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The Supreme Court and Labor Law: An Analysis of Recent Trends and Developments

William B. Gould*

IT IS ALMOST FIFTY YEARS now since Mr. Justice Holmes' dictum to Harold Laski characterized American trade unions as private clubs or their equivalent. And more than thirty years have elapsed since the Norris-LaGuardia Act committed us, ever so briefly, to a laissez-faire type Olympian detachment towards labor-management relations. Those concepts have long since been demolished by both legislators and judges; this is nowhere more clearly displayed than in the Supreme Court's treatment of the ever increasing volume of labor law cases which clamor for adjudication. Last summer the Court adjourned its October 1963 Term in the midst of widespread comment on several landmark decisions in the civil liberties field. The very fascinating evolution of new labor law dwelt in comparative obscurity.1

I. SECTION 301 AND PREEMPTION

In the October 1963 Term, the Court continued the task of fashioning principles to govern the labor contract, the instrument which often arises out of an established labor-management relationship and where, incidentally, the Holmesian comment contains its most obvious anachronisms. This judicial process began in 1957 when the Court held, in Textile Workers v. Lincoln Mills,2 that collective bar-

* The viewpoints expressed by the author are his own and do not necessarily represent those of the National Labor Relations Board or any of its members.

1. Further analysis by this writer of recent decisions by both the Supreme Court and the National Labor Relations Board can be found in Labour and the Law, The Economist (London), Oct. 10, 1964, p. 153.

2. 353 U.S. 448 (1957). Lincoln Mills held labor contracts enforceable pursuant to § 301 of the Labor Management Relations Act: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations,
gaining agreements are enforceable under section 301 of the Labor Management Relations Act in federal court, as well as state court, and that federal law would govern that action. The latter element was accurately summarized by the dissenting opinion "as yet [with]in the bosom of the judiciary." And subsequently the Court wisely deferred to arbitration whenever possible, thus blunting the sharp edge of Mr. Justice Frankfurter's unkind belief that the judiciary was unsuited for the venture at hand.

A. Impact of the Business Merger

(1) Survival of Contract Rights.—In John Wiley & Sons, Inc. v. Livingston, Mr. Justice Harlan speaking for a unanimous Court, set forth an example of how the public policy in favor of peaceful resolution of labor disputes through arbitration will override the interpretation that courts ordinarily place upon contracts between private parties. In Wiley it was held that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement."

The major result here will be to place the Court's imprimatur upon the notion that rights derived from a labor contract can survive its expiration; that the presence of a new employer, change of geographical location, and the lack of an existing agreement may not serve, "in appropriate circumstances," to deprive such rights of their "vested" characteristics. The Court was, however, careful to articulate the limited nature of its holding, though inevitably the more specific limitations could not be so successfully delineated. For instance, Mr. Justice Harlan states that "this case cannot readily be


7. Mr. Justice Goldberg did not participate in this case.
assimilated to the category of those in which there is no contract whatever, or none which is *reasonably related* to the party sought to be obligated.\textsuperscript{9} The operative language then is a reasonable relationship. What are the circumstances and factors which a judge must ascertain? Clearly, as the Court notes in Wiley, the "wholesale transfer" of employees to the new plant is important. So also is the "substantial continuity of identity in the business enterprise before and after a change . . . ."\textsuperscript{10} All of this, the Court indicates, will serve to negate such factors as the disproportionate sizes of the respective operations, a factor which may raise havoc when, as in Wiley, the successor is considerably larger. On the other hand, it is clear that the union may "abandon" or waive its rights if it does not raise its claims in a timely fashion. But what of the case in which the union raises its claims, with what in retrospect becomes embarrassing vigor? The facts in Wiley — persistently unsuccessful union attempts to convince Wiley's predecessor of its position — point up the irrelevance of any "bargaining away concept."\textsuperscript{11}

The importance of Wiley does not lie solely in successor corporation problems. For the first time the Court made it clear that the substantive question of arbitrability of a particular subject matter — as distinct from the determination of the merits of the question — is for the courts and not the arbitrator. "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty."\textsuperscript{12} This proposition was not as free from argument as Wiley pretends to make it. In *United Steelworkers v. Warrior & Gulf Nav. Co.*,\textsuperscript{13} the Court warned of the

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9. *Id.* at 550. (Emphasis added.)
10. *Id.* at 551.
12. *Id.* at 547.

> The Congress . . . has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved
dangers flowing from judicial meddling where matters were best reserved for the expertise of an arbitrator. A crucial point there—and one that is apparently missed in *Wiley*—was that the judiciary had a terrible weakness for confusing the arbitrability question with the merits of the disputes. In *Warrior*, the Court's preference seemed to be a transferral of all questions to an arbitrator when, in the first instance, a quantum of evidence would signify that the case could be properly before that tribunal. Prior to *Wiley*, however, one could only speculate about the extent to which the courts might delve into the arbitrability question. The Court had never been explicit. But now *Wiley* tells us that there had been "no doubt" about this matter; moreover, it produces a somewhat surprising result.\(^{14}\)

Two other points require mention in connection with the *Wiley* case. One is that case's holding that labor disputes "cannot be broken down so easily" into "substantive" and "procedural" aspects and that, therefore, questions concerning literal compliance with the grievance procedure must be heard by the arbitrator along with other more identifiably substantive matters.\(^{15}\) The holding is sound, as


The Court also held:

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. \(^{16}\) The Court should view with suspicion an attempt to persuade it to become entangled in the construction of substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator. \(^{17}\) Id. at 584. (Emphasis added.)

In light of the above, it seems that the *Warrior* holding, while acknowledging the consensual basis of arbitration, does not give the investigation into the parties' intent—the full substantive question of arbitrability—to the judiciary. Theirs is the more modest role of ordering the parties to submit to the arbitrator's jurisdiction except in the case of contrary "positive assurance" or "the most forceful evidence," probably in the form of a written exclusion clause. This is a limited function and one that cannot be said to resemble a determination of the entire substantive question. In a sense, it is similar to the Court's holding in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), wherein it was held that the NLRB has primary jurisdiction of cases "arguably" the subject matter of the National Labor Relations Act. The Board must then decide whether (1) to assert jurisdiction; and (2) the activity is protected or prohibited under the Act. Id. at 245. According to *Warrior* it would seem that the arbitrator must also decide two similar questions.

\(^{14}\) John Wiley & Son, Inc. v. Livingston, 376 U.S. 543, 546 (1964); in addition to *Warrior*, the Court cites Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962). This would be persuasive were it not for the fact that *Atkinson* involved a different question, a union's attempt to stay an employer damage suit on the theory that the suit should have been properly submitted to arbitration.

\(^{15}\) John Wiley & Son, Inc. v. Livingston, supra note 14, at 556.
the Court says, in terms of both logic and policy. But it is curiously inconsistent with the broad holding that arbitrability in toto, to read the Court's opinion, is for the judges.

The second point concerns the necessary import that this case must have for the National Labor Relations Board and its interpretation of an employer's duty to bargain with a union. The Court in Wiley was at pains to state no "view on the questions surrounding a certified union's claim to continued representative status following a change in ownership." In the cases before the Board, the union will seek to lay a foundation for future contracts rather than extract from that which has already been agreed upon. The former's source is a statutory right; the latter's is contractual. Despite such differences, it is possible that the criteria utilized in Wiley may be relevant to Board cases and that the latter may be similarly helpful to the courts in section 301 cases. The Board's elaboration of national labor law in duty to bargain cases may not be limited to that provision alone. As the Board said in Maintenance, Inc.:

The duty of an employer who has taken over an "employing industry" to honor the employees' choice of bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act. The critical question is not whether Respondent succeeded to White Castle's [the employer] corporate identity or physical assets, but whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition...

There is a remarkable similarity here. The Board does not reach the dilution of employee unit apparent in the Wiley merger (recognition means majority status); the Court, in future cases, may well require evidence of a commercial transaction as a reasonable relationship. But there is a convergence of relevant criteria.

(2) Duty to Bargain on Decision to Subcontract.—Finally, dictum in Wiley hints at the resolution of issues recently ruled on by the Court with regard to an employer's duty to bargain

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16. See L.M.R.A. § 8(a) (5), 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a) (5) (1958); "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides for recognition of representatives who obtain a majority vote in an appropriate unit.


about the managerial decision to subcontract. However, the hint is somewhat Delphic: "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees to a sudden change in the employment relationship." Do "rightful prerogative" and "independently" mean that the Board cannot require an employer to bargain about such decisions? Or is the duty to bargain to be distinguished from substantive regulation of such prerogatives and thus be viewed as a duty to follow procedure? Is the prerogative itself to be balanced, or does the balancing consist of "some protection to employees" in the aftermath?

