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**NLRB v. Plumbers Local 638 (Austin Co.): Limiting the Right to Enforce a Work Preservation Agreement**

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A union's refusal to handle prefabricated materials on a construction site calls into question the proper application of the hot cargo and secondary boycott provisions of the National Labor Relations Act. Section 8 (b)(4)(B) prohibits a coerced or induced refusal to handle goods with the objective of causing a person in commerce to "cease doing business" with another person. The prohibition protects neutral employers from involvement in labor disputes not

1. Sections 8 (b)(4)(B) and 8 (e) of the National Labor Relations Act, 29 U.S.C. § 158 (b)(4)(B), (e) (1959) (amending 29 U.S.C. § 158 (b)(4)(A) (1947)), (hereinafter referred to as the Act) provides in pertinent part:

158 (b) It shall be an unfair labor practice for a labor organization or its agents—
   (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—(A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by subsection (e) of this section; (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . .


3. The neutral employer has been referred to as the "unoffending" party by the Board and the courts. The secondary boycott provisions of the Act permit the impact of labor disputes to bear on "offending" employers and shield the "unoffending" employers from the dispute. See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 626-27 (1967); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951). See also Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8 (b)(4) and 8 (e), 113 U. Pa. L. Rev. 1000, 1017-18 (1965) [hereinafter cited as Lesnick]. The Board has equated "unoffending" with lack of control. See, e.g., Local 438 United Pipe Fitters, 201 N.L.R.B. 59, 64, enforced sub. nom. George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973).
their own.4 Section 8 (e) prohibits the union and its employer from entering into agreements to boycott goods produced by another employer.5 The legislative history of the Act discloses that the provisions were designed to proscribe only those union activities directed against one employer for the purpose of influencing another employer (secondary boycott).6 Consequently, section 8 (b)(4)(B) does not reach primary strike activity,7 and section 8 (e) does not reach the execution of work preservation agreements designed to protect work traditionally performed or claimable by unit employees.8

4. National Woodwork Mfrs. Ass’n v. NLRB, 386 U.S. 612, 620 (1967). The Court also found the legislative intent embodied in § 8 (b)(4)(B) to be identical with that of § 8 (b)(4)(A). Id. at 625-26. See also S. Rep. No. 187, 86th Cong., 1st Sess. 78 (1959), wherein the Committee noted that “[t]he basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer.”

5. Although § 8 (e) does not use the term “hot cargo,” the provision has been construed to ban all agreements authorizing a secondary boycott. See, e.g., S. Rep. No. 1139, 86th Cong., 2d Sess. 3 (1960), which defined a hot cargo clause as “an agreement between a union and a unionized employer that his employees, shall not be required to work or handle ‘hot goods’ or ‘hot cargo’ being manufactured or transferred by another employer with whom the union has a labor dispute or whom the union considers and labels as being unfair to organized labor.” “Hot cargo” also refers to “unfair materials” or “blacklisted products.” S. Rep. No. 187, 86th Cong., 1st Sess. 78, 79 (1959). See also American Feed Co., 133 N.L.R.B. 214, 215 (1961) (defined hot cargo contracts as agreements to support secondary boycotts); District 9 Int’l Ass’n of Machinists, 134 N.L.R.B. 1354, 1358 (1961) (a secondary subcontracting clause limiting the persons with whom the employer could do business violated § 8 (e)); Amalgamated Lithographers Local 78, 130 N.L.R.B. 968 (1961) (found “trade shop” and “refusal to handle” clauses, both union signatory, violated 8 (e)); Amalgamated Lithographers Local 17, 130 N.L.R.B. 985, 988 (1961) (held that a clause giving the union a right to terminate the collective bargaining agreement should the employer handle struck or nonunion work constituted an “implied” hot cargo agreement).


8. Work preservation agreements relate to the protection of work performed by members of the bargaining unit. The agreements must seek to preserve work which unit employees have traditionally performed. American Boiler Mfrs. Ass’n v. NLRB, 404 F.2d 547, 553 (8th Cir. 1968), modifying 167 N.L.R.B. 602 (1967), cert. denied, 398 U.S. 960 (1970). Where the object of a “work preservation” clause is to benefit union members in general, its purpose is deemed not to preserve unit work. NLRB v. Milk Drivers Union, 392 F.2d 845 (7th Cir. 1968), enforcing 159 N.L.R.B. 1459 (1966); Metropolitan Dist. Council of Carpenters (National Woodwork Mfrs. Ass’n), 149 N.L.R.B. 646, 655-56 (1964), enforced in pert. part, 354 F.2d 594 (7th Cir. 1966). The Supreme Court in National Woodwork recognized the broad language of § 8 (e) but reasoned,
In *NLRB v. Plumbers Local 638 (Austin Co.),* the Supreme Court recently confronted the antagonism between the work preservation defense and the right to control doctrine. The Court attempted to resolve conflicting interpretations of section 8 (b)(4)(B), section 8 (e), and the method of analysis previously set forth in *National Woodwork Manufacturers Ass'n v. NLRB.* This evaluation of the significance of the *Austin* decision will focus on both the substance of the Court's opinion and prior administrative and judicial treatment of these issues.

**National Woodwork**

In *National Woodwork,* the Supreme Court considered the legality of boycotts undertaken to uphold a work preservation agreement. The Carpenters' Union in *National Woodwork* executed an agreement with the subcontractor Frouge to preserve the cutting and fitting of doors for the jobsite carpenters. In the absence of specifications restricting the purchase of jobsite materials, the subcontractor ordered finished rather than "blank" doors. The Court held that the union's subsequent refusal to handle the doors constituted primary activity, the sole object of which was to maintain traditional unit work. It articulated a standard which focused on the nature of the union's objectives as evidenced by all the surrounding circumstances.

