)(4)(B) prohibits certain activities which are intended to cause a secondary boycott, for example, a refusal to handle the products of another person.[26] The prob-

22. *Id.* at 635.
23. *Id.* at 640-43.
24. *Id.* at 644.
25. *See* Comment, *Work Recapture Agreements and Secondary Boycotts: ILA v. NLRB (Consolidated Express Inc.)*, 90 Harv. L. Rev. 815 (1977).
26. 29 U.S.C. § 158(b)(4)(B) (1976). For text of the statute see note 10 *supra*.

lem usually arises when a union decides that its members' duties should include work now being done by another group. In order to coerce the employer to give the work to its members, the union causes a customer boycott of the employer or refuses to handle his goods. The union activity in encouraging the boycott must have a valid work preservation purpose in order to be considered a primary activity and thus permissible.

How are the union activities evaluated to determine whether they have a primary work peservation purpose? The judicial response to this question was the adoption of a "right to control" test as an indicator of primary activity. Under this test the employer must have the power to give the employees the work sought to be preserved.[27] The rationale for the test is that if the employer does not have control over the work that is sought by the union, the union's objective must be work acquisition and therefore secondary activity.[28]

The test originated at the NLRB level. In *Clifton Deangulo*,[29] the Board was faced with the problem of a union's refusal to install pre-piped comfort control units. The union had a work preservation agreement with its employer reserving the right to install all piping on the work it performed. The employer then entered into an agreement with a general contractor to install these pre-piped units. When the union refused to install the units, the employer sought relief from the NLRB. The Board held that despite the existence of a valid work preservation agreement the union's activity was secondary and therefore prohibited by section 8(b)(4)(B). The Board reasoned that the employer had given the union all of the work which he had been awarded under the general contract. He was powerless to give the union any additional work and therefore had no control over the work sought by the union.

The Board's continued use of the "right to control" test in distinguishing between primary and secondary union activity was generally met with appellate court approval until 1967.[30] However, the decision in *National Woodwork*[31] caused confusion over the vitality of the right to control test.

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27. Clifton Deangulo, 121 N.L.R.B. 676, 42 L.R.R.M. 1420 (1958).

28. *Id.* at 684-86, 42 L.R.R.M. at 1421-22. *See also* Associated Gen. Contractors v. NLRB, 514 F.2d 433 (9th Cir. 1975).

29. 121 N.L.R.B. 676, 42 L.R.R.M. 1420 (1958).

30. *See, e.g.*, Metropolitan Dist. Council of Carpenters, 149 N.L.R.B. 646, 57 L.R.R.M. 1341 (1964), *enforced sub nom.* National Woodwork Mfrs. Ass'n, 354 F.2d 594 (7th Cir. 1965), *aff'd on other grounds*, 386 U.S. 612 (1967); Ohio Valley Carpenters Dist. Council, 144 N.L.R.B. 91, 54 L.R.R.M. 1003 (1963), *enforced*, 339 F.2d 142 (6th Cir. 1964); International Longshoremens Ass'n Local 1694, 137 N.L.R.B. 1178, 50 L.R.R.M. 1333 (1962), *enforced*, 331 F.2d 712 (3d Cir. 1964); Local 5, United Ass'n of Journeymen, 137 N.L.R.B. 828, 50 L.R.R.M. 1266 (1962), *enforced*, 321 F.2d 366 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963).

31. 386 U.S. 612 (1967).

The issue in *National Woodwork* was whether a carpenters union's refusal to install prefabricated doors ordered by the employer in violation of a work preservation agreement constituted secondary activity. The court found that this activity was not secondary. Although the plurality in *National Woodwork* specifically declined comment on the right to control test,[32] the decision cast considerable doubt on its continued validity. In arriving at its conclusion, the Court announced that, in determining whether there was a violation of section 8(b)(4)(B), an inquiry into "all the surrounding circumstances" had to be made in order to discover the objectives of the union activity.[33]

The "surrounding circumstances" language was taken by some courts as an indication that the right to control test was no longer applicable to section 8(b)(4)(B) situations. The Third Circuit, in *NLRB v. Local 164, IBEW*[34] was the first to attack the right to control test. Deciding in favor of the union, the court found that the union's actual dispute was with the employer and, therefore, the activity directed at influencing the employer was primary even though he may not have controlled the work that the union sought.[35]

The Eighth Circuit soon joined the Third Circuit in rejecting the Board's conclusive use of the right to control test. In *American Boiler Manufacturers Association v. NLRB*,[36] the court was faced with the problem of a union's refusal to work on pre-piped boilers in order to pressure the employer into preserving piping work for the union. The court found that the right to control test is only one factor to be considered in determining whether the union activity had a valid work preservation objective.[37]

After *National Woodwork*, by far the strongest opponent of the Board's right to control test was the District of Columbia Circuit. In *Local 742, United Brotherhood of Carpenters v. NLRB*,[38] the union's employer contracted with a building owner to install prefabricated doors

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32. *Id.* at 616-17 n.3.

