Cornell Law Review

Volume 37
Issue 2 *Winter 1952*

Article 3

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FEDERAL REGULATION OF SECONDARY STRIKES AND BOYCOTTS — A NEW CHAPTER

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Four recent decisions[1] of the Supreme Court of the United States may be deemed to conclude the first chapter in the story of the Federal government's attempt in the Taft-Hartley Act[2] to outlaw the so-called "secondary boycott" in labor disputes. Seldom, if ever, has any term in American law proved more elusive of precise definition or suggestive of greater conflict of judicial and legislative opinion than the term "secondary boycott." The Taft-Hartley Act reflects a legislative opinion that concerted labor activity usually characterized by this term merits blanket condemnation. Congress wisely avoided use of the term in drafting the relevant provisions. But the breadth and complexity of the statutory definition is such that it promised to be as elusive of interpretation and as controversial in effect as earlier attempts to give legal contour to the "secondary boycott." The interpretative efforts of the National Labor Relations Board, the agency largely responsible for initial construction of the Taft-Hartley provisions, have been scrutinized by the Supreme Court for the first time. It is the purpose of this article to set forth the extent to which the NLRB's interpretation has received the imprimatur of the high Court, and to suggest a few problems left in doubt. Before doing so, however, a brief reference to pre-Taft-Hartley trends in the law of the "secondary boycott" may prove helpful to an understanding of the problems which have confronted the NLRB and the courts.

I. Pre-Taft-Hartley Trends[3]

Although the term "secondary boycott" has never been given an universally accepted definition, it generally connotes "a combination to

* See Contributors' Section, Masthead, p. 256, for biographical data.

1 NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943 (1951); International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB, 71 Sup. Ct. 954 (1951); NLRB v. International Rice Milling Co., 71 Sup. Ct. 961 (1951); Local 74, United Brotherhood of Carpenters and Joiners of America, A.F. of L. v. NLRB, 71 Sup. Ct. 966 (1951).

These cases frequently are referred to by the abbreviated titles, respectively, of *Denver, Langer, Rice Milling,* and *Watson.*

2 This is the popular name of the Labor Management Relations Act, 1947. 61 Stat. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1950).

3 The "secondary boycott" in labor disputes has been the subject of extensive commentary. The following, among others, may be consulted for detailed analysis of the topic: Gregory, Labor and the Law 120-57 (rev. ed. 1949); Laidler, Boycotts and the Labor Struggle (1913); Millis and Montgomery, Organized Labor 581-99 (1945);

influence A by exerting some sort of economic and social pressure against persons who deal with A."[4] As a matter of common law, a majority of courts unhesitatingly have held illegal most of such pressures by combinations of laborers, frequently with little analysis of the diverse factual and economic relationships involved.[5] This approach was highlighted when in substance it was adopted by the Supreme Court in applying the Sherman Anti-Trust Law to concerted labor activity.[6] But other courts —particularly those of New York—"found this comprehensive condemnation far too simple and . . . made discriminations."[7]

Perhaps the best, and certainly among the most celebrated, illustrations of the central issues are the opinions of the Supreme Court in *Duplex Printing Press Co. v. Deering*[8] and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*.[9] The majority opinions reflect the traditional condemnation of the "secondary boycott," but the classic dissents of Mr. Justice Brandeis were milestones in the unfolding law of labor relations. With characteristic insight into "the facts of industrial life,"[10] he summarized and articulated the true nature of the conflicting interests involved and provided the pattern for much of the judicial and legislative thought concerning the "secondary boycott" in the present generation. Reduced to its essential facts, *Duplex* involved a refusal by the Machinists' Union to furnish union labor to New York customers of the Duplex Co. for installation and operation of presses manufactured by Duplex in Michigan. The union's conduct stemmed from the refusal of Duplex to recognize the union or its standards, and the threat of other

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WOLMAN, THE BOYCOTT IN AMERICAN TRADE UNIONS (1916); Bernard and Graham, *Labor and the Secondary Boycott,* 15 WASH. L. REV. 137 (1940); Dennis, *The Boycott Under the Taft-Hartley Act,* 3 N.Y.U. CONF. ON LABOR 367 (1950); Dennis, *The Boycott in Labor Disputes Under State and Federal Law,* 2 N.Y.U. CONF. ON LABOR 417 (1949); Dennis, *The Secondary Boycott,* 1 N.Y.U. CONF. ON LABOR 359 (1948); Feinberg, *Analysis of the New York Law of Secondary Boycotts,* 6 BROOKLYN LAW REV. 209 (1936); Gromfine, *Labor's Use of Secondary Boycotts,* 16 GEO. WASH. L. REV. 327 (1947); Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 YALE L.J. 341 (1938); Smith, *Coercion of Third Parties in Labor Disputes—The Secondary Boycott,* 1 LA. L. REV. 277 (1939).

[4] FRANKFURTER AND GREENE, THE LABOR INJUNCTION 43 (1930).

[5] The authorities are amply collected and discussed in the books and articles cited in note 3 *supra.* For a concise and careful analysis, Gromfine, *supra* note 3, is particularly recommended.

[6] *E.g.,* Loewe v. Lawlor, 208 U. S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Bedford Cut Stone Co. v. Journeyman Stone Cutters Assn., 274 U. S. 37 (1927).

[7] Frankfurter and Greene, *op. cit. supra* note 4, at 44.

[8] 254 U. S. 443 (1921).

[9] 274 U. S. 37 (1927).

