In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. No. 75-777

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638, etc.,

Respondent.

Washington, D.C.
October 6, 1976

Pages 1 thru 39

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v.	:	No. 75-777
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Washington, D. C.,

Wednesday, October 6, 1976.

The above-entitled matter came on for argument at 2:11 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United STates
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570; on behalf of the Petitioner.

LAURENCE GOLD, ESQ., 815 Sixteenth Street, N. W., Washington, D. C. 20006; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in National Labor Relations Board against Enterprise.

Mr. Come, I think you may proceed.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COME: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the District of Columbia Circuit which, sitting en banc and dividing five to four, denied enforcement of the Board's order against respondent union.

The question presented is whether a union engages in an unlawful secondary boycott within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act when it causes employees of a firm with which the union has a collective bargaining agreement containing a work preservation clause to [sic] handle prefabricated goods that their employer's contract with a general contractor obliges the employer to install.

This was a question which was noted but not decided in National Woodwork, a 1967 decision of this Court.

The facts are briefly these:

Austin, the engineer and general contractor for construction of a Home for the Aged in Brooklyn, specified the use of climate control units manufactured by Slant/Fin Corpora-

tion. Under these specifications, Slant/Fin was to cut, thread, and install at the factory the internal piping on these units, which carried a one-year warranty contingent upon factory fabrication of the internal piping.

As a result of competitive bidding, Austin awarded a subcontract for the heating, ventilating and air-conditioning work on the Homa to Hudik. This work included, as Hudik was aware, installation of the Slant/Fin units.

Now, Hudik, the subcontractor, had a collective bargaining agreement with the respondent union, a Local of the Plumbers and Steamfitters Union.

Rule IX of this agreement provided, among other things, that radiator branches, convector branches and coil connections shall be cut and threaded by hand on the job.

Shortly after the Slant/Fin units, which had been purchased by Austin, arrived on the jobsite, the union business agent went to Austin, the general contractor, and informed him, his project superintendent, that the union members would not install the Slant/Fin units because the piping inside the units was steamfitters work, and the business agent then went to Hudik and told him essentially the same thing, adding that the prefabrication of the internal piping in the units was in violation of Rule IX of the collective agreement.

As a result, Hudik's employees refused to install the Slant/Fin units. Whereupon Austin filed an unfair labor

practice charge with the Board. The Board concluded that the union's refusal to install the Slant/Fin units was a secondary boycott in violation of Section 8(b)(4)(B), because the Board found that: While the refusal of Hudik's employees to install these units was based on a valid work preservation clause in the agreement with Hudik, and was for the purpose of preserving work they had traditionally performed, Hudik was incapable of assigning of this work to his employees, and therefore the union, in exerting strike pressure on Hudik, had coupled its work preservation objective with an unlawful secondary objective of also trying to change Austin's manner of doing business with Slant/Fin.

The Board entered an appropriate remedial order. And the Court of Appeals, as I have indicated, denied enforcement of the Board's order. The majority of the Court finding that the Board's reliance upon Hudik's lack of power to assign the work was inconsistent with the principles enunciated by this Court in National Woodwork.

Now, I'd like to turn to National Woodwork.

Section 8(b)(4)(B) makes it an unfair labor practice for a labor organization or its agents to exert strike pressure against an employer for an object of forcing any person to cease using, handling, or otherwise dealing in the products of any other person, or to cease doing business with any other person.

A proviso states that this provision shall not be construed to make unlawful any primary strike or primary picketing.

Now, as this Court recognized shortly after the '47 amendments which added the secondary boycott provision to the Act that Section 8(b)(4)(B) must be interpreted so as to foster the dual congressional objectives of preserving the right of labor organizations to bring pressure on offending employers in primary labor disputes, and of shielding unoffending employers and others from controversies -- from pressures and controversies not their own.

Now, the task of achieving this accommodation is a very, very difficult one. For the distinction between legitimate primary and illegal secondary activity, as this Court has indicated, is rarely a glaringly bright line.

Union activity is secondary, if an object of the activity is to force the cessation of or change in business relations between two entities.

On the other hand, the objectives of even primary activity includes a desire to influence others to withhold their patronage from the employer against whom the pressure is exerted.

And some union activity, which I submit is this case, will have both a primary object and a secondary object. And in that event, the activity is unlawful for Section 8(b)(4)

proscribes activity if an object is secondary.

Now, let me illustrate the way these principles were applied in National Woodwork, and try to point out the difference that the Board sees between the situation here and that which was before the Court in National Woodwork.

