

# Labor Law - Product Boycott Clauses and Section 8(e)

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In *Cloud v. Cloud*,<sup>19</sup> the court set forth these policy considerations:

"The homestead exemption is a law of public policy of this state, the object of which 'is to secure a home beyond the reach of financial misfortune, around which gathers the affection of the family, the greatest incentive to virtue, to honor, and to industry' (59 So. 2d 881, cited below), on the theory that the protection of the family is of at least paramount importance to the state as the payment of debts."<sup>20</sup>

Additionally, in *Poole v. Cook*,<sup>21</sup> an 1882 case, the Louisiana Supreme Court held that although the homestead provision of 1865 applied only to rural property,<sup>22</sup> the one in the Constitution of 1879 applied to both rural and urban property,<sup>23</sup> and the same is true of the present Constitution.<sup>24</sup>

It is submitted that the *Pouncy* rule should apply in *all* homestead exemption cases. There is no valid reason for discriminating between the two situations by holding that where recording is not required the established homestead is superior to prior ordinary debts not reduced to recorded judgments, but where recording is required it is superior only as to subsequent debts. To do so would only result in an unjust discrimination against the urban property owner.

Ronald W. Tweedel

#### LABOR LAW—PRODUCT BOYCOTT CLAUSES AND SECTION 8(e)

Section 8(e) of the National Labor Relations Act<sup>1</sup> provides that it shall be an unfair labor practice for a labor organization and an employer to enter into an agreement under which the employer agrees to refrain from using the products of another employer. Whether product boycott clauses aimed at "work

19. 127 So.2d 560 (La. App. 3d Cir. 1961).

20. *Id.* at 565; *cf.* *Lafayette Bldg. Ass'n v. Spofford*, 221 La. 549, 59 So.2d 880 (1952); *Hammond State Bank & Trust Co. v. Broderick*, 179 La. 693, 154 So. 739 (1934); *Garner v. Freeman*, 118 La. 184, 42 So. 767 (1907); *Hebert v. Mayer*, 48 La. Ann. 938, 20 So. 170 (1896).

21. 34 La. Ann. 333 (1882).

22. La. Acts 1865, No. 33, § 1.

23. La. Const. art. 219 (1879).

24. LA. CONST. art. XI, § 1.

1. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), and Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. §§ 141-187 (1964). N.L.R.A.

preservation" in the construction industry are within the purview of section 8(e) has been the subject of great controversy since the addition of section 8(e) to the Act in 1959.<sup>2</sup>

Recently the United States Supreme Court faced this question in *National Woodwork Manufacturers Association v. NLRB*.<sup>3</sup> There a general contractor was a party to a collective bargaining agreement providing that no union carpenter would handle doors fitted prior to delivery at the jobsite.<sup>4</sup> Although the specifications for the project did not call for pre-fitted doors, the gen-

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§ 8(e), 29 U.S.C. § 158(e)(1964), added by the Landrum-Griffin Act in 1959, provides: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: 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."

2. Archibald Cox, chief labor adviser to Senator Kennedy at the time of passage of the Landrum-Griffin Act, is of the opinion that product boycott clauses having a primary objective are not prohibited by § 8(e). Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959). Yet Guy Farmer, former chairman of the National Labor Relations Board, believes that such clauses are within the ban of § 8(e). Farmer, *The Status and Application of the Secondary-Boycott and Hot Cargo Provisions*, 48 GEO. L.J. 327 (1960). Stuart Rothman, general counsel for the National Labor Relations Board, contends that the scope of § 8(e) depends upon whether the provision encompasses only secondary pressures. Rothman, *Problems Raised by New Secondary-Boycott Restrictions*, 45 L.R.R.M. 78 (1959).

3. 87 S.Ct. 1250 (1967).