Prior to the *National Woodwork* decision, the National Labor Relations Board (the Board) had responded to work disputes which erupted into strike activity by developing the "right to control"
doctrine. This doctrine prohibited a union from directing a work stoppage against a neutral employer who lacked the legal capacity to control assignment of the work.\textsuperscript{13} The facts in \textit{National Woodwork} did not present the Court with an opportunity to decide the legality of this position.\textsuperscript{14} From the Court's silence, the Board inferred that the Court merely declined to decide the issue. The Board concluded that the Court was in temporary accord with its right to control approach and continued to utilize the doctrine in applying sections 8 (b)(4)(B) and 8 (e).\textsuperscript{15} Previously, the agency's application of the Act in this area evoked little disagreement from the courts.\textsuperscript{16} However, several courts of appeals construed \textit{National Woodwork} as a repudiation of the Board's approach.\textsuperscript{17}

\textsuperscript{13} The Board first articulated the right to control doctrine in the context of a case involving a secondary boycott. In Clifton Deangulo, 121 N.L.R.B. 676, 685 (1958), the Board found a § 8 (b)(4)(B) violation by a union which directed a work stoppage against an employer who was powerless to award them the work to which they asserted a claim. The Board found that the subcontractor "had given to Union members all work within the Union’s jurisdiction which it had been awarded on the project." In subsequent cases, the Board held work stoppages directed against an employer who lacked control over the work by virtue of the specifications of his subcontract for a particular project as violative of § 8 (b)(4)(B). See, e.g., International Longshoremen's Ass’n, 137 N.L.R.B. 1178 (1962), enforced, 331 F.2d 712 (3d Cir. 1964); Painters District Council 20 (Unicoat), 185 N.L.R.B. 930 (1970).

\textsuperscript{14} The union in \textit{National Woodwork} did not appeal the Board's decision and order with respect to the boycott activities directed against three contractors who lacked control over the assignment of the work. The Supreme Court found it unnecessary to consider the control issue with respect to union activities against the one contractor whom the Board deemed legally capable of assigning the work. "Not before us, therefore, is the issue argued by the AFL-CIO in its brief \textit{amicus curiae}, namely, whether the Board’s ‘right to control doctrine’ . . . is an incorrect rule of law . . . ." National Woodwork Mfrs. Ass’n v. NLRB, 386 U.S. 612, 616-17 n.3 (1967).

\textsuperscript{15} "[A]lthough the Supreme Court had not ruled on the Board’s approach and although the basic underlying rationale of the Board’s approach had not changed, the circuit courts which had occasion to pass on the Board's approach noted their disagreement with it in the light of their reading of the \textit{National Woodwork} decision." Local 438, United Pipe Fitters (George Koch), 201 N.L.R.B. 59, 63-64 (1973); "It would be anomalous to argue that although the Court expressly stated that it was not determining the validity of the 'right to control' test, it nevertheless rejected that test." Local 636, Plumbers & Pipe Fitters (Mechanical Contractors Ass’n of Detroit), 177 N.L.R.B. 189, 190 (1969), \textit{enforcement denied}, 430 F.2d 906 (D.C. Cir. 1970), acq. 189 N.L.R.B. 661 (1971). The Austin decision confirmed the Board’s inference, stating "we did not question the Board’s approach in \textit{National Woodwork}, let alone overrule it \textit{sub silentio}." 429 U.S. at 526.

\textsuperscript{16} See, e.g., Ohio Valley Dist. Council v. NLRB, 339 F.2d 142 (6th Cir. 1964); NLRB v. International Longshoremen's Ass’n, 331 F.2d 712 (3d Cir. 1964).

\textsuperscript{17} See, e.g., Local 742, United Brotherhood of Carpenters v. NLRB (J.L. Simmons), 444 F.2d 895 (D.C. Cir. 1971), \textit{cert. denied}, 404 U.S. 986 (1971), \textit{remanded}, 201 N.L.R.B. 70 (1973); Local 636, Plumbers v. NLRB, 430 F.2d 906 (D.C. Cir. 1970); American Boiler Mfrs. Ass’n v. NLRB, 404 F.2d 547 (8th Cir. 1968). \textit{But see} Associated Gen. Contractors of California Inc. v. NLRB, 514 F.2d 433, 438 (1975) where the court declared, "We believe \textit{National Woodwork} must be limited by the right-to-control doctrine."
THE BOARD

In Austin, the plumbers’ union and the employer, Hudik Ross Company, Inc., executed a collective bargaining agreement which reserved to the jobsite steamfitters the cutting and threading of internal piping. Hudik subcontracted to install climate control units for Austin Company, Inc., the general contractor and engineer, for the construction of a home for the aged. The written job specifications required Hudik to purchase factory piped units from Slant/Fin Corporation. When the prefabricated units were delivered to the construction site, the union refused to install them. Austin Company filed an unfair labor practice charge with the Board, which issued a complaint alleging violations of sections 8 (b)(4)(i) and (ii)(B).

To acquire the pipe work, the union exerted direct pressure on the subcontractor. The Board found that the union’s claim to the work arose from valid work preservation motives. However, since the right to control assignment of the work rested with the manufacturer of the units and the general contractor who specified their use, the Board concluded that the union had really intended to sever business relations between these parties. The Board held that these activities violated sections 8 (b)(4)(i) and (ii)(B).

