Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

NATIONAL LABOR RELATIONS BOARD, Petitioner,	
vs.	
LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and BURNS AND ROE, INC., et al., Petitioners,	
vs.	
LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO	

Docket No. 40

Place Washington, D. C.

Date November 18, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
vs.	:	No. 40
LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO	:	
and	:	
BURNS AND ROE, INC., ET AL., Petitioners,	:	
vs.	:	No. 42
LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO	:	

Washington, D. C.,

Wednesday, November 18, 1970

The above-entitled matters came on for argument at 1:47 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

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Counsel for AFL-CIO

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 40, National Labor Relations Board vs. the International Union of Operating Engineers.

Mr. Ordman, you may proceed whenever you are ready.

ARGUMENT OF ARNOLD ORDMAN, ESQ.,

ON BEHALF OF THE NLRB

MR. ORDMAN: Mr. Chief Justice, may it please the Court, these two cases consolidated here are here on writs of certiorari from the Court of Appeals for the Third Circuit.

In broad terms, the questions presented in both of these cases is whether the union, Local 825 of the Operating Engineers, violated section 8(b)(4)(B) of the National Labor Relations Act, the so-called secondary boycott provision, by exerting coercive pressures upon neutral employers who supported its dispute with the primary employer, the White Construction Company.

Now, that question can be further refined. All parties and the Board and the court below are in agreement here that the union did exert coercive pressures as defined by section 8(b)(4)(B) upon neutral employers. Now, that statutory section further requires for purposes relevant here that such coercive conduct have as an object forcing or requiring an employer to cease doing business with any other person.

Now, this is the pivotal issue in the case. The

Board found that the union's coercive conduct had cessation of business as it read the statute, in a statutory sense, as an object of its conduct, and the Board therefore found the violation of section 8(b)(4)(B). The court below disagreed.

Unlike the Board and unlike other courts of appeals which considered this issue, the court below reads the language in the statute quite literally. On the basis of that literal reading, the court below held that the proof was insufficient to prove that the union had an object to -- to have a cease doing business object, because the union did not, as the court saw the case, ask for a total cessation of business.

Now, the underlying facts at issue, the instant labor dispute, arose at a construction site in Oyster Creek, New Jersey, where Burns and Roe, Inc., a general contractor, was building a $68 million nuclear power plant for the New Jersey Central Power and Light Company.

Burns and Roe, the general contractor in charge of this project, had no employees of its own, it delegated all the -- no construction workers -- it delegated all the construction work to three subcontractors, the White Construction Company, Chicago Bridge and Iron Company, and Poirier and McClane Corporation.

Now, all these three subcontractors had among their employees members of the Local 825 Operating Engineers Union. Local 825 had contracts with two of the subcontractors, Chicago

Bridge and Poirier, it had no collective bargaining agreement with Burns and Roe, the general contractor, nor with the White Construction Company.

Now, White's job, one of the three subcontractors, each job under each subcontractor was to build this nuclear power plant, the reactor building of the nuclear power plant. And White's equipment included, among other things, a piece of equipment known as an electric welding machine. And as soon as White got the subcontract he assigned the operation of this electrical welding machine, including starting and stopping the machine, to employees of his who were members of the Iron Workers Union. And Local 825, the Operating Engineers Union, wanted that work and urged upon White that employees of White members of Local 825 Operating Engineers, be given the job of pushing the buttons which started and stopped the welding machine.

Now, Local 825, as I pointed out, didn't have contracts with White, the subcontractor, or with the general contractor, and in support of its demand they presented -- they proffered agreements to White and to Burns. Actually, in effect, those agreements would commit White, the subcontractor, and the general contractor to give all power equipment, including specifically welding machines, and give that jurisdiction to the Operating Engineers.

Now, these agreements would not only have bound the

signatory, White, who is doing that work, it also bound subcontractors of the signatory so that Burns and Roe, the general contractor, would have been bound to apply that subcontract to White who was a subcontractor.

Now, neither White nor Burns yielded to this pressure to sign the agreements. Now, while this dispute was going on, since the parties, all the parties involved had agreed that disputes of this kind, jurisdictional disputes, should be submitted to the national joint board for the settlement of jurisdictional disputes. The dispute was submitted around October 6 and within a couple of weeks the national joint board for the settlement of jurisdictional disputes, called the Dunlop board, settled the dispute and decided in favor of the Iron Workers to whom White had given the work. But the Operating Engineers weren't satisfied. They didn't submit, they refused to comply with that determination of the joint board and they persisted in their efforts to regain the work.

Now, just to telescope the fact just a little bit, throughout this whole period, before the joint board submission Local 825 engaged in coercive efforts -- this is agreed -- engaged in coercive efforts by threats of work stoppages and by work stoppages to compel White to change its work assignment.

Now, White, of course, is doing the work -- was the employer doing the work in question, and Local 825, so long as it observed lawful efforts in section 8(b)(4)(B), had a perfect

right to try to get this work. But the fact is that Local 825 didn't confine itself to lawful efforts. Not only did it use coercive pressures against White, the employer directly involved, it also used coercive pressures against the general contractor, Burns, against the two other subcontractors, Chicago and Poirier, as a means of getting White to comply with its demands.

Now, Burns, Chicago and Poirier had nothing to do with the assignment of White's work. White was the employer and they had no authority with respect to assignment of White's employees.

Now, on this state of the record, the Board found and the court below agreed that this was a violation of section 8(b)(4)(B) of the act, which is the jurisdictional disputes provision, but the Board further found that insofar as the union exerted coercive pressures upon Burns, Chicago, and Poirier, who were neutrals in this dispute, because of the workers in dispute, the union also violated section 8(b)(4)(B) of the act since an additional object of the union's pressure against the neutrals was to cause a disruption of business among the various employees at the job site. In the Board's view, such an object, in the Board's language, although something less than a total cancellation of business constitutes a cease doing business object within the meaning of section 8(b)(4)(B).

Now, there is no quarrel here about the jurisdictional dispute finding. That is not being challenged. But very much in issue is the propriety of the Board's section 8(b)(4)(B) finding.

Q What did they ask for in the work contract?

A For one thing, they asked for White -- Burns, rather, the general contractor, to sign the contract which would have bound the general contractor and his subcontractors to give this work to operating engineers. They told him unless he signed the contract, there would be a work stoppage, and there was a work stoppage. And they told the other subcontractors unless operating engineers got the work, there would be work stoppages, and there were work stoppages, and as a result of which operating engineers employed by the other two subs went off the job. These were the pressures.