The issue in National Woodwork was whether a union had engaged in an unlawful secondary boycott by refusing to permit its members, who were employed by Frouge, a general contractor, to install prefabricated doors. Finishing doors was work that Frouge's employees had traditionally performed on the jobsite. And the collective agreement had a work preservation clause similar to the one here, which provided that Frouge's employees would not be required to handle doors that had been finished off the jobsite.

The employees struck when Frouge nevertheless ordered the pre-finished doors, although he was not required to do so, by his contract with the project owner.

The Court stated that the determination whether the union's activity was primary or secondary turned on whether, to quote from the Court, "under all the surrounding circumstances the union's object was preservation of work for Frouge's employees or whether the agreement and the boycott were tactically calculated to satisfy union objectives elsewhere."

QUESTION: Mr. Come, --

MR. COME: Yes, sir?

QUESTION: Assume there had been no provision in the contract and that to strike otherwise wouldn't have violated the contract, the result would have been the same?

MR. COME: That is correct, Your Honor, and I think that the contract does not make the difference, the question is whether the activity that it was engaged in is secondary or primary.

Now, applying the test that I outlined to the facts in National Woodwork, the Court found that the contract clause was a valid work preservation clause, therefore no violation of 8(e), and that the facts established that the union's object in invoking the clause against Frouge was solely a preservation of the traditional task of jobsite carpenters.

Frouge had the option of prescribing pre-finished doors or not prescribing it. He had elected to order them, and that got him into his problem with the union.

Now, the facts here, we submit, differ from the situation in National Woodwork, and I might say at the same time that the Board decided National Woodwork, in that very case you had three subcontractors who were in precisely the same situation that Hudik was in here, the Board had found an 8(b)(4) violation as to them, the Court of Appeals had sustained that finding, but the union did not bring that before the court, and it was for that reason that that issue was not before the Court in National Woodwork.

QUESTION: Well, actually, that's the reason it was expressly reserved, wasn't it?

MR. COME: That is correct, Your Honor.

QUESTION: But this Court's decision in National Woodwork upheld the determination of the Board, didn't it?

MR. COME: It upheld the determination of the Board as to Frouge, who had the power to control whether or not his employees were to be deprived of the work of finishing the doors.

In contrast to Frouge, who was free to decide whether or not to use prefabricated doors, Hudik was obligated by his contract with Austin to install the prefabricated climate control units; by demanding that Hudik's employees perform on the jobsite the internal piping work on these climate control units, the union was seeking work that Hudik never possessed and did not have a right to obtain. Confronted by the union's demand for the work, Hudik, as a practical matter, had available only two courses of action:

It could have induced, tried to induce Austin to change his specifications for the job, or, failing that, to terminate its contract with Austin.

The second course, like a refusal to bid on the job initially, would not have preserved or produced work for Hudik's employees, indeed it would have lost for them the rest of the piping work that they had on this job.

The first course, inducing --

QUESTION: Well, I suppose, Mr. Come, that there was another alternative: it could perhaps negotiate with its employees and pay them a bonus to install in the doors.

MR. COME: The Court of Appeals mentions that alternative, Your Honor, and on this record there was no suggestion that that was ever contemplated by the union. On this record, the demand was solely for the work.

Now, the first course, namely inducing Austin to change its specification, would have produced this work only if Austin were willing to do that. So that in these circumstances you find that whereas the union, to be sure, may have been motivated by a work preservation object, it could not have obtained that object without changing the decision of Austin and possibly also Slant/Fin.

Whereas in the Frouge case, Frouge could have granted the union's demand by merely changing its own decision, discontinuing ordering the pre-finished doors.

Now, granted that the line between whether a cessation of business is an object or whether it's just an incidental -- it's an incident of lawful primary activity, granted that that line is a fine one, and it is difficult in some cases to find out which side of the line it falls on, we submit that it was at least within the Board's province to conclude, and it was reasonable in so concluding, that given a

situation such as you have here, where in order to obtain the union's work preservation objective the employer pressure, even though he was the employer of the employees involved, would only give them what they sought by changing the decisions of third parties, that involves too much of a impairment of the rights of third parties to be regarded as purely incidental to legitimate primary activity; and, for that reason, that the Board was warranted in concluding that the union's pressure here, at least an object, concluded an unlawful secondary one --

QUESTION: Mr. Come, --

MR. COME: -- proscribed by 8(b)(4)(B). Yes, Your Honor?

QUESTION: Weren't they violating the work preservation clause?

MR. COME: The Board did not have an 8(e) charge attacking the validity of the work preservation clause. It assumed that the work preservation clause was lawful because on its face it was susceptible of being applied in a lawful situation.