THE COURT OF APPEALS

The Court of Appeals for the District of Columbia Circuit disagreed with the Board’s view that an employer who lacks the right to control is the type of neutral party entitled to statutory prote-
tion. The court maintained that the Board had disregarded substantial circumstances which would have indicated that there was no violation of section 8 (b)(4)(B). Plainly, the boycott arose from a motivation to preserve unit work. It was reasonable to assume that a struck employer could comply with the terms of the collective bargaining agreement and resolve the dispute. Consequently, the Board had failed to support its finding of unlawful objectives with adequate evidence. Furthermore, the Board’s legal rationale was incorrect and untenable.

The Board’s right to control doctrine is a continuing attempt to circumvent the congressional proviso and is inconsistent with the Court’s analysis in National Woodwork. Moreover, it is a continuing inducement for employers to violate their bargaining agreements. The Court of Appeals held that the Board’s acknowledgement of a valid work preservation agreement was inconsistent with its conclusion that the union had violated section 8 (b)(4)(B).

THE SUPREME COURT

Section 8 (b)(4)(B)

In a broad sense, the issue presented to the Supreme Court in Austin was whether the union’s activity was primary or secondary. However, the facts required the Court to address the narrower issue of whether the employer’s legal capacity to assign the disputed work should determine the nature of the union activities directed against him. The Court pointed out that the termination of business relations between employers which could result as a consequence of a

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23. Id. at 898-99.
24. Id. at 904.
25. Id. at 903-04.
26. The court also noted that the subcontractor did not attempt to negotiate a compromise with the union to circumvent the boycott, that the subcontractor failed to bargain with the union with respect to an alternative to executing the clause, and that he did not propose a no-strike provision in exchange for a clause submitting such disputes to arbitration. Id. at 899 n.34.
27. Id. at 901. The appellate court’s criticism of the doctrine employed by the Board drew the attention of the Supreme Court upon its review of the decision denying enforcement of the Board’s order. “The statutory standard under which the Court of Appeals was obliged to review this case was not whether the Court of Appeals would have arrived at the same result as the Board did, but whether the Board’s findings were ‘supported by substantial evidence on the record considered as a whole.’” 429 U.S. at 531 (footnotes omitted).
28. 429 U.S. at 509-10. Were the activity primary, no violation of §§ 8 (b)(4)(B) or 8 (e) would exist, since the provisions of the Act prohibit only secondary conduct.
union boycott would not necessarily establish an offense.

In the opinion of the Court, the employer's lack of legal capacity at the time of the boycott was characteristic of the type of "cease doing business" objectives prohibited by the Act. The Board had not erred in inferring that where there was sufficient evidence that the employer lacked the requisite control, the union must have intended to exert pressure on other employers in order to obtain the work.30

Opponents of the Board's control doctrine have urged that it has little relevance to either section 8 (b)(4)(B) or the legality of the union's objectives.31 They have argued that the inference of illegal objectives constitutes a fundamental weakness in the control doctrine.32 In viewing the objectives prohibited by section 8 (b)(4)(B), the analysis focuses on purpose rather than effect,33 thereby suggest-

29. See note 2 supra.
30. 429 U.S. at 525.
31. The appellate court in Austin construed the enunciation of the surrounding circumstances test in National Woodwork as foreclosing the reliance on any one factor for a determination of the legality of the union's objectives. 521 F.2d at 893-94. See also United Brotherhood of Carpenters v. NLRB (J.L. Simmons), 444 F.2d 895, 900 (D.C. Cir. 1971) ("The Supreme Court properly recognized that realistic assessment of a union's objective in a particular situation is a complex, subtle matter and must depend on a variety of evidential factors.") and Local 636, Plumbers (Mechanical Contractors Ass'n of Detroit) v. NLRB, 430 F.2d 906, 910 (D.C. Cir. 1970), where the court interpreted the National Woodwork decision to mean that there are a number of issues and effects in these cases requiring a more comprehensive analysis than the narrow approach used by the Board.
32. See Brief for Respondent at 55, 429 U.S. 507 (1977) discrediting the Board's reliance on H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947) as authority for its right to control doctrine. The report stated that Congress intended to protect employers who were "powerless to comply with demands giving rise to [secondary] activity." The union in Austin argued that this statement in no way condoned the control doctrine as a legal principle. A number of courts, including the District of Columbia Court of Appeals, have characterized the doctrine as a per se approach. See, e.g., Local 742, United Brotherhood of Carpenters v. NLRB (J.L. Simmons), 444 F.2d 895, 900 (D.C. Cir. 1971), denying enforcement 178 N.L.R.B. 351 (1969), cert. denied, 404 U.S. 986 (1971), aff'd 201 N.L.R.B. 70, remanded, 533 F.2d 683 (D.C. Cir. 1976). They have found the fundamental relationship between control and objectives to be tenuous. See Local 636, Plumbers v. NLRB (Mechanical Contractors Ass'n of Detroit), 430 F.2d 906, 909 (D.C. Cir. 1970) ("In our view, the 'right to control' test as formulated by the Board, is irrelevant to this determination and tends to focus attention on the wrong factors.") Others have rejected the procedural consequences of discerning unlawful objectives from the existence of one element purporting to be conclusively indicative of secondary motives. See, e.g., American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 557, 561-62 (8th Cir. 1968); NLRB v. Local 164, IB EW, 388 F.2d 105 (3d Cir. 1968).
33. See, e.g., American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 557, 561 (8th Cir. 1968) (only if an illegal object was found could the control factor enter into a determination of a § 8 (b)(4)(B) offense); Carpenters' Union v. Labor Board (Sand Door), 357 U.S. 93, 107 (1958) (the employer's voluntary compliance with a will-not-handle clause evidences no § 8 (b)(4) violation by the union seeking to enforce the cause). See also NLRB v. Local 164, IB EW, 388 F.2d 105 (3d Cir. 1968); International Longshoremen's Ass'n (Wiggin Terminals), 137 N.L.R.B. 45 (1962).
ing that the "cease doing business" requirement be narrowly construed to encompass only conduct ultimately intended to disrupt business.\textsuperscript{34} The Board, on the other hand, has argued that the doctrine defines the nature of the activity by identifying the party to whom the grievance is really addressed.

