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Labor Law -- Labor Management Relations Act -- Secondary Boycotts -- Construction Industry NLRB v. Local 825, Operating Engineers (Burns and Roe, Inc.)

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has been sacrificed to effect a significant gain in competition in the overall supermarket industry.

The government is adamant that the *Topco* court has erred in not applying a per se rule.[73] Accordingly, it has filed a jurisdictional statement with the Supreme Court.[74] The manner in which the Supreme Court disposes of the case will have a significant effect upon future antitrust cases in the supermarket industry and other product markets having similar characteristics. If the Court reverses and finds a per se violation, the government will have weathered the doubts raised by the *Sealy* case, and will be relieved of the difficult task of marshalling evidence to prove the unreasonableness of such restraints. On the other hand, if the Court affirms the decision, or reverses because it reads the evidence to show a clear case of unreasonableness, the government will face the unpleasant prospect of litigating the all-too-difficult question of reasonableness. This burden would be weighty even if the holding were limited to factual settings similar to that found in *Topco*. It is submitted, however, that the final disposition should rest on the merits of the case rather than on the government's burden of enforcement.

The issue is not whether to do away with the per se rule in market division cases, but rather, whether a decision should be made to exempt certain situations from its application. In this regard, the principle articulated in *Appalachian Coals, Inc. v. United States*[75] is particularly appropriate: "Realities must dominate the judgment."[76] There are exceptions to all rules, and a blind adherence to a general rule without an occasional pause to reexamine the applicability of that rule to changing conditions runs the risk of overlooking realities.

TIMOTHY E. KISH

Labor Law—Labor Management Relations Act—Secondary Boycotts—Construction Industry—*NLRB v. Local 825, Operating Engineers* (*Burns and Roe, Inc.*)[1]—Burns and Roe, Inc. (Burns), the general contractor for the construction of a nuclear power generator, subconstracted all of the construction work to three companies; White Construction Co. (White), Chicago Bridge and Iron Co. (Chicago Bridge), and Poirier and McClane Corp. (Poirier). All three companies employed operating engineers who were members of Local 825. However, White was the only contractor who did not have a collective

[73] The Justice Department believes that the decision in *Topco* effectively overrules 70 years of Supreme Court decisions. BNA Antitrust & Trade Reg. Rep., No. 501, at A-2.

[74] 39 U.S.L.W. 3362 (Feb. 23, 1971).

[75] 288 U.S. 344 (1932).

[76] Id. at 360.

[1] 400 U.S. 297 (1971).

bargaining agreement with the union. During the course of construction, White assigned the operation of an electric welding machine to members of another union. Local 825 threatened White with a strike if operating engineers were not given the work. White refused to accede to the demand. The union then informed Burns that those members of Local 825 working at the site had voted to strike unless Burns signed a contract, binding upon all three subcontractors as well as Burns, giving the union jurisdiction over all power equipment operated at the jobsite. Burns also refused to meet the union demand. The operating engineers then threatened Burns and all of the subcontractors with a strike unless the contracts were signed and operation of the welding machine transferred to Local 825. The employers again refused and the operating engineers walked off the project.

An unfair labor practice proceeding was instituted against Local 825 by Chicago Bridge, Poirier and Burns. The National Labor Relations Board (NLRB)[2] found that, although the union's objective was not "a total cancellation of the business relationship" between Burns and White, it had a "cease doing business" purpose contrary to Section 8(b)(4)(B) of the Labor Management Relations Act.[3] The Court of Appeals for the Third Circuit reversed this finding and concluded that the statute required nothing short of a demand for the complete termination of the business relationship between the neutral and the primary employer.[4] The Supreme Court found the court of appeals reading too narrow and, reversing, HELD: a "cease doing business" purpose, in violation of section 8(b)(4)(B), is established where the "foreseeable consequences" of a union's conduct are that a general contractor will be required either to force a change in the subcontractor-primary em-

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[2] 162 N.L.R.B. 1617, 64 L.R.R.M. 1248 (1967).