And, as I indicated in my answer to Justice White's conclusion, it was not crucial to the Board's decision to determine whether the clause was lawful or unlawful, because whether the clause is lawful or unlawful, you cannot use secondary pressure to implement it.

QUESTION: Well, what could the union do to protect

its own contract?

MR. COME: Well, I think that, first of all, you have the question as to whether or not a contract was meant to be applied to a situation where Hudik had no control over the work.

QUESTION: Would it have an action for breach of contract against the employer, entirely independent of this?

MR. COME: I submit that it could have. I want to deal with two situations.

In the first place, if the contract was not intended -- granted that it covers finishing piping work on the jobsite -- if it was not intended, however, to apply to a situation where the sub didn't have control over the work, obviously it wouldn't -- an action wouldn't lie if one were brought, but it could be brought.

On the other hand, if it -- and whether -- and you determine the legality of the contract from the circumstances under which it was entered into, because 8(e) makes it a violation to enter into an illegal agreement. And the mere fact that the union may unilaterally later seek to apply it to a secondary situation doesn't necessarily make the contract unlawful.

So you have the initial question as to whether the contract was intended to cover a situation where Hudik lacked control.

Assuming that it did, then you get into the question

as to whether or not the contract would be, nonetheless, saved from illegality by the construction industry proviso to 8(e), which privileges certain subcontracting agreements for work to be done at the jobsite in the building construction industry, even though those contracts in other industries may violate Section 8(e).

But even those contracts, a legislative history makes clear, cannot be enforced by restraint and coercion that would violate 8(b)(4), a lawsuit is the only way that you could enforce the contract.

So if I can sum up, after giving, I think, too long an answer to your question, Justice Marshall, if in fact it is to be determined that this contract was intended to encompass a situation where Hudik lacked control over the work, Hudik -- the union may be able to get damages in a lawsuit, but it could not resort to economic pressure that would violate 8(b)(4).

But that is not a question that we're putting forth.

QUESTION: Well, couldn't Hudik have protected himself in the negotiation of the contract by adding a provision in there to limit the preservation?

MR. COME: Well, whether it had negotiated a contract, that would have provided for the payment of damages or the wages that would be lost by --

QUESTION: No, I mean couldn't he have changed the

preservation clause and had it written so that there would be provisos in there? Which would cover this situation.

MR. COME: Well, even if they did, Your Honor, I submit that they could not use pressure that would violate Section 8(b)(4)(B). They might only be able to --

QUESTION: Well, I'm not talking about -- I'm talking about the employer could have protected himself by putting a proviso in the preservation clause which said "except where" we get just like we got now. He could have put that in the contract?

MR. COME: He could have put that in the contract, --

QUESTION: But he didn't.

MR. COME: -- but I submit, Your Honor, that Congress, nonetheless, has intended to free him from economic pressure to enforce that commitment, on the same theory that this Court recognized in the Sand Door case, that under the '47 amendments the entry into hot cargo clauses was not illegalized, but, nonetheless, the Court sustained the Board's finding that while Congress permitted a voluntary entry into these agreements and permitted their enforcement through lawsuits, it drew the line at using economic pressure to enforce them.

QUESTION: In the Board's view in this case, could the union legitimately have applied economic pressure to Austin?

MR. COME: The Board has not answered that question, Your Honor.

QUESTION: Why?

MR. COME: They concluded that since the only person pressured here was Hudik, that question was not before them.

QUESTION: It seems to me it's important to know, in order to properly decide this case, assuming that you have a legitimate work preservation provision in the collective bargaining agreement, which I believe is the premise and the assumption on which we are proceeding in this case, and since the Woodworking case held that economic pressure could be exerted to enforce such an agreement, it's important, as far as I'm concerned, to know what the Board's position is as to whether or not the union is free to exert economic pressure against Austin.

Because, if not, then it's not free to exert economic pressure against anybody to enforce and effectuate the work preservation agreement that Woodworking holds can be enforced by economic pressure.

MR. COME: Well, the only thing that Woodworking held, Your Honor, as I read it, is that you can exert economic pressure to enforce a work preservation clause in a situation where the employer has control over the work.

QUESTION: Do you think Austin in this case would have been with or without power to accede?

MR. COME: I think that Austin would have been with power, in the sense that he was free to have prescribed other

doors.

QUESTION: Only by renegotiation of his contract with Hudik, isn't it? He would have no more, no less power than you tell us Hudik had. Each would involve the renegotiation of a contract, wouldn't it?

MR. COME: Well, I was going back to the original point in time, in which he --

QUESTION: No, no, I'm talking about the time at which economic pressure was applied in this case. My question was: Could it have, legitimately and legally, under the labor law, been applied against Austin?

