March 1980

Am I My Brother's Keeper? Secondary Picketing Under the Norris-LaGuardia Act

Henry H. Perritt Jr.
IIT Chicago-Kent College of Law, hperritt@kentlaw.iit.edu

Am I My Brother's Keeper? Secondary Picketing Under the Norris-LaGuardia Act

HENRY H. PERRITT, JR.*

With strike activity threatening the viability of many of the nation's major railroads in the summer of 1978, six federal district courts considered the legitimacy of secondary picketing under the Norris-LaGuardia Act. In reviewing the central legal issues addressed by those courts, Mr. Perritt analyzes the application of current American labor policy to secondary picketing. He concludes not only that the federal courts should interpret the Norris-LaGuardia Act, the Railway Labor Act, and the Labor-Management Relations Act together as providing the right of a neutral employer to be free from secondary picketing, but also that these courts should fashion equitable relief to vindicate that right.

The right of employees to strike is well recognized in the United States and in most western democracies.[1] One of the more controversial aspects of this right is whether it includes the right to engage in "secondary action," concerted action against those who are not immediate parties to the dispute. This action contrasts with "primary action," concerted action directed toward the employer most directly involved in the dispute.

Since 1947, section 8(b)(4) of the Labor-Management Relations Act[2] has made it an unfair labor practice for employee organizations subject to the Act to engage in "secondary boycotts." The National Labor Relations Board (NLRB) and the federal courts repeatedly have had to interpret the secondary boycott provision in order to define the boundary between allowable primary activity and prohibited secondary activity.[3] Nonetheless, the basic policy of the Act is clear: Secondary activity conflicts with the national labor policy and therefore should be prohibited. The Labor-Management Relations Act and its provisions against secondary picketing, however, do not cover all employers and employees in the United States. Railroads and airlines and their employees, for example, are subject to the Railway Labor Act.[4]

---

*Assistant General Counsel, Consolidated Rail Corporation. S.B. 1966, S.M. 1970, Massachusetts Institute of Technology; J.D. 1975, Georgetown University Law Center. Member of the bar, District of Columbia, Pennsylvania, Virginia. The views expressed in this article do not necessarily reflect the views of Consolidated Rail Corporation.

1. *See* INTERNATIONAL LABOR ORGANIZATION, COLLECTIVE BARGAINING IN INDUSTRIALIZED MARKET ECONOMIES 173-406 (1974) (describing recent trends in various industrialized nations).

2. 29 U.S.C. § 158(b)(4) (1976). Although this Act is commonly referred to as the National Labor Relations Act (NLRA), Congress added the provisions relevant to this article in 1947 when it enacted the Labor-Management Relations Act. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. § 141 (1976)). Consequently, the Act will be referred to as the Labor-Management Relations Act throughout this article.

3. *See generally* Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962) (discussing case law interpreting secondary boycott provisions of Labor-Management Relations Act).

4. 45 U.S.C. §§ 151-88 (1976).

Agricultural workers and employees of state and local governments are not regulated by any federal labor legislation. Thus, the clear prohibition against secondary activity contained in section 8(b)(4) of the Labor-Management Relations Act does not cover these categories of employees. Rather, federal courts, constrained by the more ambiguous provisions of the Norris-LaGuardia Act,[5] regulate the activities of these employees.

Recently, federal courts in several circuits have considered the legitimacy of secondary picketing under the Norris-LaGuardia Act. Although they were hesitant and often not very articulate in doing so, these courts indicated that some restrictions on secondary boycotts do exist. Demands for judicial consideration of secondary activity in cases arising outside the scope of the Labor-Management Relations Act are likely to increase. Regulatory changes in the airline industry,[6] for example, might lead to a period of less stable industrial relations, a situation likely to precipitate more strike activity.[7] Although the future course of collective bargaining in the agricultural and governmental sectors is harder to predict, increasing organization by these groups and a changing statutory framework create the possibility that the federal courts similarly might be called upon to define the limits of permissible, peaceful strike activity in the absence of a specific statutory provision similar to section 8(b)(4).[8]

This article uses the recent litigation over secondary picketing in the railroad industry as a starting point for an analysis of secondary picketing under current American labor policy. It does not focus on the detailed precedents developed under section 8(b)(4), but rather examines the general precepts that courts should address when the detailed substantive and procedural provisions of section 8(b)(4) do not apply.

The article first describes the factual background that led to the recent railroad litigation. Second, it reviews the major legal issues addressed by the courts in those decisions. Third, it identifies some alternative directions that courts might take in the future and suggests legal theories that might support each of these alternatives. Fourth, it argues that federal courts should interpret the Railway Labor Act and the Labor-Management Relations Act together as providing the right of a neutral employer to be free from secondary picketing. Finally, the article briefly discusses the labor issues involving agricultural and public sector employees that will confront states in the future.

I. THE 1978 RAILROAD STRIKE

The Brotherhood of Railway, Airline and Steamship Clerks (BRAC) struck the Norfolk & Western Railway Company (N & W) on July 10, 1978.[9]

---

5. 29 U.S.C. §§ 101-15 (1976).

6. Airline Deregulation Act of 1978, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

7. Deregulation has made market entry easier and has reduced restrictions on the operations of carriers already in the marketplace. For a discussion of the changing air transportation market, see Demkovich, *The Pros and Kahns of Airline Deregulation,* 10 NAT'L J. 1356 (1979); Mosher, *Rough Weather Lies Ahead for the Nation's Airways,* 11 NAT'L J. 1001 (1979).

8. For a discussion of recent developments in the agricultural and public sectors, see notes 288-307 *infra* and accompanying text.

9. Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 2323, 2323 (D.D.C.), *aff'd,* No. 78-1607 (D.C. Cir. Sept. 15, 1978).

The strike related to BRAC's proposal to extend the scope of its representation of N & W employees and its desire to provide additional protections for the earnings and job security of its N & W members.[10] Having developed an elaborate contingency plan for continuing operations if struck by BRAC, the N & W put these plans into effect after the district court denied its motion for injunctive relief.[11] As a result, the N & W managed to continue significant parts of its railroad operations despite the effectiveness of BRAC pickets in discouraging virtually all N & W agreement employees from reporting for duty.[12] In response, BRAC sought to expand the effectiveness of its strike against the N & W by extending its picketing to other railroads.[13] The union aimed its secondary picketing at two classes of railroads: (1) Those railroads that participated in a strike insurance program with the N & W (the strike insurance group)[14] and (2) those railroads that interchanged traffic with the N & W, but did not participate in the strike insurance program (the interchange group).[15]

The strike insurance group brought suit in the United States District Court for the District of Columbia seeking to enjoin BRAC from striking or picketing any of its facilities in retaliation for its participation in the strike insurance program. In *Alton & Southern Railway v. Brotherhood of Railway, Airline & Steamship Clerks,*[16] the court denied plaintiffs' motion for a preliminary injunction on the ground that the Norris-LaGuardia Act deprived the court of jurisdiction.[17] The court held that the provisions of the

---

10. Western Md. R.R. v. System Bd. of Adjustment, 465 F. Supp. 963, 965 n.1 (D. Md.), *appeal dismissed as moot*, Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979).

11. *See* R. BEDINGFIELD, THE NORFOLK AND WESTERN STRIKE OF 1978 1-2 (1979) (describing contingency plan of N & W).

12. *Id.* at 2-6.

13. Western Md. R.R. v. System Bd. of Adjustment, 465 F. Supp. 963, 965 (D. Md.), *appeal dismissed as moot*, Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979).

14. The strike insurance group included most of the large railroads in the country. The purpose of the insurance program was to enable its members to resist "whipsaw" strike tactics—the use of economic pressure against fewer than all members of a multiemployer bargaining unit. Each participant in the program contributed a sum equal to its predetermined daily indemnity, plus an annual premium and additional premiums as provided in the policy. If any insured railroad sustained a work stoppage as defined in the policy, it was entitled to receive its predetermined daily indemnity for each day, except the first day, of the work stoppage. Basic policy benefits covered items of fixed expense necessary to preserve the insured's properties in a standby condition suitable for resumption of services at the end of the strike. Supplemental policy coverage included a percentage of average daily gross operating revenue. Basic policy coverage became effective when the railroad's contract employees failed to perform their duties; supplemental coverage became effective if the railroad's operations during the strike fell to 50% or less of normal capacity. Neither type of benefit was available, however, unless the work stoppage either grew out of a dispute or involved an issue that affected other group members who contributed a total of 50% of the total daily indemnities. Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 2323, 2323-24 (D.D.C.), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978).

15. The interchange group of railroads included those that interchanged traffic with the N & W. In railroad parlance, "interchange" refers to the practice of accepting freight cars from, or delivering freight cars to, another railroad so that shippers can move freight over a number of different railroads to their ultimate destination. *Id.* at 2323.

16. 99 L.R.R.M. 2323 (D.D.C.), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978).

17. *Id.* The Norris-LaGuardia Act deprives federal courts of jurisdiction to issue injunctions except when certain preconditions are met. Of course, some independent basis for jurisdiction must exist before the Norris-LaGuardia Act comes into play. The Railway Labor Act provides that independent affirmative basis when the dispute involves railroads or airlines and their employees. *See* Virginia Ry. v. System Fed'n 40, 300 U.S. 515, 553 (1937) (Railway Labor Act provision enforceable by injunction).

strike insurance plan established "the necessary substantial alignment of Plaintiffs with N & W" so that the strike insurance group members were not true neutrals in the underlying dispute.[18] The United States Court of Appeals for the District of Columbia affirmed the district court's decision to deny the the request for an injunction.[19]

Three cases involving the interchange group proceeded to the point of decision by district courts. In *Western Maryland Railroad v. System Board of Adjustment,*[20] *Terminal Railroad Association v. Brotherhood of Railway, Airline & Steamship Clerks,*[21] and *Consolidated Rail Corp. v. Brotherhood of Railway, Airline & Steamship Clerks (Conrail)*[22] the district courts concluded that the plaintiff railroads were entitled to judicial protection against BRAC action, notwithstanding the proscriptions of the Norris-LaGuardia Act.[23] In *Western Maryland* the court based its decision on the union's lack of a direct economic interest in the dispute.[24] Because the *Terminal Railroad* and *Conrail* courts considered both railroads true neutrals in the dispute, the courts granted the railroads protection.[25] Although BRAC appealed both of these cases, the courts of appeals dismissed them as moot.[26]

II. THE 1978 RAILROAD LITIGATION

The central issue in both the strike insurance group cases and the interchange group cases was whether sections four and thirteen of the Norris-LaGuardia Act[27] deprive federal courts of equitable jurisdiction to enjoin secondary activity because it is aimed at employers who are not directly involved in the labor dispute. To understand this central issue, the article first will review briefly the historical developments that led to enactment of the Norris-LaGuardia Act and then will analyze the language of the Act and its application to the facts in the 1978 railroad cases.

---

18. *Id.*

19. Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, No. 78-1607 (D.C. Cir. Sept. 15, 1978). The railroads then applied to the Supreme Court for a stay of the proceedings while they petitioned for a writ of certiorari. On September 22, 1978, Chief Justice Burger issued a temporary stay of the proceedings until the full Court could convene. Four days later the full Court withdrew the stay, thereby giving effect to the district court's decision to deny the preliminary injunction. Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, No. A-272 (U.S. Sept. 26, 1978).

20. 465 F. Supp. 963 (D. Md.), *appeal dismissed as moot,* Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979).

21. 458 F. Supp. 100 (E.D. Mo. 1978), *appeal dismissed as moot,* No. 78-1709 (8th Cir. Mar. 16, 1979).

22. 99 L.R.R.M. 2607 (W.D.N.Y. 1978), *appeal dismissed as moot,* 595 F.2d 1208 (2d Cir. 1979).

23. 465 F. Supp. at 973; 458 F. Supp. at 103; 99 L.R.R.M. at 2611.

24. *See* Western Md. R.R. v. System Bd. of Adjustment, 465 F. Supp. 963, 973 (D. Md.) (picketing of facilities when two plaintiff railroads not servicing N & W traffic furthers no economic interest of BRAC), *appeal dismissed as moot,* Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979). The court found, however, that at one facility the railroad did service N & W traffic. Because BRAC had an economic interest in picketing at that facility, the court refused to enjoin this BRAC picketing. *Id.* at 974.

25. *See* Terminal R.R. Ass'n v. Brotherhood of Ry., Airline & S.S. Clerks, 458 F. Supp. 100, 103 (E.D. Mo. 1978) (plaintiff association not aligned with N & W), *appeal dismissed as moot,* No. 78-1709 (8th Cir. Mar. 16, 1979); Consolidated Rail Corp. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 2607, 2611 (W.D.N.Y. 1978) (no substantial alliance between Conrail and N & W), *appeal dismissed as moot,* 595 F.2d 1208 (2d Cir. 1979).

26. Terminal R.R. Ass'n v. Brotherhood of Ry., Airline & S.S. Clerks, No. 78-1709 (8th Cir. Mar. 16, 1979); Consolidated Rail Corp. v. Brotherhood of Ry., Airline & S.S. Clerks, 595 F.2d 1208 (2d Cir. 1979).

27. 29 U.S.C. §§ 104, 113 (1976).

Before passage of the Clayton Act in 1914,[28] federal courts freely enjoined both primary and secondary picketing under the the Sherman Act[29] and the common law.[30] Section 20 of the Clayton Act[31] prohibits federal courts either from granting an injunction in a dispute between an employer and employees or from holding unlawful concerted employee activity meeting certain standards of peacefulness.[32] In *Duplex Printing Press Co. v. Deering*[33] the Supreme Court determined that the Clayton Act shields only "legitimate" activity.[34] According to the Court, the section 20 prohibition against injunctive relief protects only "parties standing in proximate relation to a controversy . . . ,"[35] that is, only those parties engaged in primary activity.[36] In a seminal dissent, Justice Brandeis contended that the union's organizing tactic should have been upheld.[37] Justice Brandeis based his contention on the evolution of the common law concept that the self-interest of strikers justifies injury to the business of secondary employers.[38]

Within a decade of the *Duplex* decision, Professor Felix Frankfurter, later to become Justice Frankfurter, considered the legality of secondary action in *The Labor Injunction,* a book coauthored with Nathan Greene.[39] Frankfurter and Greene reviewed the substantive and procedural history of labor injunctions in the United States and articulated a proposal for federal legislation that eventually emerged as the Norris-LaGuardia Act. They concluded that "[a] strike or threat to strike may be brought to bear upon neutrals, provided that the neutrals thus used as a lever are within the same industry as those in whose coercion the union is primarily interested."[40] When enacted, sections four and thirteen of the Norris-LaGuardia Act embodied the position advanced by Frankfurter and Greene.