33. *Id.* at 644. The question of what constitutes the surrounding circumstances will be addressed in part III *infra*.

34. 388 F.2d 105 (3d Cir. 1968).

35. *Id.* at 109.

36. 404 F.2d 556 (8th Cir. 1968). *See also* American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 547 (8th Cir. 1968) in which the court found that a work preservation ageeement does not violate section 8(e) even though it seeks to reacquire a portion of work previously lost.

37. 404 F.2d at 561-62.

38. 444 F.2d 895 (D.C. Cir. 1971). This case was ultimately vacated and remanded, 430 U.S. 912 (1977), in light of NLRB v. Enterprise Ass'n of Steam Pipefitters Local 638, 429 U.S. 507 (1977). Final disposition of the case is reported at 237 N.L.R.B. 564, 99 L.R.R.M. 1021 (1978). *See also* Local 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906 (D.C. Cir. 1970).

under the owner's specifications. When the union struck, seeking to preserve the door fabrication for its members, the employer filed unfair labor practice charges with the Board. By applying the right to control test, the Board found the union activity to be secondary since the building owner, rather than the employer, controlled the door selection.[39] In a strongly worded opinion, the court of appeals renounced the right to control test and encouraged its complete abandonment. The court reasoned that an employer could not contract away his obligation to satisfy the union demands of work preservation, thereby causing a conflict, and at the same time claim he is a neutral under the Board's right to control test in order to avoid potential union pressure.[40] The court further stated:

> A more basic failing of the "right to control" test under *National Woodwork* is that it focuses entirely on the wrong set of circumstances. It is concerned solely with which party presently has the power to satisfy the union's objective rather than focusing on the substance of the objective itself.[41]

Despite an obviously growing disfavor with the right to control test,[42] several circuits continued to adhere to its reasoning. In *George Koch Sons, Inc. v. NLRB*,[43] the Fourth Circuit upheld the test stating that "if an employer is not legally empowered to meet his employees' demand[s], then they cannot lawfully strike him for his failure to accede."[44] In justifying the test under the *National Woodwork* decision, the court explained that the Board had followed the totality of the circumstances doctrine of *National Woodwork* and had accorded proper weight to all of the circumstances.[45] The court did note, however, that protections under section 8(b)(4)(B) would only be extended to an unoffending employer:

> Admittedly, an employer should not have an unfettered license to contract out work and, as a result, acquire a shield from union collective bargaining agreements. Certainly where the employer was initially in a position to accede to potential union demands through the negotiating stages of the contract, then he should not later be deemed a neutral if he intentionally forfeited his potential for control.[46]

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39. Local 742, United Bhd. of Carpenters, 178 N.L.R.B. 351, 72 L.R.R.M. 1107 (1969).

40. 444 F.2d at 899-900.

41. *Id.* at 900-01.

42. The First Circuit also rejected the Board's right to control test in dictum. *See* Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188, 191 (1st Cir. 1969).

43. 490 F.2d 323 (4th Cir. 1973).

44. *Id.* at 326.

45. *Id.* at 327.

46. *Id.* at 328.

The Ninth Circuit, in *Associated General Contractors v. NLRB*,[47] agreed with the Fourth Circuit and upheld the application of the right to control test. The court rationalized that, if the union's employer did not have the power to assign the disputed work, the union was seeking to acquire work from a third party. According to the court, such an extension of a work preservation clause necessarily indicated a secondary purpose prohibited by section 8(b)(4)(B).

The conflict in the circuits over the judicial treatment of the right to control test centered on the question of whether the employer's power to assign the work sought to be preserved was the determinative factor in identifying activity prohibited by section 8(b)(4)(B). The *American Boiler* and District of Columbia cases advocated the position that the right to control the work was only a factor to be considered and could be outweighed by other circumstances. The rationale for this position is that the court should focus on the work preservation objectives involved in each situation to reach a fair decision, rather than allowing the control factor artificially to indicate the outcome.

The determinative factor approach to the test advocated by the *Koch* and *Associated* cases has as its basis the prevention of work acquisition. This approach focuses on the union and decreases union prerogatives, such as work acquisition, which are considered disfavored. The conflict was soon to be settled.

B. The Pipefitters Decision

When the District of Columbia Circuit again refused to follow the Board's right to control test,[48] the Supreme Court granted certiorari to resolve the conflict among the circuits over the test's validity. In *NLRB v. Enterprise Association of Steam Pipefitters Local 638*,[49] the Court was presented with the precise question, which it had avoided in *National Woodwork*, of whether a union seeking to preserve work which it had previously performed violates section 8(b)(4)(B) when it strikes against its employer who does not have the right to control the assignment of the work sought.[50] As in many others, this case concerned a union's refusal to install prefabricated climate-control units specified by a general contractor and contracted for by the union's employer in derogation of an existing work preservation agreement.