Incidentally, the court below agrees that these kinds of pressures, the threats of work stoppages and work stoppages, fell within the statutory disagreement -- fell within the statutory definition. That finding isn't challenged here by any party.

Now, the court below, like the trial examiner in the board proceeding, gave the words, the statutory words "to cease doing business" a literal reading. An object of ceasing doing business to the court below meant a total and complete cessation of doing business, and intent to cause a disruption or

successive disruptions in the court's view was not enough. Accordingly, the court below held that the statutory criteria for the finding of a violation, mainly the object test, was not met. This was not, the court below thought, the kind of classical boycott, secondary boycott which Congress was after.

Now, our position is that the court below erred. I suppose much could be made of the fact, if Your Honors please, that a $68 million budget was repeatedly interrupted by a fight as to who was to push a button on an electric welding machine, but I don't want to make light of it. This case, like National Woodwork, like others this Court has before it, reflects the deep and understandable concern of the unions who are trying to preserve their job opportunities and their job security in the face of automation and increasing technology. This Court has talked about it often, basically in the National Woodwork case, among others.

Insofar as the unions sought to preserve its work opportunities for the employees it represented, and insofar as it used lawful efforts, it was entitled to protection. Our position here, however, is that the union went beyond lawful grounds. We submit that even if the court below was right and that the only possible reading of cease doing business is a total cessation of business, we believe the court erred in this regard on the side of literalism, and we think a few basic postulants established by this Court confirm our position.

Now, first, the basic thrust of the so-called secondary boycott provision, that is 8(b)(4)(B), formerly 8(b)(4)(A), is that it is designed to protect condescending employers from involvement in pressures and controversies not their own. That was the congressional intent which was documented in the legislative history and this Court has given the matter uniformity, confirmed that in its own decisions as far as back as Denver Building, in 341 U.S., and at least as recently as National Woodwork in 386 U.S.

No one in this case, no one evern suggests that Burns, the general contractor, and Chicago Bridge and Poirier, were anything other than neutrals in the dispute between White and Local 825. No one but White could assign the work that was in question. Whitewas the primary, in fact, and the purpose and effect of the union's pressures on the other three companies was to involve them in a dispute which was no part of their's, no part of their problem.

Now, the second proposition: A literal reading of section 8(b)(4)(B) and its companion provision, section 8(b)(4)(D), is in our view, and we believe you have so held, a literal reading of those sections is an inadequate basis for determining the statutory reach.

It would be an imposition on your time, if Your Honors please, and my time is also limited, to belabor the point that the statutory provisions in section 8(b)(4)(B) and

section 8(e) were the product of congressional compromise, and that this conflicting compromise is reflective in statutory language which, if I can understate the matter, is somewhat lacking in precision. And I think it was this lack of language precision which prompted, I think, Mr. Justice Harlan to make the comment in National Woodwork, which was a split opinion, and Mr. Justice Harlan commented that both sides of today's division in the court agree that in pursuing the search for the true intent of Congress, we should not stop with the language of the statute itself and must look beneath it to the legislative history.

We submit that the court below rested on the naked language of the statute and failed to carry out the mandate. Now there is a proscribed object, a proscribed object such that the statute says one of them is to cease doing business, need not be the only or even the predominant object of conduct within the ban of section 8(b)(4)(B).

The court made much of the fact that, after all, the real role of the union here in all its activities against all the employers was not to bring about a conduct of cessation of business but what they wanted was the work, but the work wasn't given to them, and that their real object, their real goal is to get the neutrals, the secondaries, to pressure the primary into hiring operating engineers. That was the burden of the opinion, and we conceded, and the Board so found, and

the finding was the crux of its section 8(b)(4)(B) holding. The Denver Building again was the first of a long line of cases establishing that it is sufficient, as the Board here found, a cessation of business was an additional object, an object of the union's conduct; and this Court again pointed out in two cases that come to mind immediately, that Congress deliberately substituted the words "an object" for the original bill which just condemned when you do it, when you exert coercive pressures for a purpose. They thought that was too limited and substituted the words "an object," and plainly an object of the union's conduct here was to bring about the kind of disruptions of business, the kind of work stoppages, such work stoppages as would be appropriate or necessary to achieve its goal, either of obtaining that work from White or conceivably from compliance with the contractor.

Q Do you think the Board's rule on whether or not this does come under 8(b)(4)(B) makes any difference?

A Yes, I believe, because the Board has worked in this area, frankly, because it has expertise in this area, as this Court is aware of. We have been before this Court any number of times in this area, and I think the Board's expertise is entitled to consideration.

Q I was just wondering, this is a pure question in law as to what the statute means.

A Yes, I believe it is a pure question of law, and

I don't -- the Board's view of this does not over-bear of what the court can say and, of course, the Board must and does defer to the court on the question of law, but our submission is, I probably meant to say, that the Board's view of the statute plus the legislative history I think is entitled to consideration, not controlling but certainly entitled to consideration.

Q You are talking primarily about the legislative history of the --

A 8(b)(4)(B)

Q -- Taft-Hartley Act of 1947 and --

A And the Landrum-Griffin Act of 1959, yes.

Q Both?

A Both.

Q Denver Building was decided before the 1959 act?

A Yes, about -- National Woodwork was decided after -- and Jacksonville Terminal, which also bears here, was decided after, and carries the same general content.

Q Do you think the amendments Congress made to this legislation in 1959 has any real relevance to the question here?

A Yes, I think they do.

Q If we had decided the case between 1947 and 1959?

A I think the decision would be the same.

Congress did state they were making an effort in 1959 to close some loopholes. On the other hand, at the same time it interpolated that proviso which indicated it wanted to protect primary picketing. I believe so far as this case is concerned the result would be the same in both, under both versions, the 1947 or the 1959.

Q So the amendment of the language has no real significance --

A It has no significance here. I think it just solidifies. It does contain the primary proviso, the proviso protecting the primary activity; on the other hand, that was an interpretation which the act had been given before that proviso was added.

Q I am a little puzzled. Perhaps you can clear it up with your response to Mr. Justice Harlan that this is a pure question of law. The Board, in defining this statute, had to take into account the factual situation and the purpose of the act and the impact of the secondary boycott in this whole situation, did it not?

A Of course. The pure question of law --

Q You can't really isolate the statute --

A No.

Q -- statute from the facts and the impact, can you?