[10] Duplex Printing Press Co. v. Deering, 254 U. S. 443, 481 (1921).

manufacturers of presses to withdraw their recognition of the union unless Duplex also entered into an agreement. For a majority of the Court, it sufficed to establish a violation of the Sherman Law, even as limited by Section 20 of the Clayton Act,[11] that the defendants had engaged in a "secondary boycott" which interfered with Duplex's interstate trade. But for Mr. Justice Brandeis the question was: "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standards of living and the institution which they are convinced supports it?"[12] An affirmative answer followed from a penetrating analysis of the facts of the case and "matters of common knowledge,"[13] which established the requisite community of interest. In reaching this conclusion, however, Mr. Justice Brandeis was careful to distinguish between boycotts which "are illegal because they are conducted not against a product but against those who deal in it and are carried out by a combination of persons not united by common interest but only by sympathy" and those in which, as here, "all members of a union by whomever employed . . . refuse to handle materials whose production weakens the union."[14] The *Bedford Cut Stone* case, aptly termed the "capstone" of the development in application of the Sherman Act to labor,[15] provided an even more pointed vehicle for a statement of Mr. Justice Brandeis' position. In this case, as he made clear in his dissent, the refusal of union members to handle Bedford stone was purely defensive, following the companies' refusal to continue a long course of dealing with the union, a lockout of union members, and the establishment of what plainly appears to have been a company-dominated union. And the refusal to handle the product was not accompanied, as it was in *Duplex,* by aggressive acts such as threats of violence and the conscription of other crafts. But a majority of the Court thought that such differences did not distinguish the controlling principle of *Duplex,* upon the authority of which the Court held that the employing companies were entitled to an injunction.

The Norris-LaGuardia Act[16] clearly reflected legislative acceptance of

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11 38 STAT. 738 (1914), 29 U.S.C. 52 (1946).

12 Duplex Printing Press Co. v. Deering, 254 U. S. 443, 481 (1921).

13 *Id.* at 482.

14 *Id.* at 483. This in substance was the line drawn by the New York Court of Appeals. *Compare* Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917) *with* Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919). For discussion of later New York developments, see, among others, Feinberg, *supra* note 3, and Note, *Present Status of Unity of Interest Rule in New York,* 1 SYRACUSE L. REV. 291 (1949).

15 BERMAN, LABOR AND THE SHERMAN ACT 179 (1930).

16 47 STAT. 70 (1932), 29 U.S.C. §§ 101-15 (1946).

the position urged by Mr. Justice Brandeis. The broad definition of "labor dispute" contained in Section 13 of that statute leaves no doubt that the Congress overruled *Duplex*[17] and intended to substitute the line suggested in the dissenting opinion.[18]

To those who may argue that the sweeping proscription of "secondary boycotts" in Taft-Hartley marks a retrogression to the era of the *Duplex* and *Bedford Cut Stone* cases,[19] certain factors should, in fairness, be pointed out. Again referring to the dissent in *Duplex,* it will be recalled that Mr. Justice Brandeis, in urging "the right of industrial combatants to push their struggle to the limits of the justification of self-interest," did not attach "any constitutional or moral sanction to that right" and made plain that it was within the province of the legislature to limit "individual and group rights of aggression and defense" and "substitute processes of justice for the more primitive method of trial by combat."[20] In 1932, the Congress accepted his argument that combinations of laborers should be allowed equality of "aggression and defense" in industrial disputes, and enacted in Norris-LaGuardia a policy of *laissez-faire* in such matters. In only three years, however, this policy of almost complete non-intervention was forsaken when the Wagner Act[21] gave governmental encouragement and protection to the rights of self-organization and collective bargaining. Although the Congress did not purport thereby to "limit" employee rights of "aggression and defense" in this area of industrial strife,[22] it did provide certain *alternative* "processes of justice." To this extent, it weakened the rationale underlying the treatment of secondary pressures in Norris-LaGuardia. To illustrate, if employer conduct like that in the *Bedford Cut Stone* case arose after passage of the Wagner Act, it seems clear that the sanctions of that Act would afford the union a considerable measure of protection against the employers' aggression. While it may be conceded that the Wagner Act did not obviate the need for self-help in disputes involving organization or collective bargaining, it plainly diminished its necessity and utility.

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17 U.S. v. Hutcheson, 312 U.S. 219, 231, 234 (1940).

18 Frankfurter and Greene, *op. cit. supra* note 4, at 215-17; Ratner and Come, *The Norris-LaGuardia Act in the Constitution,* 11 GEO. WASH. L. REV. 428 (1943).

19 See, *e.g.,* the remarks of Senator Pepper in the Congressional debates which preceded passage of the Taft-Hartley Act. 93 CONG. REC. 4197-99 (1947). See also SEN. REP. No. 105, Part 2 (Minority Views), 80th Cong., 1st Sess. 19-21 (1947); H.R. REP. No. 245, Part 2 (Minority Report), 80th Cong., 1st Sess. 107-8 (1947).

20 Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921).

21 This is the popular name of the original National Labor Relations Act. 49 STAT. 449 (1935), 29 U.S.C. § 151 *et seq.* (1946).

22 See §§ 7 and 13 of the NLRA. 49 STAT. 452, 457 (1935); 29 U.S.C. §§ 157, 163 (1946).

But more than this, in some circumstances the limitations of the Norris-LaGuardia Act, in juxtaposition with the sanctions of the Wagner Act, created indefensible situations. For example, where union A was currently certified by the NLRB as the exclusive representative of employees, it seemed intolerable to permit union B to strike, picket or boycott the employer or those with whom he did business to compel him to bargain with it. Yet Norris-LaGuardia has been construed as denying jurisdiction to the federal courts to enjoin such conduct.[23]

By 1947, there was substantial agreement that some of labor's secondary pressures were unjustified. But there was sharp disagreement between those who believed that the inequities which had arisen warranted blanket condemnation of "secondary boycotts" and those who thought that an attempt should be made to draw the line at certain "unjustifiable" boycotts.[24] The proponents of the Taft-Hartley Act supported the former view, and the statute to a large extent reflects acceptance of their position.[25] In Senator Taft's oft-quoted words:

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[23] Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625 (D. Minn. 1945); American Chain and Cable Co., Inc. v. Truck Drivers and Helpers Union, Local 676, A.F.L., 68 F. Supp. 54 (D. N. J. 1946). See Koretz, *Minority Pressure Vis-a-Vis Majority Rule in Collective Bargaining*, 2 SYRACUSE L. REV. 294, 296-99 (1951).