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47. 514 F.2d 433 (9th Cir. 1975). *But see* Western Monolithics Concrete Prods, Inc. v. NLRB, 446 F.2d 522 (9th Cir. 1971), later overruled in Chamber of Commerce of the United States v. NLRB, 574 F.2d 457, 462 n.9 (9th Cir. 1978).

48. Enterprise Ass'n of Steam Pipefitters Local 638 v. NLRB, 521 F.2d 885 (D.C. Cir. 1975).

49. 429 U.S. 507 (1977).

50. *Id.* at 510.

Despite the criticism and disfavor advanced by several circuits, the Court held that the NLRB, in determining whether a union's activity violates 8(b)(4)(B), may apply the right to control test and accord whatever weight the Board desires to the test's outcome.[51] The Court noted that although the appellate courts may not agree with the weight given by the Board to its finding, "this far from demonstrates a departure from the totality-of-the-circumstances test recognized in *National Woodwork*."[52] The Court based its decision on the finding that the union "sought to acquire work that it never had and that its employer had no power to give it . . . ."[53] This decision implicitly found that the right of control test does not ignore all the circumstances of the controversy and is therefore acceptable under the *National Woodwork* standards. The basis for the decision rested on the disfavored status of work acquisition.

Following the *Pipefitters* decision, courts generally agree on the validity of the right to control test as a determinative factor in cases dealing with alleged secondary activity under section 8(b)(4)(B).[54] Ideally, the test is used independently of the existence of any work preservation agreement in order to evaluate activities engaged in by a union for an alleged work preservation purpose. Control was easily ascertained in cases arising out of contractor/subcontractor relationships. However, application in other situations is more difficult.

Excellent examples of the difficulty in applying the right to control test outside the contractor/subcontractor relationship are the cases dealing with longshoremen and containerized freight. Briefly stated, the technological innovation of large shipping containers, which can be taken directly from a ship and placed in service as a truck trailer without any unloading of individual packages, has drastically reduced the number of longshoremen needed to unload each individual container.[55] The longshoremen's union responded by negotiating work preservation agreements with shippers. In evaluating the objectives behind the use of liquidated damages, boycotts or refusals to handle goods as methods to obtain compliance with these agreements, appellate courts still applied the right to control test only as an indicator of secondary activity apart from the con-

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51. *Id.* at 524.

52. *Id.*

53. *Id.* at 530 n.16.

54. *See, e.g.*, Electro-Coal Transfer Corp. v. General Longshore Workers, 591 F.2d 284 (5th Cir. 1979); Chamber of Commerce of the United States v. NLRB, 574 F.2d 457 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978); Local 501, IBEW v. NLRB, 566 F.2d 348 (D.C. Cir. 1977).

55. This subject will be addressed in more detail in part III *infra*. For the history of containerization and the longshoremen's response, *see* NLRB v. ILA, 100 S. Ct. 2305, 2305-08 (1980). *See also* Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LAB. L.J. 397 (1970).

sideration of the validity of any work preservation agreement.[56]

These cases also revealed that the right to control is highly dependent on other factors, such as the definition of the work sought to be preserved.[57] However, once the work was defined, the courts still applied the test to ascertain whether or not secondary activity existed.[58] The state of the law in the area dictated this application. However, a recent Supreme Court decision indicated that the right to control test should be used in considering the validity of work preservation agreements under section 8(e)[59] and not just in cases in which the activity, apart from the existence or the validity of any agreement, is alleged to violate section 8(b)(4)(B). This interpretation by the Court would seem to be at odds with the previous judicial applications of the test.[60]

C. Evaluation of the Right to Control Test as a Primary/Secondary Indicator

When activities in violation of section 8(b)(4)(B) are alleged, the reviewing court endeavors to reach a fair decision by balancing employee versus employer expectations. The right to control test is a method used in this endeavor. As stated previously, the basic reason for use of the right to control test is to prevent undeserved work acquisition on the part of the unions. There are, however, other valid reasons for using the test.

A general justification for the right to control test is based on the suspicion of labor power, which, in fact, initially gave rise to the secondary activity statutes.[61] Congress perceived that too much labor power would hinder commercial operations by making an employer subject to all demands and threats by a union. Utilization of the right to control test would prevent union disputes from disrupting operations of an employer who really cannot give the union the work demanded.

Koch reflected the court's desire to protect neutrals from labor disputes. The rationale is to protect those persons from pressure who would be unable to settle the dispute even if they wanted to. This protection is necessary in order to assure smooth economic operation of enterprises using union labor. Subjecting an employer to labor pressures to which he could not accede would hinder efficient planning.[62] An employer cannot

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56. *See* ILA v. NLRB, 613 F.2d 890 (D.C. Cir. 1979) *aff'd*, 100 S. Ct. 2305 (1980); ILA Local 1575 v. NLRB, 560 F.2d 439 (1st Cir. 1977).

57. "Definition of the work" is discussed in part III *infra*.

58. *See* 613 F.2d at 912 n.190 and 560 F.2d at 447.