A No, we do not. The pure question of law, I

submit, is the pivotal issue in this case, is whether to cease doing business must be read as a naked statutory language or whether we must look back to the legislative history to determine the real meaning of that language. This is the place I think where the Board and the courts -- the Board and the court below, really divide.

The court looked at that language as the statute wrote it, to cease doing business, and met only the suggestion in a dictionary sense rather than looking back at the legislative history to see what Congress was really after. Of course, once you decide the test, then of course the facts -- you then must appraise the facts to see whether it meets that test or the meaning of that language.

Q The difference in other words between the facts?

A That is correct. That is correct, and that is why, as I say, it is not a question of the actual occurrences, as there is no dispute between the court and the Board as to what actually happened.

Q Mr. Ordman, I thought one of your positions was that even if the statutory language means what the court below says it means --

A Yes, and that is the point --

Q -- that the facts of this case satisfy that meaning?

A Yes, that is a point I wish to make. First, I think a broad reading certainly is presented, I think we prevail even on a narrow meaning and I would like to touch on that --

Q We probably aren't too interested in that disposition.

A No. The court below made much of the fact that the union didn't admit, they didn't say it wanted a total cessation of business. I might make reference to a footnote in the Board decision, to the Board decision. The fact of the matter is, and it is undisputed here, the union came to White -- to Burns, the general contractor. He had no employees. They asked him to sign a contract which would not only bind him to give this kind of work -- electrical welding work to operating engineers, it would also bind the subcontractors.

Now the union asked the general contractor to sign that contract and said if you don't you will have a work stoppage, and there was. Now, if the general contractor had signed that work agreement, White either -- the subcontractor, either would have had to comply and achieve the union's purpose or under his contract obligation, the general contractor would have to say get off the project.

Now, it seems to me in that sense alone, moreover we suggest --

Q Did the Board take this view?

A The Board took a broader view but it cites this fact and it did decide this case on the facts, and this very submission of the contract and the contract is noted in footnote 6 of the Board decision. I think you will find it on page 6 of the appendix, page 6 of the appendix, footnote 5, the contract sought from White and Burns provided for respondent's members to perform the disputed work and said they couldn't subcontract any work covered by the agreement unless the subcontractor agreed in writing to perform all the work.

Besides that, we submit that the fact is that the union did bring about two successive work stoppages against the neutrals, which in and of themselves can be read as cessation of business. The fact is that the union sought here to impose a wholly new working arrangement. In other words, it said cease doing business with White, the subcontractor, if he is going to do assign work to whomever he pleases, you can only work with him under a new method which we prescribe, namely that you hire operating engineers to do this work.

And incidentally, the suggestion is that the Board didn't spell this out either because the Board talked only about something less than the total cancellation of business, is cease doing business. We believe that is right. But the Board on these other theories -- and I believe the amicus brief of the AFL-CIO says the Board didn't spell out its

rationale. The Board cited the Local 3, IBEW case in its decision in support of its present holding, in which precisely this rationale is spelled out. And I don't read as requiring, having the Board having solved a case having made such a holding to repeat the rationale of that case.

Now, I want to make one quick caveat I think is important, preliminarily one: The court below was concerned about the classical secondary boycott. I really submit that this type of boycott we find in this case, the ultimate objection of a union, and the laudable objective is to get more members, but the type of boycott we have got in this case, which is typical of the many cases we have which arise in the construction industry and might more nearly be described as the classical boycott, is the one the court below described.

Now, one very important caveat: We are confining this analysis to situations whereas in the instant case, the thrust of the union's conduct is directed at secondary and neutral employers. We recognize that primary strikes and primary picketing which are protected have secondary impacts, and this Court has noted that again in International Rice Milling and in the National Woodwork case, and primary strikes are protected under the statutory scheme notwithstanding that they necessarily have even intended secondary impacts.

We recognize also, as the respondent union urges, and the AFL-CIO urges as amicus argues, we recognize that

Congress created no sweeping prohibition even of secondary conduct. We don't want to trench on these limitations. We limit ourselves to the case where the impact is purely and expressly on secondary employers.

Thank you.

Q Is it pertinent to inquire what the situation is now?

A Yes. There was a contract bargaining dispute, Mr. Justice Harlan. These people, both Burns and White, were part of a multi-employer contractual arrangement; during this period there was a fight, they had gotten out of it. Subsequently the multi-employer arrangement was found valid by the Board and all these parties now are governed by a collective bargaining contract which disposes of this kind of dispute. There was a temporary hiatus in the bargaining relationship between the subcontractor and the union.

Q You mean all the differences have been disposed of?

A I gather this project, this building is completed.

Q You what?

A I gather this project was completed. These incidents took place back in 1965.

Q Does this dispose of the case, by any chance?

A No. No, Your Honor. The question still

remains as to what is cessation of business and the object test.

MR. CHIEF JUSTICE: Thank you, Mr. Ordman.

Mr. Apruzzese?

ARGUMENT OF VINCENT J. APRUZZESE, ESQ.,

ON BEHALF OF PETITIONERS

MR. APRUZZESE: Mr. Chief Justice, may it please the Court; Justice Harlan, may I indicate that this project was phase one of the Jersey Central Power and Light's power plant construction at that location. They are still in the process of developing some permanent water discharge lines to this project, and phase two is about to start within the next couple of months.

Moreover, the broad secondary relief that is outstanding against this union in Third Circuit orders, which the Third Circuit has found this union in contempt of continue. And consequently this is a continuing question of significance, not only in this dispute but to the entire broad question of secondary conduct generally.

Q Well, if it is not in this case, if it is not a matter of controversy now in this case --

A No, it is a matter of acute controversy, Mr. Justice Black, with regard to conduct that may be considered secondary. I think perhaps what Mr. Ordman meant to suggest was that the underlying jurisdictional controversy

with regard to electric welding machines has been resolved. We have an affirmative decision on that by the joint Board which is the equivalent of a 10K determination by the NLRB, consequently that specific type of controversy is resolved. But the secondary boycott conduct of this union, which it has continually engaged in over the years, is still important and there is still outstanding a broad Third Circuit Court injunction prohibiting, a permanent injunction prohibiting secondary conduct. So that the question involved here is most significant with regard to that outstanding secondary boycott order in other cases which are cited in our brief and for all future violations that come under the ambit of this section of the law.

Q How would the union be affected at this stage by either affirmance or reversal of the case below?

A The union will be affected, as will all unions, in the whole area of the law, Mr. Justice White.

Q Its interest in this project is gone.