The Court, albeit ever so cautiously, has indicated in *Fibreboard Paper Prods. Corp. v. NLRB*, that employee protection is to some extent provided in the face of this kind of managerial rearrangement. Chief Justice Warren, writing the majority opinion, emphasized that the duty to bargain as postulated was limited to the facts in that case, and that the contracting out concerned "work previously performed by the members of an existing bargaining unit" and that rather than an issue involving capital investment, that the Court was simply confronted with an employer "which replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." Although criticized by the concurring opinion of Mr. Justice Stewart as a holding which "radiates implications of . . . disturbing breadth . . . " the Court is quite careful to speak softly: "Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

21. *Cf. International Union, UAW v. Webster Elec. Co.*, 299 F.2d 195 (7th Cir. 1962), wherein the Seventh Circuit held that the union shop clause in the contract impliedly prohibited management's substantive right to subcontract maintenance work done on plant premises.
23. *Id.* at 213.
24. *Id.* at 218. Justices Douglas and Harlan joined in Justice Stewart's concurring opinion. Their viewpoints are accurately summarized by Justice Stewart's statement that "I do not believe that an employer's subcontracting practices are, as a general matter, in themselves conditions of employment. . . . On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." *Id.* at 224.
25. *Id.* at 213.
The Board has begun to articulate the limitations to be imposed on *Fibreboard*. The duty to bargain does not arise where there is an express "waiver" as evidenced by contractual language,\(^26\) or the bargaining history of the parties.\(^27\) A contractual prohibition of subcontracting to employers who pay substandard benefits implies a managerial prerogative in all other realms of such activity.\(^28\) If the employees do not suffer adverse economic consequences, the employer need not bargain.\(^29\) The various relevant factors are set forth by the Board in *Westinghouse Elec. Corp.*:

[B]earing in mind particularly that the recurrent contracting out of work here in question was motivated solely by economic considerations; that it comported with the traditional methods by which the Respondent conducted its business operations; that it did not during the period here in question vary significantly in kind or degree from what had been customary under past-established practice; that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings — for all these reasons cumulatively, we conclude that Respondent did not violate its statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions.\(^30\)

In *New York Mirror*,\(^31\) the Board has relied upon *Fibreboard* in dealing with an employer's duty to bargain about a plant closure or elimination of the entire unit: "The elimination of unit work is no less within that statutory phrase when it is to result from a management decision affecting an entire operation. And this is so even though the likelihood is slim that prior consultation with the union


\(^{28}\) Shell Oil Co., 57 L.R.R.M. 1277 (NLRB 1964).


\(^{31}\) 151 N.L.R.B. No. 110 (1965); *cf.* Royal Plating & Polishing Co., 148 N.L.R.B. No. 59 (1964); see generally the cases cited in *New York Mirror*, *supra*. 
will alter the employer's contemplated decision."\(^{32}\) But grave doubt now hovers over that dictum in light of the Supreme Court's holding in *NLRB v. Darlington Mfg. Co.*\(^{33}\) In *Darlington*, the Court ruled that a single businessman's decision to cease operations was beyond the purview of sections 8(a)(1) and 8(a)(3) of the act even when the conduct is motivated by antiunion considerations. How then can the employer violate the duty to bargain under section 8(a)(5) — which is derivative from 8(a)(1) — in light of *Darlington*? Presumably the Board will be called upon to explain this shortly.

(3) Individual Rights.—Another business merger was responsible for the questions presented last term in *Humphrey v. Moore.*\(^{34}\) Here a union member (1) challenged the right of an employer-union committee to "dovetail" the seniority lists of two plants, both represented by the same union, under a labor contract, and (2) claimed that the committee's decision was obtained by dishonest union conduct in breach of its "duty of fair representation." The Court, citing previous cases in point,\(^{35}\) held that such a duty was cognizable in federal courts as a result of the "broad authority" given to the unions as "exclusive bargaining agent in the negotiation and administration" of the contract. Because of both factors — alleged violation of the contract and breach of the duty of fair representation — the Court held that the action was one arising under section 301. Here, once again, the proclamation of a new doctrine was almost deceptively glossed over.

In so deciding, the Court relied upon its decision in *Smith v. Evening News Ass'n.*\(^{36}\) *Smith* had contributed mightily to the confusion about individual rights under section 301. This may have been attributable to the Court's very necessary and responsible preoccupation with the demolition of *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*,\(^{37}\) a case which said that the union could not bring section 301 actions to obtain "indi-

\(^{32}\) New York Mirror, 151 N.L.R.B. No. 110, at 8 (1965).

\(^{33}\) 380 U.S. 263 (1965).


\(^{35}\) Id. at 342. In this regard the Court cites Syres v. Local 23, Oil Workers Int'l Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Brotherhood of Railroad Trainmen v. Howard, 345 U.S. 768 (1952); Tunnell v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steel v. Louisville & N.R. Co., 323 U.S. 192 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

\(^{36}\) 371 U.S. 195 (1962).

"individual" rights — that is to say those rights which inured in a peculiarly direct manner to the employees themselves. The suit in *Westinghouse* was to recover wages. In *Smith*, a union member sued individually and on behalf of forty-nine other workers similarly situated for wages lost as a result of an illegal employer violation of the no-discrimination clause protecting union members against discrimination because of such membership. The Court disposed of *Westinghouse* as "no longer authoritative as a precedent." Furthermore, the Court said that

\[\text{[the] rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims, at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave question concerning the interpretation and enforceability of the collective bargaining contract on which they are based.}\]

The *Humphrey* case then is the Court's first opportunity to articulate just how seriously the quotation above was intended. It is clear that even where union and employee interests are "intertwined" to the extent of a clash between the two, jurisdiction is to be asserted. The idea propounded in *Smith* and relied upon in *Humphrey* — that a subversion of the uniform federal labor policy will develop if suits by individuals can be brought in state and not federal court — is a sound one. It remains valid despite the persuasive dissent of Mr. Justice Black in *Smith* which points up the individual right, intact despite the enactment of the National Labor Relations Act, to bring suit subject to normal jurisdictional requirements. It is anomalous to permit the form in which a suit is brought — by individual or union — to govern the forum, the law, and perhaps the outcome of cases which may involve identical circumstances. Moreover, it might be said that *Humphrey* simply fills in the unstated premise contained in *Smith* — the likely probability that the union itself would, under normal circumstances, bring suit, thus fulfilling its basic functions rather than assume a posture of inactivity which strongly hints at union-employee antagonisms.

Yet the very argument advanced so successfully in *Humphrey* can redound against the position just advanced. For, as Mr. Justice Goldberg stated in his concurring opinion in *Humphrey*, the proper scope of the duty of fair representation and that which the collective

39. *Id.* at 201.
bargaining agreement covers can be varying ones. The union and employer might well take action the source of which is entirely independent of the contract. In the absence of the clause in question in *Humphrey*, they might take action or even amend the contract so that their interpretation would be clearly correct. Yet this would not necessarily alter the union's duty of fair representation. A contract requiring the relegation of Negroes to janitorial classifications might be complied with, though it would undoubtedly be unenforceable in court on grounds of public policy. But can anyone now doubt that a union which negotiated such a clause would be anything but derelict in its duty as bargaining agent on behalf of all employees? It is possible that many clauses would afford the union much scope in administration. Is the shop steward who passes over the claims of one employee because the two of them have a family dispute excused from the duty to represent fairly because the contract is not offended? Such potential inconsistencies argue, much more than those envisaged by the *Smith* and *Humphrey* majorities, for the allocation of the duty of fair representation cases to the NLRB or some other expert agency, with contract actions (individual or union versus company) remaining in the hands of the courts under section 301. Mr. Justice Goldberg correctly stated that "just as under the *Huffman* decision an amendment is not to be tested by whether it is within the existing contract, so a grievance settlement should not be tested by whether the court could agree with the parties interpretation. If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal."


41. This of course should not detract from the racial discrimination cases brought in federal court independent of § 301. Cf. *Steele* v. Louisville & N.R. Co., 323 U.S. 192 (1964). While there is an equal danger of conflict in many forums here, the cost and harassment involved in lengthy court proceedings will usually compel Negro workers to seek a remedy with the National Labor Relations Board or the Equal Employment Opportunity Commission established by the Civil Rights Act of 1964, § 705, 78 Stat. 258, 42 U.S.C. § 2000 e-4 (Supp. VI, 1965). Discussion of the latter is beyond the scope of this article, as is the nonracial *Miranda*-type fair representation cases. However, for an analysis of the remedies afforded victims of employment discrimination under Title VII of the Civil Rights Act of 1964, see *Employment Discrimination: State FEP Laws and the Impact of Title VII of the Civil Rights Act of 1964*, 16 W. Res. L. Rev. 608 (1965).

42. *Humphrey* v. Moore, 375 U.S. 335, 355 (1964) (Goldberg, J., concurring opinion); see note 24 *supra*. Mr. Justice Douglas stated the following: "I agree for the
Mr. Justice Harlan, concurring and dissenting in Humphrey, would have invited the NLRB to "present its views by brief and oral argument" on the question of whether the Court's decision in San Diego Bldg. Trades Council v. Garmon, which grants the Board primary jurisdiction under the doctrine of preemption whenever the subject matter in litigation is "arguably" within the scope of sections 7 or 8 of the NLRA, precluded both federal and state court jurisdiction. Of course Smith involved activity — and herein lies much of the above mentioned confusion — which was clearly, not arguably, within the scope of sections 7 and 8. This is unchanged by whether the union or the employee initiates the action. Yet the Court in Smith seems to stumble, much to the irritation of Mr. Justice Black, in articulating the question at hand. However, the above stated policy considerations might prove to be a more convincing argument for Board jurisdiction. On the other hand, one is inclined to mute such wish-fulfillment when reflecting upon another section 301 decision handed down in the 1963 Term.