59. NLRB v. ILA, 100 S. Ct. 2305, 2313 (1980). This case and § 8(e) will be discussed in part IV.

60. See text accompanying notes 106-07, *infra*.

61. *See* notes 1-9, *supra*, and accompanying text.

62. *See generally* 90 HARV. L. REV. 815; Note, *Secondary Boycotts and Work Preserva-*

take steps to prevent or plan for something over which he has no control. This policy is justified on the ground that it would encourage free market principles and prevent unions from unduly influencing groups who are technically not parties to the dispute over preserving certain work.

The right to control test has been criticized as a technicality enabling employers to escape work preservation obligations.[63] In addition, it has been argued that adherence to the right to control test fails to consider any other circumstances or considerations which might justify a finding of primary activity.[64] In this way, the use of a right to control test really would not serve the purpose of favoring work preservation because it only deals with the employer's power and not the union objective, no matter how honorable.

It is doubtful that an offending employer would be able to contract away his work preservation objectives. The *Koch* decision indicated that an employer whose conduct is "tainted" would not be able to charge a union with section 8(b)(4)(B) violations in order to escape union pressure.[65] In addition, the *Pipefitters* decision foreclosed any argument that reliance on the right to control test fails to take into account other surrounding circumstances.[66] However, by allowing the Board to give whatever weight it desires to the test, it is likely that the Board will often ignore competing circumstances.

The major weakness of the right to control test is that its result can be highly dependent on other factors, such as the definition of the work.[67] In this sense, the outcome of the test could be predetermined by the resolution of other issues. The problem is that courts might attempt to predetermine the result to avoid the test. This practice might not result in just decisions in all instances. Alternatively, this possibility of predetermination might give courts some flexibility to reach a just result when the bare application of the right to control test would not.

The right to control test seems to be a good indicator of secondary activity if the view disfavoring work acquisition predominates. If the view favoring expanded labor prerogatives in the work preservation area is dominant, the right to control test would often undermine this objective. However, in section 8(b)(4)(B) situations, the test serves as a convenient indicator for distinguishing between the concepts of permissible and im-

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tion, 77 YALE L.J. 1401 (1968).

63. *See* Local 742, United Bhd. of Carpenters v.NLRB, 444 F.2d 895 (D.C. Cir. 1971), *vacated and remanded*, 430 U.S. 912 (1977). Final deposition is reported at 237 N.L.R.B. 564, 99 L.R.R.M. 1021 (1978).

64. *Id.*

65. 490 F.2d at 328.

66. *See, e.g., Id.* at 327.

67. *See* 613 F.2d at 912 n.190 and 560 F.2d at 447.

permissible union activity while simultaneously allowing retention of the often difficult concepts of primary and secondary activity.

III. Validity of Work Preservation Agreements

A. *Impetus of Section 8(e)*

Section 8(e) basically provides that labor agreements with a secondary objective are prohibited.[68] As stated previously, there is Supreme Court authority that section 8(e), as well as section 8(b)(4)(B), does not proscribe primary activity.[69] A general formula for distinguishing section 8(e) violations and section 8(b)(4)(B) violations exists. First, is the agreement directed towards a secondary object per se? Second, are the union's actions to implement the agreement directed at a secondary objective? If the answer to the first question is yes, the agreement violates section 8(e); if the answer to the second question is yes, the actions violated section 8(b)(4)(B).[70]

Usually through collective bargaining, an employer and the employee's union will reach agreements on the employer's duty towards preserving work for the employees. Clauses in agreements causing an employer to cease doing business with a third party do not violate section 8(e) if, under all the "surrounding circumstances," the union's objective was preservation of work for the bargaining unit.[71] "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-á-vis his own employees."[72] It is only when work preservation agreements "are sought to be applied with the intent of indirectly pressuring someone other than the immediate employer that they run afoul of the statute."[73]

The rationale for exempting valid work preservation agreements from the application of section 8(e) rests on a policy of allowing collective bargaining as the primary means for settlement of labor disputes.[74] This would be especially necessary when technological innovations threaten to

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68. The text of the statute is set out at note 14 *supra*.

69. *See* 386 U.S. 612 (1967).

70. *Id. See also* Sheet Metal Workers Local 223 v. NLRB, 498 F.2d 687 (D.C. Cir. 1974).

71. 386 U.S. at 644-45. The other circumstances which might indicate a work preservation objective include: The remoteness of the threat of displacement by a banned product or services; the history of labor relations between the union and the employers who would be boycotted; and the economic personality of the industry. *Id.* at 644 n.38. These standards are rarely used by the courts in making a decision. *See, e.g.*, Kennedy v. Sheet Metal Workers Local 108, 289 F. Supp. 65, 81 (C.D. Cal. 1968). *See also* 90 Harv. L. Rev. at 820 n.30.

72. 386 U.S. at 645.