And you refused to -- you declined to answer that.

MR. COME: I must, in view of the footnote in the Board's opinion, which is alluded to in our brief, in which the -- if I may just call the Court's attention to --

QUESTION: Is it in the Appendix or --

MR. COME: It's in the appendix to the Petition, 142a, in which the Board says, in footnote 1: "In view of our finding that Respondent's actions were undertaken for a secondary object, we find it unnecessary to pass upon the Administrative Law Judge's finding that Austin and Slant/Fin were primary employers. Hence, we are not deciding herein whether picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity."

QUESTION: I'm suggesting only that it seems to me,

in light of Woodworking, which certainly stands for the proposition that a work preservation clause such as this, assuming it's a legitimate one, and that is the assumption here, can be enforced by a union by the application of economic sanction. It's important, I would say, that in this case to know whether that could be enforced against anybody, by economic sanction. Or whether, in a case like this where there's a subcontract, that Woodworking becomes a dead letter.

MR. COME: I only repeat myself when I say that I do not read Woodworkers as deciding that there's a right to bring economic pressure to enforce a work preservation clause in a situation such as we have here.

I've also referred in my brief to two decisions that cast some light on this problem, but do not directly answer it. There is the case of Western Monolithics, in which the Board held, prior to a decision in this case, that pressure against the general contractor would be permissible in this type of a situation, and that decision was denied enforcement by the Ninth Circuit.

And, subsequent to this decision, there was a case called Summit, in which the Board found that in the circumstances there picketing of the manufacturer was not permissible; but in that situation the manufacturer's employees were represented by another union, and the pressure against him involved a violation of 8(b)(4)(D), in that they were seeking to enforce the

reassignment of work from the manufacturer's employees to the union employees.

I think the answer to that question may well depend upon what it is that the union is seeking. If it is seeking to appeal to consumers not to purchase Slant/Fin products because that diminishes their work opportunities, the answer --

QUESTION: It's seeking to effectuate its work preservation clause, that it is negotiating, through collective bargaining, has succeeded in getting into the collective bargaining agreement. And Woodworkers said that it was proper and legitimate objective. And if -- the answer to my question would let us know whether, in the context of this case, we're saying that it cannot enforce -- effectuate that against anybody, or simply that it cannot effectuate it against Hudik, but could against Austin. And I think that's of some importance.

MR. COME: I wish I had a better answer for you.

QUESTION: Well, the Board just doesn't take a position, and I understand that.

MR. COME: Right.

QUESTION: Are you suggesting that Austin have any more or less control than Hudik?

MR. COME: I think that at the time that the specifications were drawn up, yes, he may --

QUESTION: No, no, that isn't the time; that's not the time.

MR. COME: He would have been in exactly the same situation that Frouge would have been in National Woodworkers.

QUESTION: Well, that's not the critical time.

MR. COME: So at that time --

QUESTION: I'm talking about the time, the time when economic pressure was actually exerted. Of course Hudik, before he negotiated any contract, would have been equally free to accede.

MR. COME: But that would not have given his men any work, nor the work that they sought.

Whereas, in Frouge's case it would have, and had Austin prescribed non-prefabricated units, it would have --

QUESTION: Had the economic pressure been applied against Hudik before he ever entered into this subcontract, he would have been equally free to accede and not to have entered into that subcontract.

MR. COME: Thank you, Your Honor.

QUESTION: Well, Mr. Come, if, when the pressure was applied here, the principal contractor had said, "Oh, well, go ahead and use what" -- called him up on the phone and said, "I understand you're having trouble with the labor, just go ahead and use whatever doors you want." This case would have come out differently, I suppose.

MR. COME: It would have been like the situation of Frouge in National Woodworkers.

QUESTION: Yes. All right.

QUESTION: That it would have been within his power to accede.

MR. COME: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GOLD: Mr. Chief Justice, and may it please the Court:

In National Woodwork, as Mr. Come said, this Court canvassed at least the beginning of this problem, and we would emphasize that it did not reach this issue, not because it was forecasting a difference, but because, as it was explicitly stated in the opinion, the union didn't take a cross-appeal from -- didn't file a cross-petition from the portion of the case in which it did not prevail, and therefore the Court said that this further issue was not before them.

However, we don't believe that National Woodwork is immaterial here. The Court did not simply decide a case on its facts as five Court of Appeals recognized thereafter, it stated a method of decision, a method of decision for determining who is a -- what is a primary dispute is stated in the opinion. Mr. Come has quoted the operative language. And it's whether, under all the surrounding circumstances, the union's objective was preservation of work for the employees, and this is my

addition, of the employer who signed the agreement and who is being struck, and not going back to the quote, "or whether the agreements in boycott were tactically calculated to satisfy union objectives elsewhere."