[24] In his message on the State of the Union in January 1947, President Truman requested legislation "to prevent certain unjustifiable practices" and referred specifically to "the secondary boycott, when used to further jurisdictional disputes or to compel employers to violate the National Labor Relations Act." He amplified: "Not all secondary boycotts are unjustified. We must judge them on the basis of their objectives. For example, boycotts intended to protect wage rates should be distinguished from those in furtherance of jurisdictional disputes. The structure of industry sometimes requires unions as a matter of self-preservation to extend the conflict beyond a particular employer. There should be no blanket prohibition against boycotts. The appropriate goal is legislation which prohibits secondary boycotts in pursuance of unjustifiable objectives, but does not impair the union's right to preserve its own existence and the gains made in genuine collective bargaining." N. Y. Times, Jan. 7, 1947, p. 16, col. 3. Opponents of the Taft-Hartley Act agreed with this view. See, *e.g.*, SEN. REP. No. 105, Part 2 (Minority Views), 80th Cong., 1st Sess. 19-21 (1947); H. R. REP. No. 245, Part 2 (Minority Report), 80th Cong., 1st Sess. 65-66 (1947). Their unsuccessful effort to enact this approach into legislation appears in Section 106 of the "Administration" or Thomas-Lesinski Bill introduced in the 81st Congress. S. 249, 81st Cong., 1st Sess. (1949); H.R. 2032, 81st Cong., 1st Sess. (1949).

[25] Although the legislative history of the Taft-Hartley Act demonstrates the intent of Congress to outlaw the "secondary boycott" generally, it is also clear that the relevant statutory provisions, set forth below, do not proscribe all forms of conduct which have been regarded as falling within this description. In particular, it should be noted that the language of these provisions bans only pressures applied against the neutral or secondary employer through his employees, and does not outlaw direct appeals to secondary employers or to consumers. *E.g.*, Schatte v. International Alliance, 182 F. 2d 158, 165 (9th Cir. 1950); Consolidated Frame Co., 91 N.L.R.B. 1295 (1950). It also should be noted that Section 8(b)(4)(B) impliedly creates an exception to Section 8(h)(4)(A) so as to legalize conduct otherwise outlawed by permitting a *certified* union to bring pressure against a secondary

> . . . under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. 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 as to make them an unfair labor practice.[26]

II. The Taft-Hartley Provisions

The basic Taft-Hartley proscription of the "secondary boycott" is found in Section 8(b)(4)(A) and (B), which makes it an unfair labor practice for a labor organization or its agents

> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. . . .[27]

It is safe to say that no provisions of the Taft-Hartley Law have raised more difficult or complicated problems than these. A large number of cases have been decided by the NLRB and by the courts, both in interlocutory injunction proceedings and upon review of Board orders, and have been the subject of extended comment.[28] No attempt will be made to review these decisions except insofar as they bear upon the issues presented to and resolved by the Supreme Court in the four cases under discussion.

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employer to compel the primary employer to honor his statutory duty to recognize and bargain with the union. *See* International Brotherhood of Teamsters (Di Giorgio Fruit Corp.), 87 N.L.R.B. 720, 748-49 (1949).

[26] 93 Cong. Rec. 4198 (1947).

[27] 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(A) and (B) (Supp. 1950). Section 303(a)(1) and (2), in language substantially identical, provides for damage suits in the federal courts by persons injured by the conduct specified. 61 Stat. 158-59 (1947), 29 U.S.C. § 187(a)(1) and (2) (Supp. 1950).

[28] See, *inter alia*, Dennis, *supra* note 3; Johns, *Picketing and Secondary Boycotts Under the Taft-Hartley Act*, 2 Labor Law J. 257 (1951).

(1) Facts of the Boycott Cases

The essential facts of the boycott cases are as follows:

Denver:[29] A, the general contractor for the construction of a commercial building, awarded a subcontract for electrical work to B, who employed the only nonunion workmen on the project. The employees of all other subcontractors and of A were members of unions affiliated with the local building trades council, which, because of the presence of B and his employees, determined to picket the job. In accordance with the council's practice, each affiliate was notified of that decision, such notice being a signal in the nature of an order to union members to leave the job. Representatives of the council and certain of its affiliates notified A that union men could not work with nonunion and that if B's employees worked on the job, the council would put a picket on it to notify members that the job was unfair. The council did so, whereupon the only employees who reported for work were those of B. Before B completed his subcontract, A notified him to get off the job so that A could continue the project. The council then removed its picket; union employees resumed work; B's workmen were denied entrance to the job.

Upon the above facts, the NLRB found that the council and certain of its affiliates, by picketing A's project and thereby causing union members to quit work, with an object of forcing A to cease doing business with B, violated Section 8(b)(4)(A).[30] The reviewing court of appeals, however, set aside the Board's order on the ground that the union's action was "primary and not secondary."[31]

Langer:[32] A, the contractor for the construction of a private dwelling, subcontracted the electrical work to B and the carpentry work to C. B was involved in a dispute with the Electricians Union and employed nonunion men. C employed members of the Carpenters Union. While work was in progress, a representative of the Electricians Union informed C and his employees that the electrical work was being done by nonunion men and proceeded to picket the premises with an "unfair to organized labor" placard. C and his men stopped work and informed A that they had done so because of the picket. The Electricians' representative notified A that if he did not replace B he would not receive any skilled tradesmen to finish the work. A told the circumstances to B, who re-

[29] NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943 (1951).

[30] Denver Building and Construction Trades Council (Gould and Preisner), 82 N.L.R.B. 1195 (1949).

[31] Denver Bldg. and Const. Trades Council v. NLRB, 186 F.2d 326 (D.C. Cir. 1950).

[32] International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB, 71 Sup. Ct. 954 (1951).

leased A from the subcontract. A made arrangements with a union electrical subcontractor to complete the electrical work. When C was so notified, his carpenters returned to work.

The NLRB found that the Electricians Union and its representative, by picketing the job, induced the employees of C to engage in a strike, with an object of forcing A to cease doing business with B, and thereby violated Section 8(b)(4)(A).[33] This finding was approved by the reviewing court of appeals.[34]

Rice Milling:[35] The union, in the course of an organizational campaign among the employees of six rice mills, picketed the mills, including A's mill, to obtain recognition as collective bargaining representative. One afternoon two employees of B, a customer of A, came in a truck to A's mill to obtain rice or bran for B, a neutral in the labor dispute. The pickets formed a line across the road and, when the truck stopped, told its occupants there was a strike on and the truck would have to go back. The drivers agreed, returned to the highway and stopped. One got out and went to a mill across the street. At that time a vice-president of A came out and asked whether the truck was on its way to the mill and whether its occupants wanted to get the order they came for. The man on the truck explained that he was not the driver and that the vice-president would have to see the latter. On the driver's return, the truck proceeded, with the vice-president, to the mill by a short detour. The pickets ran toward the truck and threw stones at it. The truck nevertheless entered the mill.