[3] The pertinent provisions of this section are as follows:

Section 158(b). 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—
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> . . . .
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> (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 159 of this title: *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) (1964).

[4] 410 F.2d 5 (3rd Cir. 1969).

ployer's policies or to terminate the subcontractor's contract.[5] With this decision, the Supreme Court has broadened the scope of the "cease doing business" requirement of section 8(b)(4)(B) to include "serious disruptions" of business relationships, though less than a total cancellation of those relationships. This note will first examine the major developments in the interpretation of section 8(b)(4)(B) and the difficulty encountered in its application to common situs situations. Attention will be directed specifically to the construction industry and the special problem which that industry presents in the application of the statute. The Supreme Court's interpretation of the "cease doing business" requirement of section 8(b)(4)(B) will then be examined and, finally, the Court's failure to recognize the peculiarities of the construction industry will be analyzed in light of the Court's refusal to apply the "ally" theory.[6]

In a literal sense, section 8(b)(4)(B) invalidates all inducements, threats or methods of coercion where an object, not necessarily the only object, of the activity is to force a neutral, secondary employer to "cease doing business" with a primary employer. The section is directed toward secondary disputes, strikes or boycotts whose "sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it."[7] However, the proviso to subsection B of Section 8(b)(4)[8] and the legislative history of the Labor Management Relations Act[9] indicate that Congress did not intend to proscribe primary activity which incidentally affects neutral parties. The task of distinguishing between the legitimate primary and the illicit secondary activity contemplated by this congressional intendment is difficult since the objectives of any picketing include a desire to influence neutral parties to withhold from the primary employer their services or trade.[10]

In attempting to effect a workable criterion for making this distinction, early NLRB decisions employed an ownership test. Picketing or boycotting was considered valid so long as it took place around the primary employer's premises. In *Oil Workers International Union (Pure*

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[5] 400 U.S. at 305.

[6] This theory was first formulated and offered as a defense by the construction industry against charges of unfair labor practices under § 8(b)(4)(B) in NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). The theory proposes that since all of the contractors at a construction site work closely with each other and for the general contractor, they are "allies." Labor policies of subcontractors, therefore, are imputed to the general contractor, and union activity resulting from disputes over such policies thereby becomes primary activity.

[7] Electrical Workers, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).

[8] See note 3 supra.

[9] For a discussion of the legislative history of § 8(b)(4)(B) indicating that Congress did not intend to proscribe primary activity having incidental effects upon secondary employers, see Lesnick, The Gravamen of The Secondary Boycott, 62 Colum. L. Rev. 1363 (1962). See also note 61 infra.

[10] See Sailers' Union (Moore Dry Dock), 92 N.L.R.B. 547, 548 (1950); Seafarers Int'l Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959).

Oil Co.),[11] the secondary employer (Pure) had used the primary employer's (Standard) dock and employees for loading cargo onto its ships. The parties had agreed that in the event of a strike against Standard, Pure's employees would take over the loading duties. Standard's employees subsequently struck their employer and Pure's employees refused to cross the picket line. Although the striking union's activities induced Pure's employees not to handle their employer's goods, the fact that the strike was confined to the primary employer's premises influenced the NLRB to find that it was not an object of the strike to force the neutral party to cease doing business within the meaning of section 8(b)(4)(B).[12] In contrast, the NLRB found activity which took place around the secondary employer's premises to be proscribed secondary activity.[13] The rationale of these decisions was that union activity which "is wholly at the premises of the employer with whom the union is engaged in a labor dispute . . . cannot be called 'secondary.' "[14] Thus, the Board seemed to have established a workable guideline for making the required distinction.