4. The full text of Rule 17 provides: "No employee shall work on any job on which cabinet work, fixtures, mill work, sash doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America. No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections." The National Labor Relations Board ruled that the first sentence in Rule 17 violated section 8(e), and the union did not seek judicial review of that determination. 149 N.L.R.B. 646, 655-56 (1964).

eral contractor ordered such doors from a member of the National Woodwork Manufacturers Association. When the union struck to enforce the ban on prefabricated doors, the Association charged the union with violation of section 8(e) and 8(b)(4)-(B).<sup>5</sup> The Supreme Court in a 5-4 decision ruled that the objective of the contractual clause and the strike to enforce it was the preservation of work traditionally performed by jobsite carpenters and that Congress did not intend to prohibit such primary activity in the enactment of section 8(e) and 8(b)(4)-(B).

### *Legislative History*

The enactment of section 8(e) by Congress was prompted by the 1958 decision of the Supreme Court in the *Sand Door* case.<sup>6</sup> There the Court ruled that although a "hot cargo" clause<sup>7</sup> in a collective bargaining agreement was valid, the union was guilty of an unfair labor practice in striking to force the general contractor to comply with its terms. Thus, this decision left the employer free to disregard a negotiated hot cargo clause.

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5. National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1964), as amended by the Landrum-Griffin Act in 1959, states: "It shall be an unfair labor practice for a labor organization or its agents—

" . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

" . . .

"(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, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ."

6. *Local 1976, AFL v. NLRB*, 357 U.S. 93 (1958). Employees of a general contractor, whose collective bargaining agreement with the union contained a hot cargo clause, refused to hang nonunion doors delivered to the building site.

7. Burstein, *The "Hot Cargo" Clause and LMRDA*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 888 (Slovenko ed. 1961): "Traditionally, the hot cargo clause in a labor contract is a signal to union members to refuse to handle non-union, 'unfair,' or 'struck' goods. The signatory employer promises that members of the union will not be required or allowed to handle, process or transport goods or provide services for or to an unfair company."

The primary purpose of Congress in enacting section 8(e) was undoubtedly to prohibit the hot cargo clause.<sup>8</sup> The Landrum-Griffin bill introduced in the House contained the broad prohibitory language of section 8(e), and did not limit its application to secondary activities.<sup>9</sup> This bill passed the House<sup>10</sup> and was sent to conference<sup>11</sup> with the Senate bill.<sup>12</sup>

The Conference Committee adopted the Landrum-Griffin bill, barring any agreement by an employer to refrain from using the products of another employer.<sup>13</sup> In addition to a proviso exempting the garment industry from the prohibition of section 8(e), the conference adopted a limited proviso applicable to the construction industry,<sup>14</sup> but no other additions were made to section 8(e).

The Conference Report, in pointing out the effect of the construction industry proviso, specifically stated:

"It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction."<sup>15</sup>

Senator John F. Kennedy, Chairman of the Senate Conference

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8. In congressional hearings and debate § 8(e) was repeatedly referred to as a measure to close a loophole in § 8(b)(4)(A) of the Taft-Hartley Act of 1947. See S. Rep. No. 187, 86th Cong., 1st Sess. 78-79 (1959); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 942 (hereinafter cited as 1959 LEG. HIST.); H.R. Rep. No. 741, 86th Cong., 1st Sess. 20-21 (1959), 1 1959 LEG. HIST. 778-79.

9. H.R. 8400, 86th Cong., 1st Sess. (1959), 1 1959 LEG. HIST. 619.

10. 105 CONG. REC. 14519-20 (1959), 2 1959 LEG. HIST. 1691-92.

11. 105 CONG. REC. 14541 (1959); 2 1959 LEG. HIST. 1702.

12. S. 1555, the Senate Bill, contained a hot cargo provision limited only to agreements between a union and a carrier. S. 1555, 86th Cong., 1st Sess. (1959), 1 1959 LEG. HIST. 583.

13. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), 1 1959 LEG. HIST. 943.

14. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959), 1 1959 LEG. HIST. 943-44. The construction industry proviso states: "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 . . ."

15. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959); 2 1959 LEG. HIST. 943.