73. Electro-Coal Transfer Corp. v. General Longshore Workers Local 1418, 591 F.2d 284, 290 (5th Cir. 1979).

74. *See generally* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967).

displace workers. The policy exists to encourage negotiation of work preservation clauses so that the impact of an innovation could be cushioned; it is hoped that this would provide incentives for labor to allow introduction of the innovation in exchange for concessions and compromises by management, rather than total resistance to any introduction of the innovation.[75] Courts are therefore hesitant to interfere with work preservation agreements for fear of casting doubt on their validity and thereby discouraging their use. Nevertheless, courts must sometimes review the objectives behind work preservation agreement in order to prevent them from being used as offensive weapons against third parties with whom the union is competing for jobs.[76] In addition, certain methods are used to prevent unwarranted acquisition of work by unions under the guise of work preservation.

Various tests have been used by the courts to determine just what work can be subject to preservation. In *National Woodwork*, the Court used the vague standard that work "traditionally performed" by the bargaining unit was subject to work preservation agreements.[77] In *Meat and Highway Drivers Local 710 v. NLRB*,[78] the standard used was that "work fairly claimable"[79] by the bargaining unit could be preserved. Other variations have been used.[80] These varying standards are of little value in the actual determination of the permissible scope of work preservation. At best, they are labels used by the courts to prevent job acquisition or to allow some job reacquisition when the outcome was dictated by other factors. The standards are utilized when reviewing court justifies its decision by choosing to find or by choosing to ignore some connection between the work being done by the union and the work sought to be preserved.

The standards depend heavily on how the work which is the subject of the dispute is defined. In *National Woodwork*, the Court found it rather easy to define the work sought to be preserved and went on to find a valid

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75. *See generally* 90 HARV. L. REV. 815.

76. *See* 386 U.S. at 630-31 ("sword and shield" analogy used to determine improper objectives). *See also* 77 YALE L.J. 1401, 1410 and 90 HARV. L. REV. 815, 820.

77. 386 U.S. at 645-66.

78. 335 F.2d 709 (D.C. Cir. 1964).

79. *Id.* at 714.

80. Sheet Metal Workers Local 223 v. NLRB, 498 F.2d 687 (D.C. Cir. 1974) (Work fairly claimable is that which members of the bargaining unit have the skills or experience to perform); Canada Dry Corp. v. NLRB, 421 F.2d 907 (6th Cir. 1970)(Work "traditionally done" was what they had previously done and for which they had the skills and experience); American Boiler Mfrs. Ass'n v. NLRB, 404 2d 547 (8th Cir. 1968), *cert.denied*, 398 U.S. 960 (1970) ("Traditional work" is not limited to work which is currently, continuously and exclusively performed by the unit members; the term includes work which unit members have performed and are still performing at the time they negotiated the work preservation clause); Meat and Highway Drivers Local 710 v. NLRB, 335 F.2d 709 (D.C. Cir. 1964) (Work fairly claimable is that which the bargaining unit had the skills and experience to do).

work preservation objective.[81] However, some recent cases show the differing approaches courts take in defining the work and the difficulty involved in the process.

In *Electro-Coal Transfer Corp. v. General Longshore Workers Local 1418*,[82] the court remanded to the district court to determine the work in controversy. At issue was the threat by a union of labor action against a grain shipper if he did not refrain from having non-union workers perform loading work. The employer was a member of a shipping association that had a collective bargaining agreement with the threatening union, which agreement preserved for the union all loading and unloading work on the employer's ships. The Fifth Circuit remanded the case to the district court with instructions that it was to focus on the work of the allegedly displaced workers (the union members) and to decide "whether it [the work] is the loading of particular ships wherever they dock in a particular area, or the loading of all ships that dock at particular facilities."[83] The court, in effect, recommended an analysis focusing on the displaced worker and on the particular place and type of work that he performs.

A different approach was used in *Granddad Bread, Inc. v. Continental Baking Co.*[84] Granddad was a bread distributor who purchased bread from wholesale bakers. The bakers refused to sell bread to Granddad unless it stopped selling to retailers, because the bakers had a collective bargaining agreement with their employees which reserved to the bakery deliverymen the tasks of delivering and placing the bread on the retailers' store racks.[85] The court again focused on the displaced deliverymen and found that they had traditionally performed the work of servicing the retailers' bread racks.[86] The court's actual focus in defining the work was that the deliverymen had previously performed the exact tasks they sought to reacquire.

The court in *Electro-Coal* sought to have the work defined in terms of specific tasks at specific locations. In *Granddad*, the court looked for a general connection between the work claimed and tasks previously performed. Neither case offered much analysis to justify the different approaches to defining the work sought to be preserved. Seemingly, courts

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81. 386 U.S. at 646. The Court adopted the Board's definition of the work and, after reviewing the history and development of the primary/secondary distinction, found that work preservation was a valid primary objective.

82. 591 F.2d 284 (5th Cir. 1979).

83. *Id.* at 290.