In approving the Board's emphasis on the control factor, the \textit{Austin} Court simplified the distinction between activity wherein the termination of business is essential, and activity wherein the termination is merely incidental. The dissenting justices, however, articulated the belief that the agency's analysis had been outmoded by the \textit{National Woodwork} decision.\textsuperscript{35}

The Court in \textit{National Woodwork} held that the key to the primary-secondary distinction was whether the activity was addressed to immediate labor relations, not whether an actual dispute existed with the boycotted employer.\textsuperscript{36} It noted that Congress intended to protect primary activity despite the statute's liberal embrace of practically all strike activity.\textsuperscript{37} A fair reading of the statute leads to the conclusion that it immunizes traditional primary activity regardless of the degree of impact on neutral employers.\textsuperscript{38} The

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  \item See, e.g., NLRB v. Operating Engineers, 400 U.S. 297, 307 (1971) (Douglas, J., dissenting). Justice Douglas framed the issue as whether the union's aim was to close down the employer's business or to simply get the work. One writer has suggested that when the cessation of business serves as the means by which a dispute is settled, there is a prohibited object. See \textit{Lesnick}, supra note 3, at 1003.
  \item 429 U.S. at 533, 544. \textit{See also} Enterprise Ass'n of Steam Pipe Fitters Local 638 (Austin Co.) v. NLRB, 521 F.2d 885, 901 (D.C. Cir. 1975); Brief for Respondent at 8, 429 U.S. 507 (1977) wherein the union argued that the control test was "based on a misunderstanding of the governing legal principle."
  \item "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer \textit{vis-à-vis} his own employees." 386 U.S. 612, 645 (1967). The Court observed the intention inherent in the union's activities as evidenced in its tactical objectives: "There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer . . . ." \textit{Id.}
  \item The Court emphasized throughout the decision that although §§ 8 (b)(4)(B), 8 (e) and 8 (b)(4)(A) could embrace literally all activities by organized labor which are socially acceptable, the terms of these sections have not been applied to conduct outside the spirit of the statute. 386 U.S. at 625-27. Congress was alerted to the broad language of § 8(b)(4)(B) as having the potential for a judicial construction embracing all product boycotts and in response enacted a proviso protecting primary strike activity. \textit{Id.} at 632-33. \textit{See also} NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 672 (1951) (The Court noted that Congress preserved the primary strike weapon); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627 (1967) (The Court "accordingly refused to read § 8 (b)(4)(A) to ban traditional primary strikes and picketing having an impact on neutral employers even though the activity fell within its sweeping terms.").
  \item "Thus, however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective." \textit{National Woodwork Mfrs. Ass'n v. NLRB}, 386 U.S. at 627. \textit{See also} NLRB v. Operating Engineers, 400 U.S. 297 (1971) (Primary activity was protected despite serious impact on neutrals. Some collateral dis-
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primary strike proviso to 8 (b)(4)(B) evidences the exemption of primary activity and its incidental secondary effects from the proscriptions of the statute.

Even prior to the Austin decision, the broad language of the statute required distinction between the objectives and effects of strike activity. The Board's control doctrine may have evolved to meet this requirement. Moreover, the disruption of site operations coupled with the union's contractually based defense, necessitate a further distinction between those effects inherently unlawful and those effects merely incidental to lawful activity. The Austin Court concluded that the control doctrine satisfied both requirements. Where the employer has control, the "cease doing business" constr-
quences of boycott activities undertaken by the union are merely incidental to lawful activity; where the employer lacks control, the same consequences evidence unlawful objectives proscribed by the statute. The Court permitted the inference of secondary objectives from substantial evidence that the union directed its boycott against an employer who lacked legal control over the work. However, the Austin opinion suggests that the Court's reasoning emphasized effects over purposes.

Without literal reference to effects, section 8 (b)(4)(B) prohibits "an object" of causing termination of business relations. The Board has long adhered to the tenet that one secondary objective necessarily constitutes the overriding "object" of the activity, notwithstanding other primary objectives. In Austin, the Court framed the issue in terms of whether the "cease doing business" consequences constituted the prohibited "object" of the boycott, notwithstanding any work preservation objective. It concluded that the Board did not err in predicing a section 8 (b)(4)(B) violation on findings that among other primary objectives there was present an object to coerce the general contractor to cease doing business with the manufacturer and subcontractor.

According to the Court, the control doctrine conforms to the statutory scheme of section 8 (b)(4)(B), which requires the confinement of a labor dispute to the immediate employment relations.

43. Id. at 525-26. But see Brief for Respondent at 6, NLRB v. Plumbers Local 638 (Austin Co.) ("A primary strike does not become a secondary boycott even if it has inevitable adverse effects on third parties who do business with the struck employer.").