The history of the Norris-LaGuardia Act clearly supports the view that the protection of secondary activity was not intended to be absolute.[41] Defining the limits of that protection, however, has been the subject of considerable litigation.[42] In two relatively recent railroad cases, the Supreme Court has

---

28. Clayton Act, Pub. L. No. 63-212, ch. 323, 38 Stat. 730 (1914) (current version in scattered sections of 15, 18 & 29 U.S.C. (1976)).

29. 15 U.S.C. §§ 1-7 (1976). *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465-68 (1921) (under Sherman Act, manufacturer entitled to injunctive relief against secondary boycott); *In re* Debs, 64 F. 724, 743 (1894) (jurisdiction to enjoin strike based on Sherman Act).

30. *See* J. TAYLOR & F. WITNEY, LABOR RELATIONS LAW 25-40 (2d ed. 1975) (discussing use of injunctions in labor disputes).

31. 29 U.S.C. § 52 (1976).

32. *Id.*

33. 254 U.S. 443 (1921).

34. *Id.* at 469.

35. *Id.* at 471.

36. The Court, in examining the legislative history of the Act, noted that the committee reports contained extracts from judicial opinions and a textbook that upheld primary boycotts but disapproved of secondary boycotts. *Id.* at 475. The Court also observed that the House committee's spokesman had indicated that the committee did not intend to legalize the secondary boycott. *Id.* at 475-77 & n.1.

37. *Id.* at 478 (Brandeis, J., with Holmes & Clarke, JJ., dissenting).

38. *Id.* at 481.

39. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

40. *Id.* at 45 (footnote omitted).

41. *See* notes 169-201 *infra* and accompanying text (discussing judicial consideration of Norris-LaGuardia Act).

42. Even more litigation has been undertaken to define the secondary boycott provisions of the Labor-Management Relations Act.

applied the provisions of sections four and thirteen of the Norris-LaGuardia Act to secondary action. In both *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*[43] and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*[44] the Court suggested that there are limits to the types of concerted activity protected by the Norris-LaGuardia Act. In *Atlantic Coast Line* an equally-divided Supreme Court affirmed a Fifth Circuit holding that the "involving or growing out of" language of the Norris-LaGuardia Act must be interpreted through the application of an economic self-interest analysis.[45] In *Jacksonville Terminal* the Supreme Court considered the question of secondary action under the Railway Labor Act. The Court concluded not only that the secondary action complained of was legal, but also that the courts should not be drawn into determining the precise boundaries dividing permissible and impermissible activity.[46]

Both the *Jacksonville Terminal* and *Atlantic Coast Line* cases grew out of an exceptionally bitter and protracted labor dispute that began in 1963 between the Florida East Coast Railway and its labor organizations.[47] Unilateral action by the Florida East Coast to revise the rules and working conditions for its operating crafts in the spring of 1966 sparked the *Atlantic Coast Line* litigation. The affected labor organizations began picketing the railroad in protest on April 24.[48] On May 4, the same labor organizations extended their picketing to the premises of the Jacksonville Terminal Company.[49] The Florida East Coast Railway, the Atlantic Coast Line, and other railroads jointly owned the Jacksonville Terminal, which provided important services to Florida East Coast. These services were an "integral part of the day-to-day operations of [Florida East Coast]."[50] Jacksonville Terminal and its owners, including the Atlantic Coast Line, sought an injunction against the picketing of the Jacksonville Terminal facilities. The district court issued an injunction and the labor organizations appealed.[51]

The United States Court of Appeals for the Fifth Circuit reversed and remanded with directions to the district court to vacate the injunction.[52] Characterizing the activities of the labor organizations as a secondary boycott,[53] the Fifth Circuit began its analysis with the proposition that the literal terms of the Norris-LaGuardia Act would prevent any federal court from issuing an injunction against secondary picketing.[54] The court, however,

---

43. 385 U.S. 20, 20 (1966) (per curiam).

44. 394 U.S. 369, 391 (1969).

45. 362 F.2d 649, 654 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966) (per curiam). The Eighth Circuit described the "economic self-interest" test as follows: "When a non-struck employer seeks to have a union's activities enjoined by a federal court the case involves or grows out of a labor dispute—and thus the Norris-LaGuardia anti-injunction provisions apply—only when the offending activity is furthering the union's economic interest in a labor dispute." Ashley, Drew & Northern Ry. v. Transportation Union, 104 L.R.R.M. 3105, 3109 (1980).

46. 394 U.S. at 391.

47. *Id.* at 371; 362 F.2d at 650.

48. 362 F.2d at 650.

49. *Id.*

50. *Id.* at 650-51.

51. *Id.* at 651.

52. *Id.* at 655.

53. *Id.* at 651.

54. *Id.* at 653-54.

went on to apply an economic self-interest analysis[55] without offering any clear authority for doing so.[56] The Fifth Circuit identified two aspects of this test: The economic interests of the union and the economic interests of the secondary employer's employees who respond to the activity.[57] The former aspect is established through a factual inquiry into whether the union's secondary activity serves its economic interests.[58] The court noted that such an interest will exist when the secondary employer has aligned with the primary employer in a substantial manner.[59] The second aspect, the interest of the secondary employers, is established through a similar factual inquiry. In *Atlantic Coast Line* the court found that an economic interest existed for the secondary employees because the secondary railroads were in competition with the primary railroad. Furthermore, the court noted that allowing the primary railroad to operate below union standards would give it a competitive advantage.[60] Thus, the response of the secondary employees could not be characterized as merely sympathetic.[61]

The Fifth Circuit's *Atlantic Coast Line* opinion suggested, in somewhat vague terms, that the right to engage in secondary picketing under the Railway Labor Act must be limited by a judicially-applicable economic self-interest test. Despite the court's vagueness in defining this test, the test played a critical role in the 1978 railroad litigation. An equally divided Supreme Court affirmed without opinion the Fifth Circuit's decision legitimizing the secondary picketing.[62]

Three years later, *Jacksonville Terminal,* another case arising out of the Florida East Coast Railway dispute, reached the Supreme Court.[63] Although the facts mirrored those in *Atlantic Coast Line,* the appeal arose from a Florida state court decision enjoining the secondary picketing.[64] The principal issue before the Supreme Court was whether state courts possess the power to apply state law to prohibit secondary picketing. The Court concluded that federal law preempted the state law constraining picketing by Railway Labor Act unions.[65] Having made this decision, the Supreme Court had to define the applicable federal law.[66] The Court clearly was uneasy with this task. The Court noted that federal labor policy protects peaceful primary activity[67] but proscribes violent conduct.[68] The Court's unease was most manifest in the portion of its opinion that discussed federal law applicable to secondary conduct.[69] The Court was able to avoid the dilemma of defining permissible

55. *Id.* at 654-55.
56. The court conceded that there was no direct Supreme Court authority for such an analysis, but found the applicability of such a test implicit in the Brandeis dissent in *Duplex* together with the subsequent passage of the Norris-LaGuardia Act. *Id.* at 654.
57. 362 F.2d at 654-55.
58. *Id.* at 654.
59. *Id.* at 654-55.
60. *Id.* at 655.
61. *Id.*
62. 385 U.S. 20, 20 (1966) (per curiam).
63. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1968).
64. *Id.* at 372.
65. *Id.* at 380-81.
66. *Id.* at 382.
67. *Id.* at 385-86.
68. *Id.* at 386.
69. *Id.* at 386-88.

secondary conduct because the picketing complained of in *Jacksonville Terminal* involved a common situs, a location at which both the primary employer and secondary employer engaged in business.[70] Although earlier in the opinion the Court expressed reluctance to import precedent from the Labor-Management Relations Act into the Railway Labor Act arena,[71] the Court embraced the Labor-Management Relations Act precedent legitimizing secondary conduct in the common situs context.[72] Finally, in reflecting upon its duty to define the exact limits of secondary activity permissible under the Railway Labor Act, the Court concluded that the task should be left to Congress.[73]

Both *Atlantic Coast Line* and *Jacksonville Terminal* permitted secondary picketing in a situation in which secondary activity also would have been permitted under the detailed scheme of the Labor-Management Relations Act. In both cases, however, the court suggested that secondary activity more remote than that in the Florida East Coast dispute might be impermissible under the Norris-LaGuardia Act. Nearly ten years later, the controversy between BRAC and the N & W forced the federal courts to examine and to develop the Supreme Court's suggestions.

The 1978 BRAC dispute led to six district court opinions, only one of which was affirmed by a court of appeals on the merits.[74] All six looked to *Atlantic Coast Line* as the authoritative interpretation of the Norris-LaGuardia anti-injunction provision in a secondary picketing situation. All six placed considerable emphasis on whether the secondary and primary employers were aligned in some substantial manner. The emphasis on the alignment concept is significant because the *Atlantic Coast Line* Court was ambiguous about whether it intended substantial alignment to be a separate prerequisite to secondary picketing or whether it intended employer alignment to be one of several considerations that might give striking employees the necessary economic interest to justify secondary pressure.[75]

In *Alton & Southern Railway v. Brotherhood of Railroad, Airline & Steamship Clerks*[76] the plaintiff railroads sought an injunction to prohibit BRAC picketing. The plaintiffs were targets of BRAC picketing because they were members of the strike insurance group. BRAC initially defended on the ground that the strike insurance plan constituted a per se violation of the Railway Labor Act, but subsequently broadened its position to include the Norris-LaGuardia defense of the picketing.[77] From the outset, the court

70. *Id.* at 388-89.

71. *Id.* at 383.

72. *Id.* at 388-89.

73. *Id.* at 392-93.

74. Western Md. R.R. v. System Bd. of Adjustment, 465 F. Supp. 963 (D. Md.), *appeal dismissed as moot*, Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979); Southern Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, 458 F. Supp. 1189 (D.S.C. 1978); Chicago Transp. Co. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 3072 (N.D. Ill. 1978); Terminal R.R. Ass'n v. Brotherhood of Ry., Airline & S.S. Clerks, 458 F. Supp. 100 (E.D. Mo. 1978), No. 78-1709 (8th Cir. Mar. 16, 1979); Consolidated Rail Corp. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 2607 (W.D.N.Y. 1978), *appeal dismissed as moot*, 595 F.2d 1208 (2d Cir. 1979); Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 2323 (D.D.C.), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978).

75. Brotherhood of Ry., Airline & S.S. Clerks v. Atlantic Coast Line R.R., 362 F.2d 649, 655 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966) (per curiam).

76. 99 L.R.R.M. 2323 (D.D.C.), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978).

77. *Id.* at 2325 n.4.

framed the case more in terms of the strike insurance plan than the economics of the situation. Thus, the court focused its attention on the relationship between the plaintiff employers and the N & W rather than only on the economic interests of the employees. This focus distinguished the case not only from the prior secondary picketing cases, but also from the Norris-LaGuardia Act cases. The D.C. Circuit observed that the case presented a situation similar to *Atlantic Coast Line* and quoted the definition of the economic self-interest test as articulated in that decision.[78] The court went on to conclude, in a single paragraph, that the requirements of that test had been met because the "particular provisions of the strike insurance plan involved . . . establish the necessary substantial alignment of the Plaintiffs with N & W . . . ."[79] The court thus viewed alignment of the secondary employer with the primary employer as a prerequisite to protection against an injunction under the Norris-LaGuardia Act.

In *Southern Railway v. Brotherhood of Railway, Airline & Steamship Clerks*[80] and *Chicago Transportation Co. v. Brotherhood of Railway, Airline & Steamship Clerks,*[81] the two other cases involving members of the strike insurance group, the district courts followed the analytical approach developed by the *Alton & Southern* court and easily determined that participation in the strike insurance program established the substantial alignment necessary to remove jurisdiction for enjoining the picketing under the Norris-LaGuardia Act.[82] In *Southern Railway* the court did not pursue a factual inquiry to determine the breadth of the alignment. According to the court, the railroad's participation in the strike insurance program sufficiently established substantial alignment.[83] The factual situation before the court in *Chicago Transportation* involved more than picketing of allegedly neutral railroads by BRAC employees of the N & W; it involved direct strike action by BRAC members of the alleged neutrals. The court reasoned that the interpretation of the Norris-LaGuardia Act developed in *Atlantic Coast Line* and in *Alton & Southern* protects picketing of secondary employers by employees of a primary employer.[84] The court, however, distinguished direct action against a secondary employer by its own employees because such action constitutes a primary dispute subject to the strictures of the Railway Labor Act.[85]

The interchange group cases resulted in somewhat more analytical opinions. In *Consolidated Rail Corp. v. Brotherhood of Railway, Airline & Steamship Clerks (Conrail)*[86] and *Terminal Railroad Association v. Brotherhood of Railway, Airline & Steamship Clerks,*[87] the district courts applied the substantial alignment test developed in *Atlantic Coast Line* and *Alton & Southern* and found that the plaintiffs were not substantially aligned with the N & W. Accordingly, the courts held that they had jurisdiction to grant the

78. *Id.* at 2324.
79. *Id.*
80. 458 F. Supp. 1189 (D.S.C. 1978).
81. 99 L.R.R.M. 3072 (N.D. Ill. 1978).
82. *Id.* at 3072; 458 F. Supp. at 1189.
83. 458 F. Supp. at 1191.
84. 99 L.R.R.M. at 3073.
85. *Id.* at 3073-74.
86. 99 L.R.R.M. 2607 (W.D.N.Y. 1978), *appeal dismissed as moot,* 595 F.2d 1208 (2d Cir. 1979).
87. 458 F. Supp. 100 (E.D. Mo. 1978), *appeal dismissed as moot,* No. 78-1709 (8th Cir. Mar. 16, 1979).

requested preliminary injunctions.[88] In the third case, *Western Maryland Railway v. System Board of Adjustment,*[89] the district court, in applying an integrated economic self-interest test, also held that it had jurisdiction.[90]

In *Conrail*[91] the Western District of New York considered three legal arguments advanced by Conrail in support of its motion for a preliminary injunction. Conrail first argued that the definition of "labor dispute" under the Railway Labor Act is congruent with the definition in the Norris-LaGuardia Act.[92] According to this view, if the court found that the secondary picketing arose out of a labor dispute, thus triggering the provisions of the Norris-LaGuardia Act, the parties would be required to deal with the dispute under the major or minor dispute procedures of the Railway Labor Act and the court would have jurisdiction to enjoin the picketing. The court rejected this argument, holding that the concept of a labor dispute under the Norris-LaGuardia Act is broader than under the Railway Labor Act.[93] Conrail also argued that although the Supreme Court had clearly held in *Jacksonville Terminal* that the prohibition against secondary picketing contained in section 8(b)(4) of the Labor-Management Relations Act is not directly applicable to Railway Labor Act disputes, federal courts have equitable jurisdiction to apply the congressional policy reflected in section 8(b)(4) to Railway Labor Act disputes.[94] Although the court was not favorably disposed toward this argument, it did not reject the argument, but concluded that "a motion for the preliminary injunction is not the proper context for deciding these issues."[95]

The court, however, did accept Conrail's third argument that the Norris-LaGuardia Act would prohibit an injunction against secondary picketing only if Conrail were "substantially allied" with the N & W.[96] The court distinguished the factual situation involved in the picketing against Conrail from the situation involved in *Atlantic Coast Line,* in part on the ground that *Atlantic Coast Line* involved a terminal facility shared by the primary and secondary employers, while Conrail sought an injunction against picketing of solely-owned facilities.[97] The court carefully reviewed the evidence regarding Conrail's operations at the picketed facilities after the N & W strike to determine if Conrail had changed its operations in a manner indicating substantial alignment with the N & W.[98] The court concluded that the evidence did not show substantial alignment.[99]

The *Conrail* opinion contains only a limited analysis of the *Atlantic Coast Line* economic self-interest concept. The court, however, did address briefly BRAC's contention that the economic self-interest test could be met by the

88. 99 L.R.R.M. at 2611; 458 F. Supp. at 105.