The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer, vis-a-vis his own employees.

That was not a test which was new, but, as the opinion demonstrates, goes all the way back to the basic understanding beginning with Duplex vs. Deering, which is a very long time ago.

And during all the intervening time, there's been an understanding that there is a difference between primary activity and the secondary boycott, and that the essence of primary activity and a primary strike is that it's a strike by employees against their own employer, in defense of their own working conditions.

We quote --

QUESTION: Well, you, I suppose -- is it your position then that even if this particular subcontractor had always used prefabricated doors, then the union was simply striking to try to get their own employer to quit using prefabricated doors and had them constructed by them at the jobsite, you would be making the same argument?

MR. GOLD: Mr. Justice White, in National Woodwork,

the Court left open the question, another question left open, as to whether primary activity --

QUESTION: I was asking you about what your position was on it.

MR. GOLD: Yes. -- whether primary activity is only the defense of traditional work, or if it includes the attempt to secure additional work.

Our position would be that the essence of the primary-secondary dichotomy is that there is no such distinction.

QUESTION: So your answer to my question is yes?

MR. GOLD: Yes.

But isn't determinative here, is what I was trying to say, because here there is a square finding that this is traditional unit work, that this is not an acquired taste, and it may be that the line is drawn somewhere, and that we are correct here and incorrect in our further assertion, I recognize that. And I recognize that we have no authority supporting the position I was arguing before.

QUESTION: Your assertion would be even in the absence of any work preservation clause at all? That the result should come out your way in this case?

MR. GOLD: Well, that's right. Our view is that at a certain point of time the employer and his employees meet to negotiate a collective agreement. At that point there is no agreement by hypothesis.

If the union seeks a secondary agreement, the -- it's violating 8(b)(4)(A) and 8(e), that's the change of the law --

QUESTION: The Sand Door proposition.

MR. GOLD: Right. Effected in 1959.

So it can only seek a lawful agreement in the first place, and therefore the -- the agreement doesn't change anything here, it's simply evidence that that was what the -- that the union was seeking to preserve its traditional work. And it's also relevant secondarily, I would say, because it demonstrates what is, to us, a very strange set of priorities and equities, as the Board views the matter.

It so happens that here the contract was first the collective agreement. At that point, the Board, as we read its opinion, expressly recognizes that the union could negotiate a contract, and then the Board says that the employer subsequently can go and negotiate a contract with another employer, turn himself from a primary into a neutral, and neutralize the union's ability to enforce the agreement by its normal method of a strike against the employer with whom it had the lawful agreement.

Now, the Board suggests in its Reply Brief, in Point I of the Reply Brief, that we overstate the proposition -- we overstate the test of what is primary activity, because there can be some situations in which the employees' own conditions are matters which they cannot validly strike over. And they

give the example: Suppose the employees wish to have a clause in the agreement saying that they don't have to work on a job where other employers employ non-union men; or suppose that they ask to negotiate an agreement saying that they do not have to handle goods coming from a struck plant.

But we haven't used the term "working conditions" in a limitless sense. In one view of the world, a world we would far prefer, working conditions could be anything that affect employees.

But we recognize that in those two situations which are the situations of the Denver Building case, and of the issue covered by 8(e), Congress has decided that while you could reformulate the matter to say that the immediate employees who don't want to work on the same jobsite with non-union people are having their working conditions affected; it's only in the most remote way, and that the real problem is the problem between another employer, namely, whether he's going to recognize the union, and his own employees. And there's only a derivative effect.

Here the question of whether there's going to be a work preservation agreement, and whether these pipefitters and steamfitters are going to do the work they've done for years, is of immediate and direct concern to them. If they work fewer hours, if they have less work, fewer of them work, obviously; their wage rates, however high they may be, are multiplied by

fewer hours; they are directly and immediately threatened in the most basic way.

And we think that the distinction between the case here, where the whole pattern of the Act sanctions the union's concern and denominates the working conditions, these employees' own working conditions, and the situation where the employees are really interested in the working conditions and the employment relationship between other employers is plain.

QUESTION: Mr. Gold, is there anything in this record that throws any light on the question of whether Hudik, as a construction industry subcontractor here, had a regular permanent cadre of workers, or whether he might have just gotten workers by the job from the construction hall, from the hiring hall?