44. The effects are the impact, in nature and degree of severity, emanating from the union's activities.

45. See relevant statutory text at note 1 supra.

46. See United Steelworkers of America, 127 N.L.R.B. 823, 828 (1960) (Despite the existence of lawful objectives, there was an unlawful objective of causing the termination of business between the contractors); International Longshoremen's Ass'n, 137 N.L.R.B. at 1185 (1962) (It was sufficient that "an object" was to cause the employers to cease doing business with one another). But the Board has often cited the Denver decision to justify its control doctrine. In that case, the union struck the general contractor to discourage the subcontractor from employing nonunion employees. The general contractor had legal control over the disputed work and the Court found an impermissible objective in an obvious attempt by the union to disrupt business on the construction site. The court held that "it is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract." 341 U.S. at 689. The Board's reliance on Denver in the Austin case was termed misplaced by the appellate court. Unlike the activities in Austin, the union's boycott in Denver was union signatory and only a termination of site operations could achieve its objective. 521 F.2d at 902-03.

47. 429 U.S. at 528-30.

48. Id. at 530-31.

49. According to National Woodwork, the Taft-Hartley Act was enacted to counteract the immunity granted secondary activity by the Norris-La Guardia Act, which drew no distinc-
The *Austin* opinion adopts the Board's construction of section 8 (b)(4)(B) to conclude that where the subcontractor lacks the legal capacity to assign the work, the boycott directed against him must have been undertaken to realize objectives beyond the immediate dispute.  

Section 8 (e)\(^{31}\) and the Scope of Work Preservation Agreements

The Landrum-Griffin Amendments to the Taft-Hartley Act\(^{52}\) added section 8 (b)(4)(B) and section 8 (e), the hot cargo prohibition. This prohibition restrains the combination of employers and unions in blacklisting the products or services of other employers. Although work preservation agreements admittedly fall outside the proscriptions of section 8 (e), no consensus has been reached as to whether the enforcement of such agreements is also beyond the purview of section 8 (b)(4)(B).

The Supreme Court in *Austin*, in stating that the primary nature of the agreement does not imply that its enforcement necessarily arises from primary objectives,\(^{33}\) relied on two assumptions: (1) the nature of the agreement dictates neither the nature of its enforcement nor the degree of impact on the immediate or other employer;\(^{34}\) and (2) since the employer's involvement in the dispute must be assessed at the time of the boycott, the existence of an agreement provides no defense to a section 8 (b)(4)(B) charge.\(^{35}\) The latter premise provides the basis for the Board's construction of these two sections of the Act.

Prior to the enactment of section 8 (e), the Supreme Court's decision in *Carpenters’ Union v. Labor Board (Sand Door)*\(^{36}\) barred rais-
ing the existence of a labor agreement as a defense to an illegal boycott. The Austin Court's adherence to Sand Door's pronouncements on the state of the law in 1958 accounts for its reluctance to hold that any activity undertaken to enforce a work preservation agreement must necessarily be primary.

In Sand Door, the general contractor agreed not to compel members of the Carpenters' Union to handle nonunion doors. When the contractor subsequently ordered nonunion doors in connection with a hospital construction project, the union refused to hang them based on the prior agreement. The Supreme Court concurred with the Board's determination that the refusal constituted a violation of section 8 (b)(4)(A), and held that despite the legality of the agreement between the primary employer and the union, the employer was being coerced to cease doing business with another employer. The Court concluded that an agreement to boycott nonunion goods could be voluntarily observed, but alone could not legalize conduct otherwise violative of section 8 (b)(4)(A).

The enactment of section 8 (e) closed the loophole in section 8 (b)(4)(A) drawn to the attention of Congress by the Sand Door holding. Austin held that the passage of section 8 (e) preserved the prevailing law under section 8 (b)(4) and part of the Sand Door holding forbidding the use of any legal agreement to defend a secondary boycott. The Court averred that the National Woodwork decision had also spared the Sand Door opinion from modification.

Relying on Sand Door, the Court in Austin stated that even a work preservation agreement would not mitigate an offense under

57. Local 1976, United Brotherhood of Carpenters, 113 N.L.R.B. 1210, 1229 (1955). Thus inducements of employees that are prohibited under § 8 (b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision. The Board has concluded that a union may not, on the assumption that the employer will respect his contractual obligation, order its members to cease handling goods.

58. Id. at 106.
59. Id. at 106.
60. Id. at 107.
62. "By no stretch of the imagination, however, can it be thought, that in enacting § 8 (e) Congress intended to disagree with or ease Sand Door's construction of § 8 (b)(4). . . ." 429 U.S. at 517. But the dissent argued that "[Sand Door] is not authority that union pressure to enforce a concededly primary work-preservation clause (which, since the enactment of § 8 (e), is legal only because it is primary), is anything but primary pressure." Id. at 641.
63. "Nor did we modify Sand Door in National Woodwork." Id. at 518.
section 8 (b)(4)(B). The Court further inquired whether all the aspects of a work preservation agreement should be regarded as being outside the scope of that provision. Specifically, the Court considered whether a finding of the legality of the underlying agreement mandates the legality of the union's efforts to maintain it. Any determination as to the validity of the right to control test necessitated resolution of this issue. Since the test scrutinizes union objectives even after a work preservation agreement has been found, proper administration of the two sections of the Act is also brought into issue.

Austin clarified the administration of the Act by reevaluating the National Woodwork standard, under which the Board is required to examine all the surrounding circumstances in order to discern the union's objectives. According to the Court, the standard mandated an inquiry into whether section 8 (b)(4)(B) has been violated even though no violation of section 8 (e) has been found. The Court asserted that despite the identical scope of sections 8 (b)(4)(B) and 8 (e) recognized in National Woodwork, the Sand Door holding still prevented a contract which is legal under section 8 (e) from immunizing strike activity under section 8 (b)(4)(B). The Court likewise predicated the validity of the right to control test on the continued viability of the Sand Door decision.