A Well, as I indicated, Mr. Justice White, the power plant construction by Jersey Central Power and Light has various phases --

Q But the only remedy against the union is a cease and desist order, isn't it?

A Yes, Your Honor, that is the only thing on appeal here.

Q Cease and desist at that project, at that place?

A No, no. The secondary boycott order is a very broad order. It is the broadest that can be issued by the Third Circuit Court or the Board. It applies as against any employee as yet unnamed employer, sir, because of the NLRB's position that this union has demonstrated a proclivity to violate the act, so consequently the NLRB orders oustanding against this union are what we term broad orders. They have been enforced by the Third Circuit in at least two cases, the United Engineers case quoted in our brief, and by a consent decree entered into by the union in 1966, and consequently they are outstanding orders currently. And we must, I would suggest, have an answer to this type of controversy in order to find out the efficacy of those outstanding orders.

Q Is there a damage action, some kind of secondary boycott order?

A No, sir, there is no outstanding --

Q I say, doesn't the statute provide for damage action for --

A Yes, the statute does provide -- section 303 --

Q Burns and Roe, if this is reversed, would they have such an action against this union?

A They could, independently of how this case is decided, Your Honor. As I understand the law on the subject,

a finding of a violation of 8(b)(4)(B) is not res judicata on a section 303 suit for damages, which includes the identical language.

Q It may not be res judicata but it would be rather important

A Well, I would say so, but there is --

Q -- if you had to bring an action against -- for Burns against this union if we reversed, wouldn't it?

A Well, let me point out, sir, I have represented Burns and Roe since the inception of this matter, and no damage suit has been instituted nor is one contemplated.

Q Well, will you answer my question?

A Yes, sir?

Q My question was, it would be helpful to such a damage suit if this were reversed, wouldn't it?

A I think it would be inadmissible in that damage suit, Your Honor.

Q Well, it may be inadmissible but it certainly as a legal proposition, I doubt if you would --

A Yes.

Q -- I doubt if you would miss citing the case.

A That's correct, sir.

As Mr. Ordman has pointed out, the cessation of business interpretation of the statute is at the heart of the Third Circuit Opinion and I would submit that the Third

Circuit was very conscious of its narrow interpretation of this language because in its opinion it alludes to and cites for comparison a Fifth Circuit decision in the Carpenter's District Council of New Orleans, which we have cited. And the Fifth Circuit, of course, adopts the Board ruling that something less than a total cancellation of business is a violation of the statute.

Additionally, as I understand in reading that decision in the Third Circuit, it would virtually make as the Third Circuit has interpreted this statute, the evidentiary standard of demonstrating an unlawful object virtually impossible. I think the courts and the Board have held many times that it is the purpose of the conduct and not its effect. There can be an unlawful inducement, there can be an unlawful threat with an improper object that does not meet with success, however it is nonetheless unlawful. And I would point to the language of this Court, in the General Electric case, in which this Court said that in the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent.

It cannot be gainsaid, of course, that the union hardly will step forward and admit illegal intent, but I think the courts and the Board over the years have developed reasonable criteria and reasonable methods of finding out what this intent is, and it has demonstrated by that citation, adopted

by this Court in General Electric.

It seems to me that in the development of our labor law, if we look to the pre-Norris-LaGuardia type of labor disputes, with the use of injunctive power that has been criticized in the development of our law, we then look to Norris-LaGuardia, which endeavored to stop that type of abuse of judicial injunctive process.

Then we had Taft-Hartley which, if the Court please, carved out certain conduct which was proscribed by Congress; subsequently Landrum-Griffin. I submit that the purpose in the development of all of this law was to confine the area of industrial conflict; the purpose was to reduce or minimize the disruption of commerce.

In the same fashion, the Boys Market decision of this Court, in June of this year, endeavors to do that. So that consequently we find the emphasis in the development of our labor law an effort to confine the conflict, and I would submit that if the decision of the Third Circuit were adopted here, it would so enlarge the battlefield as to undo the years of development of this law, the legislative history, the intent of Congress; indeed we point out in our brief the building trades unions have tried perennially to obtain a common situs bill in Congress that would allow the very type of conduct engaged in here, and Congress has turned back that effort each time, and consequently the Third Circuit position,

it seems to me, should be rejected.

The union has available to it the collective bargaining, free collective bargaining process. In that process it has available to it arbitration. The joint board for settlement of jurisdictional disputes is a type of arbitration. It has been so held.

The union in this instance, as Mr. Ordman pointed out, rejected that procedure, though bound by it, rejected the conclusion of that body, though bound by it, and it was necessary to obtain injunctive relief for the enforcement of that type of board.

Moreover, not only did it reject the arbitration procedure and result that it was bound by, but it did so by engaging in coercive activities against neutrals not involved in the controversy. Poirier and McClane had no dispute with the union. Chicago Bridge had no dispute with the union. Burns and Roe had no dispute with the union.

Consequently, if we squarely recognize the realities of the construction industry, here we see a $68 million project with 30 men, operating engineers, all refuse to work leave their equipment and by their refusal bring to one absolute standstill a project employing some 300 men.

Obviously, the statute is designed not only to protect the rights of the neutral employers, it was also intended to protect the rights of their employees. This dislocation,

this massive dislocation also causes injury to these other employees.

I would submit that there were only three alternatives available with regard to the union conduct. One of them was the parties could have remained adamant, no one would have changed their stand, and perhaps the project would not be completed. In the absence of injunctive relief, the project would not have resumed except for that injunctive relief in the manner that it was proceeding.

The other alternative was to terminate the contract of White Construction. That is not as simple a thing as it sounds, certainly in sophisticated types of construction such as a nuclear plant. It is not a single thing to switch horses mid-stream. There are all types of problem with regard to competence, personnel, planning, approval of drawings.

The other alternative, of course, was to exert this pressure until the union had the White Construction Company bend to its will. And it seems to me that the reasonable, the reasonable course here dictates, and what Congress intended to do, was to deal with the normal type of dispute, the interdiction or, if you will, the disruption of business designed to put pressure on people who could bring about a change. These are the neutrals that are to be protected.

The respondent's brief relies upon two cases rather heavily, the Miller case and the Wendnagel case. With regard

to Miller, it seems to me that that case is inopposite. The Miller case, if we read the language of it clearly, indicates that that merely was an effort by a union to tell a general contractor that if a painting subcontractor continued to resort to the use of spray painting, it would picket the job and clearly indicate that its dispute was with the primary. That case did not involve secondary activity. In that opinion, it was clearly pointed out that the superintendent of the general contractor admitted that the union agent never specifically asked him to remove Miller from the job or take any other definitive action in regard to Miller. We say that that case is inopposite.