B. Jurisdiction: Federal, State and Arbitration

(1) The Court's Leanings to Arbitral Jurisdiction.—In Carey v. Westinghouse Elec. Corp., the Court, speaking through Mr. Justice Douglas, permitted the public policy behind arbitration to override some strong considerations in favor of exclusive jurisdiction of the NLRB — a principle which the Garmon case once seemed to promulgate. In Carey, the union and employer had entered into a collective bargaining agreement which recognized the union as exclusive bargaining representative for those units in which it was certified by the NLRB. The agreement listed among those units certified a unit consisting of "all production and maintenance employees" but excluded salaried technical employees. Also contained in the reasons stated by my Brother Goldberg that this litigation was properly brought in the state court but on the merits I believe that no cause of action has been made for the reasons stated by the Court." Id. at 351.

44. "It shall be an unfair labor practice for an employer — [to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in § 7;] by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." L.M.R.A. §§ 7, 8(a) (1),(3), 61 Stat. 140-41 (1947), 29 U.S.C. §§ 157, 158(a) (1),(3) (1958).
46. 375 U.S. 261 (1964). Mr. Justice Goldberg did not participate in this case.
47. The very broad rules of both Garmon and Warrior articulated without mutual qualification, were inevitably bound to collide. The penchant for a multiplicity of tribunals rather than judicial action is, of course, the prime reason for the confusion.
agreement was a grievance procedure culminating in arbitration in the case of unresolved disputes involving the "interpretation, application or claimed violation" of the contract.

The union filed a grievance claiming that certain employees in the engineering laboratory, who happened to be represented by another union certified as the bargaining representative for "salaried technical" employees, were performing work of a production and maintenance type. The company refused to arbitrate on the ground that the matter was properly within the jurisdiction of the NLRB as part of a representation proceeding. 48

The Court noted the existence of a "jurisdictional" dispute which could conceivably arise as a work dispute problem — the dispute being prohibited by the NLRA 49— or "a controversy as to which union should represent the employees doing a particular work" — a representation proceeding. The Court said that if it were the former, arbitration might well "put into movement forces that would

48. See LMR A. § 9(c) (1), 61 Stat. 143 (1947), 29 U.S.C. § 159 (c) (1) (1958) : Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board — (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative . . . (B) the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office who shall not make any recommendations with respect thereto. If the Board finds upon the record of such a hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereto.

See also LMR A. § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958), which provides that a majority of employees are to choose representatives "in a unit appropriate for collective bargaining."

49. See LMR A. § 8(b)(4), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (b)(4) (D) (Supp. V, 1964) : It shall be an unfair labor practice for a labor organization or its agents — (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike, or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is — . . . forcing or requiring any employer to assign particular work to employees in . . . a particular trade, craft, or class . . . unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . .
resolve the dispute"; but at the same time it conceded that only one union would necessarily be party to the arbitration.

The Court then proceeded to discuss the various eventualities under the alternate assumption that the case actually involved a representation matter; it is here that the opinion begins to go astray. It was correctly noted that in this case the union might file a refusal to bargain charge, or a motion to clarify the certification. Assuming that the union is certified, the latter would be the more probable under the facts as set forth in *Carey*. Here, however, Mr. Justice Douglas takes what might be called three steps in one stride. First, the opinion seems to assume that motion to clarify, if granted, would require the Board to issue a remedial order in an unfair labor practice case. But this is decidedly not so. However, the Court is conveniently able in this manner to escape the snares of conflict posed by the two equally available forums of representation and arbitration proceedings. Moreover, Mr. Justice Douglas advances the *Smith* holding to its outermost limits. The Court cites *Smith* for the proposition that "an unfair labor practice does not bar individual employees from seeking damages for a breach of a collective bargaining agreement . . . ."50 Unlike the Court's willingness in *Smith* to treat future cases on an *ad hoc* basis, there are now to be no more qualifications. Without discussion, the Court alters *Smith*, at least for *Carey* purposes, and applies the same broad rules to representation cases. Three steps in one. It is a dizzying pace!

The *Carey* opinion's real defect, however, is its benevolent complacency regarding the Board's ability to iron out the conflicts which even the Court admits are bound to occur. The Court assures that the Board's ruling will "take precedence" over that of the arbitrator. Thus, "the possibility of conflict is no barrier to resort to a tribunal other than the Board . . . [and] resort to arbitration may have a pervasive, curative effect even though one union is not a party. . . . The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area."51 This writer respectfully suggests that one who offers up a slight murmur of skepticism to such comforting assurances of order may rightfully expect to wind up on surer, safer, and indeed more practical grounds of reasoning. For, as Mr. Justice Black stated in dissent: "[T]he Court's recently announced leanings to treat arbitration as an almost sure and certain solvent of

51. *Id.* at 272.
all labor troubles has been carried so far in this case as unnecessarily to bring about great confusion ..." Just one example of the confusion predicted by Justice Black and, indeed, the great harm that can be done to workers and employers will suffice. Suppose that a union is negligent in representing employees in a plant and thus, as it must, dissatisfaction sets in. Suppose further that the union had not been collecting dues under its union security agreement, but that upon hearing of a rival union movement it decides to become activist in at least this sense. The workers cannot petition the Board for a new representation election because, as the regional director informs them, the present contract is a bar to such a proceeding. Their lawyer informs them that the support for their movement is not great enough to assume the contract under a "defunctness" theory, or for that matter under any other legal vehicle. Meanwhile, they are surprised to receive papers indicating that the incumbent union has filed a petition in a state court to compel arbitration on the question of whether they must be discharged for failing to pay their dues, despite a request, under the union security clause. The court, over the pleas of the workers who say that they are filing a petition with the Board for de-authorization of the union shop, citing Carey, comments that all will end happily anyway and orders arbitration. The arbitrator, whose authority is limited to the privately negotiated contract, agrees with the union's contention that the contract has been violated and that the workers should properly be discharged. The workers involved might well be enmeshed in an awkward and, for them, unfortunate situation, especially if the Board decides not to permit them to vote in the de-authorization

52. Id. at 276 (dissenting opinion).
54. Defunctness of a union disqualifies its contract as a bar to an election. It must appear that the union is not willing and able to represent the employees. The Board finds defunctness where, at a publicized meeting with a high proportion of membership in attendance, an overwhelming percentage is in favor of dissolution and disaffiliation from the incumbent union. A resolution should have been signed and no rival unions should attempt to dominate the meeting. Subsequently, grievances should be processed under the name of the rival union. See Gulf Oil Corp., 137 N.L.R.B. 544 (1962); Pepsi Cola Bottling Co., 132 N.L.R.B. 1441 (1961); Hershey Chocolate Corp., 121 N.L.R.B. 904, 908 (1958); Waterway Terminals Corp., 120 N.L.R.B. 1788 (1958); Arthur C. Harvey Co., 110 N.L.R.B. 338 (1954); Benjamin Air Rifle Co., 107 N.L.R.B. 104 (1953); American Factors Ltd., 104 N.L.R.B. 199 (1953).
proceeding\textsuperscript{57} (which would mock the Board's processes) and not to disturb their discharge in deference to arbitration.\textsuperscript{68} Even assuming that the Board clearly perceives what is happening and decides one of these questions affirmatively, which will according to the Court "take precedence," there are still problems. These disgruntled employees may get little satisfaction from the privilege of voting in a Board election if their jobs are now lost. Suppose that the union is successful in enforcing its award in court. Has the Court now scuttled the near blank check drawn for such awards a few years ago?\textsuperscript{59} Or does the absence of the rival union from the arbitration hearing, a factor that did not seem to bother the Court much in Carey, alter the decision? If either question can be answered affirmatively, surely lawyers are entitled to know rather than risk the jobs, wages, and profits of innocent parties in endless litigation. In a sense Carey has undone more than it has settled.