The NLRB held that the union's conduct toward B's employees did not violate Section 8(b)(4)(A) or (B)[36] on the ground that:

> The [union's] activities arose out of the *primary* picketing of . . . [A's] mill, and were carried out in the immediate vicinity of that mill. Violence on the picket line is not to be condoned, but violence does not convert *primary* picketing into *secondary* action within the meaning of Section 8(b)(4)(A) or (B).[37]

The reviewing court of appeals disagreed with the Board's conclusion,[38] holding in substance that the Union's conduct came within "the plain

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[33] International Brotherhood Electrical Workers (Patterson and Langer), 82 N.L.R.B. 1028 (1949).

[34] International Brotherhood of Electrical Workers, Local 501, v. NLRB, 181 F.2d 34 (2d Cir. 1950).

[35] NLRB v. International Rice Milling Co., 71 Sup. Ct. 961 (1951).

[36] International Brotherhood of Teamsters (Int'l Rice Milling Co.), 84 N.L.R.B. 360 (1951).

[37] *Id.* at 361-62.

[38] International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950).

wording of the statute," which did not admit of "any distinction between primary and secondary activities"[39] or based upon the situs of the activity.

Watson:[40] Early in 1947, the union requested A, operator of a store having a department for the sale and installation of wall and floor coverings, to execute a closed-shop contract with the union as the bargaining agent of A's installation employees. Following A's refusal, the union placed a picket in front of the store. About August 7, B, owner of a dwelling, contracted with C, a member of the union, to renovate the house. C hired the necessary workmen, including members of the union, and proceeded with the work. It became necessary to procure floor and wall coverings for certain rooms. Neither B nor C could find any satisfactory to B except at A's store, and A insisted that its own nonunion employees install any coverings it sold. B nevertheless contracted with A for the purchase and installation of the coverings. The work of installation done by A's nonunion men proceeded for a time, but when the situation came to the attention of the union, its business agent on August 21 told the four union carpenters employed on the project that they could not continue to work where nonunion men were employed. In compliance with these instructions, which were never rescinded, the carpenters did not return to work on the next day, August 22, the date on which the Taft-Hartley provisions became effective,[41] nor on several succeeding days. A's employees completed their work by August 28, and the unfinished carpentry work was completed by two of the union men, who returned without the knowledge or consent of the union.

The NLRB found that the union and its representative, by continuing after the effective date of Taft-Hartley to induce employees to engage in a strike at B's residence, with an object of forcing B to cease doing business with A, violated Section 8(b)(4)(A).[42] This finding was approved by the reviewing court of appeals.[43]

(2) Issues Involving the Boycotts

The Supreme Court upheld the orders of the NLRB in each of the four cases. In so doing, it resolved or partially resolved a number of

[39] *Id.* at 26.

[40] Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L. v. NLRB, 71 Sup. Ct. 966 (1951).

[41] § 104, 61 STAT. 152 (1947).

[42] Local 74, United Brotherhood of Carpenters and Joiners (Watson's Specialty Store) 80 N.L.R.B. 533 (1948).

[43] NLRB v. Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., 181 F. 2d 126 (6th Cir. 1950).

issues of great importance to the administration of the Taft-Hartley Act. Aside from several jurisdictional or procedural problems presented to the Court,[44] the central issues relating to the allegedly unlawful boycotts were:

(a) Whether Section 8(b)(4)(A) and (B) permits a distinction between primary and secondary labor action and, if so, to what extent.

(b) Whether picketing to induce secondary pressure is protected by Section 8(c)[45] as an expression or "views, argument, or opinion" or by the First Amendment as an exercise of the right of free speech.

(a) The Primary-Secondary Dichotomy

Probably the most important problem before the Court was whether Section 8(b)(4)(A) and (B) contemplates a distinction between "primary" and "secondary" action. The decisions of the circuit courts in the *Rice Milling, Langer* and *Denver* cases indicate the divergence of possible views on the matter. In the first, the Court of Appeals for the Fifth Circuit was of the opinion that the language of the statute precluded such a distinction; in the second, the Court of Appeals for the Second Circuit, while leaving open the question, approved the NLRB's finding of illegal "secondary" action; in the third, the Court of Appeals for the District of Columbia decided that the statute not only permitted the dichotomy, but that the NLRB had construed too narrowly the allowable area of "primary" action.

The position of the NLRB: Undoubtedly the decisions of the Supreme

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[44] The discussion which follows is limited in the main to issues involving interpretation of the boycott provisions of the statute. The other issues, largely jurisdictional or procedural in nature, were raised by the contentions: (1) in *Denver, Langer* and *Watson* that the activities in question did not affect interstate commerce sufficiently to enable the NLRB to take jurisdiction; (2) in *Denver* that the decision of the federal district court, adopting the preceding contention in the preliminary proceeding for interlocutory injunctive relief, made the issue *res judicata*; (3) in *Watson* that the allegedly illegal conduct took place before the effective date of the statute and hence could not have constituted a violation; and (4) in *Watson* that the case was rendered moot by completion of the project. The Court found no merit in these contentions. Probably of greatest practical significance in connection with these contentions is the dictum of the Court in which it plainly upheld the NLRB's discretion to decline jurisdiction on the ground that it would not effectuate the policies of the Act, even though the effect of the activities on interstate commerce is sufficient to enable it to do so. NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943, 949 (1951).

[45] "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 61 STAT. 142 (1947), 29 U.S.C. § 158(c) (Supp. 1950).