With regard to Wendnagel, Wendnagel was a Seventh Circuit decision. Wendnagel was decided in 1958, I think as our brief cites. The Seventh Circuit has rejected that approach. We cite the Pure Milk decision, which is a Seventh Circuit decision, decided in 1964, and I would call the Court's particular attention to the italics in the quotation in our brief, at page 26, in which the Seventh Circuit says, "Less than a total cessation of an existing business relationship is within the meaning of 'cease doing business.'" Consequently, we would submit that the Wendnagel case is rejected authority.

Obviously, when a union engages in this conduct, it may have several objects, and we have cited the cases talking

about those decisions which have immediate, alternative, conditional or ultimate objects. The point that Mr. Ordman makes is quite right, the legislative history shows clearly that the language of the purpose of was substituted with the language of an object and consequently the broader language has application.

With regard to the contention made by the respondents that 8(b)(4)(B) is involved here and therefore we should not have an 8(b)(4)(B) charge, needless to say, the 8(b)(4)(B) section, the secondary boycott section, involves mandatory injunctive powers as opposed to discretionary. There is a section 303 suit that can be instituted by anyone who is injured by secondary conduct, irrespective of a contractual relationship, which underscores Congress' concern for neutrals and underscores its concern for prevention of a disruption of commerce.

Moreover, after a 10K award under NLRB procedures, an injunction may be dissolved, whereas in secondary boycott matters the injunction becomes permanent.

This case, I would submit, is like the Denver Building Trades case. We have the pressures brought to bear on a general and other subs to have White change its course, to have White change the method by which it was doing business. This indeed was a long-standing dispute, has been a long-standing dispute between Local 825 and other employers.

There are cases, the Building Contractors case of 1957, quoted in our brief, the Maupai decision in '62, the Building Contractors again in '64, and Morin Erectin in 1967, all of these secondary boycott cases involved the welding machine, and I would submit as well that there have been two contempts found by the Third Circuit with regard to violation of its order on secondary boycotts by this union on welding machines.

In short, I would conclude that the nature of the construction industry is such that without applying the sound principles of Denver Building Trades and all of the decisions subsequent, it would unduly enlarge the battlefield and grant to construction unions what they have not been able to obtain through the common situs legislation.

Thank you.

Mr. Aronson? If you want to finish today, you may.

ARGUMENT OF EARL S. ARONSON, ESQ.,

ON BEHALF OF RESPONDENTS

MR. ARONSON: Thank you, Your Honor.

Mr. Chief Justice, Associate Justices, and may it please the Court. First let me say initially it is a great honor for me to appear before this Court with such distinguished adversaries, and in such splendor, and it is a day that I shall treasure for the rest of my life.

With respect to the arguments of counsel for both

the National Labor Relations Board and for the charging parties, there is some agreement on behalf of the respondent union, there is more disagreement.

With respect to the basic facts which gave rise to the instant dispute, I am in agreement. There is no question there were two work stoppages which the National Labor Relations Board in its decision found to be illegal. With respect to the fact that all of the employers are neutral employers at the job site involved, I am in complete disagreement.

The National Labor Relations Act requires with respect to section 8(b)(4)(B) that in addition to engaging in certain proscribed conduct, that conduct be engaged in for a certain specific objective; as it relates to this case, that objective is to force one employer to cease doing business another.

There is nothing in the statute itself or in the legislative history preceeding the passage of the statute which sets forth that Congress desires to have a sweeping prohibition against all secondary activity. This Court so recognizes this contention and in the General Electric case, among others, it so stated that the only areas of prohibition are those areas which are set forth in the statute.

Now, if the Board was correct in its interpretation of the statute, it can state that in every secondary situation

there must be found an illegal cease doing business objective if the form of the coercive pressure takes that of a strike or a work stoppage. I submit that the form of the pressure is irrelevant. It is the objective that the union desires which leads to the ultimate conclusion is this activity to force one employer to cease doing business with another.

This is a factual question, I submit to the Court, as to whether a union engages in conduct for a proscribed objective.

The National Labor Relations Board, in its decision, reversed the trial examiner who held that there was not a scintilla of evidence in the record to establish that the local union involved desired to cease anyone from doing business with anyone but, rather, all they wanted was that White assign a certain man, member of the local, to the operation and maintenance of a welding machine, or further that White and/or Burns and Roe execute a collective bargaining agreement.

There is nothing improper, I submit, for a union to request or demand or even strike to force an employer to execute a collective bargaining agreement. However, the Board, in its decision, sets forth no specific factual determination which can support the conclusion that it finds, namely that this conduct is to force one employer to cease doing business with another.

Q What do you give us as the hypothesis as to

what they were trying to do?

A The Board?

Q No, your client.

A My client?

Q Yes.

A My client was seeking to have union conditions uniform throughout this job. White was not complying with what in my client'sop inion were the uniform conditions on the job. It thereafter went to Burns, who is the general contractor, who is not a completely disinterested party, who in fact is so interested that it submitted this dispute to the National Joint Board initially.

It went to Burns to advise Burns that it was having difficulty with White, that White was not complying with the terms of the union conditions in the area, and that it wanted White to put a man on the welding machine.

The general contractor was asked to sign a collective bargaining agreement, which is not unusual in the building and construction industry, and he refused. The union was seeking to have Burns and Roe, the general contractor, exercise its influence over White so that White would put a member of the operating engineers on the welding machine rather than an iron worker. This was precisely the object that the union sought in the Wendnagel case, in the Seventh Circuit, and the Court there stated that there is absolutely

nothing wrong with this objective. This is not a cease doing business objective. Maybe if there are strikes and pressure, it is an illegal jurisdictional dispute, and I do not argue that point here. But it is not a cease doing business objective.

It would have served no purpose in this case to have the union or the employer, Burns, cease doing business with White, the trial examiner so found. The union didn't want White off the job. As a matter of fact, White was never removed from the job and the two work stoppages involved ceased on or about October 11 of the year involved, and White stayed on the job.

There were subsequent jurisdictional dispute work stoppages, but that was all.

Q Well, you're challenging the findings, the factual findings of the Board then, are you?