89. 465 F. Supp. 963 (D. Md.), *appeal dismissed as moot,* Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979).

90. *Id.* at 973.

91. 99 L.R.R.M. 2607 (W.D.N.Y. 1978), *appeal dismissed as moot,* 595 F.2d 1208 (2d Cir. 1979).

92. *Id.* at 2609.

93. *Id.* at 2609-10.

94. *Id.* at 2611.

95. *Id.*

96. *Id.*

97. *Id.* at 2610.

98. *Id.* at 2610-11.

99. *Id.* at 2611.

interest of the primary or secondary employees without regard to the position of the secondary employer.[100] The court concluded that when shared facilities are involved, as in the common situs situation in *Atlantic Coast Line*, the "economic self-interest of the secondary employees might be sufficient but, in a case such as this, where the union attempts to picket solely-owned facilities of the secondary employer, there must be some substantial alignment between the two employers."[101]

In *Terminal Railroad*,[102] the second interchange group case, the Eastern District of Missouri provided more extensive analysis of the substantial alignment requirement.[103] In *Terminal Railroad*, the plaintiff railroad, like Conrail, asserted that the term "labor dispute" in the Norris-LaGuardia Act should be defined congruently with the same term in the Railway Labor Act.[104] Like the court in *Conrail*, the *Terminal Railroad* court rejected this contention, holding that the term "labor dispute" has a broader meaning under the Norris-LaGuardia Act than under the Railway Labor Act.[105]

The court began its analysis by considering the *Atlantic Coast Line* self-interest test.[106] It noted that *Jacksonville Terminal* held that the prohibition against secondary picketing contained in section 8(b)(4) of the Labor-Management Relations Act does not apply to railroads, but refused to read *Jacksonville Terminal* as legitimizing all forms of secondary picketing against railroads.[107] The court considered the *Atlantic Coast Line* substantial alignment test to be essential because, without this parameter, primary employees would be unrestricted in their choice of secondary employers to picket. In such circumstances, a union conceivably could establish a picket line on the premises of an employer who had no connection whatsoever with the primary, struck employer.[108]

The court went on to consider the factual relationship between the Terminal Railroad Association (TRRA) and the N & W, concluding that it was significantly different from the primary-secondary employer relationships in the *Jacksonville Terminal* and *Atlantic Coast Line* cases.[109] The court

---

100. *Id.* at 2610.

101. *Id.*

102. Terminal R.R. Ass'n v. Brotherhood of Ry., Airline & S.S. Clerks, 458 F. Supp. 100 (E.D. Mo. 1978), *appeal dismissed as moot*, No. 78-1709 (8th Cir. Mar. 16, 1979).

103. *Id.* at 103-05.

104. *Id.* at 102.

105. *Id.*

106. The court briefly summarized the analysis:

> Secondary activity such as that in the case at bar constitutes a "labor dispute" within the meaning of the Norris-LaGuardia Act when there is an economic self-interest on the part of the primary employees in taking action against a secondary employer who has in some substantial manner aligned himself with the primary employer. *Atlantic Coast Line.* If this standard is not met, there is no labor dispute within the meaning of the Norris-LaGuardia Act, and that Act's restriction on the jurisdiction of the courts to enjoin certain secondary activity does not apply.

Id. at 102-03.

107. *Id.* at 103.

108. *Id.*

109. *Id.* at 104. The Jacksonville Terminal was a jointly owned and operated facility with employees of four railroads on the premises; TRRA property was under sole ownership of TRRA, with only TRRA employees working on the premises. *Id.* Jacksonville Terminal employees provided other services to the

declined to accept BRAC's contention that interchange alone would meet the requirements of the substantial alignment test because such an analysis would permit the shutdown of a significant portion of the national railway system whenever a local labor dispute occurred.[110] It noted that the substantial alignment test might be met when the secondary employer assumes new duties after commencement of the strike.[111] After examining the evidence, it found that this criterion for substantial alignment had not been met.[112] Finally, the court accepted TRRA's contention that BRAC's secondary picketing against it was fundamentally at odds with the purpose and policy of the Railway Labor Act.[113] The court, however, stopped short of holding that this policy conflict, by itself, would vest the court with jurisdiction to enjoin the picketing notwithstanding the Norris-LaGuardia Act.

In *Western Maryland,*[114] the third interchange group case, the District Court for Maryland applied the *Atlantic Coast Line* economic self-interest standard in a somewhat different fashion. In the opinion, the court quoted from the *Conrail* decision, but did not mention *Terminal Railroad.* The court expressly considered whether "substantial alignment" is a separate element of the *Atlantic Coast Line* test and concluded that it is not. The court found that the "so-called 'substantial alignment' requirement is little more than a refinement of the 'economic self interest' analysis which has been applied to BRAC picketing . . . ."[115]

The court went on to apply its integrated version of the economic self-interest test and found that, at two facilities where the N & W did not interchange traffic with the plaintiff railroads,[116] the picketing furthered no economic interest of BRAC in the labor dispute and thus did not "grow out of a labor dispute."[117] It concluded that the employees of the plaintiff railroads had no economic interest in the dispute between the N & W and BRAC because BRAC had not shown that the "scope rule,"[118] which was at the center of the dispute, had ever been a point of major contention in negotiations between BRAC and the plaintiffs.[119] The court, however, did find sufficient economic self-interest to permit picketing by the N & W BRAC members at another facility located in Hagerstown, Maryland, a terminal at which the plaintiff railroad interchanged traffic with the N & W. Its

---

primary employer, Florida East Coast, including car, locomotive, and track maintenance, and car switching and signaling. Although TRRA performed no general locomotive repairs, it did repair cars when necessary for their safe movement. *Id.*

110. *Id.* at 104-05.

111. *Id.* at 105.

112. *Id.*

113. *Id.* at 105-06.

114. 465 F. Supp. 963 (D. Md.), *appeal dismissed as moot,* Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979).

115. *Id.* at 974.

116. The Baltimore and Ohio Railroad, as well as the Western Maryland Railroad, was a plaintiff in the suit.

117. *Id.* at 973.

118. A "scope rule" in a collective bargaining agreement defines the activities that are within the work jurisdiction of the craft covered by the agreement.

BRAC proposed that the "scope rule" be changed so that all work traditionally performed by employees within the clerical or telegraphic craft and class would continue to be performed by employees represented by BRAC in the event a position was abolished or machines were used to perform such work. *Id.* at 965 n.1.

119. *Id.* at 973.

conclusion was based on a determination that cutting off interchange with the N & W at Hagerstown would cut the N & W off from many of its customers. Thus, the activities conducted at the Hagerstown facility were essential to the daily operation of the N & W, giving the defendant union an economic interest in picketing that site.[120]

All six district court cases in effect adopted the conclusion quoted by the *Western Maryland* court from the *Atlantic Coast Line* opinion "that the proper framework for a Norris-LaGuardia 'labor dispute' falls substantially short of an all-out class war, unrelated to fairly direct economic interests of the disputants."[121] Five of the six cases undeniably establish substantial alignment as an essential element of a Norris-LaGuardia Act labor dispute involving secondary parties. Only the *Western Maryland* court was willing to agree with BRAC's contention that employee economic self-interest alone suffices, though it drew rather stringent boundaries around the self-interest that would support picketing. The five courts applying the substantial alignment test as a separate element insisted upon more than a continuation of prestrike business relations to meet the substantial alignment test, borrowing to some extent from the "ally doctrine" analysis developed under the Labor-Management Relations Act.[122] BRAC appealed the three decisions unfavorable to it, but the courts of appeals dismissed the cases as moot after the strike against the N & W ended.[123]

III. TWO COMPETING APPROACHES TO SECONDARY ACTION

The 1978 railroad cases considered two fundamentally different interpretations of secondary pressure under the Norris-LaGuardia Act. This section probes those competing interpretations and suggests that the interchange group courts properly determined that secondary picketing can be enjoined under the provisions of the Act.

A. HANDS OFF

The first interpretation, vigorously promoted by BRAC in the 1978 litigation, suggests that the judiciary should impose no restrictions on secondary activity.[124] This position has some logical appeal. First, labor law does not have to restrict secondary action. In Great Britain, for example, secondary action is legal.[125] Second, because drawing a rational line between different types of concerted economic action is impossible, the secondary boycott should be available to labor organizations as a legitimate weapon of

120. *Id.* at 974.

121. *Id.* at 973 (quoting Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 654 n.6 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966) (per curiam)).

122. For a discussion of the "ally doctrine," see notes 210-16 *infra* and accompanying text.

123. Western Md. R.R. v. System Bd. of Adjustment Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979); Terminal R.R. Ass'n v. Brotherhood of Ry., Airline & S.S. Clerks No. 78-1709 (8th Cir. Mar. 16, 1979); Consolidated Rail Corp. v. Brotherhood of Ry., Airline & S.S. Clerks, 595 F.2d 1208 (2d Cir. 1979).

124. *See generally* Brief for Appellant at 13-32, Consolidated Rail Corp. v. Brotherhood of Ry., Airline & S.S. Clerks, 595 F.2d 1208 (2d Cir. 1979).

125. *See* note 134 *infra* and accompanying text.

free collective bargaining.[126] Finally, the language and history of the Norris-LaGuardia Act appear to resolve the matter. The argument in favor of allowing secondary activity is basically that the federal courts should not be weaving the fine details of a policy web that circumscribes the legal meaning of "involving or growing out of any labor dispute."[127] Because such a task could be performed better by Congress, proponents of secondary activity argue that the courts should not intrude into this legislative function.

The supporters of this view argue that a secondary boycott, however defined, is simply a device for bringing economic pressure to bear on the primary disputant.[128] The very premise of free collective bargaining is the notion that the resolution of labor disputes should be determined by the relative economic strength of the parties. Thus, depriving unions of the use of secondary pressure deprives them of one element of their economic strength and thereby alters the balance of power between employers and employees.[129] These commentators reject arguments that secondary pressure must be restricted in order to protect neutrals. All strike activity affects neutrals, including customers and suppliers of the struck employer, consumers of the product of the struck employer, and those nonstriking employees laid off from their jobs.[130] They also reject the argument that a prohibition is necessary to restrict the area of economic conflict. Restrictions on secondary pressure focus on union conduct and not on the scale of the conflict or the resulting economic repercussions. Regardless of the extensive potential for national economic injury, a nationwide steel or trucking strike will be permitted because only primary pressure is involved. Thus, argue the proponents of secondary pressure, a localized secondary boycott with very limited effects also should be permitted. President Truman, in adopting this position in the 1947 controversy over enactment of section 8(b)(4), argued that "[n]ot all secondary boycotts are unjustified"[131] and concluded that "[t]here should be no blanket prohibition [against them]."[132]

According to those commentators who characterize the secondary boycott as simply a device for bringing economic pressure to bear on the primary disputant, the courts should recognize secondary pressure as a legitimate weapon in labor's arsenal, as long as it is used in pursuit of legitimate objectives relating to improvement of wages and working conditions.[133] Indeed, this policy has been adopted in Great Britain.[134] Conceptually, British

---

126. *See* Editorial Note, *Labor's Use of Secondary Boycotts,* 15 GEO. WASH. L. REV. 327, 344-45 (1947) [hereinafter Note, *Secondary Boycotts*] (equal justification for legitimate primary and secondary economic coercion).

127. 29 U.S.C. § 104 (1976).

128. International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (1950); Note, *Secondary Boycotts, supra* note 126, at 344-45.

129. *Cf.* Western Md. R.R. v. System Bd. of Adjustment, 465 F. Supp. 963, 968 (D. Md.) (secondary picketing is union weapon; once settlement procedures exhausted, neither courts nor government entities should intervene to alter balance of economic forces between opposing sides), *appeal dismissed as moot,* Nos. 79-1052 and 79-1054 (4th Cir. May 3, 1979).

130. *See generally* Lesnick, *supra* note 3, at 1411-15 (strike often injures third parties).

131. SEN. MIN. REP. NO. 105, pt. 2, 80th Cong., 1st Sess. 20 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 1947, at 482 (1948) (quoting President Truman).

