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RECENT DEVELOPMENTS

LABOR LAW—WORK PRESERVATION—IDENTIFICATION OF WORK AT ISSUE REQUIRES ANALYSIS OF BARGAINING UNIT TRADITIONAL WORK PATTERNS. *NLRB v. International Longshoremen's Association*, 100 S. Ct. 2305 (1980). The International Longshoremen's Association (ILA)¹ and a multiemployer bargaining association² entered into a collective bargaining agreement³ containing provisions with respect to containerization.⁴ Containerization is a technological innovation that threatens the jobs of longshoremen.⁵ The agreement provided that ILA labor perform all stuffing and stripping⁶ of containers within the local port area.⁷ Under the liquidated damages provision of the contract, a joint union-management committee fined certain employer shipping companies for transacting business with the charging parties, motor carriers and consolidators engaged in off-pier stuffing and stripping of containers.⁸ The shipping companies subsequently ceased doing business with the charging parties.⁹

The National Labor Relations Board (Board), in separate proceed-

1. The ILA is the bargaining representative for all longshoremen represented in this dispute. 100 S. Ct. 2305, 2309 n.10 (1980).

2. The Council of North Atlantic Shipping Association (CONASA) is a multiemployer bargaining association representing employers' shipping organizations, including the New York Shipping Association (NYSA), the Steamship Trade Association of Baltimore (STAB), and the Hampton Roads Shipping Association (HRSA). Since 1970, CONASA has bargained with ILA on a master-contract basis. *Id.*

3. The relevant provisions have been termed the Rules on Containers (Rules), and are contained in the 1974-77 collective bargaining agreement. 100 S. Ct. at 2310.

4. Containers are large, reusable metal receptacles capable of accommodating 30,000 pounds of cargo and can be transported intact on and off an ocean vessel. 100 S. Ct. at 2308. *See generally* Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L. REV. 1077 (1969).

5. Containerization has enabled the shipping industry to drastically reduce the amount of on-pier work traditionally performed by longshoremen. 100 S. Ct. at 2309. This innovation has had a profound impact on the shipping industry and waterfront labor relations. *See* Fairley, *The ILWU-PMA Mechanization and Modernization Agreement*, 12 LAB. L.J. 664 (1961); Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LAB. L.J. 397 (1970). *See generally* Note, *Technological Change: Management Prerogative vs. Job Security*, 31 IND. L.J. 389 (1956).

6. Stuffing and stripping are industry terms of art defining the process by which cargo is packed into and removed from a container. 100 S. Ct. at 2310.

7. The local port area encompasses a geographical radius of fifty miles from the port. *Id.*

8. *See* 100 S. Ct. at 2311-12, 2321 (app.).

9. *Id.*

ings,¹⁰ found that the contract provisions and their enforcement constituted a “hot cargo” agreement,¹¹ and a secondary boycott¹² respectively proscribed by sections 8(e)¹³ and 8(b)(4)(ii)(B)¹⁴ of the National Labor Relations Act.¹⁵ The cases were consolidated on appeal,¹⁶ and a divided panel of the United States Court of Appeals for the District of Columbia vacated the orders and remanded the case.¹⁷ The United States Supreme Court granted certiorari¹⁸ and *held*: Identification of work in controversy in technological displacement cases requires an analysis of the traditional work patterns that the bargaining unit employees seek to preserve, which is divorced from all considerations of similar work performed by other employee bargaining units.¹⁹

Section 8(b)(4)(B)²⁰ of the Taft-Hartley Act,²¹ enacted in 1947, pro-

10. International Longshoremen’s Ass’n (Dolphin Forwarding, Inc.), 236 N.L.R.B. 525 (1978); International Longshoremen’s Ass’n (Associated Transport, Inc.), 231 N.L.R.B. 351 (1977).

11. A hot cargo agreement is one under which the employer agrees to refrain from transacting business with designated employers. *See* Nash, *Connell “Hot Cargo” Arguments: The Supreme Court as Interpreted by the NLRB*, 83 DICK. L. REV. 661, 663 (1974).

12. A secondary boycott involves the application of economic pressure on a neutral party to coerce that party to cease doing business with an employer with whom the union has a dispute. *See id.* at 662.