Application of the ownership test, however, was soon confounded by situations wherein both primary and secondary employers were continuously performing separate duties on common premises. The source of the difficulty in these situations is that the primary employer often does not own the premises, but the common situs is the only place where the primary employer can be effectively picketed by his aggrieved employees. The ownership test would completely deny employees of the primary employer any right to protest a legitimate grievance. The NLRB confronted this problem in *Sailors' Union* (*Moore Dry Dock*).[15] In that case, a union engaged in a dispute with a shipowner picketed outside an entrance to a dock where a ship owned by the struck employer was being outfitted. Although the premises were owned by a secondary employer, the NLRB recognized that it was the only place where picketing could be effective. To meet this problem, the NLRB set out four standards for valid picketing in such common situs situations: (1) the picketing must be limited to times when the situs of the dispute is located on the secondary employer's premises;[16] (2) the primary

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[11] 84 N.L.R.B. 315 (1949).

[12] The Board stated that "[i]n this case the Union was making certain lawful demands on Standard Oil. It was pressing these demands, in part, by picketing the Standard Oil dock. As that picketing was confined to the immediate vicinity of Standard Oil premises we find that it constituted permissive primary action." 84 N.L.R.B. at 318-19.

[13] See, e.g., United Bhd. of Carpenters & Joiners of America (Wadsworth Bldg. Co.), 81 N.L.R.B. 802 (1949).

[14] United Elec., Radio & Mach. Workers (Ryan Construction Corp.), 85 N.L.R.B. 417, 418 (1949).

[15] 92 N.L.R.B. 545 (1950).

[16] The reason for this condition was that *Moore Dry Dock* was concerned with an ambulatory situs—a ship. However, the principles of *Moore Dry Dock* have not been limited to such roving situs situations. In Local 55, Carpenters' Council (Professional and Businessmen's Life Insurance Co.), 108 N.L.R.B. 363 (1954), the Board applied the *Moore* principles to a constant common situs situation.

employer must be engaged in his normal business activities at the common premise; (3) the picketing must take place reasonably close to the common premises where the dispute is centered; and (4) it must be clearly disclosed that the dispute is only with the primary employer.[17] The Board reasoned that in a common situs situation there must be a balance between the union's right to picket and the secondary employer's right to be free from such picketing. The *Moore Dry Dock* principles are also applied to common situs situations where the primary employer owns the premises, since in that situation there is similarly a need to balance the union's rights and the secondary employer's interests.[18] Where two or more employers are continuously performing work on common premises, then "the controlling consideration has been to require that the picketing be so conducted as *to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees*."[19] The NLRB has pointed out, however, that the common situs decisions do not overrule the ownership test as applied to situations where the picketing affects neutral parties who intermittently deal with the primary employer on premises occupied solely by the primary employer.[20]

The construction industry presents an especially difficult problem in the secondary boycott area. The source of this difficulty is the unity of interest[21] among the various employers at a construction site which would seem to render them allies working for a common goal, rather than independent employers "doing business" with one another. The nature of the industry itself seems to support the alliance characterization. When contractors receive contracts for work on construction projects, they usually do not have a permanent work force which accompanies them to each job assignment. Rather, they must recruit laborers in the particular area where the projects are located. As a result, construction employment is migratory, the jobs are of short duration, and most employees change employers as often as they change

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[17] 92 N.L.R.B. at 549.

[18] In common situs situations where the primary employer owns the premises, mere mechanical application of the ownership test would preclude any consideration of the secondary employer's interests. In Retail Fruit & Vegetable Clerks (Crystal Palace Market), 116 N.L.R.B. 856 (1956), the primary employer owned a large common market and operated some of the shops therein and leased the remaining shops to independent sellers. The union, in a dispute with the primary employer, picketed the entire premises. The Board found this to be a violation of § 8(b)(4)(B) since the union did not attempt to minimize the effects of its conduct on the independent sellers in accordance with the principles of *Moore Dry Dock*. The Board concluded that these "principles should apply to all common situs picketing, including cases where . . . the picketed premises are owned by the primary employer." 116 N.L.R.B. at 859.

[19] Id. at 859.

[20] Id. at 860 n.10.