(2) \textit{New Dimensions of State Jurisdiction}.—In contrast to Carey, the Court when confronted with the competing claim of state rather than arbitral jurisdiction, encouraged a broad interpretation of Garmon, which harked back to the Garner\textsuperscript{60} and Weber\textsuperscript{61} cases, in \textit{Local 20, Teamsters Union v. Morton}.\textsuperscript{62} In Morton, the question was whether an Ohio state court could apply state law in awarding damages resulting from peaceful strike conduct vis-à-vis a secondary employer, or whether it was confined to damages resulting from the "specifically limited provisions of section 303 of the Federal Act," which provides for damage suits in federal and state courts arising out of unlawful secondary boycotts. The contention was that the total strike activity could be regulated by the states when part was unlawful (under state but not federal law) and, more precisely, that the subject matter in question was neither "arguably" protected nor prohibited and that consequently the states had a free hand. With Mr. Justice Stewart writing for a unanimous

\textsuperscript{57} See the cases cited in Carey note 46 supra.
\textsuperscript{58} The Board in International Harvester Co., 138 N.L.R.B. 923 (1962), \textit{aff'd sub. nom.}, Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964), which involved similar enforcement of a union security agreement, has been hospitable to arbitration awards. \textit{But see} Lummus Co., 142 N.L.R.B. 517 (1963); \textit{cf.} Raley's Inc., 143 N.L.R.B. 256 (1963); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).
\textsuperscript{60} Garmon v. Teamsters Union, 346 U.S. 252 (1953).
\textsuperscript{61} Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1954). Both Garner and Weber are discussed in Gould, \textit{The Garmon Case: Decline and Threshold of Litigating Elucida-
\textsuperscript{62} 377 U.S. 252 (1964).
bench, the Court made it clear that Garmon is not to be restrictively applied, and that the lugubrious no man’s land which contains neither protected nor prohibited territory is tightly barred to state interference:

If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.63

The Garmon case had clearly overruled the Court’s decision in International Union, U.A.W.A. v. Wisconsin Employment Relations Bd. (Briggs-Stratton),64 which allowed the courts to decide on the merits what was for the Board and what was for the states. Procedurally, Garmon gave the Board first crack. But now the Morton decision obliterates the substantive foundations of Briggs-Stratton: the idea that the states can handle conduct falling into the murky terrain which is neither section 7 nor 8.65

A similar attitude was reflected in Liner v. Jafco, Inc.66 In that case a North Carolina building contractor was engaged by Jafco, a general contractor, to erect a shopping center in Cleveland, Tennessee. The building contractor operated an “open shop” and the workers were paid lower than union scale wages. The Hod Carriers Union, pursuant to authority obtained from its Building Trades Council, placed one picket at the site in protest. The picket sign stated that the building contract was “not under contract with Chattanooga Building Trades Council, AF of L.” As a result of the picketing, work promptly ceased. Jafco then sought and obtained in a state court an ex parte injunction against such conduct. Mr. Justice Brennan, speaking for the Court, held that the injunction must be set aside as it was aimed at what was arguably a “labor dispute.” Determination of such a case’s merits is thus allocated to the Board.

63. Id. at 259-60; Mr. Justice Goldberg concurred separately and stated the following: “My concurrence in the Court’s opinion and judgment does not indicate approval of the Court’s holding in UAW v. Russell, 356 U.S. 634, and United Const. Workers v. Laburnam Corp., 347 U.S. 656.” Id. at 262. As both cases held state jurisdiction valid in cases involving violence, those issues may be reopened. But see San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).
65. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), wherein the Court hinted that the rule might be as broad as Morton now states.
66. 375 U.S. 301 (1964).
Section 14(b) and Union Security.—Retail Clerks Int'l Ass'n v. Schermerhorn was an important preemption decision which involved a contract issue in a state court. The action did not fall under section 301 and its federal law as would normally be the case in a state court action, but was rather a suit for declaratory judgment stating that a negotiated agency shop clause violated Florida's right-to-work law. Section 301 could not be at issue as Congress in section 14(b) of the Taft-Hartley Act delegated the power to enact union-security legislation, more restrictive than the union shop permitted by federal law, to the states. The Court, in the previous term, had held that Florida had the authority under section 14(b) to prohibit the agency shop along with other types of union security agreements. But the Court was troubled with the question of whether state courts were the proper tribunals to enforce such prohibitions rather than the NLRB.

In the 1963 Term, Mr. Justice Douglas, writing for a unanimous Court, held that the state courts can enforce the prohibitions against these clauses enacted by their legislatures but that "state power, recognized by § 14(b), begins only with actual negotiation and execution of the type of agreement described by § 14(b)." One cannot quarrel with the soundness of a decision which permits the states to enforce that which they properly legislate, rather than to invite conflict by awarding the former authority to the Board. Justice Douglas is also correct in stating that the broad language used in Garmon could not be applied to subject matter specifically relegated to the states by Congress.

Of course the Court is candid enough to say that "as a result of Section 14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union security field." One such problem arises out of the Court's allocation of state jurisdiction to the negotiation of unlawful

69. L.M.R.A. § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958); "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."
72. Id. at 105.
73. Ibid.
ful clauses, while at the same time noting its adherence to its previous decision which placed picketing "to get an employer to execute an agreement to hire all-union labor in violation of a state union security statute . . . exclusively in the federal domain . . ."74 These two rulings would appear to disadvantage the union which frames its demands peacefully, albeit for objectives that are illegal, while the union that strikes or pickets for the very same goals is protected from state prosecution. This can be rationalized in terms of the Court's proper sensitivity to the constitutional importance of the latter, but it would also seem to contradict the above mentioned public policy supporting the peaceful resolution of industrial disputes.75

One other point made by Justice Douglas, which is certainly dictum, should be noted. It is one thing to dismiss the argument that Garmon is "at war" with the present holding by way of the accurate analysis of the latter as plagued by the thicket-like impediments posed by section 14(b); but it is quite another matter — and this writer believes an erroneous over statement — to say, as does Mr. Justice Douglas, that Garmon does not state a constitutional principle.76 The doctrine of preemption is one rooted in constitutional foundations. More specifically, it is the judiciary's interpretation of congressional intent to occupy a field of legislation pursuant to their power to do so under the commerce clause and the supremacy clause. Garmon, of course, does rationalize "the problems of coexistence between federal and state regulatory schemes" as the Court says. But the acknowledgement of the manifold difficulties with which the Court wrestled before finally settling for that case as a means to achieve an orderly and intelligible rationalization does not require a misstatement of constitutional law.77

C. Administration of the Collective Bargaining Agreement

Unlike Wiley and Humphrey the employer-employee relationship here has a more identifiable, though not necessarily stable form. Returning to section 301 problems, one other case in need of mention is United Packinghouse Workers v. Needham Packing Co.78 Mr. Jus-

75. See notes 2, 52 supra.
77. Ibid.
78. 376 U.S. 246 (1964).
tice Harlan, speaking for a unanimous Court, held that a walkout, allegedly in violation of a no-strike clause, does not repudiate the labor contract and that, thus, the union does not necessarily waive its right to arbitration. The arbitration clause here was a broad one,\textsuperscript{79} thus covering the no-strike provision itself.\textsuperscript{80} The Court reserved comment on the possibility of a different conclusion if the strike involved "a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration . . . ."\textsuperscript{81} It may be that a case involving critical economic circumstances visited upon the employer by such action would argue for a different holding.\textsuperscript{82}

One obvious trend contained in both present cases as well as \textit{Drake Bakeries, Inc. v. American Bakery Workers}\textsuperscript{83} is their departure from the rationale of \textit{Lincoln Mills} and \textit{Warrior} — the notion that the promise by the union not to strike is the quid pro quo for the promise to arbitrate by the employer.\textsuperscript{84} If that concept had been retained rather than the more realistic investigation into the parties' intent, the Court might have been compelled to discharge the employer from a duty to arbitrate, at least where conduct was clearly within the ambit of the no-strike clause.\textsuperscript{85} Mr. Justice Harlan may very well have guarded against this argument by stating that the grievance and arbitration procedures were intended largely, if not wholly, for the benefit of the union, and that one would thus imagine that breach of the no-strike obligation by employees apparently without union authorization would not waive the independent rights of the union, both parties being specifically referred to in the no-strike clause.\textsuperscript{86}

In the \textit{Needham} case, Mr. Justice Black did not dissent as in \textit{Smith}. One might surmise the reasons to be that: (1) the union rather than the employees brought the action; and (2) the activity in question was less visibly related to the exclusive jurisdiction of

\textsuperscript{79} \textit{Id.} at 250.
\textsuperscript{80} \textit{Ibid.}
\textsuperscript{81} \textit{Id.} at 253.
\textsuperscript{82} This might be similar to the \textit{ad hoc} treatment of lockout cases. See especially American Brake Shoe Co., 116 N.L.R.B. 820 (1956), \textit{rev'd}, 244 F.2d 489 (7th Cir. 1957); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).
\textsuperscript{83} 370 U.S. 254 (1962).
\textsuperscript{85} The argument implicit in \textit{Warrior} that the Court is without the proper expertise is now impaired by \textit{Wiley}.
the NLRB. But, in light of his sharp criticism in *Carey*, which expressed concern with the employer's quandary in confronting a number of tribunals and the consequent potential of being "mulcted in damages," it is curious that a similar comment was not registered here. In *Needham*, the employer had already started a damage suit in a state court. Might not the judge in this action have to pass on the legal issues in the strike? What impact does this have on arbitration? The Court acknowledged the converse hypothetical: "[W]e find it unnecessary to decide what effect, if any, factual or legal determinations of an arbitrator would have on a related action in the courts."88

II. THE NATIONAL LABOR RELATIONS BOARD AS LITIGANT

A. Secondary Boycotts

By far the most significant decision of the Court with respect to secondary boycotts is *NLRB v. Fruit & Vegetable Packers (Tree Fruits).*89 This case marks a rather surprising shift in the Court's attitude toward picketing as free speech. Moreover, the approach undertaken is certain to spawn progeny which will return to haunt the Court for many years.