132. *Id.*

133. Note, *Secondary Boycotts, supra* note 126, at 145.

134. The statutory language of the Trade Union and Labor Relations Act of 1974 is similar to the

law regulating strikes and picketing differs from the Norris-LaGuardia Act. Whereas the Norris-LaGuardia Act protects certain types of industrial action by divesting courts of jurisdiction,[135] British law immunizes certain types of conduct by precluding liability under specific tort causes of action.[136] Nevertheless, the approaches of the two bodies of law are similar enough to provide useful comparisons. The Norris-LaGuardia Act, for example, protects conduct "arising or growing out of a labor dispute."[137] Similarly, the British law protects conduct "in contemplation or furtherance of a trade dispute."[138] Under both formulas, two similar elements must exist for the conduct to be protected: (1) A labor or trade dispute must exist or be imminent, and (2) the conduct must involve or grow out of the dispute or it must be in contemplation or furtherance of the dispute.

British courts have been willing to restrict the types of disputes that meet the first element.[139] In *Express Newspapers Ltd. v. McShane*[140] the House of Lords recently gave an expansive reading to the second element. This case involved a strike—admittedly a "trade dispute"—in December, 1978 between the National Union of Journalists (NUJ) and an association of provincial newspapers. To make its strike against the provincial newspapers more effective, the NUJ called a strike of its members working for the Press Association, which supplied wire service copy to the provincial papers.[141] Concerned that some of its member employees of the Press Association would ignore the call to strike because of their sympathy for the provincial newspapers, the NUJ also called upon its members employed by metropolitan newspapers to "black" (to refuse to handle) copy produced by the Press Association.[142] By boycotting this material, the NUJ sought to increase the effectiveness of its strike against the Press Association, which in turn was intended to add to the effectiveness of its primary strike against the provincial newspapers.

Although the secondary action targeted against the Press Association was not challenged, the Express Newspapers Limited, seeking both an injunction and damages, attacked the more remote action against the metropolitan newspapers.[143] After the lower court granted an injunction, the NUJ appealed

---

language of the Norris-LaGuardia Act. *See* notes 137-38 *infra* and accompanying text (comparing two statutes). This similarity lends support to persons or groups, like BRAC, who argue that the Norris-LaGuardia Act shields all forms of secondary activity.

135. 29 U.S.C. § 107 (1976).

136. *See* Trade Union and Labor Relations Act 1974, § 13, *reprinted in* 44 HALSBURY'S STATUTES OF ENGLAND 1769-70 (3d ed. 1975) (contains restrictions on legal liability and legal proceedings for acts in contemplation of or furtherance of trade disputes). Under this statute, for example, "an act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground that it is an interference with trade, business or employment of another person . . . ." *Id.* § 13(2).

137. 29 U.S.C. § 101 (1976).

138. Trade Union and Labor Relations Act 1974, § 13(1), *reprinted in* 44 HALSBURY'S STATUTES OF ENGLAND 1769 (3d ed. 1975).

139. *See* Express Newspapers Ltd. v. McShane, [1980] 1 All E.R. 65, 68-69 (H.L.) (opinion of Lord Wilberforce) (discussing cases meeting first element).

140. [1980] 1 All E.R. 65 (H.L.).

141. *Id.* at 67 (opinion of Lord Wilberforce).

142. *Id.*

143. Express Newspapers Ltd. v. McShane, [1979] 2 All E.R. 360, 360 (C.A.).

to the Court of Appeal.[144] The court affirmed the decision,[145] prompting the NUJ to appeal to the House of Lords.

In the Court of Appeal, Lord Denning, Master of the Rolls,[146] found the action against the metropolitan papers to be outside the protection of the Trade Union Labor Relations Act. Noting that the only trade dispute was between the NUJ and the provincial papers, Lord Denning determined that "the important words in the statute are 'an act done by a person in contemplation or furtherance of a trade dispute.'"[147] In his view, the union took the primary action against the provincial newspapers "in furtherance of" that dispute because a strike by NUJ members employed by the local papers would bring direct pressure on those employers.[148] He also indicated that the secondary action against the Press Association was "in furtherance of" the primary dispute, for the strike by NUJ members employed by the Press Association "would also bring pressure to bear on the local newspapers because, by stopping copy going out from the Press Association, it would hamper the production of local newspapers . . . ."[149]

According to Lord Denning, however, the further secondary action against the metropolitan newspapers demanded different considerations.[150] The NUJ contended that "furtherance" depends on a union's state of mind. Thus, the NUJ argued that if it genuinely and honestly believed that the "blacking" would advance the cause of the provincial journalists, then its actions were done "in furtherance of" the dispute.[151] Disagreeing with the union's interpretation, Lord Denning stated that "furtherance" is an objective, not a subjective, concept.[152] He also rejected the union's argument that, because the "blacking" of Press Association copy would improve the morale of the strikers, the action met the "in furtherance of" test.[153] Accordingly, the Court of Appeal dismissed the union's appeal.[154]

The National Union of Journalists then appealed to the House of Lords. Of the five Law Lords that heard the appeal, only Lord Wilberforce was willing to find an objective element in the "in furtherance of" test.[155] Under such an objective test, however, he held that the appeal should have been allowed and the injunction discharged.[156] He reasoned that, as a practical effect of the

144. *See id.* at 361 (reporting decision below).

145. *Id.* at 368.

146. The Master of the Rolls is the senior civil judge of the Court of Appeal. One commentator has noted that "[i]n modern times some of the greatest lawyers of their day have held the office . . . ." R. WALKER, THE ENGLISH LEGAL SYSTEM 161 (4th ed. 1976).

147. Express Newspapers Ltd. v. McShane, [1979] 2 All E.R. 360, 363 (C.A.).

148. *Id.*

149. *Id.*

150. Lord Denning stated:

> The act of calling on the member journalists employed by the Daily Express to "black" the copy supplied by the Press Association . . . would not affect the local newspapers in the slightest degree. It would not bring any pressure to bear on them. It would not affect the Press Association either . . . . Can such an act be said to be "in furtherance of" the dispute?

Id.

151. *Id.* at 364.

152. *Id.*

153. *Id.* at 365.

154. *Id.* at 368.

155. Express Newspapers Ltd. v. McShane, [1980] 1 All E.R. 65 (H.L.).

156. *Id.* at 71.

NUJ's persuading the Press Association journalists to join the strike, the union would further its primary dispute with the provincial papers.[157] The other four Lords, adopting a subjective test, agreed that an honest, reasonable belief by the union that its action would further the dispute satisfied the requirements of the statutory language.[158] Lord Scarman's metaphor summed up the reasoning of the four Lords: "It would need very clear statutory language to persuade me that Parliament intended to allow the courts to act as some sort of backseat driver in trade disputes."[159]

By adopting a subjective test, the Lords nevertheless retained some power of judicial review. Lords Diplock and Keith of Kinkel, for example, would permit a plaintiff to rebut a union's asserted honesty and reasonableness by producing evidence of some ulterior motive for the action in the trade dispute.[160] Additionally, Lord Salmon, commenting on recent action to halt fuel oil deliveries to a hospital involved in a trade dispute, suggested that some conduct might be so outrageous that it would undermine the "reasonableness" requirement.[161] Notwithstanding the appeal of Lord Salmon's position, the logic is not compelling because "reasonableness," as interpreted by the other Lords, depends on the union's beliefs, not its conduct.

The *Express Newspapers* decision interprets English law in a manner designed to minimize judicial intrusion into labor disputes. Thus, it basically supports the position BRAC espoused during the 1978 railroad dispute. As long as the union unilaterally determines that the secondary action is in its interest, the action will be permitted. No involvement by the *secondary* employer is necessary. Indeed, Lord Wilberforce specifically noted that industrial action could extend to customers or suppliers of a party involved in a labor dispute that have "no means of influencing that dispute or of making concessions which might bring that dispute to an end."[162]

In support of its argument that the Norris-LaGuardia Act shields secondary pressure regardless of its remoteness from the primary dispute, BRAC did not cite English precedent, but rather relied on a considerable number of United States cases, including Justice Brandeis' seminal dissent in *Duplex Printing Press Co. v. Deering*.[163] Careful analysis of this precedent, however, suggests that all of the decisions affording protection under the Act involved special factual situations that can be distinguished from the pure secondary picketing involved in the Interchange Group cases.

B. A BALANCE SHOULD BE STRUCK

The cases that most concerned Frankfurter and Greene, including *Duplex*, involved efforts by a labor organization to organize the employees of a

157. *Id.*

158. *See id.* at 72 (opinion of Lord Diplock) (union protected if it "honestly thinks" action will achieve desired objectives); *id.* at 75 (opinion of Lord Salmon) (union must "honestly and reasonably" believe actions in furtherance of trade dispute); *id.* at 77 (opinion of Lord Keith of Kinkel) (union protected when "hope and belief" reasonable that action will achieve desired result); *id.* at 78 (opinion of Lord Scarman) (if person acts honestly, "Parliament leaves to him the choice of what to do").

159. *Id.* at 78 (opinion of Lord Scarman).

160. *Id.* at 73 (opinion of Lord Diplock); *id.* at 76-77 (opinion of Lord Keith of Kinkel).

161. *Id.* at 75 (opinion of Lord Salmon).

162. *Id.* at 69 (opinion of Lord Wilberforce).

163. 254 U.S. 443, 479 (1921) (Brandeis, J., with Holmes & Clarke, JJ., dissenting).

nonunion firm.[164] To anyone reviewing Frankfurter and Greene's proposal for regulating the granting of injunctions in labor disputes, the emphasis on organizing campaigns should be obvious because protection is defined in terms of craft identity.[165] As passed by Congress, the Norris-LaGuardia Act embodies the general scheme suggested by Frankfurter and Greene. It likewise defines protection in terms of craft and industry identity. For injunctive relief to be proscribed by the Act, for example, the case must involve or grow out of a labor dispute and the injunction must run against a person or persons participating in or interested in the dispute.[166] Read literally, the language of the Act does not extend protection as far as the House of Lords did in *Express Newspapers.* Under the Act the defendant must be "engaged in the same industry, trade, craft, or occupation" in which the primary dispute occurs. Because "labor dispute" is defined broadly to include "any controversy concerning terms and conditions of employment,"[167] however, the literal language does not single out organizational campaigns for special protection. Nonetheless, to make sense of the total scheme, the special relationship between craft identity and organizational campaigns must be recognized.[168]

The difference between the economic interests of unionized employees in two distinct scenarios illustrates this relationship. In the first situation,

---

164. In outlining their proposal for new federal legislation to regulate the use of injunctions in labor controversies, Frankfurter and Greene stated they were attempting

> to recognize frankly that the central problem of law of industrial relations is to determine the purposes that justify combination of laborers by marking the outposts of the concept of "self interest." How far laborers may combine to strive for concessions that are not of immediate benefit to them but which strengthen the union organization; how far a union in one craft may use its power to achieve unionization of non-union plants within the same craft; how far a union of one craft may exert its power in aid of unions of another craft, and how dependent one craft must be upon the other to justify co-operative tactics—those and like issues are the crucial ones . . . . [T]he proposed bill settles all of these questions so far as application for equitable review is concerned. Immunity from injunctions extends to all the categories that we have described, save alone as to persons who are not engaged in the same industry with the complainant. What occupation, craft or trade is necessarily left for individual decision. The obvious change intended . . . is to extend the area of unrestrainable conduct beyond the limits now recognized by federal decisions.

FRANKFURTER & GREENE, *supra* note 39, at 215-16 (footnote omitted).

165. *See id.* at 205-28 (discussing proposed legislation).

166. 29 U.S.C. § 104 (1976). Although "case" and "involve or grow out of" are not defined separately, section 13 of the Act indicates that to qualify, the persons to be protected must be "engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein . . . ." *Id.* § 13(a). The term "labor dispute" is defined as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." *Id.* § 13(c). "Persons participating in or interested in the dispute" include persons or associations:

> If relief is sought against him or it, and he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

Id. § 13(b).

167. *Id.* § 13(c).

168. *See* Ashley, Drew & Northern Ry. v. United Transp. Union, 104 L.R.R.M. 3105, 3111-12 (1980) (discussing special relationship).

typified by the events underlying *Duplex*, a union calls upon its members to support action against a firm employing nonunion labor. Direct product competition occurs only within individual industries and direct labor market competition exists only within individual crafts. Thus, union members within the same craft and employed in the same industry as the primary employer will have a strong economic interest in forcing him either to employ union labor or at least to employ labor under the same terms and conditions afforded the union members of other employers. If an action against the primary employer is unsuccessful, union security will be undermined. After the action, either the primary employer will be able to pay lower wages, thereby developing a competitive advantage over firms employing union workers, or he will be able to pay the same wages to nonunion employees, thereby reducing the incentive to belong to the union.

In the second situation, typified by the events underlying the 1978 interchange group railroad cases, the primary dispute involves a unionized employer confronted by demands by his employees for improvements in their collectively bargained terms of employment. Although the members of the same union within an industry would not necessarily be indifferent to the success or failure of the primary strike, their interest is much more attenuated than it would be if their union were seeking to organize an employer paying substandard wages. At most, they have an economic interest in establishing a "pattern" that they eventually might force their own employers to follow.

Elevating the interest of the union employees in the second scenario into a legal right protected by the Norris-LaGuardia Act would alter fundamentally the right of the parties to collective bargaining agreements to define their bargaining units. Moreover, even if the interest of secondary employees in a pattern set by a primary negotiation were legally cognizable, no valid reason exists for requiring that the secondary employees be members of the same craft. Patterns set in collective bargaining are important despite craft and industry lines. Therefore, a rational application of the scheme adopted by Congress in the Act requires that organizing campaigns be treated as fundamentally different from disputes over the terms to be included in new collective bargaining agreements.

Careful review of both the decisions leading to the Norris-LaGuardia Act and the decisions applying its terms supports an analysis that weighs the interests of the union against the interests of the neutral employer.[169] In *Duplex*, for example, the International Association of Machinists (Machinists), having organized three of the four domestic manufacturers of printing presses, endeavored to organize the Duplex Printing Press Company (Duplex).[170] Two of the already-organized companies energized the Machinists' efforts by threatening to terminate their agreements with the union unless Duplex was organized.[171] In addition to calling a strike against Duplex, the Machinists instructed members of affiliated unions not to work on Duplex presses delivered to third parties in New York City.[172] The Supreme Court,

169. All of the leading cases frequently cited in support of unlimited secondary activity involved special procedural or substantive facts that distinguish them from a pure secondary pressure situation, like the one in *Terminal Railroad* or *Conrail*. For a discussion of these two cases, see notes 85-113 *supra* and accompanying text.