MR. GOLD: I don't believe that there is anything in the record in this case. Hudik was dealing with the union on behalf of the people he normally employed.

QUESTION: But if he just got people from a hiring hall on a job basis, you could say that there certainly would appear to be something to the Board's contention that these people never would have had a job at all, if he hadn't bid on this contract.

MR. GOLD: Well, but these are the kinds of calculations that both employers and unions and their members have to make all the time.

The union is saying: Our long-run interest is preserving this traditional work.

The employer's reply argument is that: I will not be able to bid and secure as much work as I otherwise would.

And the union says that: We are prepared for that test. That's our calculation, and that's our gamble.

That's no different from the union saying: We want to work for eight dollars an hour. And the employer saying: Most of the bids come out in a way which means that if my labor costs are over seven-fifty, I canot secure the work.

The union says: We think the labor -- there's more elasticity in the bid market than you say; we think that we can organize enough of the workers in this area so that we can maintain our labor conditions, and we insist on the conditions we ask.

The whole theory of the Act is that a matter like that is to be worked out between the employer and his employees and their representative through bargaining. If the union is wrong, it's wrong. But that doesn't mean it isn't seeking to preserve its traditional standards, or, in the wage case I gave, to get the wages that the employees believe are worthwhile for their work.

And to denominate that as turning from primary to secondary, if the employer accepts a bid for seven-fifty and then says: I no longer can pay you eight dollars. Which is

really the Board's theory. Because I no longer have control over the matter.

That seems to us to be a perversion of the whole theory of the Act.

The Board's position, as Mr. Come has indicated, is that an employer who cannot give the employees immediate satisfaction without changing an agreement he has subsequently reached with someone else, is a neutral, seems to us to be defective on many, many scores.

Let me begin with one which has already been explored, and that is: once the two employers have reached their agreement, who is the primary?

And there are two possible answers.

The Board first ventured the answer in the Western Monolithics case, which Mr. Come mentioned, which is a Ninth Circuit case, which eventually became a Ninth Circuit case, that the general contractor becomes the primary because he has the right of control.

The Ninth Circuit, in an opinion by Judge Eugene Wright, said no, you can't say that the general contractor, with whom the union has no contacts, he doesn't bargain, he doesn't employ any of their members, is the primary; and the Board was reversed.

As Mr. Come indicates, subsequently, in a Board case there has been a suggestion that no one is the primary, that,

whereas, at the time the agreement was negotiated the union would have had the right of enforcement, once their employer enters into an agreement with somebody else, there is no primary.

And we think that that is flatly inconsistent with the whole theory of the Act.

As I was indicating in my answer to Mr. Justice Rehnquist, and as this Court has reiterated time and again, most recently in the Machinists case, preemption case, last year, the theory of the Act is to center labor conflict in the bargaining unit of an employer and his employees.

And the theory of the Act is that so long as they're dealing with lawful mandatory subjects of bargaining what the wages are, what work the employees will insist on doing, that is a matter not to be settled, not by outside parties, but by a test of economic strength if reason, as either side sees it, fails.

And to say that employers can, by agreements among themselves, change the situation entirely and create a situation where, even though the union does not enter into a no-strike clause and thereby retains its right to enforce its agreement by its normal strike weapon, it has lost that strike weapon, and has nobody against whom it can employ economic force if there is no primary dispute, seems to us to be flatly and absolutely inconsistent with the genus of this Act.

I would like to conclude -- because I think my time is

about up -- I would like at this point to turn to a discussion of two cases in this Court, upon which the Board places reliance and which we think they misunderstand.

The first is the Denver Building case. In Denver Building, the crux of the dispute was the fact that a subcontractor on a jobsite was employing non-union labor. The unions who were concerned about that did not go to the subcontractor, rather, they went to the general contractor and told him that they wanted the subcontractor off the job or converted into a union contractor, or else they were going to strike.

And the Board found that that was a violation of 8(b)(4)(B).

Now, it seems to us that the plain lesson of Denver Building Trades is that the -- who has the ultimate economic control is not determinative. It's plain that the general contractor, in the Denver case, had the right of control. He could, both originally, as you were pointing out, Mr. Justice Stewart, have given the contract to somebody else, and he could have terminated the contract, or he could have told the subcontractor that he had to operate union on that job, at least, or maybe over-all.

And yet, the Board found, and this Court agreed, that that was a secondary boycott. We don't understand how the Board can draw any comfort from the proposition that a union which has its real dispute with a sub can't strike the general,

when, right here, what the union is trying to do is to strike the sub, who is the person who employs the employees who have a complaint, and the person who entered into the collective agreement, which begins the matter in the first place.