In *Tree Fruits*, the Board held that Congress, by enacting section 8(b)(4)(ii)(B)90 as a part of Landrum-Griffin in 1959, had prohibited all secondary consumer picketing.91 The court of appeals set aside the Board's order and remanded so that the Board could accept evidence relating to whether in fact the secondary establishment was threatened, coerced, and restrained within the meaning of the above mentioned provision. The court of appeals stated the requirement as affirmative proof that the secondary employer had

89. 377 U.S. 58 (1964). In this regard see Note, *Picketing and Publicity under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265 (1964).
90. L.M.R.A. § 8(b)(4)(ii)(B), 61 Stat. 140, as amended, 29 U.S.C. § 158(b)(4)(ii)(B) (Supp. V, 1964); "It shall be an unfair labor practice for a labor organization or its agents — . . . to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person."
suffered substantial economic impact or the immediate threat there-of. Otherwise, the court said, serious constitutional problems would be raised.92

The Court's majority opinion related the facts: Local 760 had called a strike against fruit packers and warehousemen who sold "Washington State" apples to some stores in the chain of Safeway retail stores. The union instituted a consumer boycott against the apples, and placed picketers who walked back and forth in front of the customers' entrances at forty-six Safeway stores in Seattle. The pickets wore placards and distributed handbills — both of which clearly identified their dispute with the primary employer — which appealed to the consuming public not to buy "non-union Washington State apples." The apples were, in the words of the Court, "only one of numerous food products sold in the store." There were no work stoppages involving either Safeway employees or employees of other employers; there was no interference with customer ingress and egress.

(1) Publicity-Signal Analysis.—The Court prefaced its examination of legislative history by citing NLRB v. Drivers Local Union,93 wherein the Court had held that minority union organizational picketing did not "coerce" and "restrain" employees within the meaning of section 8(b) (1) (A).94 The Court then stated:

Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . Both governmental policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.95

Operating within this framework, the Court said that legislative history showed that the isolated evil proscribed by Congress was peaceful secondary consumer picketing used to persuade customers to stop trading with the secondary employer so that he, in turn, would cease trading with the primary employer — the firm with which the union had its original dispute. The Court also found that this "narrow focus" bespoke such conduct as different from

94. L.M.R.A. § 8(b) (1) (A), 61 Stat. 140, as amended, 29 U.S.C. § 158(b) (1) (A) (Supp. V, 1964): "It shall be an unfair labor practice for a labor organization or its agents — to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7."
"peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods." With all respect to the Court's research, most observers, this writer included, have dissented from the view that Congress has followed its "usual practice" and thus played the role of careful particularization that the Court has assigned to it. Mr. Justice Harlan's findings, in dissent, would seem to reflect the more accurate mood of Congress; that secondary consumer picketing was intended to be illegal per se. But the Court insists on its interpretation and hints darkly at the possibility of constitutional reefs lurking up out of waters such as those through which Justice Harlan calmly navigates.

The feared "broad ban" cannot be that of the Thornhill v. Alabama98 variety, for the legislation in Thornhill possessed breadth so all encompassing as to create an unconstitutional vagueness. Though this case promulgated the incorporation of picketing as an exercise of constitutional right, First Amendment contours were not clarified. In meeting the constitutional question here, the Court might have taken the same line with regard to the breadth, or at least inherent vagueness, of the words "threaten, restrain or coerce." But in this context the troublesome legislative history would have caused even greater embarrassment. Employment of the vagueness standard here would require extraordinary judicial persuasiveness. And even more important, the Thornhill approach would require that most of the NLRA be struck down as unconstitutional. All of section 8(a), which is dependent on the "interference, restraint and coercion" language of section 8(a) (1), would have to go. Section 8(b) (1) (A) would face similar difficulties. So also would section 8(c), the free speech proviso, the guideline of which is "coercion." Most probably then, reference to prior free speech cases would have to settle on AFL v. Swing,100 which struck down as unconstitutional a state statute prohibiting stranger picketing at a retail establishment.

96. Id. at 63.
97. Id. at 84-92.
98. 310 U.S. 88 (1940).
99. L.M.R.A. § 8(c), 61 Stat. 140, as amended, 29 U.S.C. § 158(c) (Supp. V, 1964): "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."
100. 312 U.S. 321 (1941).
Thus, presumably even were Congress to specify the per se prohibition of picketing more specifically than is done in Landrum-Griffin, the Court, if one may rely on the hints thrown out in Tree Fruits, would view it, or at least its application to the facts here, as an unconstitutional deprivation of free speech. If all the above is true, however, it is nevertheless difficult to avoid the conclusion that the Court is leading us into virgin territory that is beyond Swing principles. This is so because: (1) the picketing activity present in Tree Fruits is secondary in location rather than the primary activity present in Swing; and (2) the Court in Hughes v. Superior Court101 viewed the more analogous (than Swing) consumer boycott picketing there as per se a "signal" to immediate action, thus making it distinguishable from a purer variety of free speech. The Court there was able to couple the explosiveness of signal activity with an unlawful objective which the state legitimately sought to proscribe and thus come up with state action inoffensive to the Constitution. Moreover, one must remember that Hughes was not even a traditional labor-management dispute in the sense that Tree Fruits is;102 ergo it is not a context in which signal picketing is comparable to cases like the latter.103

Thanks to the statutory construction utilized in Tree Fruits and the theories necessary thereto, the Court is now constrained to amputate substantial portions of Hughes when it faces, as it must, the constitutional issue. Of course, had the Court more frankly acknowledged the legislative history's true import, the way would have been open to reevaluate the Hughes signal theory in terms of consumer picketing.104 By declaring invalid a statutory provision which prescribed unlawful objectives (equally clear to the Court and Congress if one takes the Swing approach rather than something else like Thornhill) the Court would have struck at the very heart of Hughes and, moreover, at the flimsy construction of judicially created state policy, the poor stuff out of which the Hanke105 and Vogt106 de-

102. Picketing in Hughes was found to be violative of California's policy against quota hiring on a racial basis. But see New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1937); Tanner Motor Livery Ltd., 57 L.R.R.M. 1170 (NLRB 1964).
104. This is not to underestimate the real hurdles posed by the arguably less threatening action in Hughes and the secondary employer involvement in Tree Fruits.
106. International Bhd. of Teamsters v. Vogt, 354 U.S. 284 (1957). Indeed Tree Fruits would appear to go beyond the protection sought after and denied the union in
Cisions were built. But evidently a majority of the Court could not stir itself to devise a more plausible analysis to protect customer-directed picketing as “publicity” rather than a “signal” as aimed at employees. Instead, the Court seems to concede this issue completely by stating that the employed distinction between product and establishment picketing is opposed as “unrealistic” because it is urged, all picketing automatically provokes the public to stay away from the picketed establishment. The public will, it is said, neither read the signs and handbills nor note the explicit injunction that “this is not a strike against any store or market.” Be that as it may, our holding today simply takes note of the fact that a broad condemnation of peaceful picketing, such as that urged upon us by petitioners, has never been adopted by Congress, and an intention to do so is not revealed with that “clearest indication in the legislative history” which we require . . . .

In other words, even if the public acts in response to a signal type picketing, or more accurately, indulges in a signal type reaction, the conduct of this saving operation made on behalf of constitutional enactments could not be altered. Thus, the picket sign inscribed with good intentions, but which produces immediate action similar to the impact which the Court has previously enjoined, when aimed at secondary employees and primary consumers, would appear just as firmly anchored to the calm harbor of the Constitution.

The answer to all of this is that the Court may be said to have avoided judgments about whether consumer response to the picket signs as such is one of reasoned reflection or whether this signal produces a more harmful or destructive — from Congress’ viewpoint — emotional reaction. It might be said that the above quoted remarks relate solely to consumer attentiveness and literacy, and leave the Court free to draw back, without contradicting itself, and uphold and strike down congressional legislation on the basis of its applicability to publicity or signal picketing. But this writer submits that a broader conclusion is unavoidable. Consumer reaction of course does not change the constitutional considerations present here, at least when the pickets demonstrate a proper intent. Moreover, the Court rejects the court of appeals’ economic loss test. It

both Hanke and Vogt. In the former the union causes the same approximate effect or injury present in Hanke and Vogt and at the secondary rather than primary sites. 107. See the excellent analysis in this regard contained in Cox, Strikes, Picketing and the Constitution, 4 Vand. L. Rev. 574 (1951).

is quite conceivable that Justice Brennan misunderstood this test as set forth by the District of Columbia Circuit, for in the sentence following its rejection this comment appears: "A violation of § 8(b)(4)(ii)(B) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led, or might lead Safeway to drop the item as a poor seller."  

Thus, sensibly, a successful effort does not make unlawful that which must be lawful according to the Court's first premise. Economic ruination for the secondary employer, insofar as the primary product is concerned, is irrelevant. But the District of Columbia Circuit would appear to have been interested in economic injury to the entire establishment, and not the *single* product, as Justice Brennan assumes, so as to perhaps gather evidence ascertaining whether *in fact* the impact is primary (lawful) or secondary (unlawful). In short, this approach would determine whether the picketing, regardless of the words used, produced signal emotional responses from the public; it is admitted, however, that the garnering of such evidence would be difficult. The Supreme Court's *Tree Fruits* analysis will not permit such investigation, at least in cases where the union obtains good enough counsel to give them the right words to use on their placards. But pursuant to this approach, picketing which is not so clear may run afoul of the law — the audience aimed for would seem to be irrelevant if the Court is to be logically consistent with its *Tree Fruits* holding.