170. 254 U.S. at 479-80 (Brandeis, J., with Holmes & Clarke, JJ., dissenting).

171. *Id.*

172. *Id.*

having determined that the Machinists' action amounted to a secondary boycott,[173] held that Duplex had a "clear right" to injunctive relief under the Sherman Act as amended by the Clayton Act.[174]

In his dissent, Justice Brandeis reviewed the common law of New York State and the law that had developed under section 20 of the Clayton Act, two sources of law that he felt supported the Machinists' organizing tactic.[175] He based his analysis of the common law on tort concepts. Traditionally, if a group of employees injured a business without justification, it would be held legally liable for its action. Brandeis noted that the concept of justification had evolved in recognition of "the facts of industrial life."[176] Courts gradually conceded that, although a strike by workmen in a plaintiff's factory injured his business, the strike was not an actionable wrong because the obvious self-interest of the strikers justified their action.[177] Brandeis further noted, however, that even after courts had held that strikes to raise wages or reduce hours were legal, some courts nonetheless had held that an insufficient causal relationship existed between a strike to unionize a shop and the self-interest of the strikers to justify the injuries inflicted.[178]

Brandeis believed that centralization in the control of business, having brought about a centralization in the organization of workingmen, required a more pragmatic analysis by the courts. He recognized that a single employer like Duplex, by refusing to be organized, could threaten not only the labor union promoting organization, but also the standards of all its members. To protect its livelihood, such a union usually would refuse to work on materials produced by the recalcitrant employer and then purchased by another firm. Although courts initially had held that such an action was a strike against the purchaser by an unaffected third party, Brandeis argued that the members of the union would be justified in refusing to work on the materials produced by a nonunionized employer.[179]

In making this argument, Brandeis approved of decisions handed down by the Court of Appeals of New York that distinguished between legal and illegal secondary pressure.[180] In *Bossert v. Dhuy*,[181] for example, the defendant union, pursuant to a campaign to organize woodworking factories, had published a list that it distributed to builders. In this publication the union called upon builders to use only union-made woodwork and notified them that it would handle only material manufactured under strict union conditions.[182] Plaintiffs, nonunion manufacturers of doors, sashes, blinds, trim, and other kinds of woodwork that they sold to builders in the New York City area,[183] sought and obtained an injunction against the union's activities.[184] The New York Court of Appeals reversed,[185] basing its analysis on the

173. *Id.* at 474 (opinion of Court).
174. *Id.* at 478.
175. *Id.* at 480-88 (Brandeis, J., with Homes & Clarke, JJ., dissenting).
176. *Id.* at 481.
177. *Id.*
178. *Id.*
179. *Id.* at 482.
180. *Id.* at 483.
181. 221 N.Y. 342, 117 N.E. 582 (1917).
182. *Id.* at 351-52, 117 N.E. at 583.
183. *Id.* at 350, 117 N.E. at 583.
184. *Id.* at 343-44, 117 N.E. at 582.
185. *Id.* at 366, 117 N.E. at 588.

proposition that anyone may refuse to work for another on "any ground that he may regard as sufficient, and the employer has no right to demand a reason for [the refusal]."[186] In explaining its reasoning, the court noted that the same rule had been applied to a group of men who, having organized as a union for reasons deemed beneficial to themselves, refused to work alongside nonunion workers.[187] In that instance, the court had recognized the right of a union to seek employment for its members that was in their own self-interest.[188] In *Bossert* the court indicated that the same rationale applied to the refusal by the defendant union to erect structures with materials furnished by plaintiffs' nonunion shops.[189] The court reasoned that "[i]n refusing to work on non-union made material, [the union members] were conserving their interests as individuals and as members of the Brotherhood, and in so doing necessarily interfered to some extent with non-union manufacturers."[190]

Although one might infer both that the self-interest of the labor organization would be sufficient to justify injurious action and that the determination of self-interest could be unilateral without being subjected to judicial scrutiny, the court suggested that such an inference was contrary to its intended meaning. By distinguishing between the kind of action involved in *Bossert* and "a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer,"[191] the court seemed to suggest the need for judicial balancing between the self-interest of the strikers and the degree of harm to the business.

Two years later, in *Auburn Draying Co. v. Wardell*,[192] the same court[193] applied such a balancing concept and held that the pressure exerted by the union was illegal.[194] The dispute in *Auburn* grew out of an effort by the Teamsters Union No. 679 (Teamsters) to organize the Auburn Draying Company (Auburn Co.), a New York trucking company. After the plaintiff corporation refused to limit its employment to members of the Teamsters, the Central Labor Union of Auburn, composed of twenty-two local labor organizations including the Teamsters, publicized its intent to "withdraw and use our influence to have others withdraw all patronage from [Auburn Co.]."[195] As a result, dealers, ice deliverers, bakers, butchers, builders, plumbers, and contractors discontinued all business transactions with the plaintiff.[196] Although the court noted that the defendants ultimately hoped to better the condition of union members, it determined that their immediate object was to destroy the plaintiff's business "in order that the plaintiff,

186. *Id.* at 353, 117 N.E. at 584 (quoting National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 170 N.Y. 315, 320, 63 N.E. 369, 369 (1902)).

187. 221 N.Y. at 353, 117 N.E. at 584.

188. *Id.* at 354, 117 N.E. at 584.

189. *Id.* at 355, 117 N.E. at 584.

190. *Id.* at 355-56, 117 N.E. at 584.

191. *Id.* at 355, 117 N.E. at 584.

192. 227 N.Y. 1, 124 N.E. 97 (1919).

193. The makeup of the court differed for the two decisions. Only Judges Chase and Collin sat on both panels. Judges Andrews, Cardozo, and Pound concurred in the *Bossert* opinion, but were not on the *Auburn* court. Chief Judge Hiscock and Judges Cuddeback and McLaughlin concurred in *Auburn*, but were not on the *Bossert* court. Judge Crane took no part in *Bossert* and concurred in *Auburn*. Judge Hogan concurred in *Bossert*, but did not vote in *Auburn*.

194. *Id.* at 12, 124 N.E. at 100.

195. *Id.* at 5, 124 N.E. at 98 (quoting Central Labor Union declaration of principles).

196. *Id.*

through its sufferings, might be forced to yield to the demands of the union."[197]

The *Auburn* court, in applying the balancing test implied by the *Bossert* court, stated that "[t]he right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others."[198] The union not only had refused to be employed by the plaintiff or its patrons, but also had attempted to induce all employers of labor in the general community to discontinue business relations with the plaintiff until it complied with the union's request for representation.[199] In distinguishing *Bossert*, the court held that a union could not seek to compel third parties to create a general exclusion and isolation of the business of the plaintiff.[200] Two separate elements appear to have been involved in the court's analysis: The general isolation of the primary employer and the application of pressure to third parties. By distinguishing between the facts in both cases, the court's rationale in applying the first element is more understandable, though of questionable soundness. In *Bossert* the union's action curtailed only the plaintiff's selling of materials to union contractors in New York City. In *Auburn*, on the other hand, the union's pressure curtailed the plaintiff's entire business. Although in *Auburn* the degree of harm was possibly greater, the harm still accrued to the employer that the union was seeking to organize—the primary employer. The court less clearly explained the second element, relating to harm caused the third party customers of the primary employer. In *Auburn* the court found that a more general type of pressure was exerted on the New York businessmen who had to ponder the union's destructive threat of "labor troubles" than on the New York City contractors in *Bossert* who faced only a union's mere refusal to handle a particular product.

Read together, the two cases clearly introduced a balancing concept through which the interests of the labor organization are weighed against the degree of harm both to the primary employer and to third parties. Justice Brandeis embraced both cases, distinguishing the refusal to work on certain products in *Duplex* and *Bossert* from boycotts, as in *Auburn*, "conducted not against a product but against those who deal in it [that] are carried out by a combination of persons not united by common interest but only by sympathy . . . ."[201] Since enactment of the Norris-LaGuardia Act, the courts have continued to apply the same kind of balancing of interests analysis suggested by Justice Brandeis. Scrutinized carefully, the decisions frequently cited in support of the proposition that the Norris-LaGuardia Act protects secondary activity[202] fit into categories in which either the labor organization had a special need to engage in the secondary activity to support its primary

197. *Id.* at 6, 124 N.E. at 98 (quoting findings of court on trial at Special Term).

198. *Id.* at 8, 124 N.E. at 99.

199. *Id.* at 9, 124 N.E. at 99.

200. *Id.* at 12, 124 N.E. at 100.

201. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 483 (1921) (Brandeis, J., with Holmes & Clarke, JJ., dissenting). Although Brandeis accepted and applied the balancing test in *Duplex*, he also might have been influenced by the nature of the defendant unions in *Duplex* and *Auburn*. In *Auburn* the defendants were not members of a single union as in *Duplex*, but rather were members of a federation of unions that had a less immediate interest in the dispute.

202. *See* notes 211-30 *infra* and accompanying text (discussing Norris-LaGuardia Act cases in which secondary activity protected).

action[203] or the interest of the party bringing the lawsuit was such that the party could not be characterized as completely neutral.[204] None of these cases involved a truly neutral plaintiff protesting against the activity of a union that merely had demonstrated its support for organized employees striking against a primary employer.

Before beginning a case-by-case analysis of these Norris-LaGuardia Act decisions, it would be useful to review the categories of secondary activity defined by the NLRB as permissible under section 8(b)(4) of the Labor-Management Relations Act.[205] This reference to the law that has developed under section 8(b)(4) is not suggested out of a desire to import section 8(b)(4) into the Norris-LaGuardia Act, although an argument can be made that such importation is appropriate.[206] Rather, section 8(b)(4) law aids in identifying the kinds of factors that might have influenced courts applying the Norris-LaGuardia Act to differentiate between permissible and impermissible concerted activity.

Under section 8(b)(4), the interpreter starts at the opposite extreme from the interpreter of the Norris-LaGuardia Act. As originally written, section 8(b)(4) seems to prohibit all forms of concerted activity, even primary activity.[207] The Norris-LaGuardia Act, on the other hand, seems to legitimize all forms of concerted activity, even secondary or tertiary activity. Although starting from opposite poles one need not end up at a point at which the impermissible becomes permissible and the permissible becomes impermissible, nevertheless the factors considered in drawing the line well might be the same.

Courts have interpreted section 8(b)(4) as permitting action that might be described as secondary in three types of situations. First, action with secondary effects has been permitted at a "common situs," where the activities of the primary and secondary employer were so interrelated as to

---

203. *See, e.g.*, Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369, 388-90 (1966) (secondary picketing permitted when common use of railroad terminal rendered impracticable separation of activities of primary and secondary employers); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 368 (1960) (Norris-LaGuardia Act not violated when union threatened to extend picketing of foreign ship to shore consignees of ship's cargo if consignees accepted delivery); Levering & Garrigues Co. v. Morrin, 71 F.2d 284, 287 (2d Cir. 1934) (secondary activity permitted when building subcontractors' employees refused to work for owners, architects, and contractors unless subcontracts provided for closed shop).

204. *See* Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of America v. Dixie Motor Coach Corp., 170 F.2d 902, 905-07 (8th Cir. 1948) (secondary picketing of plaintiff bus company allowed because plaintiff furnished depot facilities to primary company during strike); Alton & S. Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 2323, 2324 (D.D.C.) (secondary strikes and picketing permitted because railroad companies' participation in strike insurance program established common economic interest between primary and secondary companies), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978);

205. 29 U.S.C. § 158(b)(4) (1976).

206. *See* notes 245-87 *infra* and accompanying text (describing interplay between and judicial interpretation of Norris-LaGuardia Act and Labor-Management Relations Act).

207. As originally enacted, section 8(b)(4) made it an unfair labor practice for a labor organization "to engage in, or to induce or encourage the employees of any employer to engage in, a strike." Labor-Management Relations Act, ch. 372, § 8(b)(4), 61 Stat. 141. As amended in 1959, the section excluded primary picketing from its coverage. *See* note 257 *infra* (comparing original to amended language). In amending section 8(b)(4), the "Congress enacted 'no . . . sweeping prohibition' of secondary conduct." Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 387-88 (1969) (quoting Local 1976, United Bhd. of Carpenters & Joiners of America v. NLRB, 357 U.S. 93, 98 (1958)).

necessitate pressure against the secondary employer if the striking union was to put pressure on the primary employer.[208] Second, in situations described as "ambulatory picketing," striking employees have been permitted to follow the product of the primary employer through secondary customers or suppliers, as long as the target of their pressure clearly was the product rather than the enterprise of the secondary party.[209] Finally, primary disputants have been entitled to apply pressure to a secondary employer who lost his neutrality by becoming an "ally" of the primary employer by assisting him in his efforts to resist the strike.[210]

The "common situs" and "ambulatory" exceptions to section 8(b)(4) involve circumstances in which the labor organization must engage in the conduct to increase the likelihood that its strike against the primary employer will be effective. Prohibiting such activity seriously would undermine the primary strike weapon. The "ally" exception involves a secondary party who is not truly neutral because he is providing aid and comfort to the primary employer. Not only does the union have a direct interest in cutting off the aid and comfort that will undermine its primary strike, but also the secondary employer cannot claim to be completely innocent because he has taken sides in the dispute.

The same kinds of special circumstances have existed in many of the Norris-LaGuardia Act cases. *Jacksonville Terminal*,[211] for example, involved

---

208. The "common situs" doctrine protects secondary picketing at a common site when four conditions are met: (1) The picketing is strictly limited to times when the situs of the dispute is located on the premises; (2) the secondary employer is engaged in its normal business at the situs when the picketing occurs; (3) the picketing is limited to places reasonably close to the situs; and (4) the picketing discloses clearly that the dispute is with the primary employer. Sailors' Union (*Moore Dry Dock*), 92 N.L.R.B. 547, 549 (1950). *See generally* Lesnick, *supra* note 3, at 1366-74 (describing erosion of "primary situs" doctrine and development of common situs rationale).