13. 29 U.S.C. § 158(e) (1976) provides in pertinent part:

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

14. 29 U.S.C. § 158(b)(4)(ii)(B) (1976) provides in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . 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

15. *See* 29 U.S.C. § 151 (1976). The Board held that the Rules and their enforcement constituted an unlawful attempt to acquire work not previously performed by the bargaining unit. International Longshoremen’s Ass’n (Dolphin Forwarding, Inc.), 236 N.L.R.B. 525, 526 (1978); International Longshoremen’s Ass’n (Associated Transport, Inc.), 231 N.L.R.B. 351, 352 (1977). *See also* notes 32-34 *infra* and accompanying text for discussion of “work acquisition.”

16. *See* International Longshoremen’s Ass’n v. NLRB, 613 F.2d 890 (D.C. Cir. 1979).

17. The Court held that the Rules represented a lawful attempt to preserve work for the bargaining unit employees and that the Board erred as a matter of law in defining the work in controversy. *Id.* at 914. *See* notes 32-34 *infra* and accompanying text for discussion of “work preservation.”

18. *See* 100 S. Ct. 2305 (1980).

19. *See id.* at 2315.

20. 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

21. 29 U.S.C. §§ 141-87 (1976).

hibits a labor organization from applying coercive pressure²² on a neutral employer²³ to force that employer to cease doing business with another.²⁴ The Supreme Court in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*²⁵ construed the prohibited conduct narrowly²⁶ by holding that an employer's voluntary compliance with a boycott provision of a collective bargaining agreement rendered the boycott lawful.²⁷

In 1959 Congress enacted the Landrum-Griffin Act²⁸ in part to close the loophole created by *Sand Door*.²⁹ Section 8(e) of the Landrum-Griffin Act prohibits voluntary agreements to boycott the goods or services of any other person.³⁰ Although the statutory language pros-

22. See *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 68 (1964) ("coercive" includes any form of economic pressure of a sufficiently compelling or restraining nature); *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 701 (1951) (coercive pressure includes peaceful picketing and "every form of influence and persuasion"); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 686 (1951) (same); *Electro-Coal Transfer Corp. v. General Longshore Workers*, 591 F.2d 284, 289 (5th Cir. 1979) (use of contractually authorized fining mechanism against employer held "coercive"); *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976) (resort to grievance proceedings held coercive), *cert. denied*, 431 U.S. 974 (1977); *Associated Gen. Contractors, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975) (same).

23. Section 8(b)(4)(B) of the Act was enacted to shield unoffending employers from union pressures designed to involve them in disputes not their own. *NLRB v. Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507, 523 (1977); *Connell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 634 (1975); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689 (1951).

An employer is neutral for purposes of this section if it does not have the power to assign the work in controversy. *NLRB v. International Longshoremen's Ass'n*, 100 S. Ct. at 231; *NLRB v. Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507, 526 (1977); *George Koch Sons, Inc. v. NLRB*, 490 F.2d 323, 327 (4th Cir. 1973).

24. Section 8(b)(4)(B) of the Act does not require that a union demand a complete termination of the business relationship. The language requires an analysis of the union's goal and the foreseeable consequences of the secondary pressure. *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 400 U.S. 297, 304-05 (1971); *Kaynard v. Local 282, Int'l Bhd. of Teamsters*, 576 F.2d 471, 477 (2d Cir. 1978); *NLRB v. Local 3, IBEW*, 467 F.2d 1158, 1160-61 (2d Cir. 1972) (requirement met if foreseeable consequence is more than a slight disruption of the business relationship); *NLRB v. Local 85, Int'l Bhd. of Teamsters*, 454 F.2d 875, 878-79 (9th Cir. 1972).

25. 357 U.S. 93 (1958).

26. "Employees must be induced . . . to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person." *Id.* at 98.

27. *Id.* at 98-99.

28. 29 U.S.C. §§ 401-531 (1976).

29. See *Connell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 628 (1975). See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959).

30. See 29 U.S.C. § 158(e) (1976).

cribes all boycott agreements, the Supreme Court in *National Woodwork Manufacturers Association v. NLRB*³¹ held that those agreements that seek to “shield” and preserve the work traditionally performed by the bargaining unit employees are “primary” and lawful.³² The Court intimated in dictum, however, that a boycott used as a “sword” to monopolize or to acquire new jobs is “secondary” and might violate the proscriptions of the National Labor Relations Act.³³ Courts subsequent to *National Woodwork* have upheld boycott agreements that preserve the work of bargaining unit employees. The courts have invalidated “secondary” agreements, which attempt to acquire work for the bargaining unit.³⁴

The Supreme Court delineation between lawful primary activity and

31. 386 U.S. 612, 640 (1967). See *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 247-52 (1967).