The Board has taken this approach in applying section 8 (b)(4) at least since 1958 when it decided Clifton Deangulo [footnotes 64-68].
omitted]. . . . Relying on its decision in the Sand Door case [footnotes omitted] and ruling against the union, the Board re-
jected the union’s ‘main contentions . . . that the dispute was with Limbach, who was the primary employer; that the Union was seek-
ing merely to exercise a valid contractual right to which Limbach had voluntarily agreed in advance, and that it was therefore en-
gaged in privileged primary activity, not in proscribed secondary activity.\(^{69}\)

Thus, the Court refused to presume the legality of the activity under section 8 (b)(4)(B) solely from the legality of the agreement.\(^70\)

According to the Court, the substance of National Woodwork was that neither section 8 (e) nor section 8 (b)(4)(B) could be indepen-
dently violated by primary union activity.\(^71\) National Woodwork implied, however, that sections 8 (b)(4)(B) and 8 (e) ought not to be administered without reference to each other\(^72\) because neither section of the Act alone reaches the execution or maintenance of work preservation clauses.\(^73\)

**Provisos to Sections 8 (b)(4)(B) and 8 (e)**

The interrelationship of sections 8 (b)(4)(B) and 8 (e) is compli-
cated by the primary strike proviso to section 8 (b)(4)(B)\(^74\) and the two exemptions from section 8 (e).\(^75\) The primary strike proviso

\(^{69}\) 429 U.S. at 525. See also Clifton Deangulo, 121 N.L.R.B. 676 (1958).

\(^{70}\) “Our rationale [in National Woodwork] was not that the work preservation provision was valid under § 8 (e) and that therefore it could be enforced by striking or picketing without violating § 8 (b)(4)(B).” 429 U.S. at 519.

\(^{71}\) Id.

\(^{72}\) 386 U.S. at 649 (Harlan, J., mem.). Although the majority never articulated this judgment in such terms, it repeatedly emphasized the coextensiveness of §§ 8 (b)(4)(B) and 8 (e) and their equal construction. See also Brief for Respondent at 9, NLRB v. Plumbers Local 638 (Austin Co.), 429 U.S. 507 (1977).

\(^{73}\) See note 8 supra.

\(^{74}\) The proviso to § 8 (b)(4)(B) reads: “Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;” 29 U.S.C. § 158 (b)(4)(B) (1959).

\(^{75}\) The provisos to § 8 (e) read:

*Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work; Provided further, That for the purposes of this subsection (e) and section 8 (b)(4)(B) the terms ‘any employer,’ ‘any person engaged in commerce or an industry affecting commerce,’ and ‘any person’ when used in relation to the terms ‘any other producer, processor, or manufacturer,’ ‘any other employer,’ or ‘any other person’ shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.*
permits lawful strike activity and the provisos to section 8 (e) allow certain secondary activities in the construction and garment industries.  

If sections 8 (e) and 8 (b)(4)(B) admit of the same substantive scope, the lack of a primary strike proviso to section 8 (e) poses certain questions. Its absence may be indicative of a congressional intent to refrain from excusing strike activity with respect to hot cargo agreements. Some commentators suggest that section 8 (e) be narrowly defined to encompass only the execution of hot cargo contracts, despite the negative implications of the absence of a primary strike proviso to section 8 (e). The Board takes the position that strike activity to obtain or enforce a hot cargo clause is prohibited. Furthermore, the Board asserts that picketing to obtain a work preservation clause is not prohibited, although picketing to enforce such a clause is not necessarily lawful.

The plumbers union in Austin argued that primary subcontracting clauses designed to protect the work of the bargaining unit were entirely outside the scope of both the hot cargo and secondary boycott provisions of the Act. The Board has traditionally insisted that such clauses fall only outside the hot cargo provisions. The Austin Court concurs with these views. However, it read the primary strike proviso as a simple exclusion of previously lawful strikes and picketing from the prohibitions of section 8 (b)(4). On the other hand, the primary strike proviso would not convert "otherwise

76. The provisos to § 8 (e) were enacted in response to adverse labor conditions in the construction and garment industries. See 105 Cong. Rec. 17886 (1959) (Senator Morse recognizing the problems of integrated production in the garment industry); 105 Cong. Rec. 6668 (1959); 105 Cong. Rec. 16590 (1959) (emphasizing the effects of garment production subcontracting as furthering sweatshop conditions); Essex County Carpenters v. NLRB, 332 F.2d 636, 640 (3d Cir. 1964) (The construction industry exemption was added in recognition of intermittent work stoppages on the construction site arising from refusals of unionists to work with nonunion men); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 638-39 (1967) (Certain secondary activities are permitted on the construction site because of a close community of interests there).

77. See Lesnick, supra note 3, at 1013.

78. See, e.g., Los Angeles Mailers Local 9, 135 N.L.R.B. 1132, 1135, enforced, 311 F.2d 121 (D.C. Cir. 1962); Amalgamated Lithographers Local 78, 130 N.L.R.B. 968, 978 (1961) enforced, 301 F.2d 20 (5th Cir. 1962).