[21] This concept of unity of interest among the parties at a construction site was alluded to by Justice Douglas in his dissenting opinion in the *Denver* case, 341 U.S. at 692. See note 6 supra.

jobs.[22] Additionally, general contractors usually sublet most of their work to subcontractors who furnish most of the equipment, purchase the necessary materials, and hire and direct most of the workmen, while general contractors coordinate the operation.[23] Thus, all of the parties at a construction site, as well as their employees, constitute a single work force for a particular project, and disband upon completion of that assignment. Further, physical proximity, common economic interest, and enmeshed labor activity—plumbers and electricians, for example, cannot perform their tasks until carpenters have erected the frame of a building, and the latter cannot complete the building until the plumbing and electrical apparatus are installed—create a unique interrelationship of the personnel at a construction site unparalled by any other industry.[24] This unity of interest among the contractors at a construction site would seem to defy application of existing criteria for distinguishing primary and secondary activity since the contractors and subcontractors on the same project would appear to be allies rather than independent, neutral entities.

Initially, the NLRB circumvented this issue by refusing jurisdiction over the construction industry.[25] However, in 1951, the Supreme Court brought the industry within the prohibition of section 8(b)(4)(B). In *NLRB v. Denver Building & Construction Trades Council*,[26] a general contractor awarded a subcontract to a non-union employer. After notifying all of the parties at the jobsite of its intention to strike if the project was not made all-union, the union picketed the jobsite. The general contractor subsequently fired the non-union subcontractor, and the union was charged with an unfair labor practice by the NLRB.[27] The Court of Appeals for the District of Columbia Circuit rejected the NLRB's finding, and concluded that the contractors were allies, that the general contractor was, therefore, the primary employer, and that the strike was thus legitimate primary activity.[28] The Supreme Court, however, reasoned than *an object* of the union's activity was to force the general contractor to "cease doing business" with the non-union subcontractor and upheld the NLRB's decision.[29] The *Denver* Court, rejecting the "ally" theory, and literally interpreting section 8(b)(4)(B), subjected the construction industry to the same standards of common situs picketing as any other industry. In *Denver*

[22] See Comment, The Impact Of The Taft-Hartley Act On The Building And Construction Industry, 60 Yale L.J. 673, 677 (1951).

[23] Id. at 678-79.

[24] Id. at 679.

[25] The Board never stated its reasons for this refusal, but it would appear that the temporary nature of construction work, where a union's presence at the jobsite would cease once its task had been performed, rendered cease-and-desist orders ineffective. Comment, Common Situs Picketing And Section 8(b)(4) Of The National Labor Relations Act, 10 Wm. & Mary L. Rev. 454, 461-62 (1968).

[26] 341 U.S. 675 (1951).

[27] Denver Bldg. & Constr. Trades Council, 82 N.L.R.B. 1195 (1949).

[28] Denver Bldg. & Constr. Trades Council v.NLRB, 186 F.2d 326 (D.C. Cir. 1950).

[29] 341 U.S. at 688-89.

and subsequent cases where unions picketed an entire jobsite and claimed that their dispute was with the general contractor for bringing a non-union employer unto the project, the NLRB had no problem in finding a violation of section 8(b)(4)(B). In these construction industry disputes, demands were made on the general contractor to terminate its contract with the non-union subcontractor. A "cease doing business" purpose was either affirmatively expressed, or could be reasonably inferred from the circumstances, particularly in light of avowed union refusal to work alongside non-union personnel.