32. A determination of the primary or secondary nature of an agreement must involve an inquiry into all of the surrounding circumstances. 386 U.S. at 645.

The Court noted that such circumstances might include “the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry.” *Id.* at 644 n.38. See generally Note, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280, 1297-1300 (1971).

33. See 386 U.S. at 630-31.

34. The bargaining unit for which a union may lawfully seek to preserve work is that unit for which separate collective bargaining occurs. *Local 282, Int’l Bhd. of Teamsters (D. Fortunato, Inc.)*, 197 N.L.R.B. 673, 675 (1972); *United Mine Workers*, 165 N.L.R.B. 467, 468 (1967).

The Court in *NLRB v. International Longshoremen’s Ass’n*, 100 S. Ct. at 2313, advocated a two-pronged test to ascertain the nature of the boycott. First, the Board must define the work at issue by focusing on the work traditionally performed by the bargaining unit employees. Second, a lawful, “primary” agreement must seek to do no more than preserve the work of the bargaining unit employees.

See *Grandad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979) (efforts to preserve work for bargaining unit held valid); *California Dump Truck Owners Ass’n v. Associated Gen. Contractors*, 562 F.2d 607 (9th Cir. 1977) (same). But see *Pacific N.W. Chapter of Associated Builders & Contractors, Inc. v. NLRB*, 609 F.2d 1341, 1346 (9th Cir. 1979) (clause operating for general benefit of union held invalid); *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1187 (2d Cir. 1976) (provision seeking work of “new product” held invalid), *cert. denied*, 431 U.S. 974 (1977); *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976) (same), *cert. denied*, 434 U.S. 854 (1977); *Associated Gen. Contractors, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975) (same); *Local 282, Int’l Bhd. of Teamsters (D. Fortunato, Inc.)*, 197 N.L.R.B. 673 (1972) (clause seeking work more expansive than that traditionally performed held invalid); *Culinary Alliance Local 402*, 175 N.L.R.B. 161, 168-69 (1969) (clause seeking new work held invalid).

See generally *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 538 (D.C. Cir. 1964) (primary activity must be “germane to the economic integrity of the principal work unit”); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Nash, *Connell “Hot Cargo” Agreements: The Supreme Court as Interpreted by the NLRB*, 83 DICK. L. REV. 661, 664 (1979); Comment, *Subcontracting Clauses and Section 8(e) of the National Labor*

unlawful secondary activity is somewhat "more nice than obvious."³⁵ The distinction has proved particularly troublesome when the bargaining unit employees seek not only to preserve traditional work, but also to recapture work previously displaced by technological innovation.³⁶ Courts have construed *National Woodwork* to protect certain boycott activity directed toward work recapture or "reacquisition."³⁷

The Eighth Circuit in *American Boiler Manufacturers Ass'n v. NLRB*,³⁸ a decision hailed as the "seminal recapture case,"³⁹ clearly recognized the legitimacy of efforts to recapture work diminished by technological changes.⁴⁰ *American Boiler* confined its holding, however, to reacquisition efforts aimed at work currently performed but at a greatly reduced level.⁴¹ The court expressly declined to decide the lawfulness of a restrictive clause that attempted to acquire work never performed by the bargaining unit or work lost to technology prior to contract negotiations.⁴² Precise criteria that delineate the parameters of lawful reacquisition efforts have not evolved in the courts.⁴³ Rather, decisions have utilized the elusive terms of "traditional"⁴⁴ or "fairly

Relations Act, 62 MICH. L. REV. 1176 (1964); Note, *Secondary Boycotts and Work Preservation*, 77 YALE L.J. 1401 (1968).

35. See Local 761, Int'l Union of Elec. Workers v. NLRB (General Electric), 366 U.S. 667, 674 (1961).

36. One author notes that such efforts "involve a measure of both preservation of existing jobs threatened by further erosion and acquisition of jobs which are currently held by non-unit workers and which have displaced traditional unit work assignments." See 90 HARV. L. REV. 815, 821 (1977).