Committee, reiterated this point on the day before final passage of the bill.<sup>16</sup>

Before passage of the Conference Bill, two committee members stated in a joint analysis of the bill that its broad prohibition would bar subcontracting clauses designed to protect against loss of jobs by employees.<sup>17</sup> Another conferee later expressed the same view.<sup>18</sup> Despite these observations both Houses of Congress passed the bill without change.<sup>19</sup>

### *Primary-Secondary Distinction*

In *National Woodwork* the Court, in holding that Congress did not really intend what section 8(e) plainly states, cites the rule "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."<sup>20</sup> This principle was held particularly applicable in construing labor legislation which results from a compromise between strong opposing forces within

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16. Senator Kennedy stated, 105 Cong. Rec. 17900 (1959), 2 1959 LEG. HIST. 1433: "It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the job site, or suppliers who do not work at the job site."

17. In the analysis of the effects of the bill prepared by Senator Kennedy and Representative Thompson it was stated: "Subcontracting clauses: Companies and unions in manufacturing industries often agree upon restrictions upon subcontracting in order to protect the employees against the loss of jobs. For example, a textile concern might agree not to contract out the mending of cloth while any of its own members were unemployed. It would not be unusual for a power company to agree not to contract out any of its line construction while its own regular employees worked less than 40 hours a week. These clauses are frequently negotiated in all kinds of industries. They have nothing to do with hot cargo agreements or secondary boycotts. Yet they appear to be outlawed by the House bill." 105 CONG. REC. 16590 (1959), 2 1959 LEG. HIST. 1708.

18. Senator Morse observed: "It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit." 105 CONG. REC. 17884 (1959); 2 1959 LEG. HIST. 1428.

19. For a tracing of the legislative history to indicate that § 8(e) should cover both primary and secondary activities, see Dannett, *The Legality of Subcontracting Provisions under Section 8(e)*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 905 (Slovenko ed. 1961). For a view that § 8(e) was passed in a context of secondary activity and thus applies only to secondary activities, see Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965).

20. 87 S.Ct. 1250, 1255 (1967). This rule was first set forth in *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

the nation's economy.<sup>21</sup> The Court also stated that the apprehensions about the bill were those of its opponents, not its sponsors,<sup>22</sup> and that the absence of action to rectify these doubts was due to a disbelief in the alleged effects of the bill.<sup>23</sup> However, the Court ignores the fact that Senator Kennedy, who expressed concern as to the effects of the House bill, was Chairman of the Senate Conference Committee and a proponent of this labor legislation. Also, the statements of the Conference Committee members, who were the final drafters of the enacted law, point out that these effects were in fact clearly envisioned.

The Court held that the broad language of section 8(e) was passed in a context of secondary activity and was thus intended to proscribe only secondary activities. Judicial interpretation of section 8(b) (4) (A) of the Taft-Hartley Act consistently limited its effect to secondary pressures in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."<sup>24</sup> Section 8(e) was viewed by the majority as a loophole closing measure which did not expand the type of activity which 8(b)-(4) (A) prohibited. The Court stated:

"Although the language of section 8(e) is sweeping, it closely tracks that of section 8(b) (4) (A), and just as the latter and its successor section 8(b) (4) (B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, section 8(e) does not prohibit agreements made and maintained for that purpose."<sup>25</sup>

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21. 87 S.Ct. 1250, 1255 (1967).

22. The Court states: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). Although the Court held that section 8(e) was passed in a context of secondary activity, it apparently overlooked the fact that the meaning of the statutory language is clear.

23. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 273 (1959): "The fact that Congress rejected the attacks upon the secondary boycott provisions of the Landrum-Griffin bill which alleged that the bill unwisely threw doubt upon the validity of bona fide restrictions upon subcontracting, may be attributed to disbelief in the allegation just as easily as to congressional opposition to contractual restrictions upon managerial freedom to subcontract."

24. *NLRB v. Denver Building & Const. Trades Council*, 341 U.S. 675, 692 (1951).

25. 87 S.Ct. 1250, 1263 (1967).