Court can best be understood against the background of the approach of the NLRB to the problem of statutory construction.[46]

At the outset, the NLRB concedes that Section 8(b)(4)(A) and (B), if read literally and in isolation, appears to proscribe all strikes and picketing, whether primary or secondary.[47] But such a construction does violence to other provisions of the statute and frustrates Congressional purpose. Thus, Section 7[48] explicitly protects the right to engage in concerted activities and Section 13[49] the right to strike. And several other sections[50] of the Act likewise would be largely meaningless if Section 8(b)(4)(A) and (B) were given literal construction.[51] Further, the legislative history of the Act demonstrates that this section was intended to outlaw union tactics familiar to Congress as "secondary boycotts," and that Congress did not, in general, intend to ban the primary strike and concomitant pressures, such as primary picketing and allied inducement, even though such pressures might induce third parties to support the primary strike.[52] And violence attending the inducement is immaterial to a determination of whether a violation of Section 8(b)(4)(A) and (B) has occurred, for this section is concerned with the objectives of labor activity rather than the means by which it is carried out.[53] In sum, Section 8(b)(4)(A) and (B) "represents an effort by Congress to achieve a satisfactory reconciliation of the interest of employees and labor organizations in exerting effective economic pressure upon employer participants in labor disputes, on the one hand, and

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[46] The following outline of the NLRB's position is based largely on the NLRB's excellent briefs before the Court, and upon 14 NLRB ANN. REP. 87-98 (1949); 15 NLRB ANN. REP. 137-49 (1950).

[47] Brief for NLRB, pp. 18-19, NLRB v. International Rice Milling Co., 71 S. Ct. 961 (1951), hereinafter referred to as "Rice Milling brief." "Every primary strike has '*an* object thereof' to cause the employer to 'cease doing business' with another person and thereby to induce the employer to yield to a demand in order to avoid resulting economic loss through the disruption of his business relations. So too, and with the same end in view, all primary picketing and related inducement, by urging the workers of a neutral employer not to enter the premises of the struck employer, has as 'an object thereof' to 'induce or encourage the employees of any employer to engage in . . . a concerted refusal in the course of their employment to . . . work.'" *Id.* at 19.

[48] 61 STAT. 140 (1947), 29 U.S.C. § 157 (Supp. 1950).

[49] 61 STAT. 151 (1947), 29 U.S.C. § 163 (Supp. 1950).

[50] §§ 2(3), 206-10, 201-05, 8(b)(4)(C), 8(b)(1)(A), 61 STAT. 137-38, 155-56, 153-55, 141-42, 141, 29 U.S.C. §§ 152(3), 176-80, 171-75, 158(b)(4)(C), 158(b)(1)(A) (Supp. 1950).

[51] Rice Milling brief, pp. 21-23.

[52] These arguments are extensively discussed and documented in the Rice Milling brief, pp. 26-63.

[53] *Id.* at 63-66.

the interest of neutral employers in immunity from economic pressure, on the other."[54]

The foregoing compromise between conflicting interests has been the basis of the NLRB's approach in drawing the line between permissible primary pressures and proscribed secondary action.[55] In the usual case, where the employer's place of business is stationary, and geographically removed from the premises of any other employer, this determination ordinarily is based upon whether the pressures are geographically confined to the situs of the labor dispute. Thus if, as in the *Rice Milling* case, picketing is restricted to the premises adjacent to the business of the employer party to the dispute, or if third persons are otherwise induced at this site not to enter those premises,[56] such pressures are primary and lawful, notwithstanding that an obvious object of such conduct is to dissuade all persons from entering.[57] But if these pressures extend to the place of business of a neutral employer, they are secondary and unlawful.[58]

Obviously more difficult is the problem of interpretation where there is no geographic separation between the premises of the primary em-

[54] Brief for NLRB, p. 21, NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943 (1951), hereinafter referred to as "Denver brief."

[55] Denver brief, p. 22. The following summary of the criteria adopted by the NLRB in drawing the line between primary and secondary action is based largely upon the Denver brief, pp. 23-38; 14 NLRB ANN. REP. 87-98 (1949); 15 NLRB ANN. REP. 137-49 (1950).

[56] In the light of the Court's decision in *Rice Milling*, discussed *infra*, it is worth noting the NLRB's argument with respect to any attempt to differentiate between "incidental inducement" attendant to primary picketing and "intentional inducement" illustrated by the pickets' statements to the employees of B as they approached the picket line in B's truck. The NLRB argued, *inter alia*: "Such a line creates more mischief than it avoids. According to this formulation, the inducement which flows from the mere existence of a picket line is permitted, but as soon as a picket tells the employee of a neutral that to cross the picket line is to 'scab,' that is prohibited. Suppose, instead of such an oral statement, the same statement is printed on a picket's placard for all the world to see. Is the ensuing inducement of employees of other employers who approach the picket line incidental or intended? Must the printed statement be qualified by the addition of the words 'except employees of other employers'? Must the placard be removed when employees of other employers approach the picket line? What is the picket's obligation when workers employed at the plant and employees of other employers approach simultaneously? Such queries can be multiplied by the infinite variety of situations which picket line activity presents. . . ." Rice Milling brief, pp. 53-54.

[57] See also Lumber and Sawmill Workers Union (Santa Ana Lumber Co.), 87 N.L.R.B. 937 (1949); International Brotherhood of Teamsters (DiGiorgio Wine Co.), 87 N.L.R.B. 720 (1949).

[58] *E.g.*, United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Co.), 81 N.L.R.B. 802 (1949), *enforcement granted*, 184 F.2d 60 (10th Cir. 1950); Printing Specialties and Paper Converters Union (Sealright Pacific, Ltd.), 82 N.L.R.B. 271 (1949); Service Trade Chauffeurs, Salesmen, and Helpers (Howland Dry Goods Co.), 85 N.L.R.B. 1037 (1949).

ployer and those of the neutral employer. In such "common-situs cases" additional criteria necessarily must be invoked:

> . . . The Board has considered it particularly pertinent to inquire into these questions: (1) whether the labor organization involved has publicized the dispute as involving the primary employer exclusively, or has by its publicity or directions indicated that it regards the dispute as extending to neutral employers as well; (2) whether the labor organization has indicated that its direct and immediate objective is to force neutral employers to cease doing business with the primary employer, or is merely to curtail the primary employer's business; (3) whether the labor organization has attempted to induce employees of neutral employers to refuse to perform services for their own employer, rather than merely to refuse to render only such services as assist the primary employer; and (4) whether the labor organization has restricted its picketing as closely as practicable under the circumstances both in point of time and place to the immediate situs of the primary dispute. . . .[59]

Thus, where the neutral employer is engaged in business operations on the primary employer's premises, picketing confined to these premises with signs advertising only the dispute with the primary employer is legal, notwithstanding that it has the effect of enlisting the aid of the neutral's employees.[60] This result has been reached even where the picketing of the premises included a gate which had been cut through the fence to provide ingress for the employees of the neutral, a contractor constructing additional facilities for the primary employer.[61] Similarly, where the business operations of the primary employer are ambulatory and take place temporarily at the premises of the neutral—as, for example, in the trucking business—picketing of the primary employer at these premises, if confined to the times when he is doing business with the neutral and publicizing only the primary dispute, is legal.[62] But

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[59] Denver brief, pp. 15-16, 26-27.