37. Local 742, United Bhd. of Carpenters v. NLRB, 533 F.2d 683, 690 (D.C. Cir. 1976) (legitimate work preservation objective if the tasks and skills required for the new product are "closely related" to those skills required for traditional work), *vacated on other grounds*, 430 U.S. 912 (1977); *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547, 554 (8th Cir. 1968) (reacquisition of that portion of work "lost" to technology held valid), *cert. denied*, 398 U.S. 960 (1970); *Meat & Highway Drivers Local 710 v. NLRB (Wilson & Co.)*, 335 F.2d 709, 714 (D.C. Cir. 1964) (union can recapture "fairly claimable" work); *Retail Clerks' Local 648 (Brentwood Markets, Inc.)*, 171 N.L.R.B. 1018, 1020 (1968) (efforts to attain work of a similar nature to that currently performed held valid).

38. 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970).

39. 90 HARV. L. REV. 815, 822 (1977).

40. See 404 F.2d 547, 552 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970).

41. *Id.*

42. *Id.*

43. See Local 546, Milk Drivers & Dairy Employees, 133 N.L.R.B. 1314, 1316-17 (1961) (restrictive agreements curtailing subcontracting of work "regularly performed" requires a separate examination of each such contract or agreement). See also Note, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280, 1296-97 (1971); Note, *Secondary Boycotts and Work Preservation*, 77 YALE L.J. 1401, 1406 (1968).

44. The term "traditional work" has been defined as that work which the bargaining unit has

claimable"⁴⁵ work to define the scope of lawful work preservation efforts.⁴⁶

The Board, in a series of decisions⁴⁷ prior to *NLRB v. ILA*, confronted the legality of ILA efforts to capture a portion of the work generated by containerization. The Board in each decision narrowly defined work in controversy by focusing on geographic location, type of company performing the work, and type of cargo.⁴⁸ The Board concluded that work generated by containerization was not work traditionally performed by longshoremen but, rather, traditional work of competing employee units.⁴⁹ Thus, the Board held that the provisions

performed and is still performing at the time the clause is negotiated. *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547, 552 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970).

45. Fairly claimable work has been defined as that work which is "of the type which the men in the bargaining unit have the skills and experience to do." *Meat & Highway Drivers, Local 710 v. NLRB (Wilson & Co.)*, 335 F.2d 709, 714 (D.C. Cir. 1964).

46. *See Sheet Metal Workers Local 223 v. NLRB*, 498 F.2d 687, 695 (D.C. Cir. 1974) ("fairly claimable" work standard employed); *Wilson v. Milk Drivers & Dairy Employees Local 471*, 361 F. Supp. 1151, 1156 (D. Minn. 1973) (fairly claimable work is work of the same type or category); *Retail Clerks' Local 648 (Brentwood Markets, Inc.)*, 171 N.L.R.B. 1018, 1020 (1968) (fairly claimable work is work of the same "generic" classification). *Cf. National Maritime Union v. Commerce Tanker Corp.*, 457 F.2d 1127, 1134 (2d Cir. 1972) (findings of organizational objectives in addition to work preservation objective rendered conduct unlawful); *Local 98, Sheet Metal Workers v. NLRB*, 433 F.2d 1189, 1195 (D.C. Cir. 1970) (work not traditionally performed by work unit held not fairly claimable); *Retail Clerks Int'l Ass'n, Local 1288 v. NLRB*, 390 F.2d 858 (D.C. Cir. 1968) (findings of organizational objectives in addition to work preservation objective rendered conduct unlawful); *Retail Clerks Union, Local 770 v. NLRB*, 296 F.2d 368, 375 (D.C. Cir. 1961) (same); *Local 282, Int'l Bhd. of Teamsters (D. Fortunato, Inc.)*, 197 N.L.R.B. 673, 678 (1972) (work of a similar nature requiring like skills held not claimable by unit when a "substantial portion" of the work had not previously been performed by unit employees); *Asbestos Workers Union*, 139 N.L.R.B. 688, 701 (1962) (union members without requisite skills to perform work compelled finding of unlawful secondary purpose).

Decisions involving "new" work, which is closely related to the "traditional" work of the bargaining unit, reflect the tenuous nature of the classifications. *See, e.g., Canada Dry Corp. v. NLRB*, 421 F.2d 907, 909 (6th Cir. 1970) (shelving of new brands of goods held to be of the same "type" of work traditionally performed); *Retail Clerks' Union, Local 648 (Brentwood Markets, Inc.)*, 171 N.L.R.B. 1018, 1026 (1968) (work sought fell within same generic classification as job tasks traditionally performed). *See also R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 268 (1976).

47. *See note 49 infra.*

48. In each instance the Board defined the work in controversy as either LCL ("less than container load"), LTL ("less than trailer load"), or FSL ("full shippers' loads") cargo work performed by the charging parties at their own off-pier premises. *See International Longshoremen's Ass'n (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1976).