79. See cases cited supra note 78. See also Lane-Coos-Curry-Douglas Counties, 155 N.L.R.B. 1115 (1965).


82. 429 U.S. at 510.
unlawful” activity into protected activity. 83 The Court held that the enactment of section 8 (e) preserved the law under section 8 (b)(4) to the extent that section 8 (b)(4) would proscribe strikes to enforce agreements saved by the proviso. The majority found the legislature to have dispelled arguments suggesting that a work stoppage to enforce a primary agreement would also necessarily be primary. 84 Nevertheless, the minority in Austin urged that if an agreement, by virtue of its primary nature, is not prohibited by section 8 (e) then any activity relative to its maintenance would escape both the literal and implied prohibitions of section 8 (e) and itself be primary. The dissent thereby underscored the fundamental conflict in the case.

Section 8 (e) prohibits all secondary subcontracting clauses except those falling within the terms of the provisos. However, the differing language of the two provisos to section 8 (e) suggests that the terms of section 8 (b)(4)(B) apply only to the enforcement of a contract exempted by the construction industry proviso and not to a contract exempted by the garment industry proviso. 85 With respect to the construction industry, the basic nature of the agreement will distinguish one exempted by the proviso from one which never enters within the terms of section 8 (e). For instance, secondary subcontracting agreements prohibited by section 8 (e) would be permitted by the proviso. 85 By its terms, the proviso does not save strike activity related to the agreement, as does the garment industry proviso. Therefore, maintenance of the agreement by secondary means is prohibited by section 8 (b)(4)(B). Conversely, primary subcontracting clauses, such as agreements to preserve unit work, exist entirely outside the terms of section 8 (e). It might appear that the primary nature of the agreement should foreclose any inquiry into the legality of its maintenance without necessitating a consideration of the provisos, because the activity related to upholding the clause is of the same nature as the clause itself. 86

83. National Woodwork noted that the proviso was added to confirm the continued sanctions against historically secondary activity. 386 U.S. at 632-33 n.20. See also H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959).

84. “Undoubtedly, Congress embraced the rule then followed by the Board and approved by this Court in Sand Door that a contract permitting or justifying the challenged union conduct is no defense to a § 8 (b)(4) charge.” 429 U.S. at 518 (referring to H.R. Rep. No. 1147, 39 (1959) wherein the Committee explained that picketing to enforce agreements saved by the proviso “would be illegal under the Sand Door case.”). The committee, in referring to “saved” agreements, apparently sought to describe the function of the proviso in exempting certain conduct from the terms within the body of § 8 (e).


86. The Austin minority contended that union pressure to enforce the agreement was no
The Supreme Court in *National Woodwork* noted that the enactment of sections 8 (b)(4)(B) and 8 (e) preserved the legality of primary activity in labor-management relations and eschewed a construction that would permit only garment workers to preserve unit work.

> [If the body of [section 8 (e)] and section 8 (b)(4)(B) were construed to prohibit primary agreements and their maintenance, such as those concerning work preservation, the proviso would have the highly unlikely effect, unjustified in any of the statute’s history, of permitting garment workers, but garment workers only, to preserve their jobs against subcontracting or prefabrication by such agreements and by strikes and boycotts to enforce them.]

Therefore, the Court found the import of the provisos to be the absolute protection of work preservation agreements.

Despite its articulated reliance on *National Woodwork*, the Court in *Austin* found that regardless of the existence of a work preservation agreement, the union’s purpose in boycotting the climate control units was to achieve termination of business between employers.

*The National Woodwork Standard*

The Supreme Court in *Austin* reconciled the Board’s right to control test with the National Labor Relations Act and the *National Woodwork* standard by holding that the Board’s assignment of greater weight to the control factor does not imply that the Board has failed to consider all the surrounding circumstances. The Court’s treatment of the surrounding circumstances standard exposes the conflict between the Board and the courts of appeals since *National Woodwork* was decided.

The Board contends that the standard does not define the extent of analysis required under section 8 (b)(4)(B), but rather describes

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less primary than the agreement itself. 429 U.S. at 542. In fact, no § 8 (e) charges were filed in the *Austin* case and the Board noted that the will-not-handle clause was a valid work preservation clause. See *Enterprise Ass’n of Steam Pipefitters*, 204 N.L.R.B. 760 (1973).

87. 386 U.S. at 638.
88. “The provisos are therefore substantial probative support that primary work preservation agreements were not to be within the ban of § 8 (e).” *Id.* at 639.
89. Here, of course, the union not only sought to acquire work that it never had and that its employer had no power to give it, namely, the piping work on units specified by any contractor or developer who prefers and uses prepiped units. By seeking the work at the Norwegian Home, the union’s tactical objects necessarily included influencing *Austin* . . .
429 U.S. at 530 n.16.
90. *Id.* at 524.
a method for determining whether or not there is a work preservation objective. The Board also claims that the National Woodwork standard does not limit the scope of inquiry to the existence of work preservation objectives. In Local 438, United Pipe Fitters (George Koch), the Board read the reasoning of its right to control doctrine into the National Woodwork standard.

Rather, the whole thrust of the National Woodwork decision is that the pressure as directed to [the subcontractor] was primary only because (1) its object was work preservation and (2) [the subcontractor] was in a position, as the facts themselves demonstrated, to respond itself to the union's pressure and give the union's members the work that they had traditionally performed.