The Court cites the construction industry proviso<sup>26</sup> as further proof that through section 8(e) Congress sought to prohibit only secondary activities.<sup>27</sup> This proviso exempts from the prohibition of section 8(e) any agreement relative to the subcontracting of jobsite work. The majority felt that it would be illogical to uphold agreements preserving the employees' traditional tasks against jobsite prefabrication but to invalidate agreements dealing with non-jobsite prefabrication.<sup>28</sup> Construing section 8(e) as applying only to secondary activities will permit agreements covering jobsite secondary activities under the construction proviso because of the close community of interests but will prohibit secondary activity agreements relating to non-jobsite work.

To further support the primary-secondary distinction the Court cites the lack of congressional debate as to the effects which would flow from a literal reading of section 8(e).<sup>29</sup> The majority points out that technological innovation poses complex problems in the area of job security and that it is only natural to expect that legislation limiting the right of management and labor to voluntarily negotiate solutions would be supported by extensive debate.

The dissenting opinion, however, found that the agreement fell squarely within the literal impact of section 8(e) and that the primary-secondary distinction was unwarranted by the legislative history. It states that if section 8(e) and its legislative history are examined without preconceptions, it will follow that product boycott clauses aimed at work preservation are banned.<sup>30</sup> In examining the construction industry proviso, the dissent contends that its language and the content of the Conference Report add support to the idea that agreements covering products shipped from outside the worksite are prohibited.<sup>31</sup>

The decision in *Allen Bradley*<sup>32</sup> and the ensuing congressional response are relied upon heavily by the dissent. In that

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26. See note 14 *supra*.

27. 87 S.Ct. 1250, 1265 (1967).

28. *Id.* The Court states that to hold the construction proviso has only a limited exemption "would have the curious and unsupported result of allowing the construction worker to make agreements preserving his traditional tasks against job-site prefabrication and subcontracting, but not against nonjob-site prefabrication and subcontracting."

29. *Id.* at 1266.

30. *Id.* at 1277.

31. *Id.*

32. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945).

case the Supreme Court held that a combination between electrical contractors, electrical manufacturers, and the electrical union under which union members refused to install electrical equipment manufactured outside New York City violated the antitrust laws. The union motive was to monopolize electrical job opportunities for members employed by New York City electrical contractors and manufacturers. The dissent likens the product boycott in *National Woodwork* to that in *Allen Bradley* and states that such agreements were proscribed by section 8(b) (4) (A) of the Taft-Hartley Act. In essence, the dissent contends that "a product boycott for work preservation purposes has consistently been regarded by the courts, and by the Congress that passed the Taft-Hartley Act, as a proscribed secondary boycott."<sup>33</sup>

In distinguishing the two cases the majority states that the boycott in *Allen Bradley* was aimed at secondary objectives—to secure benefits for other electrical manufacturers and their employees—rather than work preservation or any other primary objective. The majority also states that the boycott in *Allen Bradley* was used as a "sword" to create and monopolize job opportunities for union members while in *National Woodwork* the boycott was utilized as a "shield" to preserve the jobs traditionally performed by union members. The dissent, however, takes the position that the sword-shield distinction is merely a deceptive play on words by the Court since the boycott in each case was undertaken for defensive purposes.

#### *Application and Extension of the National Woodwork Rule*

In *Houston Insulation Contractors Assn. v. NLRB*<sup>34</sup> the Supreme Court carried the *National Woodwork* principle even further. There a collective bargaining agreement between Local 22 and a contractors' association stipulated that the employer would not subcontract work relating to preparation of pipe and boiler coverings. A general contractor was engaged in a project within the jurisdiction of Local 113, a sister union of Local 22. Cutting and mitering of asbestos fittings was customarily performed at this contractor's shop within Local 22's jurisdiction. When the general contractor purchased prefabricated asbestos fittings for use on the project, Local 113 refused to install the fittings unless the cutting and mitering were per-

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33. 87 S.Ct. 1250, 1272 (1967).