A Yes, I am, Your Honor. I am challenging because when the case was submitted to the court below, and I believe that both counsel misinterpret the holding of the court below, nowhere in the decision of the court below does it state there must be a total cessation of business. What the court below says, as I read its opinion, is that if the form of coercive activity takes that of a work stoppage, that in and of itself without law is insufficient to establish a cease doing business objective. The without law, which

the Board and counsel would ask be found as a matter of law, is the crucial fact, the fact which this Court found in Denver, not by implication but as a matter of fact. The union said we don't want them on the job, we want to get rid of his business, which the court found, as a matter of fact, in the following two cases which were decided on the same day that Denver was.

The Board says this is what the union must have wanted. This is the only alternative to the primary employer exceeding to the union's demands. That is not so. It is pure conjecture. It very well may be that the general contractor will remove the primary from the job site. That might happen. But the mere fact that it might happen does not mean that the union desired that that would happen or had the remotest wanting for that to happen. The mere fact that at times there are incidental effects to activity does not necessarily follow that that is the desired effect.

Q Are you suggesting that on this record if that had occurred it would be an incidental effect which the union had never intended?

A Yes, sir, I suggest that, because that was not the only alternative open to Burns and Roe. If the union -- and there are unions and there are cases and the Board decisions are rife with these cases -- goes to the general contractor and says to the general, "I want you to utilize your

influence upon this subcontractor to have him comply, and if you can't do it I want you to bounce him off the job," then we have no difficulty. We have then the union stating what its alternative objective is and that which it desires, but in this case, one, White did not put a man on the welding machine, two, he was not removed from the job, and, three, the union never asked that he be removed from the job or, in fact, is there any evidence to show that it desired he be removed from the job.

The findings of fact of the trial examiner, which the Board completely disregards and just substitutes its own finding as a conclusion, established that the union didn't want White removed from the job as it would have served absolutely no useful purpose.

Again, in contradiction to the Board's argument of per se, the Court of Appeals for the District of Columbia, in the Retail Clerks case, which is cited in my brief, also refused to accept the Board's per se argument that every time a union engages in secondary activity, it must be for a cease doing business objective. In that case, the union was seeking to force the primary employer to recognize it. The statute prohibits secondary activity for that purpose, and the Board contended to the court if the evidence establishes that the union engaged in conduct secondary to force the primary to recognize it, as a matter of law it must be found that the

union engaged in the conduct also to force the secondary to cease doing business with the primary. The court rejected the argument.

It said it could visualize situations where a union might seek recognition but not a cessation of business. With respect to the argument that a change in business operations, such as the imposition upon White of an obligation to put an operating engineer on its payroll to operate a welding machine, is the equivalent of a cease doing business objective, is an exaggeration of this statute beyond means and compare.

There is absolutely nothing to show that Congress ever intended a change in business operation to be proscribed. Had it so intended, it would have stated it. It only proscribes a cease doing business objective.

There is an important area of disagreement, and that is the neutrality of the employers involved on the particular job site. There is no evidence in this record that the union extended any work stoppages or any threats beyond the confines of this job site.

The Denver case has been in existence since approximately 1951. However, its principles do not, in my opinion, conclusively establish that the mere fact that there are independent corporations, independent contractors on a construction site, that that alone means that they are neutral. I believe that the principle set forth by the

petitioners has been altered by this Court in the General Electric case and in the Carrier case.

In those cases, although they involve separate gate picketing which is not involved in this case, but the principle remains the same, because if the proviso to section 8(b)(4)(B) has any meaning, it means that if it is a primary strike there are primary picketing situations that is protected -- in those cases we had independent contractors at the same job location, and this Court developed the normal operations test to conclude whether the employers were in actuality neutrals, secondaries, and whether the union's right to extend its dispute to these other employers was protected.

The Board does not apply the normal operations test to the construction industry. It utilizes a form test, that is, you are an independent contractor therefore you are neutral. It closes its eyes, I submit, to the realities of the construction industry and, as pointed out by this case, it claims that Burns was a neutral.

Burns had more interest in this job site, I submit, than any employer located thereon. He was the general contractor, number one. Number two, Burns was the one who could have bound White by executing a contract with a legal subcontractor clause. Number three, it was Burns who submitted the dispute to the National Joint Board.

Now, the NLRB's decision does not go into or discuss

in any way factually what the operations of these employers were in relation to each other at the job site. If it is permitted to disregard the Carrier case and the General Electric case, it will be discriminating against unions in the construction industry because there is nothing in the statute which states that unions or employers in the construction industry are under any different set of rules than unions in industrial plants.

There is further support for this type of an argument concerning the non-neutrality of employers on the same construction site in Board Member Fanning's decisions. He, when there is a jurisdictional dispute and a secondary boycott, if you will, holds that the finding of a jurisdictional dispute precludes the finding of the secondary boycott.

But he also states that in jurisdictional dispute situations, it is clear that the concept primary and secondary is unreal, that in a jurisdictional dispute situation a union should have the right to exert whatever pressure it has to in support of its jurisdictional claim upon all of the contractors because of the interrelationship. H in effect applies the normal operations test to the situation as this Court did in the Carrier and General Electric cases.

Q Is this an argument that all of the conduct of your client then was primary conduct?

A Yes, Your Honor. It is an argument that the

conduct directed towards Burns was clearly of a primary nature.

Q How about as to the other subcontractors?

A The other subcontractors as well, Your Honor --

Q I gather the strikes were primarily of their employees?

A That's true. Burns had no employees of its own. He subcontracted all of the work. It is our position that --

Q The only conduct related to Burns was the approach of burns to sign the contract, was that it?

A No, sir. There were approaches made to Burns, however, as well, Burns was advised that unless he did sign a contract and unless White signed a contract or put a man on the welding machine there would be work stoppages.

Q Work stoppages would be of the employees of the other two subcontractors?

A And White as well.

Q And White, too?

A That's right.

Q Did you have some membership in White or not?

A Yes, White did employ operating engineers for a period of time on a crane, and I am not sure whether there was another piece of equipment. But at the initial work stoppage, the October 1 work stoppage, White had in its employ members of the operating engineers on a crane.

I say to the Court that the Denver case is still the law. However, there are some facets of Denver which this Court, I submit, has changed. To allow a union in the industrial plant situation more leeway than you do in the construction industry is not proper.

As Mr. Justice Douglas stated in his dissent in the Denver case, if a union has the right to obtain certain working conditions, why then must it be forced on one job to live with conditions other than that which it has with other employers.

If it extends its activity to another job, I have no difficulty with that situation.

Q Has any court accepted your proposition that in circumstances like this on construction jobs the conduct in which your client engaged is always the primary contractor?