The Austin Court impliedly construed the National Woodwork standard as mandating inquiry beyond the work preservation issue, endorsing the Board's version of the standard in George Koch. In George Koch, the Board inquired "(1) whether . . . the union's objective was work preservation and then [emphasis added] (2) whether the pressures exerted were directed at the right person, i.e., at the primary in the dispute." It concluded that the Board's approach was thereby incompatible with National Woodwork. In fact, those courts of appeals critical of the doctrine have pointed out that the Board's assignment of overriding significance to the right to control is a major deviation from National Woodwork. Although the Board insists that the legal ca-

91. See Local 438, United Pipe Fitters (George Koch), 201 N.L.R.B. 59, 62 (1973).
92. Id.
93. Id. at 63.
94. 429 U.S. at 523 n.11.
95. Local 438, United Pipe Fitters (George Koch), 201 N.L.R.B. 59, 64 (1973).
96. 521 F.2d at 903-04 n.44.
97. See Local 636, Plumbers, 430 F.2d 906 (D.C. Cir. 1970), denying enforcement, 339 F.2d 142 (6th Cir. 1964), aff'd, 189 N.L.R.B. 661 (1971). In the Ninth Circuit, it has been held that the control over may constitute a circumstance, though not the sole circumstance on which a § 8 (b)(4)(B) violation may rest. See also Western Monolithic Concrete Products, Inc. v. NLRB, 446 F.2d 522 (9th Cir. 1971) where the Board had allowed a strike against a general contractor with whom the union had no collective bargaining agreement on grounds the contractor had the right to control work. The court of appeals reversed. It has been argued that the control test compels the impermissible per se finding of a § 8 (b)(4) violation where the employer lacks control over the work. See Enterprise Ass'n of Steam Pipe Fitters Local 638 v. NLRB, 521 F.2d 885, 903 (D.C. Cir. 1975); Local 742, United Brotherhood of Carpenters v. NLRB, 444 F.2d 895, 896, 900 (D.C. Cir. 1971). See also Pipe Fitters Local 120 (Spohn & Wrightco), 168 N.L.R.B. 991, 992 (1967) (Member Brown, dissenting in part). In the D.C. Circuit, the control doctrine met with rejection on the grounds that it focused mechanically
pacity of the employer to award the work measures the degree of statutory protection to which he is entitled, the courts have been unable to find adequate justification for the doctrine in the statutory text or legislative history.

In defense of the Board’s method, the Supreme Court in Austin commended both the consistency of the Board’s application of the doctrine, as well as its thorough consideration of all the material facts. The Court held that the Board’s emphasis on the control factor does not deviate from National Woodwork, but rather reflects the requisite degree of proof in a manner not expressly overruled in that decision. The Austin Court averred that where the boycotted employer lacks control, the Board’s test correctly presumes that the union intends to influence some other employer adversely. By focusing directly on the consequences of union activity, the Board’s test identifies the primary and secondary parties in the dispute and thereby reflects the intent of the Act. The Court permitted the Board to pursue any rational method of examining all the surrounding circumstances, provided the Board’s finding of secondary objectives rests on substantial evidence. Within this framework, the Court found that the Board had examined the collective bargaining agreement, the history of jobsite work performed by the subcontractor’s employees, and the local market in which the boycott took place. Where the Board considers such other relevant factors in addition to the legal capacity of the employer to meet the union’s demands, its decision will withstand judicial scrutiny even in light of National Woodwork.

98. “[T]he Board has continued to interpret and apply § 8 (b)(4)(B) to find an unfair practice at least where the union employs a product boycott to claim work that the immediate employer is not in a position to award, and it has declined to find a violation where the employer has such power....” 429 U.S. at 525-26.

99. “Surely the fact that the Board distinguishes between two otherwise identical cases because in the one the employer has control of the work and in the other he has no power over it does not indicate that the Board has ignored any material circumstance.” Id. at 524.

100. “It thus does not appear to us that either the administrative law judge or the Board, in agreeing with him, articulated a different standard from that which this Court recognized as the proper test in National Woodwork.” Id. at 523.

101. Id. at 525-26.
102. Id. at 531.
CONCLUSION

By subjecting work preservation agreements to the prohibitions of section 8 (b)(4)(B) of the National Labor Relations Act, the Supreme Court in NLRB v. Plumbers Local 638 (Austin Co.) impairs union efforts to preserve traditional construction site work from prefabrication. In effect, the Court allows the National Labor Relations Board to determine the relative capacity of the employer to comply with the union’s demands, and then implement the National Workwood surrounding circumstances test to ascertain the nature of the union’s objectives. The Court thereby reduces the impact of the National Workwood decision on the administrative and judicial management of secondary boycotts in the area of traditional unit work. The Austin decision confirms the Board’s liberal reading of National Workwood by holding that the Board’s test is consistent with the National Workwood standard. The Court decided that National Workwood had, in effect, recognized the Board’s standard as the proper one under which to assess a boycott against an employer who lacked control over the specification of the materials.104

The Supreme Court’s position reflects disfavor with the resort to product boycotts by labor unions in order to assure the employer’s compliance with the terms of the collective bargaining agreement. Its approval of the right to control doctrine restricts the otherwise broad mandate of the National Workwood standard. The decision suggests that a subcontractor may forego the opportunity to acquire traditional work for his employees by accepting contracts with terms irreconcilable with the collective bargaining agreement. As a result, he may effectively divest himself of the legal capacity to assign the work and thereby successfully avoid his agreement to preserve the site work for his employees.

The Board has held that the work preservation clause does not prohibit a subcontractor from accepting contracts only for labor, despite opportunities to accept contracts for labor and materials.105 The Austin opinion discourages the execution of work preservation agreements in the construction industry by precluding their enforcement by extrajudicial means. By depriving labor organizations of

104. “In [National Workwood] we did not purport to announce a new legal standard and then ourselves to assess the facts in light of the modified construction of the statute.” 429 U.S. at 522.
106. The union may seek to enforce the agreement by bringing a suit under § 301 (a) of
the strike weapon in these cases, the Supreme Court restricts the union to seeking its remedy in court.\textsuperscript{106}

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