34. 87 S.Ct. 1278 (1967).

formed by employees of sister Local 22 as provided in the collective bargaining agreement. The Court held the strike by Local 113 against the general contractor, with whom Local 113 had no dispute, permissible as a work preservation measure since it protected primary activity and was not engaged in for its effect elsewhere.

In *Houston Insulation* the union strike was not to preserve work traditionally performed by the striking union, but to preserve work performed by a sister union. The majority relied on the following test in *National Woodwork*:

"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."<sup>85</sup>

Subsequent decisions have followed the *National Woodwork* rule. In *NLRB v. Local Union No. 28*,<sup>86</sup> a collective bargaining agreement to which a mechanical subcontractor was a party prohibited the use of prefabricated dampers unless made by a contractor having a signed agreement with Local 28. When the subcontractor began using dampers fabricated by a sister union, Local 28 initiated a product boycott and threatened to shut down the job. The Second Circuit Court of Appeals, relying on *National Woodwork*, held that the restrictive clause was applied for preservation of work traditionally performed by members of Local 28 and that its application thus comprised lawful primary activity. The Court, however, did not have before it the issue of whether the original agreement itself constituted an 8(e) violation since charges were instituted more than six months after the parties entered the agreement.<sup>87</sup>

More recently, in *Pipe Fitters Local 455* and *Pipe Fitters Local 539*,<sup>88</sup> collective bargaining agreements between the unions and a contractors' association required installation of exterior boiler piping at the jobsite or in the shop of an employer within

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35. 87 S.Ct. 1250, 1268 (1967). The Court then restates the test in *Houston Insulation*: "[C]ollective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity." 87 S.Ct. 1278, 1281 (1967).

36. *NLRB v. Local Union No. 28, Sheet Metal Workers' Int'l Ass'n*, 380 F.2d 827 (2d Cir. 1967).

37. National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1964), provides that no complaint will issue based upon an unfair labor practice which has occurred more than six months prior to the filing of the unfair labor practice charge.

38. 167 N.L.R.B. No. 79 (1967) and 167 N.L.R.B. No. 80 (1967).

the bargaining unit bound by the pipefitters' labor agreement.<sup>39</sup> The NLRB ruled that the prefabrication clauses, which prevented use of packaged boilers on construction projects, were designed to preserve and reacquire work for the employees in the bargaining unit. As such, the clauses were ruled primary work preservation clauses and outside the scope of section 8(e).

### Conclusion

It is admitted at the outset that a literal application of section 8(e) would invalidate many subcontracting clauses now contained in collective bargaining agreements.<sup>40</sup> This fact tends to support the majority view in *National Woodwork* that legislation producing such a result would obtain passage only after extensive congressional study and debate. However, the Court apparently overlooks the statements of the conferees who specifically warned that work preservation clauses would be banned under the final legislation forged by the Conference Committee.

More importantly, the Court's technique in construing the applicable legislation in *National Woodwork* is unconvincing and leaves much to be desired. The Court, in spite of the plain language of section 8(e), derives the primary-secondary distinction with support from the *Holy Trinity Church* rule "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of the makers." Application of this rule appears justified only when legislative history clearly shows that Congress intended statutory effect different from the literal import of the words used. Although the rule that unambiguous language of a statute leaves no room for construction<sup>41</sup> has been somewhat

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39. Package boilers, which have trim piping installed at the factory, first appeared in the Minneapolis area in 1951. By 1963 approximately 70% of boilers installed on construction projects in the area were packaged boilers, each representing loss of two days' work on the jobsite for two union pipefitters. In 1963 the two unions obtained the restrictive prefabrication clauses in their collective bargaining agreements.

40. See Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LABOR REV. 579 (1961). The Bureau of Labor Statistics, in a 1961 study, examined 1687 major collective bargaining agreements covering 1,000 or more workers each and applying in sum to approximately 7.5 million employees. Of the 1687 agreements examined, 387 of those agreements contained some limitation on subcontracting.