The second case in this Court that the Board mentioned, the second case that the Board mentions in this Court is the Sand Door case, the carpenters case in 357 U.S., which Mr. Come has mentioned.

Prior to 1959, and under the Sand Door rule, there were agreements that the parties could enter into, which were lawful, but which the union could not enforce by collective economic action, even against the employer with whom they had entered into the agreement.

And the theory of Sand Door, with which we agree, is that while those contracts were lawful under the statute as it stood then, they could not turn what was otherwise a secondary boycott into primary activity.

And we do not argue here that the original agreement turned what would otherwise be secondary activity into primary activity. We simply say that the original agreement was a traditional --

QUESTION: Now, what are you talking about, the original agreement?

MR. GOLD: I'm sorry. The original agreement between the union and Hudik, containing the work preservation clause.

QUESTION: The collective bargaining agreement, you mean?

MR. GOLD: Yes. The original --

QUESTION: Including the work preservation clause.

MR. GOLD: Right.

QUESTION: Right.

MR. GOLD: The original collective bargaining agreement was an agreement on a primary subject, and that the enforcement is also on a primary is, by perforce, primary.

QUESTION: What do you mean when you say the enforcement is perforce primary?

MR. GOLD: Well, --

QUESTION: That's Woodwork.

MR. GOLD: Yes. What I'm trying to say, Mr. Justice Rehnquist, is that the original -- you test the original agreement by the standard stated in National Woodwork: Is the agreement addressed to preserving the work of the employees, the type of work they've done on the jobsite?

And the answer in this case is yes, just as it was in National Woodwork.

And you test the enforcement of the agreement by the same standard. And the answer again is yes, because what the employees are trying to do is to assure that the employer continues to observe that agreement which they feel is in their basic long-term interest. That's how --

QUESTION: But certainly the enforcement has consequences against Austin in this case, it could bring pressure on Austin, doesn't it?

MR. GOLD: Well, the agreement, if it had been lived up to, would have those consequences right from the first day. It is inevitable that the agreement has consequences. Once Hudik enters into the agreement, if he's in good faith, he has a limitation on the terms upon which he can do business with third persons. He either is going to limit his bids to situations in which the bid is one he can accept without violating his agreement, or he's not.

And that is one of the plain consequences of every agreement, whether it's an agreement on hours or an agreement on what type of work the employees demand as a condition of doing any work.

And that is one of its intended effects. It's an inescapable effect.

QUESTION: Well, why don't you -- aren't you arguing that under, what is it, 158(e), where a contract is expressly banned except that it - except that it isn't banned if it covers a situation like this?

MR. GOLD: No, Mr. Justice White, we don't --

QUESTION: Well, did Congress expressly permit this kind of a contract?

MR. GOLD: Yes. This kind of contract is lawful in the

construction industry and out of the construction industry.

QUESTION: And the Board doesn't suggest that this agreement, in this case, is illegal?

MR. GOLD: No.

QUESTION: Or that it is not enforcible?

MR. GOLD: Well, it isn't clear whether they said that.

QUESTION: Well, would it be -- could you enforce it in a 301 action?

MR. GOLD: We don't understand, after 1959, how we could enforce it in a 301 action if the Board prevails here. Because what Congress did in 1959 was say that there is a unity between what, the type of agreement you can enter into and the type of agreement you can enforce by economic pressure. And since there's such a unity, what we think is happening is that we're being shot down piece by piece.

First, we're told that we can't enforce it because it would be a violation of 8(b)(4)(B); then the next step will be that since it's a violation of 8(b)(4)(B) to enforce it, insisting on enforcement is -- demonstrate that it's an 8(e) violation.

QUESTION: Well, I would think -- and maybe you do just come right out and say that because of Congress' express approval of a contract like this, and because of its express provision that in 301 actions you can enforce a contract, that

this provision, this construction of the Board is just simply contrary to the intent of Congress.

MR. GOLD: Absolutely. I mean, that is what we're saying.

I just want to make one thing clear, because I don't want to take advantage of a question which I believe aids my cause, and then find out I misunderstood it. We're not saying that this is -- that this contract is legal because of the so-called construction industry proviso to Section 8(e); we're saying that this is a primary clause, would be lawful in the contruction industry or in any other industry.

QUESTION: Oh, you want to win more than your case.

MR. GOLD: No. No. It's just that --

QUESTION: Well, let's just assume -- let's just assume the question was: Does the construction industry proviso cover this case?

QUESTION: Your answer to that is no, isn't it?

MR. GOLD: My understanding is that the construction industry proviso doesn't cover this case, because --

QUESTION: In terms of validating the contract.