[60] *E.g.*, Oil Workers International Union (Pure Oil Co.), 84 N.L.R.B. 315 (1949); Deena Artware, Inc., 86 N.L.R.B. 732, 735 (1949).

[61] United Electrical, Radio and Machine Workers of America (Ryan Construction Corp.), 85 N.L.R.B. 417 (1949).

[62] *E.g.*, International Brotherhood of Teamsters, etc. (Schultz Refrigerated Service, Inc.), 87 N.L.R.B. 502 (1949); Sailors' Union of the Pacific, AFL, (Moore Dry Dock Co.) 92 N.L.R.B. No. 93 (Dec. 8, 1950). In the latter case, the NLRB announced in considerable detail the criteria applicable to this type of case. It stated that "picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer." On July 31, 1951, the Court of Appeals for the Second Circuit, per Judge Frank, remanded to the Board a case which it had decided before formulating these criteria for reconsideration in their light, NLRB v. Service Trade Chauffeurs, 191 F.2d 65 (2d Cir. 1951).

where the union pressures are not so limited in time[63] or in publication,[64] they are illegal. Thus if, as in *Watson*, the union calls a strike among employees of a neutral contractor because of its dispute with a subcontractor, or if, as in *Langer* and *Denver*, it engages in picketing directed at a neutral contractor or subcontractor because of a dispute with another subcontractor, such pressures are secondary and fall within the ban of the statute.

The Supreme Court decisions: While upholding the orders of the NLRB in each of the four boycott cases, the decisions leave some question as to the extent to which they accept the Board's rationale.

The heart of the Court's analysis of this aspect of the cases appears in the *Denver* and *Rice Milling* decisions. The former seems to go far toward sustaining the NLRB's approach. Certainly, it leaves no doubt but that the Board is not required to read Section 8(b)(4)(A) and (B) in literal isolation. The Court recognizes that the legislative history of these provisions reflects Congressional intent to ban "secondary boycotts"; that "at the same time . . . §§ 7 and 13 safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute";[65] and that Section 8(b)(4)(A) and (B) therefore should be read in "conformity 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."[66] And, according to the Court, the NLRB's findings of statutory violations in *Watson, Denver* and *Langer* not only follow the literal language of the statute, but comport with the "dual congressional objectives." It is of course true, as pointed out by Mr. Justice Douglas in his dissenting opinion in *Denver*, that where the unions' conduct stems from the employment of nonunion men on the same job, the "right to strike" is made "dependent upon fortuitous business arrangements. . . ."[67] But it is difficult, as a matter of statutory interpretation, to quarrel with the majority's conclusions (1) that, in the language of the statute, "an object" of the unions was to force a contractor to cease doing business

[63] International Brotherhood of Teamsters. etc. (Sterling Beverages, Inc.), 90 N.L.R.B. 401 (1950).

[64] *E.g.*, Local 1796, United Botherhood of Carpenters, etc. (Montgomery Fair Co.), 82 N.L.R.B. 211 (1949); Local 760, International Brotherhood of Electrical Workers (Roane-Anderson Co.), 82 N.L.R.B. 696 (1949).

[65] NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943, 951 (1951).

[66] *Id.* at 953.

[67] *Ibid.*

with a subcontractor[68] and (2) that no "adequate reason" can be found for departing from the statutory language of "doing business" so far as the relationship of contractor and subcontractor was concerned.[69] It becomes entirely clear, then, that the facts of common situs and single job do not preclude the NLRB from finding illegal secondary pressure where there is an independent contractor relationship between the employers involved. And there can be no doubt that the NLRB has been sustained in its holdings that strike and concomitant pressures directed against secondary contractors or subcontractors are illegal.

But the other side of the coin, as reflected by the *Rice Milling* decision, is considerably less distinct. The Court, in sustaining the NLRB's dismissal of the charge in question, did not rest its decision simply on the grounds upon which the Board had relied, *viz.*, that the union's "activities arose out of the *primary* picketing of . . . [A's] mill and were carried out in the immediate vicinity of that mill."[70] Rather, the Court reasoned as follows:

> A sufficient answer to this claimed violation of the section is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribes. While each case must be considered in the light of its surrounding circumstances, yet the applicable proscriptions of § 8(b)(4) are expressly limited to the inducement or encouragement of

[68] It was argued, and the court of appeals had held in the *Denver* case, that as the unions' ultimate object was to unionize the entire project, "the object was not in any literal sense to require . . . [the contractor] to cease doing business with . . . [the subcontractor]." NLRB v. Denver Bldg. and Const. Trades Council, 186 F.2d 326, 335 (1950). As the Supreme Court pointed out, however, the language and legislative history of the section make it clear that the proscribed object need not be the *sole* object of the union's pressure. NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943, 952 (1951).

[69] The rationale underlying the decision on this point has been most clearly articulated in Judge Learned Hand's opinion in *Langer*:

> "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands. We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase 'doing business' would ordinarily cover any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do. The third party cooperates as truly with one to whom he furnishes materials as with a subcontractor. Indeed, when the coercion is upon the third person to break a contract with the employer, his position is more embarrassing than if he may discontinue his relations with the employer without danger of liability. The phrase, 'cease doing business,' is general and admits of no such evasion."

International Brotherhood of Electrical Workers, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).

[70] See p. 242, *supra*.