A No, Your Honor. As a matter of fact, in the --

Q It has been rejected actually --

A That's correct, in the Markwell and Hartz case it was rejected, with Judge Wisdom dissenting. I feel that the National Labor Relations Board, Board Member Fanning at least, eaccepts the argument. And in the Markwell and Hartz case I believe there were two dissenting opinions from the majority opinion, accepting the argument.

It is an inequity. It is an inequity that I feel should be stopped. I feel that the National Labor Relations

Board has the expertise to set forth in its decisions criteria other than the mere independent contract --

Q Can you cite anything in the legislative history of any of these provisions which support that argument as related to a construction site, that this conduct is always primary conduct?

A I cannot pinpoint anything in the legislative history --

Q Well, actually, isn't it quite the other way?

A No, I can't agree with that also, Your Honor.

Q Well, there really wouldn't be a secondary boycott?

A Precisely, Mr. Chief Justice.

Q There is no such thing?

A No, there is a secondary boycott, and I can give the Court an example of a secondary boycott. I thought I had. If a union goes to an employer and says I want you to suspend your contractual relationship with another employer because he won't sign a contract with us and not do business with him --

Q Is that the way of life in the real world of industrial relations?

A Your Honor, is the way of life and it does happen, and it happens more frequently than people could believe on construction jobs. The union agents are not as

sophisticated as attorneys who represent them or as attorneys who represent the employers, and when they get on a job site, and the cases before the NLRB are consistent in this regard, they indicate to the general contractor we've got a problem with the subcontractor or we have a problem with another employer and unless you get rid of him this job is going to be shut down.

Now, the Board, of course, can make its ultimate finding of fact from facts other than that which I have just stated to the Court, and it has done so. It looks at the entire record as a whole to find out what the true object of the union was. This is not an easy area for the Board. The Board has had difficulty over the years in finding in many cases what the true objective was. However, it can be done. I don't say that is the only way it can be done, but to substitute a per se argument, as the Board has done here, without any basis in fact, is improper.

Thank you.

Q I notice that this case was decided by a panel of only two judges in the United States Court of Appeals for the Third Circuit. What was the reason for that?

A Your Honor, I believe there was a third judge appointed to the panel, Justice Van Duzen, who disqualified himself. That is my recollection.

Q And they proceeded just with the quorum of

two then?

A That's correct.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gold?

ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE AFL-CIO

MR. GOLD: Mr. Chief Justice, may it please the Court, I think it would be best if I started by attempting to distinguish between what we regard as two very separate issues in the law of secondary boycotts.

The great majority of cases which have come before this Court involve situations involving the primary-secondary dichotomy, whether activity is primary and therefore outside the sweep of section 8(b)(4)(B) because of the explicit proviso in the 1959 legislation and because of the manifest in Kent of Congress, as this Court recognized, prior to 1959.

It was our understanding from the opinion of the Court below that that facet of the overall problem relating to section 8(b)(4)(B) was not in this case. The decision below concentrates on quite a different problem. But, as Mr. Aronson points out, there are decisions of this Court in Carrier and General Electric which indicate that there is a test of relatedness of work and there are no findings by the Board on that issue. The Board simply states and assumes that all the employers other than White were neutral and --

Q That has been the assumption, as I read the record, all the way through.

A Yes.

Q And the examiner decided the case in favor of the union --

A Right.

Q -- nonetheless seemed to not question that White was neutral.

A No. This, as I say from our reading of the decisions by the trial examiner, the Board and the court below, was that this issue as to primary, secondary was not in this case, and we briefed the case accordingly. I just note that in light of Carrier and General Electric there are no findings about relatedness of work here, and it might be that the Board's findings are defective in that regard, in addition to the regard which I would like to turn my attention to now.

Q Let me ask you just one question, if I may. Is it your submission that there isn't a secondary boycott in operation unless it succeeds in bringing about a complete cessation of work?

A No, Your Honor.

Q If it is aimed at that, it is, isn't it?

A Yes, Your Honor, I think that is clearly correct and I think, in addition, the question is -- narrowing down to the point you raised and putting aside the primary

secondary aspects -- the question is from all the evidence, can the Board rationally infer that there was an object of cease doing business, object --

Q But nothing less than that suffices under the statute?

A Excuse me, Your Honor?

Q Nothing less than that suffices under the statute, that is your view, isn't it?

A Yes. Well, our view is --

Q In other words, there must be a finding, whether it succeeded or not, that an object was complete cessation? Is that it?

A Yes. Well, I feel that talking in terms of cessation of business alone isn't sufficient. Through the years we have fought for the proposition that literalism is not the key to this statute, and we have fought because we think that that is the correct view in light of the way the statute was written and in light of the legislative history, and we are not going to abandon that position for any short-term advantage in this case.

However, we do believe that the Board has to make a finding as to the union's object. It has to find that there was an illegal means and an illegal object, and in finding the illegal object it has to look -- it has to determine what the policy embodied in section 8(b)(4)(B) is and whether the

union is seeking to implement that policy.

Q Specifically, what does the Board fail to find here?

A Well, we feel that the Board failed to find that the union conduct was designed to coerce the neutral to take action which is economically detrimental to him. We believe that --

Q What does that mean, in the context of these facts?

A Well, we believe that the purpose of section 8(b)(4)(B) is to prevent unions from coercing neutral employers to take actions which hurt them. Let's take --

Q Let's take these two subcontractors. What findings should there have been?

A The finding should have been as to them that the union wanted them to either stop doing business with White or to take some other --

Q They weren't doing business with White, were they?

A Well, I think they all three -- I think all four were doing business together. There was a general and two subcontractors --

Q What is your alternative?

A Either to stop doing business with White or to take -- to make some change in their relationship with White

which would harm them economically, in their pocketbook. If all the union does is go to a neutral and ask him to use his good offices or his influence with --

Q Yes, but here they actually struck --

A Well, that is the means --

Q -- they struck the two.

A That is the means.

Q To what end?

A The end being to get White to give them the work, and that being the only end. In other words, if means were sufficient in themselves you would never have to look to what the union hoped to accomplish. Every time there is a secondary strike, the Board would be home free.

Q Then what is it you say by striking these other contractors to violate the statute would have to have been their objective? What?

A There would have to be -- certainly if they wanted them to give up their contract and to get off the job, that would hurt them economically. If they asked them to give up some work that they were doing and give it to White, that would hurt them economically. Something has to be shown that the union wants the neutral to do something which hurts him economically. We believe that that is what section 8(b)(4)(B) was intended, that is its purpose.