49. *International Longshoremen's Ass'n*, 548 F.2d 494 (4th Cir. 1977); *International Longshoremen's Ass'n Local 1575 v. NLRB*, 226 N.L.R.B. 34, 37 (1976), *enforced*, 560 F.2d 439 (1st Cir. 1977) (evidence of organizational motives strengthened conclusion of illegal secondary motive); *Consolidated Express v. New York Shipping Ass'n*, 221 N.L.R.B. 956, 961 (1975), *enforced*,

and their enforcement constituted unlawful hot cargo agreements⁵⁰ and secondary boycotts⁵¹ prohibited by sections 8(e)⁵² and 8(b)(4)(ii)(B)⁵³ of the National Labor Relations Act.⁵⁴

The Supreme Court in *NLRB v. ILA*⁵⁵ held that the Board's definition of work in controversy was erroneous as a matter of law.⁵⁶ The Court noted that the Board focused on the work performed by the charging parties after the advent of containerization.⁵⁷ This approach "foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement [permitting] them to . . . play any part in the loading or unloading of containerized cargo."⁵⁸ The Court held that the nature of the work performed by employees of the charging parties and the secondary effects of the contract provisions on those parties are irrelevant to ascertain the validity of the provisions.⁵⁹ The legality of the agreement is contingent on whether the relationship between traditional work performed by the bargaining unit, and work desired, denotes a work preservation objective.⁶⁰ The Court remanded the case to the Board for a factual determination of whether the Rules attempt to preserve traditional longshoremen work,⁶¹ or whether they

602 F.2d 494 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980); International Longshoremen's Ass'n (Consolidated Express, Inc.), 221 N.L.R.B. 956 (1975) (Board found work acquisition objective and abandonment of claim by 1959 contract; court affirmed on work acquisition basis only), *aff'd*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); International Longshoremen's & Warehousemen's Union Local 13 (California Cartage Co.), 208 N.L.R.B. 994, 994-95 (1974) ("make-work" rights bargained away in earlier contract), *enforced mem. sub nom.* Pacific Maritime Ass'n v. NLRB, 515 F.2d 1018 (D.C. Cir. 1975). *See also* Intercontinental Container Transport Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970) (work preservation objective found in action brought under the Sherman Act); Balicer v. International Longshoremen's Ass'n, 364 F. Supp. 205 (D.N.J.), *aff'd mem.* 491 F.2d 748 (3d Cir. 1973); International Longshoremen's Ass'n Local 1248 (Naval Supply Center), 195 N.L.R.B. 273, 274 (1972).

50. *See* note 11 *supra*.

51. *See* note 12 *supra*.

52. 29 U.S.C. § 158(e) (1976).

53. 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

54. 29 U.S.C. § 141 (1976).

55. 100 S. Ct. 2305 (1980).

56. *Id.* at 2315.

57. *Id.*

58. *Id.* *See generally* 90 HARV. L. REV. 815, 825-28 (1977) (an in depth discussion of the policy considerations underlying the narrow and broad views of work reacquisition agreements).

59. *See* 100 S. Ct. at 2315 n.22.

60. *Id.* at 2316. The Court noted that the result would depend on "how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *Id.* at n.24.

61. *Id.* at 2317. The Court noted that, in view of congressional preference for collective

are "tactically calculated to satisfy union objectives elsewhere."⁶²

The Court in *NLRB v. ILA* recognized that in complex cases of technological innovation, a narrow definition of work in controversy effectively denies workers the opportunity to preserve work patterns when they accommodate management's desire to increase productivity. Adoption of the Board's narrow definition of work in controversy produces an anomaly. Workers can lawfully preserve their jobs by arguing against the implementation of an innovation,⁶³ but cannot preserve the work in controversy if they agree to accommodate the technological change.⁶⁴ The Court perceived that the Board must define work in controversy broadly by focusing on displacement of bargaining unit employees to adequately extend the protection of the work preservation doctrine to reacquisition agreements.⁶⁵

The Court implicitly recognized that the longshoremen's efforts did not present the classic work preservation situation⁶⁶ presented by *National Woodwork* in which effects on third parties are minimal.⁶⁷ In contrast to *National Woodwork*, enforcement of the ILA contract provisions would cause significant secondary effects by displacing workers in other bargaining units.⁶⁸ The *ILA* Court, however, refused to address

bargaining as the means for resolving these disputes, the question is not whether the Rules represent the most rational response to innovation, but whether they are a "legally permissible effort to preserve jobs." *Id.*