84. 612 F.2d 1105 (9th Cir. 1980). The case was actually decided on antitrust principles but discussed work preservation since a valid work preservation objective may be a defense to antitrust liability. *See generally* Note, *Section 8(b)(4)(B) Limitations on Union Enforcement of Work Preservation Agreements*, 32 MIAMI L. REV. 721 (1978).

85. 612 F.2d at 1107-08.

86. *Id.* at 1110.

could utilize either approach so long as they focused on the displaced worker. These cases show the difficulty the courts have in using consistent methods to reach results in work preservation cases. The major problem is whether the work should be defined on the basis of the general or specific tasks involved. Obviously, other factors indicate this choice to a reviewing court. However, these decisions do not make it clear just what these factors are.

B. Work Preservation and the Containerization Cases

Complex situations can make the definition of the work and even the identification of the displaced worker exceedingly difficult. One situation that has been the subject of much litigation involves containerization, longshoremen, and a work preservation agreement designed to offset the effects of containerization.

The increasing use of containerization in the shipping industry jeopardized the job security of longshoremen by eliminating the need for piece by piece cargo handling.[87] On the east coast of the United States, a 1959 agreement between the New York Shipping Association (NYSA) and the International Longshoremen's Association (ILA) settled a strike caused by the use of containers and the decreasing use of longshore labor. The ILA gave all employers the "right to use any containers without restriction."[88] Use of containers dramatically increased and, as a result, there was an increased demand for freight consolidators who "stuffed and stripped"[89] containers at off-pier facilities. The consolidators did not have a bargaining agreement with the ILA and were not affiliated with NYSA. Their employees were represented by the Teamsters.[90]

In 1969, the ILA renegotiated an agreement[91] with NYSA which provided that all shipments which were less than a full load destined to a single consignee would be stuffed and stripped by longshoremen if the container was to be stuffed and stripped within 50 miles of the docks.[92] The shippers were to pay a fine for each container covered by the agree-

87. *See* notes 55-56, *supra*, and accompanying text.

88. *See* H. LEVINSON, C. REHMUS, J. GOLDBERG, & M. KAHN, COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION 275, 370 (1971) [hereinafter cited as LEVINSON].

89. 90 HARV. L. REV. at 816. "Stuffing and stripping consists of combining smaller cargo lots into one container load and separating inbound containers filled with cargo with varying destinations, into individual shipments. It is the principle source of revenue for the consolidators." *Id.* at n.11.

90. *Id.* at 816.

91. The present text of the agreement is reprinted in the appendix to the Court's opinion in NLRB v. ILA, 100 S. Ct. at 2318.

92. *Id.*

ment that was not stuffed and stripped by ILA labor. The containers covered by the agreement amounted to approximately 20% of the total container traffic.

The ILA discovered that consolidators and trucking companies were stuffing and stripping containers in violation of the terms of the agreement. NYSA owned the containers and only leased them to the consolidators. Since they had not been stuffed and stripped by ILA labor, the ILA fined NYSA according to the terms of the agreement. NYSA looked to the consolidators for indemnity but they declined to pay. As a result, NYSA refused to allow the consolidators use of the containers and the consolidators filed charges with the NLRB alleging that the union had violated sections 8(b)(4)(B) and 8(e) by causing the shippers to refuse to do business with the consolidators. The issue presented was whether the union's agreement providing for the fines had a secondary objective because it caused a cessation of business between the shippers and consolidators.

In an early case arising from these facts, *ILA and Consolidated Express (Conex)*,[93] the NLRB found that the agreement violated section 8(e) because its object was to force NYSA to cease doing business with the consolidators. The Board focused on the work of the consolidators rather than on that of the longshoremen (who had the work preservation agreement) and found that the work was not traditionally performed by the longshoremen. The Board defined the work as the loading and unloading of containers away from the dock. Therefore, the Board held that the agreement was not directed towards work preservation.[94]

In *ILA v. NLRB (Conex)*,[95] the Second Circuit sustained the Board's finding. The majority again focused on the off-pier stuffing and stripping by the consolidators. In dissent, Judge Feinberg asserted that the Board's decision was erroneous as a matter of law. Feinberg would have focused on the general category of the work (unitizing cargo) rather than the tasks currently performed by the longshoremen.[96] He would have held that the object of the agreement was work preservation. He argued that under the majority's view, work preservation agreements would be " 'virtually precluded . . . where it could be established that other employees at other sites were doing or had done the work for which protection was being sought.' "[97]

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93. 221 N.L.R.B. 956, 90 L.R.R.M. 1655 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

94. *Id.* at 892, 90 L.R.R.M. at 1674.

95. 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

96. *Id.* at 712 (Feinberg, J., dissenting).

97. *Id.* at 713, *quoting* ILA and Consol. Express, Inc., 221 N.L.R.B. 956, 974 (1975) (footnote omitted).