MR. GOLD: Right.

QUESTION: Why not?

MR. GOLD: Because our understanding is that it relates only to the contracting and subcontracting of work on a site, and here the problem is, in part, a problem of what work

is to be done off-site and what work is to be done on-site.

And, therefore, our source of validation is that the --

QUESTION: I see. All right.

MR. GOLD: -- that the agreement -- the desire of these employees to preserve their traditional work is a primary demand. It's the same type of demand a group of factory workers could make, saying: We don't want you to contract out assembly line work which we have always done in this plant.

QUESTION: Mr. Gold, putting it a little differently, your contention that the contract is legal is because you understand that it's within the rationale of National Woodworkers?

MR. GOLD: Absolutely.

QUESTION: Yes.

MR. GOLD: And -- I can't add to that, and I won't try.

I want to point out, although it is a secondary aspect of our argument, that the Board says that we must have an object, a secondary object in this case, because the employer has only two choices: either he can cease doing -- the employer Hudik -- he can -- either he can cease doing business with Austin, or he can attempt to get a change in the agreement between Austin and himself.

And, as the Court of Appeals pointed out, there is a third option. If somebody breaches an agreement, he can seek to pay a premium or some other compensation for the breach, and

get on with the work.

As Mr. Come indicates, that isn't a choice that any contract breaker really relishes. But to say that it doesn't exist, and that there are only two choices, seems to us to be illogical in the extreme.

Finally, I do want to note -- I do want to take up a point that the Board makes in its Reply Brief, in terms of the so-called secondary object conjoined with the primary object.

It's our view that that type of approach destroys the primary-secondary dichotomy.

Let me give two examples, in addition to the example here, to show that this is not a sui generis situation.

Suppose that the employees meet and discuss the matter among themselves and decide that they do not want to work week-ends? That's hardly an unrealistic hypothetical, as the members of the Court who heard the Jewel Tea case will remember.

Thereafter, their employer enters into an agreement with somebody else, which requires him to have three shifts, seven days a week, in order to complete the work.

As we understand the Board's theory, this primary agreement becomes unenforcible, because the employer has given away his right of control. He would have to renegotiate his agreement with the general contractor from whom he accepted this bid, knowing that it was inconsistent with the agreement he had made with the union.

QUESTION: Except that agreement wouldn't be covered by the language of the statute, would it?

MR. GOLD: The hours, whether employees will work eight to four, and whether they will work Monday through Friday --

QUESTION: I mean, be covered by the language in 8(b)(4)(B).

MR. GOLD: I'm sorry, Your Honor, I don't understand.

QUESTION: Well, I just don't think your hypothetical would come within 8(b)(4)(B).

MR. GOLD: Well, the other piece is /that the employees refuse to work at all, unless he no longer requires them to work on the weekends as a condition of their continued employment. That would be precisely this case.

In other words, here the employer says: You do this work, but you don't get to do the other work you want.

In the case I am positing, the employer says: If you want to continue to work for me, you have to do the work on the weekends.

They say: No, we don't want to work on weekends.

He says: That's a matter outside my control now, I've agreed with the general contractor to run three shifts.

And it seems --

QUESTION: But you think the language of 8(b)(4)(B) covers the hours of work, the agreement to work seven days a

week? I just don't think the language applies.

MR. GOLD: I don't think that --

QUESTION: They are not ceasing to do business with another employer.

MR. GOLD: Well, the employer --

QUESTION: The basic language. I'm saying the basic prohibition in 8(b)(4)(B) just doesn't fit that example, as I read it.

MR. GOLD: Well, that -- I don't know if you're referring to a --

QUESTION: Well, here you say you can't do work on these other, you know, on the products you bought from a third party; but you don't have the third-party situation, I don't think, in your hypothetical example.

MR. GOLD: Well, in the hypothetical example, the employees won't do the work that the third party tenders under the agreement.

All right, let me just --

QUESTION: They'll do it for five days but not for seven, that's all.

MR. GOLD: That's right. And part of the agreement between the employer and another -- in other words --

QUESTION: Well, I'm sorry, I shouldn't have --

MR. GOLD: Well, no, I apologize; obviously, I don't want to give examples which don't further my argument, when I

feel the argument stands on its merits.

It's just that the Board says that this situation is sui generis. We don't believe that it is. We think the problem is the same whenever employees negotiate an agreement with their own employer, and then that employer enters into an inconsistent contract with a third person, says: You can't enforce your collective agreement against me, because I am now a nautral.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Gold.

MR. GOLD: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:12 p.m., the case in the above-entitled matter was submitted.]

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