Nothing in Mr. Justice Brennan's "publicity — signal" concession need have been particularly unfortunate were it not for the simultaneous movement which, when viewed in connection with the above, acquires characteristics resembling encirclement of the foe, in this case, unmentioned prior constitutional decisions. Although recently reaffirming its previous views on picketing as free speech, and thus perhaps *limiting* the meaning of *Tree Fruits* as a less combustible expression situated at a *remote* secondary situs, the Court, for the first time since the immediate post-*Thornhill* days, appears willing to tell Congress and, necessarily, the states that they have gone too far in their substantive legislation concerning unlawful

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109. *Id.* at 72-73.

110. However, the Court has countered the argument that this is likely to occur, thus truly threatening, coercing and restraining some employers in some real hypotheticals. Both the Court's argument and hypotheticals are discussed below.

objectives. Ever since Swing and Cafeteria Employees v. Angelos, the Court, under the steady rein of Mr. Justice Frankfurter, has countenanced the most sweeping restrictions against peaceful picketing. While it is good that that trend may now be destined for an abrupt termination, it is somewhat regrettable that the pertinent and useful dichotomy of publicity and signal picketing was given away to advance a questionable statutory construction that detracts from the Court's prestige as judges standing above legislation. Those prior constitutional decisions now have allies whose motives vary. The first might be classified as the "statutory constructionists" who will both point angrily at the contrary impact of legislative history, as well as bemoan the consequent surrender of constitutional analysis. The second are the "constitutionalists": some of them may protest the double sided squeeze of disregard for the publicity-signal analysis on the one hand, and the encroachment on Congress' substantive regulation on the other.

(2) Economic Injury Test.—What kind of future does this statutory construction bode for the NLRB and the courts? As previously mentioned, the Supreme Court did not allow the possibility of severe economic injury relating to the primary product or actual disruption of that business relationship to alter its holding. While conceding the possibility that customers would not read the placards, the Court seemed concerned to point up the small likelihood that a secondary employer, perhaps having been stung by the contention that their distinction is "unrealistic," could realistically be "threatened, restrained or coerced" where the placards are advertised within the rules of the game. The Court's prophecy — or could the idea have been derived from experience — was that the following results would proceed from the two types of picketing:

When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firm are decreased only because the public has diminished its purchase of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of falling demand, but in response to pressure

112. 320 U.S. 293 (1943).
designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.\textsuperscript{114}

In a footnote, the Court poses an example of what is meant by the above language. The Court says that if a public appeal directed only at the product results in a 25 per cent decline of sales of that product, “the corresponding reduction of his purchases of the product is due to his inability to sell any more.”\textsuperscript{115} But with a union appeal broadened to seek public cessation of all patronage and the same 25 per cent response, “the secondary employer faces this decision: whether to discontinue handling the primary product entirely, even though he might otherwise have continued to sell it at the 75 per cent level, in order to prevent the loss of sales on other products.”\textsuperscript{116}

One’s first reaction is astonishment. The Court frames the product picketing example in terms of mere falling demand similar to the economic phenomena of the business cycle; such circumstances seem to be described as almost beyond control or influence by immediate parties such as the union. Only the customer decides. More important, the Court balks at envisaging a cessation of business between secondary and primary employers, although as stated before the Court later refers to this possibility and brushes aside any suggestion of illegality. But if the placards and handbills contain language which lacks sufficient identification of the primary dispute, an entirely different result will ensue. Here it is said that the secondary employer “stops buying the struck product,” though in the footnote the opinion is flexible enough to allow that the employer “faces a decision.” Is the Court here attempting to employ the same economic injury test which it rejected, although perhaps mistaken as to its theory, of the District of Columbia Circuit? Not entirely, it would seem, in light of the above mentioned statement that customers may act contrary to the signs’ instructions. But it is possible that economic injury to nonprimary products would be relevant where ambiguous or hazy language makes it difficult for the Board to discover the unions’ intent.\textsuperscript{117} An actual boycott of nonprimary products might expose intentions and help resolve the case.\textsuperscript{118} Perhaps consumer testimony as to what he thought the

\textsuperscript{114.} NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 72 (1964).
\textsuperscript{115.} Id. at 72 n.20.
\textsuperscript{116.} Ibid.
\textsuperscript{117.} See Coca Cola Bottling Co., 151 N.L.R.B. No. 86 (1965).
\textsuperscript{118.} Presumably if this approach were followed, the union could submit evidence showing that losses due to primary goods were disproportionately greater than others.
pickets meant and whether he was "coerced" would be important here. But would lack of coercion turn this case in favor of the union? Does this come dangerously close to an "inconvenience to the owner" test? Here also it is possible that constitutional questions would be presented in which an abandonment of the publicity-signal analysis would produce regret. In any event we may well expect some approach by the Court itself which varies from Tree Fruits, for it disagrees, "for the purpose of this case," with the economic loss test.

It should be remembered that secondary consumer-directed picketing could take place within many different factual contexts. Some of them may impose great strains on the Tree Fruits analysis. The dissent of Mr. Justice Harlan gives one of the most obvious examples. This is the case of the retailer largely or entirely dependent upon the sales of the struck product. The Court is more persuasive in dealing with a retailer like Safeway with many products when it says that product picketing does not "threaten, coerce or restrain." But what of the independent gas station owner, to take Mr. Justice Harlan's example, who buys from one company; or what of retailers with exclusive franchises, such as automobile dealers? Suppose that the retailer is dependent upon three or four products. How is the line—if it indeed exists—to be drawn? The Court must strain logic in these cases to find no violation, or else it must declare this provision unconstitutional as applied in a piecemeal fashion. Is either course a satisfactory one?

What of consumer picketing against suppliers and distributees who do not deal regularly with the public? What is the effect of Tree Fruits on a merchant who deals with the public and is picketed for advertising in a newspaper with which the union has a primary dispute? The analysis does not fit these cases, but since the

120. An example of such strains is contained in NLRB v. Upholsterers Frame & Bedding Workers, 331 F.2d 561 (8th Cir. 1964). In that case the Eighth Circuit, with little discussion, applied Tree Fruits in support of a complaint dismissal when the union simply wished to channel manufacturing agreements with the picketed retailer to local employers. There was no specific primary employer to be identified and the placards requested consumers to "patronize home industry." It would seem that this indicates an intended boycott of total, rather than selective proportions and would thus fall beyond Tree Fruits rationale's protection. But the Court held that that case was "controlling here" and "dispositive." Id. at 564.
121. See Local 154, Int'l Typographical Union, 135 N.L.R.B. 991 (1962). See also the recently decided Glazers' Union, 57 L.R.R.M. 1210 (NLRB 1964), wherein the Board rejected the claim that secondary picketing was informational and relied, in part, upon the difficulties involved in ascertaining a public response to picketing at a construction site.
wording on picket signs is of primary importance it might be difficult for the Court to sanction injunctions against such conduct.

(3) Identifying the Primary Dispute.—Another question here is how clearly must the primary dispute be identified. Paradoxically, it would seem that statutory construction would argue for strict standards, but the Court's desire to avoid constitutional questions requires laxity. Do the words "do not patronize" imply a total boycott of the secondary establishment and thus convert picketing which is otherwise lawful into unlawful activity?\textsuperscript{122} This is not to deprecate an approach which places a premium on reasoning and intelligence (publicity) rather than emotions (signal). On the contrary, the high value which the first amendment places on the communication of ideas is well reflected in the former and, moreover, in the goals which the Court sets for itself in \textit{Tree Fruits}. This writer's basic quarrel with that decision goes to the means established for implementation; in short, the focus on the picket sign rather than on the audience to which the appeal is addressed. The writer does not view the former as entirely irrelevant or unimportant. Indeed, in the writer's opinion, the sign which is without words or identification from which the viewer may possibly extract ideas and opinions is an albatross, uninvited and unsuited to the Holmesian marketplace of ideas, and as such is not entitled to the same protection. But it is this writer's fear that the Court, by disregarding effect, will come to quibble excessively and wastefully with cause. The latter's pertinency should be, as described above, a rule for what is hopefully a near fringe of worthlessness. It seems to this writer that the audience is of primary importance. The courts must evaluate, on the best information available, the reactions of customers as distinguished from, for instance, skilled craftsmen, subject to severe internal union discipline, when confronting picket lines. Certainty and more clearly defined guidelines are not the least of the benefits to be derived from this approach.

(4) Unlawful Objective Test.—It is this writer's opinion that Mr. Justice Black's concurring opinion in \textit{NLRB v. Fruit \& Vegetable Packers}\textsuperscript{123} was the best position to take. His concurring opinion concludes, like Mr. Justice Harlan's dissent, that Congress meant to outlaw secondary product picketing; but unlike the dissent, Mr. Justice Black contends that the provision abridges speech and press in violation of the first amendment. The concurrence states that the

\textsuperscript{122} See note 117 supra.
\textsuperscript{123} 377 U.S. 58 (1964).
provision in question is not to keep public order or safety, but rather "it is difficult to see . . . [how it] intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment." Thus, the conclusion is that a statute proscribing the particular views of one side of a certain kind of labor dispute "rather than all picketing for public order" is bad. This would appear to constitute the heart of the rationale. However, Mr. Justice Black recognizes the existence of other and what this writer believes to be more important obstacles to his conclusion.