The Supreme Court approved of the common situs doctrine and the *Moore Dry Dock* standards in Local 761, International Union of Electrical Workers v. NLRB, 366 U.S. 667, 677 (1961). Federal courts have continued to protect picketing under the common situs doctrine. *See, e.g.*, Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369, 388-90 (1966) (common situs picketing of railroad companies permitted when common use of terminal rendered impracticable separation of primary and secondary activities); Helgesen v. International Ass'n of Bridge, Structural & Ornamental Ironworkers Local 498, 548 F.2d 175, 183 (7th Cir. 1977) (picketing at job site lawful because totality of union's conduct failed to demonstrate secondary objective); New Power Wire & Electric Corp. v. NLRB, 340 F.2d 71, 74 (2d Cir. 1965) (common situs picketing met *Moore Dry Dock* requirements even though picketing continued when employer temporarily suspended work).

209. Allied Concrete, Inc. v. NLRB, 607 F.2d 827, 831 (9th Cir. 1979) (discussing Shultz Refrigerated Service, Inc., 87 N.L.R.B. 502 (1949)) (only way for union to put pressure on primary employer is to "picket between the headlights" of trucks as they made deliveries to customers).

210. *See* NLRB v. Business Machines Local 459 (*Royal Typewriter*), 228 F.2d 553, 558-59 (2d Cir. 1955) (employer with no prior dealings with struck employer but who takes farmed out work from struck employer is an ally), *cert. denied*, 351 U.S. 96 (1956); Douds v. Metropolitan Fed'n of Architects Local 231, 75 F. Supp. 672, 676-77 (S.D.N.Y. 1948) (increased work to prestrike subcontractor makes it an ally). *See also* Newspaper Production Co. v. NLRB, 503 F.2d 821, 827-28 (5th Cir. 1974) (allied relationship existed when companies conducted integrated business operations under common ownership and acted as single enterprise for collective bargaining purposes); NLRB v. Machines & Office Appliance Mechanics Conference Board Local 459, 228 F.2d 553, 558-59 (2d Cir. 1955) (allied relationship existed when independent employer knowingly assisted primary employer by meeting primary employer's contractual obligations during strike), *cert. denied*, 351 U.S. 962 (1956); International Bhd. of Teamsters, 128 N.L.R.B. 916, 919-20 (1960) (ally doctrine justified picketing of company's several warehouses because of common supervision and ownership, integrated operation, and physical proximity of warehouses).

211. 394 U.S. 369 (1969).

a dispute over common situs picketing. In that situation, if the union was not allowed to picket, it would have been prohibited from exerting pressure on the primary employer by picketing his business.[212] *Alton & Southern*[213] and the other strike insurance group cases[214] involved "allies"—plaintiffs who, as a result of their participation in the strike insurance plan, were "substantially aligned" with the primary employer and thus were no longer neutrals. Similarly, *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Dixie Motor Coach Corp.*[215] involved a plaintiff who arguably was an ally because he sold tickets for the primary disputant, furnished depot facilities, announced arrival of its buses, and provided porter services.[216] Even if the section 8(b)(4) prohibitions against secondary picketing applied to any of these employees and employers, the concerted action would have been permitted.

Another group of Norris-LaGuardia Act cases involved either "area standards" picketing[217] or organizational campaigns. In these situations, the unions considered it vital to exert pressure by curtailing business relationships between the primary employer and his suppliers and customers. In *Marine Cooks & Stewards v. Panama Steamship Co.*,[218] for example, the union picketed a foreign ship that employed a foreign crew at wages lower than the union's standards.[219] Similarly, in *Milk Wagon Drivers' Local 753 v. Lake Valley Farm Products, Inc.*[220] the union picketed retail stores that sold milk purchased from nonunion "vendors" who were undercutting union standards and wages.[221] In both *Wilson & Co. v. Birl*[222] and *Levering & Garrigues Co. v. Morrin*[223] unions attempted to organize open shop employees by threatening the primary employers' customers.[224] In all four cases, the interests of the union in protecting and promoting the welfare of its members were similar.

This fundamental interest justifies a union's applying pressure directly against an employer that uses nonunion labor. Because a strike against a nonunion employer is inherently more limited in its effect than a strike against a union employer, the union's interest also justifies a broader effort to apply pressure against customers and suppliers of the nonunion employer. A union employer suffers two types of harm from the primary action: Loss of service by his employees and curtailment of relations with those suppliers and

---

212. *Id.* at 361.

213. 99 L.R.R.M. 2323 (D.D.C.), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978).

214. Southern Ry. v. Brotherhood of Ry., Airline & S.S. Clerks, 458 F. Supp. 1189 (D.S.C. 1978); Chicago Transp. Co. v. Brotherhood of Ry., Airline & S.S. Clerks, 99 L.R.R.M. 3072 (N.D. Ill. 1978).

215. 170 F.2d 902 (8th Cir. 1948).

216. *Id.* at 905.

217. Area standards picketing is designed "to induce [an employer] to raise its wage rates to the union scale prevailing in the area." Houston Bldg. & Constr. Trade Council, 136 N.L.R.B. 321, 323 (1962).

218. 362 U.S. 365 (1960).

219. *Id.* at 367.

220. 311 U.S. 91 (1940).

221. *Id.* at 94-96.

222. 105 F.2d 948 (2d Cir. 1939).

223. 71 F.2d 284 (2d Cir. 1934).

224. *See* 105 F.2d at 949 (union persuaded customers not to accept plaintiff's meat deliveries); 71 F.2d at 285 (union threatened owners, architects, and general contractors who might let subcontracts to plaintiff for erection of structural iron and steel).

customers whose employees will not cross the picket line.[225] If his unionized employees completely stop working, the union's efforts to curtail the employer's relations with suppliers and customers will prove to be of only marginal significance. A nonunion employer, however, only suffers the harm resulting from the curtailment of his relations with customers and suppliers because his nonunion employees are likely to continue working despite the secondary boycott. Thus, the inevitable objective of "area standards" picketing or an organizational strike is to induce customers and suppliers to reduce their trade with the primary disputant. In precisely this type of situation, Brandeis, Frankfurter, and Greene considered secondary action most necessary to serve fundamental union interests. Permitting secondary action in this type of situation, however, does not suggest that it should be permitted when the primary employer is organized and the union, because it has the ability to cause its members to cease work, has a more attenuated interest in interrupting commercial relations with other employers.

United States v. Hutcheson,[226] *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.,*[227] and *Taxi-Cab Drivers Local Union 889 v. Yellow Cab Operating Co.*[228] represent a third category of Norris-LaGuardia Act cases. Each dispute involved both a primary strike against an organized employer and secondary pressure against a true neutral at a location where the primary employer's presence was minimal.[229] Thus, the common situs, ambulatory, ally, and organizational justifications for the picketing did not exist. Even so, these cases do not necessarily support the proposition that the Act deprives the neutral employer of a remedy, for in none of the three cases did the secondary employer bring suit.[230]

The Norris-LaGuardia Act divests the courts of jurisdiction only over "a case involving or growing out of a labor dispute."[231] Under our scheme of jurisprudence, a case exists only in relation to the competing claims of adversaries.[232] When both the plaintiff and the defendant are the primary disputants, the proscription against jurisdiction under the Act clearly applies. If the neutral, secondary employer is the plaintiff, however, only one side of the case involves a labor dispute. It therefore seems less clear that the Act should apply.

---

225. *See generally* Lesnick, *supra* note 3.

226. 312 U.S. 219 (1941).

227. 126 F.2d 931 (10th Cir. 1942).

228. 123 F.2d 262 (10th Cir. 1941).

229. *See* 312 U.S. at 228 (union struck primary employer, picketed its tenant, and urged union members to avoid purchasing primary employer's beer); 126 F.2d at 932 (union picketed plaintiff's loading docks and threatened to strike if defendant firms continued to handle freight destined for plaintiff's lines); 123 F.2d at 264-65 (union struck cab company and encouraged hotel to cease business with cab company by threatening strike).

230. In *United States v. Hutcheson* the government brought a criminal action against the union. 312 U.S. at 220 (argument before Court of Assistant Attorney General Arnold). The primary employer brought suit in both Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc., 126 F.2d at 932, and Taxi Cab-Drivers Local Union 889 v. Yellow Cab Operating Co., 123 F.2d at 265.

231. 29 U.S.C. § 101 (1976).

232. *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 357 (1911) (litigants' claims brought before courts for determination); Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892) ("friendly" suits not heard by courts); Lord v. Veazie, 49 U.S. (8 How.) 250, 255 (1850) (suit not maintainable if no controversy or adverse interests).

An equitable analysis, perhaps more appealing than a narrow construction of "case," also would distinguish a lawsuit brought by the primary employer from one brought by the secondary, neutral employer. When the primary employer brings suit, he not only is seeking to curtail the arsenal of weapons that can be brought to bear against him, but also is attempting to tip the balance of power in his favor. For the courts to permit such an action would be directly at odds with the policy intended to allow unions to use a full panoply of pressure against primary employers. When a neutral brings the action, however, he is not attempting to tilt the balance of power in the labor dispute. Rather, he is seeking protection from a harm arising out of a situation not of his own making and frequently beyond his control. An extension of the "clean hands" doctrine in equity[233] should grant his plea more sympathetic consideration.

The major cases involving application of the Norris-LaGuardia Act to secondary picketing situations support the decisions in *Consolidated Rail Corp. v. Brotherhood of Railway, Airline & Steamship Clerks (Conrail)*[234] and *Terminal Railroad Association v. Brotherhood of Railway, Airline & Steamship Clerks*,[235] in which the courts protected the interchange group railroads.[236] Each of these factual situations involved a balance of interests more favorable to the union than was present in any of the major cases previously decided. The Norris-LaGuardia Act in both its inception and application requires a balancing of the interests of the union and the party seeking injunctive relief. This approach fundamentally differs from the tack adopted by the British courts in *Express Newspapers Ltd. v. McShane*[237] and preferred by BRAC in the 1978 railroad litigation.

Tort doctrine, as applied by the New York courts in the cases cited by Justice Brandeis,[238] provides the foundation for this balancing-of-interests approach. According to this approach, courts will permit an interference with property and contractual rights of another only when an adequate justification can be demonstrated. The greater the interference, the greater must be the justification. When employees are engaged in concerted activity, their primary motivation must be to further their self-interest, rather than to injure employers or others against whom a boycott is directed. Thus, secondary action aimed solely at the product of the primary employer rather than at other enterprises should be held permissible, particularly when the union's objective is to cause its members involved in the primary dispute to cease handling the product of the primary employer. Presented with such a factual situation in *Duplex Printing Press Co. v. Deering*,[239] Justice Brandeis made much of the self-interest of the union members employed by secondary

---

233. Under the "clean hands" doctrine, a party may be protected when it has "acted fairly and without fraud or deceit as to the controversy in issue." Precision Instrument Mfr. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814-15 (1945).

234. 99 L.R.R.M. 2323 (D.D.C.), *aff'd*, No. 78-1607 (D.C. Cir. Sept. 15, 1978).

235. 458 F. Supp. 100 (E.D. Mo. 1978), *appeal dismissed as moot*, No. 78-17609 (8th Cir. Mar. 16, 1979).

236. *See* notes 85-113 *supra* and accompanying text (discussing *Conrail* and *Terminal Railroad*).

237. *See* notes 139-62 *supra* and accompanying text (discussing *Express Newspapers*).

238. Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919); Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917). For an analysis of Justice Brandeis' discussion of these cases, see notes 179-201 *supra* and accompanying text.

239. 254 U.S. 443 (1923).

employers in the success of the primary strike.[240] The employee's self-interest is especially clear: If a union's primary, organizational effort is unsuccessful, the employee's firm might suffer a disadvantage in the marketplace and the security of the union will be threatened.

Moreover, when the secondary activity also is directed at the product of the struck employer, the employer only has a weak countervailing interest. The immediate customer of the primary disputant is the only third party injured, and then only in proportion to the importance of the struck product to his own enterprise. Additionally, when the primary dispute involves an organizing effort or a protest over substandard terms of employment, the secondary employer might have an interest in the primary dispute because of the benefit that results from paying lower prices for the primary employer's product. In other cases, when the secondary pressure is aimed at an entire enterprise and not just at the struck product, neither the secondary employer, as in the case of a supplier rather than a customer, nor the persons that the union seeks to induce to meet its demands have a connection with or interest in the primary dispute, so the balance of competing interests differs. In these instances, less reason exists for finding sufficient union self-interest to justify the secondary activity.

Because the interests of the secondary employer and the employees can be examined independently, a completely neutral secondary employer could be protected against secondary activity regardless of how strong are the interests of the employees in exerting pressure against him. Such an independent analysis of the secondary employer's interest is most analogous to the "ally doctrine" developed under section 8(b)(4). As suggested by the *Terminal Railroad* court, once an employer is considered neutral, he is protected from secondary activity regardless of the interests of the employees.[241]

Certain practical advantages, including predictability, result if the competing interests are considered independently. An employer not involved in the primary dispute, for example, can be relatively certain about how to maintain his neutrality. By remaining neutral, he can be sure that he will not be subjected to secondary action, no matter how imaginatively or persuasively the employees involved in the primary dispute characterize their interest in putting pressure on him.[242]

---

240. *Id.* at 480-83 (Brandeis, J., with Holmes & Clarke, JJ., dissenting).

241. *See* notes 103-13 *supra* and accompanying text (analyzing *Terminal Railroad*).

242. Indeed, after this article was written, the United States Court of Appeals for the Eighth Circuit virtually adopted the approach suggested by the author. In Ashley, Drew & Northern Ry. v. Transportation Union, 104 L.R.R.M. 3105 (1980), the court affirmed a district court's decision to grant a preliminary injunction in a dispute between the United Transportation Union (UTU) and the Ashley, Drew & Northern Railway Company (AD&N). The Eighth Circuit noted that the defendant union had no controversy with AD&N over either representation or the terms and conditions of employment of its employees. The court held that because the case did not arise or grow out of a labor dispute, it was beyond the restrictions of the Norris-LaGuardia Act. *Id.* at 3112.