The distinction between the approaches of the majority and dissenting opinions is very important. One commentator has stated that the majority and dissenting opinions correspond to "narrow" and "broad" approaches of defining work.[98] The two approaches suggest a distinction based on the temporal aspect of the focus on the work:

> The broad view treats work reacquisition as preservation by focusing on the displacement of unit workers; thus, technology-generated work assignments which are functionally equivalent to work previously performed by the unit, and which have displaced that work, may be "reacquired". The narrow view suggests that reacquisition is more like acquisition by focusing on the difference in the description or manner of performance of the new work from the traditional work of the unit. Under the latter view, reacquisition is a legitimate union goal only if the jobs claimed have not yet evolved into the distinct employment of other workers, or if the new work is so similar to that performed by the original unit that it is literally the same except for its performance by outsiders.[99]

Even though it has been criticized,[100] the *Conex* rationale gave rise to a conflict among the circuits over defining the work in cases with very similar facts dealing with the same work in cases with very similar facts dealing with the same work preservation agreement.[101] In opting for the narrow approach, the majority in *Conex* approved the Board's definition of the work "by geographical location, type of company doing the work, and type of package loaded."[102] In other words, the definition was based on the specific character of the work.

In response to conflicting views over defining the work, the Supreme Court granted certiorari in *NLRB v. ILA*,[103] and held that the Board's narrow definition of the work in controversy was erroneous. This rendered its finding that the longshoremen's agreement was not a valid work preservation agreement erroneous as well, since that finding resulted from a misapplication of the law.[104] The Court found that, "[i]n applying the work preservation doctrine, the first and most basic question is, what is the 'work' that the agreement allegedly seeks to preserve?"[105] Justice

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98. 90 HARV. L. REV. at 821.

99. *Id.* at 821-22.

100. *Id.* at 825.

101. Cases adopting the narrow approach set forth in *Conex* include: ILA Local 1575 v. NLRB, 560 F.2d 439 (1st Cir. 1977); Humphrey v. ILA, 548 F.2d 494 (4th Cir. 1977). A case adopting a broader approach to defining the work and overturning the NLRB determination is ILA v. NLRB, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 100 S. Ct. 2305 (1980).

102. 560 F.2d at 445.

103. 100 S. Ct. 2305 (1980).

104. *Id.* at 2307.

105. *Id.* at 2314.

Marshall's majority opinion also indicated that work preservation clauses negotiated in the face of changing technology should be carefully scrutinized.

> Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance.[106]

Retention of the term "traditional work" keeps the vague concept alive. However, the Court offered some aid in the determination of what traditional work encompasses. Essentially, the Court adopted the broad view to the preservation of work:

> The Board must focus on the work of the bargaining unit employees, not on the work of the other employees who may be doing the same or similar work, and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.[107]

The Court is, therefore, enunciating a policy of favoritism for the bargaining unit whose agreement is before the Board. This policy could have ill effects on any other bargaining unit that is, will, or could be doing the samework.

The Court also precluded the Board from looking to many free market and economic policies in evaluating a work preservation agreement. "[I]n judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs."[108]

The analysis for defining the work in controversy is made clearer by this decision. The focus remains on the displaced worker and it seems that the displaced worker will be a member of the bargaining unit whose work preservation objectives are at issue, rather than other workers such as the consolidators in the longshore cases. The court retains the use of a temporal connection as sufficient to show work "traditionally performed." It is not at all clear how close this connection has to be. Finally, the court allowed for flexible decision-making in this area by permitting review of the reasonableness of the means used to achieve the preservation. At the same time, the Court indicated that work preservation should not be subordinated to efficiency concerns by its statement that the means do not necessarily have to be the most rational or productive.

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106. *Id.* at 2315.
107. *Id.* (footnote omitted).
108. *Id.* at 2317.

In one area, the decision seemingly expands the importance of the right to control test. The Court announced a two part test for determining the validity of a work preservation agreement: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so called "right of control" test . . . .[109] This expands the use of the test to a section 8(e) situation, something that was not done in earlier cases.[110] It is difficult to understand how an employer could contract to preserve work he does not control in the first place. Perhaps the best explanation for the use of the test in a section 8(e) situation is that the Court does not want unions to extort concessions from an employer which he cannot fulfill. Holding such an agreement invalid would likely serve to lessen some of the union's pressures against an employer during the negotiation of the work preservation clause.

The Court in *ILA* never actually defined the work in controversy. The case was remanded to the Board for a consideration of the facts in light of the new rules announced in the decision. The Court stated that the Board may still decide on whether the work, once defined, was traditionally performed by the longshoremen.[111]

C. Evaluation of the Focus on the Displaced Worker

The *ILA* decision is most likely an attempt to reconcile the *National Woodwork* and *Pipefitters* decisions. The case reflects the policy of favoring collective bargaining and goes a little further in allowing some work reacquisition. The Court retained use of the "traditional work" standard and the "right to control" test although the latter test seems to have been misapplied in a section 8(e) situation. *National Woodwork* expanded union prerogatives by adhering to the traditional work standard that allows some job reacquisition. *Pipefitters* reduced union prerogatives by requiring employer control of the work sought. Work preservation, therefore, did not justify an absolute protection for all union pressures. The *ILA* decision retains both tests and at the same time expands union prerogatives by requiring a focus only on the displaced unit. As seen earlier, this is most likely the union whose agreement is the subject of the controversy.