If that wasn't its purpose, a good many things

become inexplicable. First, why did Congress talk in terms of means and objects?

Q Are you saying then that the Court of Appeals went too far in its definition of what the objectives had to be?

A I think the Court of Appeals did go somewhat too far. I think that its view has a kernel of soundness. It saw the defect in the --

Q Yes, but it was in effect, its view was that the statute was not violated unless the object was to get White off the job. In effect, that is what it said.

A Yes.

Q And you say that is not what the Board had to find?

A That's right.

Q I mean less, short of that would be --

A Yes, we do. We rest much more strongly on Judge Prettyman's view in the Retail Clerks case in the D.C. Circuit. We believe that both Judge Prettyman and the Third Circuit were looking towards the same defect in the Board's reasoning. In other words, we think the defect is that the Board is seeking to read objects completely out of the act and find that secondary conduct and secondary boycotts are synonymous, and we believe that that is absolutely incorrect and we think that Judge Prettyman has pulled them up short

and the Third Circuit has as well. But we believe that Judge Prettyman did it correctly and we believe that the Third Circuit, while diagnosing the evil properly may well have gone too far.

Now, I see that it is two minutes past three and I have some time. Should I --

MR. CHIEF JUSTICE BURGER: You have four more minutes.

MR. GOLD: Should I finish at this time?

I want to especially note the applicability here of Mr. Justice Frankfurter's opinion in Sand Door. As I started to say, we think there are two quite separate problems in this area. One is the primary-secondary dichotomy and the second is whether there is a distinction between secondary conduct and secondary boycotts. We believe that this Court, starting with Sand Door and going to Mr. Justice Harlan's opinion in Jacksonville Terminal, has recognized that there is a distinction.

And Sand Door was especially important because that was, as we read it, a case where there was no primary aspect, is a footnote saying that there is a contention of primary activity and that it was rejected. And all of that was in issue.

Q I understand that was a hot cargo case.

A It was, Your Honor, a hot cargo case.

Q Prior to the 1959 --

A Right, and the question was whether both means, illegal means and an illegal object had been shown, and that is the way Mr. Justice Frankfurter analyzes the problem, recognizing that the conduct was secondary, he then says do we have both illegal means and an illegal object, and he finds that in that case there was a violation.

Now, however, there was a caveat in that case that hot cargo agreements in and of themselves were not illegal so that he didn't completely take out the ability to use a certain means to reach a clearly illegal object. Congress responded to that in '59 by reading a structure of the statute the same.

It seems to us that by doing so they agreed that means and object had to be shown, but they reacted by broadening the prohibition against means to accomplish the end that they sought, which was to close the particular loophole. So we think --

Q What in your judgment did they intend to forbid?

A Congress?

Q Yes.

A In 8(b)(4)(B)?

Q Yes.

A We believe they intended to make it illegal

for a union to coerce an employer to take -- to coerce a neutral employer to take action which was economically detrimental to him, such as ceasing to do business with someone else, the assumption in our economy being that doing business with someone is an indication that the relationship is advantageous to both sides.

I just want to note, in concluding, I covered the two basic points I wanted to make. I want to note in concluding that we don't think that Denver Building Trades has anything to do with this case other than the fact that both arose at a work site. The findings which we note in our brief made it perfectly plain that the only thing the Denver Building Trades wanted was this electrical subcontractor off the job because he was a thorn in their side and they were going to try to drive him out of business. The Board's findings make that perfectly plain.

Q May I ask one more question, Mr. Gold. Do you read Judge Prettyman's opinion in the Retail Clerks case as meaning that there must be an objective of complete cessation of business?

A No, Your Honor.

Q He merely gave that as an illustration of pressure which would produce the maximum result as against a pressure that had no impact at all?

A Yes --

Q But lying between those two extremes, a disruption of business could be a violation clearly under Retail Clerks?

A Right, and we think that the problem is in drawing the line the Board is trying to get away from that by cutting out the whole problem and saying wherever you ask for a change in the relationship they can find that you have violated section 8(b)(4)(B) but they don't have to find any object to harm the neutral in his economic situation.

And I also want to say in disagreement with --

Q May I ask you, have you cited any legislative history which supports this meaning of cease to do business?

A We haven't cited any legislative history on the meaning of cessation to do business because we couldn't find any --

Q I couldn't either.

A What we do is our argument really is based on the language that Congress used, the reasonable emanations of that language and the fact that a reading broader than the one we would give it would knock out or make nugatory certain other provisions of the act, and we believe that this is the most rational meaning that we can give.

Finally, I want to note that the irresistor argument which is made by the Board is barred by Chenery. I hate to disagree with the general counsel. It is true that the

Board cited a case called Local 3, IBEW in stating why it was finding that there was a violation here, but that case is simply one which states that anything that -- any request of an employer for a change of business is illegal per se under section 8(b)(4)(B) and the Board -- that case really demonstrates why the Board would never have turned to irresistor because its per se theory makes irresistor, which is one about drawing inferences, irrelevant. And we think that this is a demonstration by Board counsel that they recognize the weakness of the Board's opinion and the Board's approach in this case, and we think it is barred, and we think it would have the most drastic consequence.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gold, you have one minute left if you wish to use it.

MR.GOLD: Yes.

ARGUMENT OF VINCENT J. APRUZZESE, ESQ.,

ON BEHALF OF PETITIONERS

MR. APRUZZESE: Mr. Chief Justice, just one observation. I think Mr. Gold has conceded the fact that the cessation of business can be something less than total and complete. I merely wish to observe that his definition of this question of something being economically disadvantageous to the neutral is something new, that our courts have not adopted, and I submit that there were many subcontractors

that came on this site under Burns and Roe subsequent to these three; and the economic disadvantageous definition which has never been adopted -- no legislative history to support it -- ignores, one, they were economically damaged by having their job stopped. These men have superintendents, they have equipment, they have running expenses, they were economically damaged irrespective of what would happen with the welding machine.

Moreover, the joint board procedure and the appendix indicates clearly that under the engineers' contract, which is in the appendix at page 324, says that with regard to that joint board procedure which bound all of these employers that the last known job decision must be followed by each of them, consequently if the engineers had won this particular type of dispute, that would have been a condition that would have to have been accepted by Burns and any of his subs and, consequently, it would have been economically disadvantageous.

MR. CHIEF JUSTICE BURGER: Thank you. Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:10 o'clock p.m., argument in the above-entitled consolidated matter was concluded.)

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