Analytically, *Atlantic Coastline* and the interchange cases discussed above developed the standard adopted by the Eighth Circuit: "In short the evidence before the district court was that AD&N was not Rock Island's ally . . . . Because UTU has failed to establish a substantial connection between its labor disputes and its picketing of the premises of AD&N, the 'economic self-interest test' mandates the conclusion that the picketing did not grow out of the labor dispute and therefore was not protected by the Norris-LaGuardia Act." *Id.* at 3110-11 (footnote omitted). The court rejected the literal interpretation of Norris-LaGuardia urged on it by the UTU because such an interpretation would lead to "absurd

A logical flaw exists, however, in a policy that purports to shield nonparties based on their neutrality alone. Any strike action will hurt a neutral by curtailing the activities of the primary employer.[243] If public policy does not protect against injury to customers of the primary employer who are deprived of his product, why should it shield a nonparty employer that merely proclaims his neutrality? Moreover, such an independent analysis is inconsistent with the Norris-LaGuardia Act cases involving organizational campaigns. In those situations, the interest of the union in curtailing economic relations with suppliers and customers was strong enough to justify pressure against wholly neutral third parties.

An integrated balancing of the interests of the union against the interests of the secondary employer makes more sense. This approach would distinguish between an organizational or area standards dispute, in which the union's interest in curtailing trade with the primary, nonunion disputant is greater, and a dispute with union employers over contract terms or grievances, in which the union's interest is less important because it can directly picket the primary employer. Furthermore, certain types of secondary pressure aimed strictly at the products of the primary employer might be permitted, even though a neutral might be injured. In those instances, the injury to the neutral would be less than if the union directed pressure against the entire enterprise of the secondary employer rather than merely against those parts of the enterprise involving the struck product. Secondary pressure also should be legal in situations either when the secondary employer legitimately would be exposed to economic pressure if he aligned himself with the primary employer or when his operations are integrated with the primary employer's operations at a common situs.

IV. IMPLYING A SECONDARY PRESSURE LIMITATION: *Boys Markets* IN REVERSE

The balancing test discussed in the preceding section comports both with the history of the Norris-LaGuardia Act and with a clear policy predisposition to contain strike action within reasonable bounds. This approach, as applied by district courts in the 1978 BRAC litigation, permitted secondary action to be enjoined in a manner consistent with the proscriptions of the Norris-LaGuardia Act. This section suggests that an independent analytical approach also would have permitted the 1978 secondary picketing to be enjoined by accommodating the Norris-LaGuardia Act with both the labor policies expressed in the Railway Labor Act[244] and the proscription against

---

consequences." *Id.* at 3111. The *Ashley* court apparently selected an interpretation of *Atlantic Coastline* that requires independent examination of the neutrality of the secondary employer, rather than an interpretation requiring a balancing between the interests of the secondary employer and the economic self-interest of the union.

The *Ashley* court also expressed sympathy with the proposition advanced below in this article that courts should accommodate the Norris-LaGuardia Act with section 8(b)(4) of the Labor-Management Relations Act. Having found that the Norris-LaGuardia Act did not apply, however, the court did not have to resolve this issue. *Id.* at 3108 n.6.

243. *See generally* Lesnick, *supra* note 3.

244. 45 U.S.C. § 151 (1976). One of the central purposes of the Act is "to avoid any interruption to

secondary picketing embodied in section 8(b)(4) of the Labor-Management Relations Act.[245]

In 1978, BRAC argued that under *Jacksonville Terminal* a union that exhausted the procedures of the Railway Labor Act with respect to one railroad could interrupt the operations of any carrier as long as the union had an economic interest for doing so. An alternative argument that comports better with the purpose of the Act can be made: The same necessity for avoiding any interruptions to commerce that warrants restrictions on the right to initiate a strike also warrants restricting the scope of disruptive strike activity.[246]

In none of the 1978 railroad cases did any party contend that BRAC, having exhausted the Railway Labor Act procedures with respect to the N & W, secured the right to strike the N & W. Arguably, however, satisfying the procedures with respect to one carrier does not negate the policies of the Act with respect to other, uninvolved carriers. The elaborate mechanisms of the Railway Labor Act are designed to discourage and delay strike action against the primary employer, the party with whom the dispute exists. The drafters hoped that the delay would encourage the parties to settle their grievances, thereby sparing the public from the effects of a strike. The desire to minimize these adverse effects from strikes supports limiting the scope of strikes when they do occur. If delay is appropriate with respect to a primary disputant, containment is equally appropriate with respect to uninvolved railroads. The same Railway Labor Act policies that required BRAC to bargain with the N & W, however, do not support the notion that, having won the right to strike the N & W, BRAC could strike *any* railroad.

---

commerce or to the operation of any carrier engaged therein . . . ." *Id.* § 151(a). Furthermore, as the Act provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carriers and the employees thereof.

Id. § 152.

245. 29 U.S.C. § 158(b)(4) (1976).

246. The Railway Labor Act contains comprehensive provisions governing procedures that must be followed, *inter alia*, in handling proposed changes in collective agreements covering rates of pay, rules, and working conditions, 45 U.S.C. §§ 155-158, 160 (1976), in handling grievances or disputes about the interpretation or application of agreements, *id.* §§ 152 Sixth, 153, and in handling representation disputes, *id.* § 151a Ninth. Adherence to these procedures may be enforced by injunction, notwithstanding the Norris-LaGuardia Act. *See* Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570, 582 (1971) (sections 155-58, 160); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 42 (1957) (sections 152 Sixth, 153).

With respect to "major disputes," those involving the creation of agreements for the future, Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723 (1945), the Act imposes on carriers and their employees a lengthy and time-consuming procedure involving direct negotiations, mediation, proffer of voluntary arbitration, and emergency board procedures, all of which must be exhausted either before a union may strike a carrier or the carrier may take economic action against the union. Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369, 378 (1969). In addition, the Act imposes a judicially enforceable duty to bargain in good faith. Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570, 574-75 (1971). With respect to "minor disputes," those involving disputes over grievances or the interpretation of agreements, strikes under the Railway Labor Act are forbidden. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 39 (1957).

The Supreme Court has considered the relationship between the public's interest in continued operation of a railroad and the right of employees to strike once the Railway Labor Act procedures have been exhausted. In *Brotherhood of Railway, Airline & Steamship Clerks v. Florida East Coast Railway*[247] the railroad, consistent with its duty under the Act, had continued to operate during a strike. The Court emphasized that such a carrier "owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides . . . ."[248] The same reasoning supports a contention that the policies of the Railway Labor Act continue to require the protection of the public's interest in uninterrupted transportation, even after the right to strike becomes available under the procedures of the Act.

In settling the various disputes brought under the Railway Labor Act by carriers and unions, the courts have recognized that injunctions often are appropriate remedies and, indeed, are the only way to promote the central purpose of the Act—avoidance of interruptions to commerce or to the operation of *any* rail carrier. This overriding purpose of the Act is served by giving a neutral railroad injunctive relief to prevent a strike on another carrier from spreading to its facilities.[249] Thus, whatever doubt might exist about the construction of "labor dispute" under the Norris-LaGuardia Act, Congress has established a policy against secondary picketing aimed at railroads.

Furthermore, regardless of the original reach of the Norris-LaGuardia Act, the 1959 amendments to section 8(b)(4) of the Labor-Management Relations Act[250] established a clear congressional intent that secondary picketing aimed at railroads should be limited. Because the regulatory scheme of the Railway Labor Act requires judicial rather than administrative enforcement of congressional policy, vindication of this policy requires that the Norris-LaGuardia Act and the amended section 8(b)(4) be accommodated to permit injunctions against secondary picketing aimed at railroads.

In 1947, concerned that secondary picketing had become difficult to control under the vague "involving or growing out of a labor dispute" standard in the Norris-LaGuardia Act,[251] Congress added section 8(b)(4) to the Labor-Management Relations Act.[252] This section makes secondary picketing an unfair labor practice.[253] Furthermore, section 10 of the Act authorizes the NLRB to seek injunctive relief against such picketing.[254] Because railroads are not "employers" and railway workers are not "employ-

247. 384 U.S. 238 (1966).

248. *Id.* at 245.

249. Statutes should be construed by reference to policy. As Professor Frankfurter sagely noted, "[s]tatutory construction in doubtful cases . . . is a choice among competing policies as starting points for reasoning." FRANKFURTER & GREENE, *supra* note 39, at 169.

250. 29 U.S.C. § 158(b)(4) (1976).

251. 29 U.S.C. § 101 (1976).

252. 29 U.S.C. § 158(b)(4) (1976).

253. *Id.*

254. *Id.* § 160.

ees" under the Labor-Management Relations Act,[255] however, the section initially did not apply to secondary picketing aimed at railroads.[256]

By expanding the scope of section 8(b)(4) in 1959, however, Congress manifested an intent that railroads, like other industries, should be protected against secondary activity.[257] As the Senate Report accompanying the legislation indicates, Congress was concerned with the presence of "loopholes" in section 8(b)(4).[258] In amending that section, Congress specifically intended to bring railroads within the protection against secondary activity because, as the Senate Report noted, secondary boycotts involving railroad groups "are just as much against the public interest as boycotts by anyone else."[259]

The Supreme Court's four-to-three opinion in *Jacksonville Terminal*[260] appears to require a contrary conclusion. Several factors discussed above, however, suggest that the decision can be read narrowly. Although the Court seemed willing to read section 8(b)(4) as including Railway Labor Act employees within the class protected against secondary pressures,[261] it concluded that the NLRB does not have primary and exclusive jurisdiction when "traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act."[262] Having determined that *Jacksonville Terminal* presented "a railway labor dispute, pure and simple,"[263] the Court concluded that section 8(b)(4) had "no *direct* application to the . . . case."[264] Because the issue presented was whether a state court could enjoin a secondary boycott, the Court did not pursue this line of reasoning far enough to permit a determination of whether it intended the protection of railroads to be entirely unenforceable under section 8(b)(4). Although the Court suggested that the common situs picketing complained of might be permissible under section 8(b)(4) and therefore that a state court injunction would conflict with the national labor policy,[265] the Court did not have to define the boundary beyond which, consistent with the Norris-LaGuardia Act, secondary activity against a railroad can be proscribed by a federal court. Nonetheless, the Court strongly suggested that some types of picketing could be enjoined not-

---

255. 29 U.S.C. § 152 (1976).

256. Because railroad labor disputes prior to 1947 had not involved significant secondary picketing, Congress did not consider the problem explicitly addressed by section 8(b)(4) important in the context of railroad labor disputes.

257. Section 8(b)(4), as amended by the Labor-Management Reporting and Disclosure Act of 1959, substituted "(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 (ii) to threaten, coerce, or restrain *any person engaged in an industry affecting commerce* . . . ." in place of "to engage in, or to induce or encourage the employees of any employer to engage in, a strike," ch. 372, § 8(b)(4), 61 Stat. 141 (1947). 29 U.S.C. § 158(b)(4) (1976) (emphasis added).

258. S. REP. NO. 187, 86th Cong., 1st Sess. 80, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2384.

259. *Id.; see* United Steelworkers of America v. NLRB, 376 U.S. 492, 501 (1964) (1959 amendments intended "to extend to railroads the same protections which other employers enjoyed").

260. 394 U.S. 369 (1969).

261. *See id.* at 377 (citing United Steelworkers of America v. NLRB, 376 U.S. 492, 501 (1964)).

262. 394 U.S. at 376-77.

263. *Id.* at 377.

264. *Id.* (emphasis added).

265. *Id.* at 389-90.

withstanding the Norris-LaGuardia Act.[266] Preferring to leave the task to Congress, however, the Court declined to define what types of picketing can be enjoined.[267]

In *Marriott In-Flite Services v. Local 504, Air Transport Division*[268] the Court of Appeals for the Second Circuit closely examined the Supreme Court's reasoning in *Jacksonville Terminal.* An action for damages rather than for an injunction, the case involved a primary, major dispute between two Railway Labor Act parties: KLM Royal Dutch Airlines (KLM) and Local 504 of the Transport Workers of America (Local 504), representing KLM's employees.[269] After a six-month "cooling-off" period invoked by the National Mediation Board, KLM contracted its food service to Marriott In-Flight Services, a Labor-Management Relations Act employer.[270] In response, Local 504 picketed Marriott. Alleging that this action violated section 8(b)(4), Marriott sought damages pursuant to section 303(b) of the Labor-Management Relations Act.[271] The case reached the court of appeals after the district court entered summary judgment, having dismissed Marriott's complaint on the ground that section 8(b)(4) did not protect against secondary picketing by Railway Labor Act employees.[272] Concluding that Congress clearly intended to prohibit secondary activity by railway labor organizations and that, in amending section 8(b)(4) in 1959, Congress did not intend to establish an unenforceable right, the court of appeals reversed and remanded.[273]

In reaching its decision, the Court of Appeals for the Second Circuit distinguished *Jacksonville Terminal* as involving a "pure" Railway Labor Act dispute between railroad employers and employees, whereas *Marriott* involved a mixed dispute between railway employees and a nonrailway employer.[274] Furthermore, the court dismissed a footnote in *Jacksonville Terminal*[275] as weak grounds "for a major inroad into the national labor policy against secondary boycotts."[276] Because of the mixed nature of the dispute, the court did not have to hold that secondary picketing violates the national labor policy in a "pure" Railway Labor Act context. Nonetheless, the court's reasoning clearly supports the conclusion that section 8(b)(4) principles should guide judicial consideration of secondary picketing in such a context.

---

266. *See id.* at 389 (secondary employers "not necessarily protected against picketing aimed directly at their employees").

267. *Id.* at 392-93. In footnote 10 and throughout the opinion, the Court suggested that railroads have no way to enforce their section 8(b)(4) rights. These statements, however, should not be given much weight. *See* Marriott In-Flite Services v. Local 504, Air Transport Division, 557 F.2d 295, 299 (2d Cir. 1977) (characterizing footnote 10 as "ambiguous dictum").

268. 557 F.2d 295 (2d Cir. 1977).

269. *Id.* at 295.

270. *Id.* at 296. Prior to the labor dispute, KLM employees prepared the company's meals in its commissary at Kennedy Airport. *Id.* at 295-96.

271. *Id.* at 296.

272. Marriott In-Flite Services v. Local 504, Air Transport Division, 418 F. Supp. 609, 613 (E.D.N.Y. 1976).

273. 557 F.2d at 297-98, 300.