See generally *National Woodwork Mfr's. Ass'n v. NLRB*, 386 U.S. 612, 642 (1967); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

62. 100 S. Ct. at 2317 (quoting *National Woodwork Mfr's. Ass'n v. NLRB*, 386 U.S. 612, 644 (1967)). If the Board does find that the Rules have a valid work preservation objective, the "right to control" issue remains open on remand. For a discussion of the right to control doctrine, see *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 521-28 (1977); Edwards, *The Coming of Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C. L. REV. 1, 37 (1977); Note, *The Right-to-Control Test in Secondary Boycotts: NLRB v. Enterprise Ass'n of Steam Pipefitters Local 638*, 31 Sw. L.J. 947, 948-51 (1977).

63. *See* *National Woodwork Mfr's. Ass'n v. NLRB*, 386 U.S. 612 (1967).

64. *See* 100 S. Ct. at 2316.

65. *See id.* at 2315. *See generally* 90 HARV. L. REV. 815, 825 (1977).

66. *See* 100 S. Ct. at 2314-15.

67. Enforcement of a classic work preservation clause produces minimal secondary effects because the boycotted employer is not deprived of work he has relied on in the past. He is simply denied the opportunity to acquire new work from the primary employer. Comment, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1188 (1964).

68. Chief Justice Burger points out in dissent that this is "far from a classic case of labor

itself to the secondary effects problem.⁶⁹ The Court, consistent with the congressional preference for resolving disputes through the collective bargaining process, relegated resolution of the issue to collective bargaining tables.⁷⁰

The *ILA* Court's deference to the collective bargaining process does not appear to present an adequate solution to the difficult and sensitive issues created by massive technological displacement of workers. Until Congress enacts a statutory scheme, however, to confront the problems generated by the technological displacement of workers, there appears to be no adequate alternative to the *ILA* Court's holding.⁷¹

CONSTITUTIONAL LAW—FIRST AMENDMENT—CONDITIONING PUBLIC EMPLOYMENT ON POLITICAL AFFILIATION UNRELATED TO JOB PERFORMANCE HELD UNCONSTITUTIONAL. *Branti v. Finkel*, 445 U.S. 507 (1980). When the Democrats gained control of the Rockland County legislature in 1977, they appointed petitioner Branti to the position of Public Defender to replace the Republican incumbent.¹ Upon taking office, Branti issued termination notices to six of the nine assistant public defenders,² including respondents Finkel and Tabakman.³

versus management. Here, one segment of labor seeks to take work away from another segment." 100 S. Ct. at 2324 n.1. (Burger, C.J., dissenting).

The severity of the disruption on other bargaining units is intensified because the longshoremen had, in prior collective bargaining agreements, permitted outside workers to perform the work now claimed. See International Longshoremen's Ass'n (Dolphin Forwarding, Inc.), 236 N.L.R.B. 525, 526 (1978); International Longshoremen's Ass'n (Associated Transport, Inc.), 231 N.L.R.B. 351, 355 (1977) (Fanning, Chairman, dissenting). For a discussion of contractual abandonment of claims, see International Longshoremen's & Warehousemen's Local 13 (California Cartage Co.), 208 N.L.R.B. 994, 996 (1974), *enforced mem. sub nom.* Pacific Maritime Ass'n v. NLRB, 515 F.2d 1018 (D.C. Cir. 1975); 90 HARV. L. REV. 815, 827 (1977). But see International Longshoremen's Ass'n v. NLRB (Consolidated Express, Inc.), 537 F.2d 706, 712 (2d Cir. 1976).

69. See 100 S. Ct. at 2315 n.22.

70. See *id.* at 2314, 2317. See also note 61 *supra* and accompanying text.

71. See generally International Longshoremen's Ass'n v. NLRB, 613 F.2d 890, 893, n.11 (D.C. Cir. 1979); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1041 (1965).

1. *Branti v. Finkel*, 445 U.S. 507, 509 (1980).

2. *Id.* at 509.

3. Respondent Tabakman was a registered Republican. *Id.* Respondent Finkel changed his party affiliation in 1977 from Republican to Democrat to enhance his chances of reappointment. The district court found that despite Finkel's change in political affiliation, the parties regarded him as a Republican during the period in issue. *Id.* at 509 n.4.