It is important to note that Justice Marshall, the author of the *ILA*

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109. *Id.* at 2313.

110. *See* part II *supra.*

111. 100 S. Ct. at 2317. The general tone of the opinion, however, seems to indicate that the outcome is a foregone conclusion in favor of the validity of the agreement.

opinion, was a dissenter in *Pipefitters*.[112] *ILA* allows for greater union prerogatives by favoring the negotiation of work preservation agreements, especially in instances of technologial displacement. The *Pipefitters* dissent also favored negotiation of valid work preservation agreements over consideration of other factors.[113] *ILA* signals a trend of expanding union options to cope with job displacement.

Problems still exist in the choice of utilizing a broad definition of work to satisfy the "traditionally performed" standard. In effect, this broad definition would always result in a finding that the objective in preserving the work is justified. There only has to be some connection between work currently being done and work previously done in order to include the past work in the work "traditionally performed" standard. This connection most likely consists of a similarity in performance of tasks currently and previously done. If there is a technological innovation, the Board should look to the tasks performed prior to the innovation. The position fails to take into account, however, the possibility that one group may abandon a job which can then be claimed by different workers.[114] Should a union be allowed to claim this work under the guise of work preservation? Obviously not, but the broad view to defining work leaves this possibility.

Another problem for courts in analyzing cases under section 8(e) is that the reviewing tribunal must focus on the displaced unit. In the container cases, there were actually two units which were subject to displacement: the longshoremen and the consolidators. The Court looked to the unit with the agreement (the longshoremen) and not the consolidators. This approach does not fully consider effects on the other unit. Problems could arise when both units which were doing, or had done the work, had bargaining agreements to preserve the work. Who could actually claim the work? Would it be the first unit which had its agreement litigated? This hard and fast rule concentrating on the displaced worker will be difficult to use in many situations because there is no real reason for distinguishing between the expectations of either group regarding the claimed work.[115]

The same general policies underlie section 8(e) analysis as in section 8(b)(4)(B) problems. The courts must decide in differing fact situations the relative weight to be given to each: collective bargaining, work acquisition, technological advance, union power, and employer power. Perhaps the use of vague tests for determining secondary objectives is warranted by the very diversity of each fact situation. The obvious effect is to allow

112. 429 U.S. at 532 (Marshall, J., joined in the dissenting opinion of Brennan, J.).
113. *Id.*
114. 100 S. Ct. at 2317. *See generally* 90 HARV. L. REV. at 827.
115. 90 HARV. L. REV. at 823.

courts a flexible framework in which to decide each controversy. The weight of each policy is subject to change, however. The *ILA* decision demonstrated a favoritism for union opportunities on those facts. In another situation, the policies favoring employer prerogatives may be more persuasive. Only the varied fact situations can determine which policies take precedence.

IV. Conclusion

The facts in any work preservation situation play a large part in dictating the outcome. Although the courts rely on concepts of primary, secondary, traditional work, right to control, and collective bargaining, there are most likely other determinants of when an impermissible objective should be found to exist.

Conceivably, a court might look to the manner in which collective bargaining was negotiated. Did the parties have full knowledge of the situation? Were they bargaining at arms length? If they were, a court might find a primary objective based on the premise that both parties knew best what they were doing and negotiated what was best for themselves.

Under the policy to prevent work acquisition, a court might look to find out who initially performed the work sought to be preserved. If one party had originally done the work, a decision to allow an agreement to preserve that work would be closer to work reacquisition rather than acquisition of new work. In addition, a court would likely consider the similarity of the work sought to be preserved with the work currently done. If the tasks are closely related, a work preservation objective might be justified.[116]

As stated previously, the objective might depend on the timing of a technological change. A work preservation objective might be limited to the period before a technological innovation has come into wide use.[117] The rationale for this approach would be that steps should be taken to preserve the work during this period or the right to the work should be abandoned.[118] New workers would perform the labor unless the work was preserved and these persons should not be displaced when the entire problem could have been eliminated at an earlier stage.

The most important consideration by a court should be the impact its finding would have on the workers and third parties. The court will have to weigh the interests of the bargaining unit, other workers, and third parties who are likely to be affected by a decision on a work preservation objective. Weighing these interests is conceivably done on the basis of

116. *Id.*
117. *Id.*
118. *Id.*

economic, social, or even equitable concerns.

These considerations show that a determination of primary or secondary activity necessarily entails a great deal of balancing even before the relevant statutes are considered. Because of this balancing, there is seldom detailed analysis directed at justifying the result in work preservation cases. At best, the decisions only serve to show the difficulty in denominating an activity as primary in many and varied situations. Perhaps the unclear status of the concepts in the work preservation area has some merit; at least the courts are not forced to sacrifice justice for adherence to clear cut legal rules.

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