41. The Court apparently discounts the rule that where statutory language is clear and free from ambiguity there is no room for construction. *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98 (1937); *Helvering, Comm'r of Internal Revenue v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935).

eroded in recent years, disregard for the plain and unobscure language of a statute seems proper only where the legislative history overwhelmingly supports a construction contrary to its literal impact. The legislative history of section 8(e) not only offers a clear repudiation of the *National Woodwork* decision, but would also seem to justify criticism of the case as a flagrant example of judicial usurpation of the legislative function.<sup>42</sup>

The rationale behind the construction industry proviso may be found in the relations of the workers at a common jobsite. Where employees of the general contractor and subcontractors work alongside each other at the same jobsite, one group may seek a subcontracting agreement with the contractor to protect and preserve work performed by that group. In this sense, the proviso's literal impact would be to exempt agreements limiting subcontracting for jobsite work but not those limiting subcontracting for non-jobsite work. Where jobsite employees are displaced by other jobsite employees rather than by a cost-saving product fabricated away from the jobsite, the disruptive effects of a labor dispute are apt to be more pronounced. The proviso would thus serve the purpose of preventing labor strife among jobsite workers by protecting an agreement as to jobsite work, but not protecting an agreement as to prefabrication work done away from the jobsite.<sup>43</sup>

In applying the *National Woodwork* test in future product boycott cases the crucial question will be whether the union's ultimate aim is to require the primary employer to allow his own employees to perform the stipulated work rather than use a prefabricated product. If the answer is affirmative, then no violation of section 8(e) and 8(b)(4)(B) will be found. Although still an open question, it would seem that under the *National Woodwork* test the work sought need not be work traditionally performed by these employees; it may be work which they seek to acquire. If the only requirement is that "the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees," there seems to be no

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42. "Perhaps the greatest difficulty in resolving the subcontracting clause issue stems from a lack of any clear indication of congressional intent." Comment, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 917 (Slovenko ed. 1961). The doubt as to a clear congressional intent is reinforced by the diversity of opinion among some of the nation's leading labor authorities and commentators. See note 3 *supra*.

43. See Comment, 62 MICH. L. REV. 1176 (1964).

restriction limiting work to that which has been traditionally performed by the employee group. A "work acquisition" agreement would still meet the test in that it would be "addressed to the labor relations of the contracting employer vis-a-vis his own employees."<sup>44</sup>

It is submitted that the decisions in *National Woodwork* and *Houston Insulation* will tend to deprive management of the benefits of technological innovation, thus hindering the contractor's competitive position in the industry. If a contractor is bound by a restrictive product boycott clause limiting managerial discretion, he will be prevented from purchasing new cost-reducing products which would reduce his bid. This contractor will thus be forced to bid a higher price than a contractor who is not bound by such an agreement and can take full advantage of cost-saving innovations. Hence the contractor and his employees may be faced with a serious loss of work due to competition from other contractors who operate free of these restrictive agreements.

Also, non-union contractors, who are not bound by these restrictive clauses, may enjoy an unfair competitive advantage in some areas. But in areas dominated by union contractors the general public may also suffer from the higher prices resulting from restricted use of cost-saving products. Furthermore, these decisions may ultimately tend to stifle human initiative in that innovators will face a greatly curtailed market for their products. Lack of substantial financial reward may thus tend to discourage research to produce cost-saving products in the construction field.

It is submitted that the Supreme Court in formulating the *National Woodwork* rule has completely disregarded the literal impact of section 8(e) to evolve a distinction unsupported by the plain statutory language or *convincing* legislative history. Indeed, as Justice Stewart states in his dissent:

"... the Court is simply substituting its own concepts of desirable labor policy for the scheme enacted by Congress."<sup>45</sup>

*Harry E. McInnis, Jr.*

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44. See Johns, *Analysis of Philadelphia Pre-Cut Door Decision*, LABOR LAW BULLETIN OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, No. 9, at 1 (May 24, 1967).

45. 87 S.Ct. 1250, 1275 (1967).