> *concerted* conduct by the employees of the neutral employer. That language contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill. There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described. There were no inducements or encouragements applied elsewhere than on the picket line. The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. The picketing was directed at . . . [A's] employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by § 8(b)(4). Insofar as the union's efforts were directed beyond that and toward employees of anyone other than . . . [A] there is no suggestion that the union sought *concerted* conduct by such other employees. Such efforts also fall short of the proscriptions in § 8(b)(4). In this case, therefore, we need not determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor practice under subsection (A) or (B) of § 8(b)(4). A union's 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. Generally, therefore, such actions do not come within the proscription of § 8(b)(4), and they do not here.[71]

And the Court went on to approve the NLRB's conclusion that the violence on the picket line was not material, stating that: "The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8(b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt."[72]

The Court's rationale with respect to the word "concerted" appears to mark a somewhat surprising transition from rather liberal interpretation to extreme literalness. While the Court seems justified in stating that Section 8(b)(4) is "expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employer,"[73] can it realistically be said that the union's activity was not such an inducement? Conceding that the inducement involved only the "driver of a single truck,"[74] would the result have been different had

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[71] NLRB v. International Rice Milling Co., 71 Sup. Ct. 961, 964 (1951).

[72] *Id.* at 965.

[73] *Id.* at 964. As previously indicated, however, the section read literally and in isolation would seem to proscribe strike activity or inducement or encouragement of concerted conduct of employees of the *primary* employer, regardless of any inducement directed toward the employees of the neutral. See note 47 *supra*.

[74] The evidence is plain that there were *two* employees of the neutral on the truck. So far as appears, the NLRB has always considered as "concerted" any parallel activity involving more than one employee. *See, e.g.*, Denver Building and Construction Trades

there been two or more trucks of the same employer, or of different employers driven by members of the same labor organization? Would not the refusal to permit this truck to pass induce other drivers, if any, of the same employer not to pass? Would not the last question be particularly pertinent if the truck were that of a neutral employer engaged in the transportation industry who owned several trucks which variously serviced the primary employer? Indeed, with reference to certain facts in *Rice Milling* raising an issue not before the Court on the certiorari granted—the inducement of employees of two neutral railroads to refuse to transport articles to and from the mill[75]—the Court stated that "the encouragement of concerted action which was alleged in that charge differed substantially from the conduct which is before us."[76] Aside from this, the only guide the Court suggests is that the section "contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill."[77] Such an attempt to distinguish between inducement of individual and of concerted activity may prove quite as unrealistic and unworkable as would have been a rejection of the primary-secondary dichotomy.

But perhaps more troublesome than the Court's holding are possible implications arising from the rationale upon which it was based. Before turning to this, however, it must be emphasized that the fact that the Court chose to rest its decision on ultimate grounds different from those urged by the NLRB does not mean that it rejected *in toto* the Board's theory. On the contrary, there is much in the language of the opinions that supports the Board's approach. As already stated, the Court apparently accepted the Board's argument that the statute permits the

Council (Gould and Preisner) 82 N.L.R.B. 1195, 1197-98 (1949); Griffin Wheel Co., 80 N.L.R.B. 1471 (1948). *Cf.* United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Co.), 81 N.L.R.B. 802, 818 (1949).

[75] The inducement in this connection involved not only the extension of the picket line across the railway tracks, but requests to the railroad employees' bargaining representative that it have the employees respect the picket line and threats of violence to such employees if they did not. The NLRB dismissed charges relating to this conduct on the ground that railroad employees were not "employees" of an "employer" within the meaning of § 8(b)(4). International Brotherhood of Teamsters (Int'l. Rice Milling Co.), 84 N.L.R.B. 360 (1949). The court of appeals held to the contrary. International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950). The Board did not seek a review of this portion of the case.

[76] NLRB v. International Rice Milling Co., 71 Sup. Ct. 961, 963, n. 2 (1951).

[77] *Id.* at 964. At no time did the NLRB urge that its action dismissing the complaint be sustained on the theory adopted by the Court. In the *Ryan* case the Board stated in somewhat sinnilar circumstances that "It makes no difference whether 1 or 100 other employees wish to enter the premises." United Electrical, Radio and Machine Workers of America (Ryan Construction Co.), 85 N.L.R.B. 417, 418 (1949).

"primary-secondary" distinction. Each of the four opinions makes it plain that striking and picketing at the premises of, and directed toward, the primary employer and his employees is not banned by Section 8(b)(4)(A) and (B), even though per se it might have the incidental effect of inducing or encouraging employees of neutrals concertedly to refuse to perform their services.[78] It seems a fair implication from the opinions that where the primary employer's business operations are ambulatory and take place temporarily at the neutral's premises, picketing directed at the primary employer at this site likewise is permissible.[79] From the language of *Rice Milling* quoted above, it must be inferred that the Court was troubled by what the NLRB aptly has termed "intentional inducement," as distinguished from the "incidental inducement" flowing from the usual primary picket line.[80] For while the Court expressly stated that the picketing directed at A and his employees was not banned by Section 8(b)(4), it upheld the validity of the union's further efforts directed at B's employees—presumably, the express request that the truck go back followed by stone-throwing—only on the ground that this was no inducement of "concerted" conduct. If the Court meant to imply that such "intentional inducement," when aimed at "concerted" rather than at individual conduct, is violative of Section 8(b)(4), it may well be pointed out, as the NLRB had argued, that such a refinement is unrealistic,[81] and ordinarily is of little practical siguificance. For it is common knowledge that a picket line in and of itself is in most cases quite as effective a form of inducement to employees of neutrals as the direct approach—certainly among organized workmen. Indeed, as set forth below, in holding that peaceful picketing per se for an object declared illegal by statute is not protected as an exercise of the right of free speech, the Court expressly recoguized that such picketing is the customary means of enlisting employee support.

In the final analysis, it is concluded that, as a practical matter, the

[78] NLRB v. Denver Bldg. and Const. Trades Council, 71 Sup. Ct. 943, 951 (1951); International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB, 71 Sup. Ct. 954, 957 (1951); NLRB v. International Rice Milling Co., 71 Sup. Ct. 961, 964 (1951); United Brotherhood of Carpenters and Joiners of America, A. F. of L. v. NLRB, 71 Sup. Ct. 966, 969 (1951).

[79] *See, e.g.,* International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB, 71 Sup. Ct. 954, 957 (1951). The Court of Appeals for the Second Circuit has construed the *Rice Milling* decision as permitting such picketing of the ambulatory employer. And this court expressly approved as sound the criteria, set forth in note 62 *supra,* which the NLRB has adopted for this type of case. NLRB v. Service Trade Chauffeurs, Salesmen and Helpers, Local 145, 191 F.2d 65 (2d Cir. 1951).