In 1949, Mr. Justice Black wrote the Court's opinion in *Giboney v. Empire Storage & Ice Co.* There it was held that picketing for the purpose of obtaining agreements in violation of Missouri's anti-trust law, for which there were criminal sanctions, could be enjoined. Mr. Justice Black rejected the contention that the first amendment's protection extended to "an integral part of conduct in violation of a valid criminal statute." It is interesting to note that the *Tree Fruits* concurrence characterizes the unlawful objective in *Giboney* as "an unlawful or criminal undertaking." It is difficult to discover the unstated emphasis given to this, but as the Court has held in the preemption cases, the form that a statute assumes, be it criminal, tort or administrative, cannot impinge upon constitutional considerations.

The crux of *Giboney* was the union's activities, "their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross it at peril of their union membership, their publicizing . . . ." all of which joined together to constitute substantive matter within legislative reach. Mr. Justice Black was able to distinguish *Giboney* on this point because the objective was prohibited; the publicity proviso specifically protects activity other than picketing to accomplish the same ends. This is an interesting argument, and although it could be applied to all secondary boycott law so long as any loophole existed, the presence of congressional affirmation lends it some plausibility. But this writer does not think that the latter provides enough of a distinc-

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124. *Id.* at 78.
126. *Id.* at 498.
127. *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 79 (1964). It cannot be said that Justice Black *necessarily* relies on or cites *Giboney* within this context as the word preceding its citation is "compare."
tion from the former to be convincing. Of course, Mr. Justice Black is wise to say that the test should be unlawful objectives and to thus, as a consequence, ignore Hanke and Vogt where such were non-existent. The majority's requirement of "specific ends" probably dooms those cases; but like the majority, Mr. Justice Black avoids the unavoidable. Here, the secondary consumer picketing is prohibited, and with all deference to the Justice, the consummation of an agreement formalizing the union's objective in this very case would have been unlawful. The unavoidable question is how far may Congress go in regulating picketing? The answer given by Mr. Justice Black is the right one: not as far as section 8(b)(4)(ii)(B) extends.

(5) Construction of Sections 8(b)(4)(i) and (ii).—Mr. Justice Brennan was not plagued with criticism in writing the opinion in NLRB v. Servette, Inc., for there were no concurring or dissenting opinions. In Servette, the Court interpreted more of the new Landrum-Griffin amendments and held that certain managers were "individuals" so as to make unlawful under certain circumstances inducement of them by trade unionists to cease business with a primary employer. Respondent Servette, a wholesaler of specialty food merchandise, alleged that the union had induced and encouraged supermarket managers to stop handling Servette merchandise and that therefore a violation of subsection (i) of section 8(b)(4) had been committed. The Board held that the managers were not "individuals" such as the subsection contemplates and thus found no violation. The Ninth Circuit reversed on this point. The Supreme Court agreed with the Board's result to the effect that subsection (i) could not apply to the inducements in question aimed at management decisions. Thus, it was held that while the union could well violate subsection (i) in regard to supermarket managers if it appealed to them to "down tools" in a

131. Id. at 50-54. A discussion of the legislative history is contained therein.
132. L.M.R.A. § 8(b)(4)(i), 61 Stat. 140, as amended, 29 U.S.C. § 158(b)(4): "It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . ." where the objective is that of an unlawful secondary boycott.
134. Servette, Inc. v. NLRB, 310 F.2d 659 (9th Cir. 1962), rev'd, 377 U.S. 46 (1964).
rank and file fashion; such was not the case in Servette. The Court put it this way:

The careful creation of separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals for other ends which are attended by threats, coercion or restraint, argues conclusively against the interpretation of subsection (i) as reaching the Local's appeals to the supermarket managers in this case. If subsection (i), in addition to prohibiting inducement of employees to withhold employment services, also reaches an appeal that the managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, subsection (ii) would be almost superfluous. Harmony between (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement of the managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would "threaten, coerce, or restrain" that exercise.135

It should be noted that the Court's approach is at slight variance with the position of the Board. The Board's rule created an irrebuttable presumption that supervisors would not react like employees to union appeals. The Court, on the other hand, adopts a "wait and see" attitude. The Board is wrong, says the Court, in holding that supervisors cannot be individuals within the meaning of subsection (i). This would seem to make the union's intentions, and perhaps the manager's reaction, paramount. Even though a manager might normally speak and act in the employer's interest — and thus usually come within the applicable subsection (ii) — an appeal to act as an employee violates subsection (i). Presumably, the latter would encompass work stoppages, slow downs, and simple encouragement to harass. The union does not take the manager as it finds him.

The Court also held that wholesale distributors were to be viewed as "producers" (thus protecting union handbilling) within the meaning of the publicity proviso,136 and that a warning to distribute handbills in front of the non-cooperating stores of secondary employers could not constitute "threats" under subsection (ii): "The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected."137

136. L.M.R.A. § 8(b)(4), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (b)(4): "nothing contained in such paragraph (4) shall be construed to prohibit publicity, other than picketing. . . ." Qualifications on this right are truthfulness and a failure to induce work stoppages.
With regard to the first holding, the Court indicates, though it does not expressly state, that its interpretation of a “producer” is even broader than the facts in *Servette* require. The Court notes with approval the Board’s holding in *Lohman Sales Co.* to the effect that a wholesaler comes within the definition. But *Lohman* enunciated a doctrine much more wide sweeping. In that case the Board held that the word “producer” as used in the proviso encompasses anyone who enhances the economic value of the product ultimately sold or consumed and thus that no distinction need be drawn between processors, distributors, and suppliers of services. A wholesaler might be said to be more closely related to actual production, thus placing such an employer in a distinct classification in relation to other employers with whom the “producer” nexus does not tie so tightly.

But the Court would appear to acquiesce in the Board interpretation for two reasons. The first and more persuasive reason is the Court’s comment that legislative history does not suggest a narrower protection in the proviso than that set forth in the prohibitions of section 8(b) (4) to which the proviso is an exception. The second consists of disagreement expressed with the Ninth Circuit’s ruling in *Great W. Broadcasting Co. v. NLRB* to the effect that a television station was not a “producer.” Although this was not stated, the Court’s broad interpretation was probably necessary to avoid serious constitutional questions in regard to publicity at and away from the secondary employer’s situs. Fewer of the hurdles erected by picketing to first amendment protection are found here. This is especially true of the more traditional and supposedly less emotional forums like newspapers, radio, and television.

(6) *Separate Gate Picketing*.—Mr. Justice White delivered the opinion of the Court in *United Steelworkers v. NLRB*, another secondary boycott case. Here, the union picketed a special entrance used only by railroad personnel, the entrance being adjacent to the primary employer’s struck plant. The property upon which the picketing took place was owned by the railroad rather than the primary employer. The question before the Court was whether the picketing violated sections 8(b) (4) (i) and (ii). The
Board held\textsuperscript{142} that the picketing was primary activity under the Court's previous decision in \textit{Local 761, IUE v. NLRB (General Electric)}.\textsuperscript{143} The Second Circuit reversed.\textsuperscript{144}

In the \textit{General Electric} case, the Court had held that separate gate picketing at gates used exclusively by secondary employees at the primary situs was primary and lawful if the work done by such employees was connected with the normal operations of the primary employer; it was secondary and unlawful if unrelated to the day-to-day operations. Here, \textit{General Electric} was viewed as dispositive. The Court stated:

\begin{quote}
We think \textit{General Electric}'s construction of the proviso § 8(b) (4) (B) (protecting primary activity) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved "primary picketing" from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations.\textsuperscript{145}
\end{quote}

There are, however, difficulties with the Court's treatment of this case. In \textit{General Electric}, it was said that "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."\textsuperscript{146} Here, the separate gate and picketing were somewhat more remote from the primary situs; this difference is significant. Location, though important to the \textit{General Electric} rationale, was not decisive. Picketing here was so proximate and related to the employer's day-to-day operations that property ownership considerations could not operate to convert this into unlawful activity. The \textit{Steelworkers} ruling liberally expands the \textit{General Electric} situs so as to reach even those approaching the situs.

\begin{itemize}
\item \textsuperscript{142} Carrier Corp., 132 N.L.R.B. 127 (1961).
\item \textsuperscript{143} 366 U.S. 667 (1961).
\item \textsuperscript{144} Carrier Corp. v. NLRB, 311 F.2d 135 (2d Cir. 1962), rev'd, 376 U.S. 492 (1964).
\item \textsuperscript{145} United Steelworkers v. NLRB, 376 U.S. 492, 498-99 (1964).
\item \textsuperscript{146} Local 761, IUE v. NLRB, 366 U.S. 667, 681 (1961). (Emphasis added.)
\end{itemize}
Accordingly, the Court seems to rely equally upon location and the nature of the work. Thus, the key here is not, contrary to what was said in General Electric, the nature of the work performed by the secondary employer. The importance of such hedging on rationale is dramatized by the Court's all-inclusive application of the nature of the work concept to separate gate suppliers. For the Court, it is to be recalled, picketing is primary when "aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt."\footnote{147}

In General Electric, the Court apparently sought to distinguish construction on new buildings as capital improvement for which the primary employees did not have necessary skill or manpower (unrelated), from routine maintenance work subcontracted because of economic considerations (related). With regard to the latter, it was noted that primary unit employees had performed such work on occasion. This maintenance was what was necessary to the normal operation of the plant and consequently was considered primary.