274. *Id.* at 300 & n.11.

275. *See* note 267 *supra* (describing footnote 10 in *Jackson Terminal* and certain other textual references as dicta).

276. 557 F.2d at 299.

Marriott and *Jacksonville Terminal* directly support only the proposition that the Norris-LaGuardia Act permits injunctions in cases involving a non-Railway Labor Act party. Neither case, however, suggests that Congress believed secondary pressure was any less harmful or unfair when directed at a Railway Labor Act neutral by a Railway Labor Act labor organization. Moreover, the *Marriott* holding that section 8(b)(4) protects Labor-Management Relations Act employers against secondary picketing by Railway Labor Act employees, when combined with the Supreme Court's acknowledgement that section 8(b)(4) protects Railway Labor Act employers against secondary picketing by Labor-Management Relations Act employees,[277] leads to the ineluctable conclusion that Congress also intended that section 8(b)(4) principles be applied to protect Railway Labor Act employers from secondary picketing by Railway Labor Act employees. *Jacksonville Terminal* simply bars the use of the NLRB's "unfair labor practice" mechanism in "pure" Railway Labor Act disputes. The case does not preclude the use of judicial remedies to enforce the section 8(b)(4) protection in all cases. In *Jacksonville Terminal* the Supreme Court was reluctant to fashion a remedy that would involve the judiciary in defining the scope of permissible strike activity. Moreover, the Court did not have to make such a determination because the common situs picketing complained of probably would have been permissible under section 8(b)(4).

Congress has delegated to the courts the task of fashioning remedies for illegal conduct involving pure railroad labor disputes. *Jacksonville Terminal* bars access to the administrative "unfair labor practice" mechanism established for Labor-Management Relations Act employers. The decision would permit state injunctive relief, but only according to federal law, which, in the absence of congressional action, must be developed by the courts. Although the Norris-LaGuardia Act does not preclude damage actions, damages are difficult to prove after the fact and can be awarded only after the harm to the neutral employer and its customers has occurred.[278] Considered together and read broadly in light of the regulatory philosophy of the Railway Labor Act, *Jacksonville Terminal* and *Marriott* support the conclusion that injunctive relief also should be available to prevent secondary picketing. This conclusion is buttressed by Justice Harlan's majority opinion in *Chicago & North Western Railway v. United Transportation Union*,[279] a decision handed down two years after his plurality opinion in *Jacksonville Terminal*. In the later opinion, Justice Harlan suggested that the federal regulatory approach to rail labor relations requires development of equitable remedies.[280]

The regulatory machinery for applying and enforcing the national labor policy with respect to railroad employers and employees differs greatly from the machinery for nonrailroad employers and employees. With respect to the latter, the NLRB has exclusive jurisdiction to apply the national policy.[281] With respect to Railway Labor Act employers, however, a court of equity is

277. United Steelworkers of America v. NLRB, 376 U.S. 492, 501 (1964).

278. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 248-49 & n.17 (1970).

279. 402 U.S. 570 (1971).

280. *See id.* at 581-84 (in providing relief, Court must accommodate conflicting purposes of Norris-LaGuardia Act and Railway Labor Act).

281. Amazon Cotton Mill Co. v. Textile Workers of America, 167 F.2d 183, 186 (4th Cir. 1948); Afran Transport Co. v. National Maritime Union, 169 F. Supp. 416, 422 (S.D.N.Y. 1958).

entitled to develop remedies when an administrative remedy is unavailable.[282] In *Chicago & North Western Railway v. United Transportation Union*,[283] for example, the Supreme Court expressly sanctioned judicial enforcement of section 2 First of the Railway Labor Act, a right that the National Mediation Board could not enforce administratively.[284] As Congress intended in 1959, a federal court should be entitled to fashion an appropriate remedy to vindicate the right of neutral rail carriers to be protected from secondary picketing.

The Supreme Court's opinion in *Boys Markets, Inc. v. Retail Clerks Local 770*[285] supports the position of this article that the Norris-LaGuardia Act prohibition against injunctive relief should be accommodated with the general labor policy that prevails today. Admittedly, the decision can be read as supporting the proposition that the national labor policy favors arbitration. That policy, however, opposes secondary picketing as much as it favors arbitration.

The secondary picketing issue presents the converse of the arbitration issue in *Boys Markets*. In that decision, the Court was willing to accommodate the Norris-LaGuardia Act to the need for equitable remedies in order to protect a policy preference for arbitration.[286] Although the only explicit statutory provision for arbitration exists in the Railway Labor Act, the Court inferred the existence of a general policy preference for arbitration and applied this policy preference to non-Railway Labor Act employers.[287] Similarly, federal courts can accommodate the Norris-LaGuardia Act to an explicit national policy against secondary picketing set forth in the Labor-Management Relations Act.

V. APPLICATION TO OTHER SECTORS

As noted at the outset of this article, although neither railroads nor airlines are covered by the explicit secondary picketing provisions of the Labor-Management Relations Act, they are subject to the provisions of the Railway Labor Act. Two other major sectors of the economy, agricultural employees and the employees of state and local governments, however, are not covered by any federal labor legislation.[288] In recent years, Congress has considered specific statutes for each group.[289] Unless Congress enacts legislation applicable to these sectors, federal courts probably will have little opportunity to consider whether the Norris-LaGuardia Act provides jurisdiction for enjoining secondary activity within these two sectors. When courts do decide cases involving secondary picketing arising in the agricultural and public sectors,

---

282. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 207 (1944); Virginia Ry. v. System Fed'n No. 40, 300 U.S. 515, 545 (1937).

283. 402 U.S. 570 (1971).

284. *Id.* at 581.

285. 398 U.S. 235 (1970).

286. *Id.* at 250-52.

287. *Id.* at 251-52.

288. *See* 29 U.S.C. § 152 (1976) (excluding state or political divisions from definition of "employer" and agricultural laborers from definition of "employee").

289. *See* Elisburg, *Legislative Outlook for Public Sector Labor Relations*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 24 & n.15 (A. Knapp ed. 1977) (discussing proposed public-sector legislation); 84 DAILY LAB. REP. (BNA) A-1 (Apr. 30, 1979) (discussing proposed agricultural-employee legislation).

however, they will have to deal with many of the same issues involving interpretation of the Norris-LaGuardia Act that confronted courts in suits arising in the railroad industry.

The inapplicability of a specific federal secondary picketing statute leaves these sectors vulnerable to some of the same uncertainties that confronted railroad management and BRAC representatives in the 1978 railroad litigation. Federal courts applying federal law will not necessarily resolve uncertainties with respect to these sectors. Although federal courts have jurisdiction over strikes involving Railway Labor Act employers,[290] the basis for federal question jurisdiction over agricultural or state and local labor relations is not apparent under present federal law.[291] In suits founded on diversity of citizenship,[292] however, federal courts might have the opportunity to consider whether the Norris-LaGuardia Act permits enjoining secondary activity. In such a situation, a federal court would have to weigh the possibly competing federal policies of the Norris-LaGuardia Act against state labor statutes.[293]

Regardless of the likelihood of an early federal judicial effort to deal with the problem of secondary pressure outside of the railroad industry, states must grapple with the problem in areas where state policy has not been preempted by existing federal legislation.[294] Indeed, states already have begun formulating statutes dealing with secondary pressure in the agricultural sector. California, for example, has enacted the California Agricultural Labor Relations Act of 1975,[295] which creates a comprehensive regulatory scheme.[296] The statute includes a secondary pressure provision significantly different from section 8(b)(4) of the Labor-Management Relations Act.[297] It permits broader action against a secondary employer who deals in products of

---

290. The Supreme Court has held that under two sections of the Judicial Code, 28 U.S.C. §§ 1331, 1337 (1976), federal courts have original jurisdiction in cases brought under the Railway Labor Act. *See* International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 696 (1963) (federal court has jurisdiction under § 1331 if jurisdictional amount satisfied and, "in any case," under § 1337).

291. Federal question jurisdiction might arise with respect to state secondary picketing provisions that arguably infringe on federal constitutional rights of free speech. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 303 (1979) (challenge to provision of Arizona Agricultural Employment Relations Act restricting consumer publicity states a justiciable claim).

292. 28 U.S.C. § 1332 (1976).

293. The Norris-LaGuardia Act does not affect state court jurisdiction. Ford v. Boeger, 362 F.2d 999, 1005 (8th Cir. 1966); American Dredging Co. v. Local 25, Marine Div., 338 F.2d 837, 852 (3d Cir. 1964). Labor cases can be removed to the federal courts, however, when diversity of citizenship exists. *See* Smith v. Baltimore & Oh. R.R., 144 F. Supp. 869, 872 (S.D. Oh. 1956) (suit brought under Railway Labor Act and founded on diversity of citizenship). A federal court, in a suit founded on diversity of citizenship, might be able to consider the applicability of the restrictions of the Norris-LaGuardia Act on its jurisdiction to issue an injunction in light of the state policies it is bound to apply under Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

294. States are preempted from regulating aspects of labor relations already regulated by federal law. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 194-95 n.24 (1978). In the absence of federal legislation regulating agricultural and public employee labor relations, such preemption would not occur.

295. CAL. LAB. CODE §§ 1140-66 (West Supp. 1976).

296. *See generally* Note, *Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act*, 29 STAN. L. REV. 277 (1977); Comment, *Consumer Picketing: Reassessing the Concept of Employer Neutrality*, 65 CAL. L. REV. 172 (1977) [hereinafter Comment, *Consumer Picketing*].

297. CAL. LAB. CODE § 1154(d) (West Supp. 1976). *See* Comment, *Consumer Picketing*, *supra* note 296, at 212-18 (California provision broader than § 8(b)(4), for example, because it affirms right to engage in consumer picketing).

the primary employer than is permissible under the *Tree Fruits* doctrine articulated by the Supreme Court.[298] Nevertheless, the California statute does not permit unlimited secondary pressure generally aimed at the secondary employer's business. One commentator has suggested that the California approach is a desirable step toward a balancing concept that determines the lawfulness of consumer picketing by assessing whether the economic impact of the picketing on the secondary employer is disproportionate to his involvement with the primary employer.[299]

Unlike the California statute, the Arizona Agricultural Employment Relations Act[300] contains prohibitions against secondary boycotts and restrictions on consumer picketing.[301] A challenge to the consumer picketing provisions of the Act[302] brought under the first and fourteenth amendments to the United States Constitution[303] already has led to a Supreme Court decision, *Babbitt v. United Farm Workers National Union.*[304] The Court did not decide the constitutional challenge to the statute, however, because it determined that the district court should have abstained until state courts could interpret certain ambiguous provisions of the Act.[305]

The problem of secondary pressure might arise less frequently in the state and local government sector. Unions engage in secondary activity to reinforce their economic action against primary employers. If the primary action alone is sufficient to bring the primary employer to terms, secondary activity is unlikely. As public sector bargaining matures and some employers endeavor to accept a strike without capitulating,[306] however, unions might have an economic incentive to explore the limits of permissible secondary activity. Because all state or local employers in a single jurisdiction derive their authority from the same sovereign, they might not be considered as separate employers for purposes of secondary activity. If so, judicial treatment of that problem might be made more difficult. Nonetheless, the possibility exists that employees of an entity of state or local government might seek to make their strike against that entity more effective by extending pressure to employers either in another jurisdiction or in the private sector.[307]

---

298. *See* NLRB v. Fruit & Vegetable Packers Local 760 (*Tree Fruits*), 377 U.S. 58, 71 (1964), *rev'g* 308 F.2d 311 (D.C. Cir.), *rev'g* 132 N.L.R.B. 1172 (1961) (under § 8(b)(4), picketing of secondary business legally used only for persuading customers not to buy struck product). The *Tree Fruits* doctrine does not, however, protect secondary picketing that threatens neutral parties with ruin or substantial loss. *See* NLRB v. Retail Store Employees Union Local 1001, 48 U.S.L.W. 4796, 4799 (U.S. June 20, 1980) (secondary picketing prohibited when plaintiff companies sold only primary employer's product and services associated with it).

299. Comment, *Consumer Picketing, supra* note 296, at 218.

300. ARIZ. REV. STAT. ANN. §§ 23-1381 to 23-1395 (West Supp. 1976).

301. *Id.* § 1385.

302. ARIZ. REV. STAT. ANN. § 23-1185(7) (West Supp. 1976); *id.* § 23-1185(8).

303. U.S. CONST. amend. I, XIV.

304. 442 U.S. 289 (1979).

305. *Id.* at 311-13.

306. For a discussion of the response of New York City to a recent transit strike by municipal employees, see Schumacher, *Leaders in Business Back City in Strike,* N.Y. Times, Apr. 10, 1980, § A, at 1, col. 4; Serrin, *The Transit Talks Labyrinth,* N.Y. Times, Apr. 5, 1980, § A, at 1, col. 4.

307. Strikers, for example, might seek to extend their pressure across state lines in metropolitan areas like New York City, Philadelphia, and Washington, D.C. Alternatively, they might seek to put pressure on private sector suppliers of public agencies.

CONCLUSION

Federal courts should be able to enjoin secondary picketing in pure Railway Labor Act disputes nothwithstanding the Norris-LaGuardia Act because such secondary pressure is beyond the scope of the phrase "arising or growing out of a labor dispute" as that phrase was intended by the drafters of the statute and as it has been applied by the courts. Only if the person seeking the injunction is "aligned" with the struck employer or if the employees exerting the pressure can demonstrate a legitimate "self-interest" in pressuring the plaintiff would the Norris-LaGuardia Act forbid an injunction.

Alternatively, provisions of the Railway Labor Act frequently have been interpreted by reference to provisions of, and law developed under, the Labor-Management Relations Act. This practice suggests that the national labor policy against secondary picketing embodied in the relatively recent amendment to section 8(b)(4) of the Labor-Management Relations Act and the policy of avoiding "any interruption to commerce or the operation of any carrier engaged therein" set forth in section 2 of the Railway Labor Act[308] should be read together. No administrative mechanism exists for enforcing the Railway Labor Act. By interpreting the Railway Labor Act and the Labor-Management Relations Act together and thereby articulating the right of a neutral employer to be free from secondary picketing, a federal court can and should fashion equitable relief to vindicate that right.

---

308. 45 U.S.C. § 151(a) (1976).