[80] Rice Milling brief, pp. 52 *et seq.*

[81] See note 56 *supra.*

NLRB's approach has been substantially approved, notwithstanding some peripheral obfuscation stemming from the Court's theory concerning "concerted, as distinguished from individual, conduct." The holding that the usual picket line, directed at the primary employer and his employees at the former's place of business, does not violate Section 8(b)(4), regardless of its subjective effect on the employees of neutrals, can reasonably be anticipated in a majority of situations to shield what in fact is effective pressure against the neutral at this place.[82] Where the usual primary picket line fails to accomplish this result, the Court's expansive conception of "individual" conduct may be expected to embrace most additional union efforts to isolate the primary employer at his place of business from his suppliers and customers.[83]

(b) Picketing as Free Speech

The contentions that the conduct of the unions in *Denver, Langer* and *Watson* was privileged as an exercise of freedom of speech seemed much less difficult of disposition. These contentions were based upon two grounds: (1) that the picketing and similar inducement constituted only the expression of "views, arguments, or opinion," safeguarded by Section 8(c); and (2) that peaceful picketing was protected by the First Amendment. Short shrift was given to these contentions in *Denver* and *Watson.* In the latter case the conduct condemned by the NLRB was that the union and its agents had engaged in, and directly ordered, a strike for a proscribed object. Neither Section 8(c) nor the First Amendment applies to such acts. In *Denver* the NLRB had found that the

82 See the article on the four boycott cases by legal counsel to the American Federation of Labor. Woll, Glenn, and Thatcher, *Secondary Boycott Provisions Clarified,* 2 LABOR LAW J. 677 (Sept. 1951).

83 The foregoing conclusions seem fully supported by DiGiorgio Fruit Corp. v. NLRB, 191 F.2d 642 (D.C. Cir. 1951), *cert. denied,* 72 Sup. Ct. 110 (1951). In this case, during picketing by the Teamsters Union of an employer with whom it had a dispute, several trucks of four trucking concerns were halted, and the pickets sought to persuade the drivers not to pass. Some of these drivers were members of the union, the constitution and by-laws of which prohibited members from crossing its picket line. Such members were threatened with disciplinary action if they crossed the line, and one was disciplined for doing so. A majority of the court read the *Rice Milling* decision as authority for approving the NLRB's conclusion that this conduct was permissible "primary activity." *Id.* at 649. A concurring member of the court thought that *Rice Milling* permitted this conduct only because it did not induce a "concerted" refusal to handle. *Id.* at 651-52. It may prove more difficult, however, to construe the Supreme Court's reasoning as supporting the NLRB's position in cases presenting somewhat unusual circumstances such as those in the *Ryan* case (note 61 *supra*), *i.e.,* where the usual primary picket line is extended to a gate cut through the fence to provide ingress for employees of a neutral contractor working on the primary employer's premises. In such circumstances it is arguable that the extended picket line in itself is a form of "intentional inducement" of "concerted" activity.

picket was "tantamount to directions and instructions"[84] to union members to engage in strike action. Such "signal" picketing came within neither the statutory nor the constitutional ambit of protected speech. In *Langer*, however, there was no finding that the picketing and related activities were signals for strike activity in accordance with union by-laws or other practices. Rather, the NLRB found that the union, by peaceful picketing, induced or encouraged the employees of subcontractor C to strike to force A, the contractor, to cease doing business with subcontractor B. Hence the Court was faced squarely with the question whether peaceful picketing per se for an object declared illegal by Section 8(b)(4)(A) was protected by Section 8(c). The Court entirely sustained the Board's rationale in approving its negative answer. Not only the literal language of Section 8(b)(4), but its construction in the light of related sections, demonstrates that picketing is a form of inducement or encouragement which is outlawed. Moreover, as the Board had emphasized, to exempt peaceful picketing, the customary means of enlisting employee support, would frustrate the basic purpose of Section 8(b)(4)(A).[85]

Finally, in the light of recent decisions recognizing the constitutional right of states to outlaw peaceful picketing in furtherance of similarly unlawful objectives,[86] there could be little doubt but that Congress could "do likewise"[87] without infringing constitutional rights.

III. Conclusion

On the whole, the four boycott decisions represent a significant contribution to an understanding of some of the most vexed problems that have arisen under the Taft-Hartley Act. It is true that important questions seem to have been left unsettled—especially those arising from the Supreme Court's rationale in *Rice Milling* based upon the term "concerted." But the concrete results far outweigh the remaining uncertainties. Certainly, though not unexpectedly, the decisions have put the

[84] Denver Building and Construction Trades Council (Gould and Preisner), 82 N.L.R.B. 1195, 1213 (1949).

[85] The Court quoted extensively from the leading NLRB decision on this point. United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Co.) 81 N.L.R.B. 802 (1949), *enforcement granted,* NLRB v. United Brotherhood of Carpenters, 184 F.2d 60 (10th Cir. 1950), *cert. denied,* 71 Sup. Ct. 1011 (1951).

[86] Building Service Employees International Union 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); Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949).

[87] International Brotherhood of Electrical Workers, Local 501, A. F. of L. v. NLRB, 71 Sup. Ct. 954, 960 (1951).

quietus on the principal constitutional and jurisdictional objections urged against the Taft-Hartley provisions. Of far greater significance, however, is the substantial extent to which, as previously indicated, they approve the interpretative efforts of the NLRB. In particular, it is submitted that the Board's articulation and application of the primary-secondary dichotomy have injected a considerable degree of realism and intra-statutory consistency into very broadly and intricately phrased, and highly controversial, provisions. This is not to assert that these provisions, as thus interpreted, are the ultimate answer to the diverse economic and legal problems suggested by the "secondary boycott." Reasonable men undoubtedly will continue vigorously to question the wisdom and efficacy of these sweeping provisions, and their interpretation as well. But given the premise upon which they were enacted—that the abuses of the "secondary boycott" called for blanket proscription—the boycott decisions reflect a notable service by the NLRB in giving the Taft-Hartley provisions reasonable meaning in terms of industrial life as we know it.