This analysis poses problems quite similar to those confronting the Board under section 8(e), the proscription of unlawful objectives which the union seeks through section 8(b)(4).\footnote{148} Harmony between the two sections is desirable and, to some degree, seems to have been intended by Congress.\footnote{149} But neither General Electric nor other decisions handed down to date provide clear guidelines for a primary-secondary dichotomy on the basis of the work's nature.

If the actual work performed by the secondary employees must have been done in the past in the Court's reference to past performance of maintenance work in General Electric, then the answer must be in the affirmative. But the Board's approach in section 8(e) cases as most recently articulated in the Wilson & Co.\footnote{150} ad-

\footnote{147. United Steelworkers v. NLRB, 376 U.S. 492, 499 (1964).}
\footnote{It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .}
\footnote{150. 143 N.L.R.B. 1221 (1963), modified, 335 F.2d 709 (D.C. Cir. 1964). But see United Artists Theatre, Inc., 4 CCH LAB. L. REP. § 13,418 (NLRB 1964).}
monition against contractual work "recapture" by primary employees is more cautious. However, the General Electric approach, if it can be called such, would seem to comply somewhat with the "ally" doctrine which views pressure directed at farmed out work by the struck employer as primary activity. But there are other variants on this theme. Suppose that primary employees have only the skills, experience, and manpower, but not past performance. Might not this picketing be lawful? The first three requisites are what the Court thought the unit employees did not possess in regard to the construction work in General Electric. But what if more manpower is needed? What if technogical advances alter the skills, but not the content of the job function? The answer given by the District of Columbia Court of Appeals, within the context of section 8(e), is that work is "fairly claimable" when the primary employees have requisite skills and experience. Unfortunately, the Supreme Court's General Electric opinion does not clarify what its standard is to be; and whether the factor of location requires a more expansive interpretation than that given by the Board in Wilson & Co. or by the "ally" doctrine.

The Steelworkers case did not afford a feasible opportunity to open up this problem for discussion. The various criteria have no rational application to the facts of that case. One cannot imagine the case being decided on the basis of whether railroad work was traditionally performed or fairly claimable by unit employees. Moreover, the happenstance of the delivery method — boat, truck, railroad, etc. — is unsatisfactory for purposes of this analysis. The crucial question is really the arriving product and its relationship to the integrity of the employer's operations. In this manner, the criterion employed in the General Electric case takes on a new and different costume in the Steelworkers case.

In a sense, of course, the maintenance work in General Electric and the coal delivered in Steelworkers are conceptually identical. This is because the loss of each seriously damages the employer's

152. Meat Drivers, Int'l Bhd. of Teamsters v. NLRB, 335 F.2d 709 (D.C. Cir. 1964) (Wilson & Co.).
ability to conduct his primary operation. But Steelworkers particularly— with its indiscriminate categorization of all related work— must fall upon the proximate location of the separate gate as an important factor.105 Otherwise little would remain of the secondary prohibitions contained in section 8(b)(4).

B. Representation Elections

(1) Pre-election Employer Benefits.—NLRB v. Exchange Parts Co.106 presents issues which are considerably simpler than the tortuous web through which Congress bids us crawl in the area of secondary boycotts. Regardless of one’s convictions, it would seem that there is too much law of secondary boycotts and that it is too complicated. In the Exchange Parts case, the union advised the employer that it was conducting an organizational campaign and that a majority of the workers had designated the union as their bargaining representative. The union petitioned the Board for a representation election, which was subsequently conducted about five months later. During two meetings before the union approached the employer, management officials announced that the employees’ “floating holiday” would come due in six weeks and that there would be an additional floating holiday during the following year. Shortly after the Board’s election order, the employer held a dinner for the employees at which they were asked to vote on whether the extra day of vacation would be a floating holiday or take place on their birthdays. At the dinner, the company vice-president referred to the forthcoming election: he stated that the employees would be giving up their right to speak and act for themselves if they voted union; he accused the union of distortions; he pointed to the benefits that the employees had received without a union, and finally he urged all employees to vote. Two weeks before the election, all employees received a letter from the company which emphasized that only the company could produce benefits for the work force—not the union. Moreover, the letter contained a detailed statement of benefits which employees had received over a period of eleven years, a new system of computing overtime, and a new vacation schedule.

In Exchange Parts, the Court held that pre-election employer benefits immediately favorable to employee interests, as well as threats and promises conditioned upon a vote against the union,  

156. 375 U.S. 405 (1964).
could impinge on employee free choice in the selection of their bargaining representative. Citing Medo Photo Supply Corp. v. NLRB\textsuperscript{157} wherein it was held that threats or favors to individuals could unlawfully induce employee choice of the bargaining representative, the Court extended as "fully applicable" the principle in that case where the union was already bargaining agent to the case at hand. Referring in a footnote to the company's veiled threat not to bargain with the union for new benefits if it won, the Court stated:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. The danger may be diminished if, as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable.\textsuperscript{158}

This is one of those concepts which is basic to the administration of the NLRA, but at the same time difficult for the public to comprehend. It seems curious, the argument goes, to make unlawful those benefits which an employer generously bestows on his workers. But Mr. Justice Harlan, writing for the Court, succinctly dealt with this objection in the following language: "The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organization from calculated good will of this sort deprives employees of little that has lasting value."\textsuperscript{159} More precisely, the goals of collective bargaining and employee free choice — both of which the Board is mandated by Congress to pursue — cannot prosper where the above employer conduct goes unchecked.

(2) Review of Board Orders in Certification Proceedings.— Finally, in Boire v. Greyhound Corp.,\textsuperscript{160} a unanimous Court resolved an extremely significant representation case in favor of the Board. In this case, the union filed a representation petition with the Board pursuant to section 9(c)\textsuperscript{161} requesting an election among the por-

\textsuperscript{157} 321 U.S. 678 (1944); cf. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).
\textsuperscript{158} NLRB v. Exchange Parts Co., 375 U.S. 405, 409-10 (1964).
\textsuperscript{159} Id. at 410.
\textsuperscript{160} 376 U.S. 473 (1964).
ters, janitors, and maids working at four terminals operated by the employer. The amended petition designated the employer of the workers for whom representation was sought as the Greyhound Corporation and Floors Incorporated. The latter was a corporation engaged in the business of providing cleaning, maintenance, and similar services and had contracted with Greyhound for such services at the four terminals in question. The Board found that the two were joint employers because of the common control that they exercised over the employees.

Before the election, Greyhound filed suit in a federal district court to enjoin the Board from carrying out the election. The district court, relying on Leedom v. Kyne, found that the Board's conclusions as to who was the employer of the service staff to be insufficient as a matter of law and set the election aside. The case came to the Supreme Court after circuit court affirmance.

At the outset, the Court noted that the general rule makes most Board representation final orders not directly reviewable in the courts. In the light of legislative history, the Boire opinion was able to find only two exceptions to that rule. The first was Leedom v. Kyne in which the Board acted in excess of its statutory powers by approving a unit of professional and non-professional employees without a vote by the former — a statutory obligation under the act. In the Leedom case, (and Mr. Justice Stewart seemed to agree with that case in Boire) Board action was reviewable because the order was in excess of delegated power. The second exception arose, said the Court, where the Board was operating in the area of "public questions particularly high in the scale of our national interest because of their international complexion." But the Court could not find either exception present in Boire as this case provided essentially a factual issue. "The Kyne exception is a narrow one, not to be extended to permit plenary District Court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law..." Suffice it to say that the Board's election machinery would have been severely frustrated if the parties were continually

free to seek injunctions whenever a Board holding on such questions which require a speedy determination did not suit their taste. Though it assuredly can never clarify the sometimes arbitrary lines drawn between law and fact, Boire is a good decision and it works to the advantage of a well functioning National Labor Relations Act.

III. Conclusion

The October 1963 Term was one in which the Court made a number of cautious resolutions without penetrating too deeply into the realm of controversy. In some instances, such as the Tree Fruits case, the luxury of this approach may have cost the Court and cut down its ability to rationalize future cases intelligently; moreover, it may have impaired some of the prestige which an independent judiciary must savor. But for every critic who complains of unnecessary reticence there will be one who points out the error of overstatement. One does not surrender the critical exercise in acknowledging that the Court cannot play specialist in this or any other field. Indeed, this situation is, as it should be, the most acceptable to the citizenry at large.

But there will be other terms where this seemingly endless flow of unanswered labor questions will demand of the Court a more definitive and exacting burden. The Court's future guidelines for this yet youthful body of case law is a dominant theme in our country's propensity for economic growth and in the values which we would retain as free men.

166. See Lewis, Gideon's Trumpet (1964).