Burns, however, presents a more difficult case, since it is not readily apparent that Local 825's activity had a "cease doing business" purpose. In *Burns*, the Court acknowledged that the primary object of the union's activity was "to achieve the assignment of [the] disputed work."[80] Local 825 made no explicit demand that White's contract be terminated. However, the Court held that the "cease doing business" requirement of section 8(b)(4)(B) is met where the foreseeable consequence of its secondary pressure is a serious disruption of the business relationship of the various employers at a jobsite, although not necessarily a total cancellation of that relationship.[81] Since the union's coercive conduct was aimed directly at the contractors who were not involved in the dispute in an effort to force them to compel White to meet the union's demands, the Court concluded that the foreseeable consequences of this union activity was a serious disruption of the business relationships.[82]

Burns held that section 8(b)(4)(B) does not require a complete termination of the business relationship between a secondary employer and a primary employer, but only a "serious disruption" of that relationship. However, the Court did not decide what constitutes a "serious disruption" sufficient to meet the "cease doing business" requirement of section 8(b)(4)(B). The union's primary goal was a work assignment, and it attempted to obtain this capitulation by forcing neutral contractors to compel White to meet the union demands. In approaching the neutral parties, the union did not demand a complete cessation of business dealings with White, but rather, sought a contract renegotiation binding on all employers at the jobsite. In effect, Local 825 was asking the neutral parties only to cease doing business with White under the existing contract. This abrogation of the existing contractural relationships is apparently what the Court considered a serious disruption, though less than a total cancellation of the business relationships.

To understand this interpretation of "cease doing business" in *Burns*, it is necessary, in light of the Court's reliance upon NLRB determinations, to consider the NLRB's reasoning in similar situations. In *NLRB v. Carpenters District Council of New Orleans and Vicin-*

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80 400 U.S. at 304.

81 Id. at 304-05.

82 Id. at 305.

ity,[83] a subcontractor-primary employer laid off six union men. The union went on strike and the subcontractor cancelled its contract and gave the work to another union. The striking union induced the general contractor's employees to strike and pressured the general contractor to force the subcontractor to return the employees to their former jobs. The NLRB found that although the union did not seek a total cancellation of the business relationship between the employers, its objective was to force the general contractor to "cease doing business" with the subcontractor under the existing contractual arrangement. "Secondary coercion to force a neutral to add a condition . . . to its existing contractual arrangement with a primary employer is an illegal objective within the meaning of the statute."[84] The NLRB applied this same reasoning in *Local 3, International Brotherhood of Electrical Workers, AFL-CIO & New York Telephone Co.*,[85] where a union threatened a general contractor with withdrawal of its members from the project if the general contractor did not renegotiate its contract with a particular subcontractor to permit work to be done by the union instead of the subcontractor's men who were represented by a different union. The protesting union was not working for the subcontractor in any capacity at the time. The NLRB found that while it did not appear that the union explicitly demanded that the general contractor cancel the contract with the subcontractor, this was the only alternative the general contractor had if the subcontractor refused to hire the union. The NLRB also reasoned that, even assuming the union did not consciously contemplate the imposition of such a sanction, the union sought to require the general contractor to "superimpose upon its existing agreement . . . an added condition of performance. . . ."[86] The NLRB felt that acceptance of the condition would constitute "cease doing business" under the terms of the original contract. Finally, in *Local 825, International Union of Operating Engineers (Nichols Electric Co.)*,[87] the general contractor and the subcontractor had a collective bargaining agreement with Local 825 giving the union jurisdiction over all power equipment. The subcontractor let out certain of its work to another subcontractor who employed members of another union. When these employers had to use power equipment, Local 825 informed the subcontractor that its operating engineers must do the work. Its demand was refused and Local 825 struck the project. Although the union did not explicitly demand a cancellation of the other-union employer's contract, the NLRB concluded that even if the union merely intended to force its employer to require the other subcontractor to change its method of operation, "this in itself would have disrupted or seriously curtailed the existing business relationship . . . which would have been tantamount to caus-

[83] 407 F.2d 804 (5th Cir. 1969).
[84] Id. at 806.
[85] 140 N.L.R.B. 729 (1963).
[86] Id. at 730.
[87] 138 N.L.R.B. 540 (1962).

ing"[38] the employers of members of Local 825 to "cease doing business" with the other employer. Thus, the NLRB has developed, and *Burns* has adopted, a flexible interpretation of "cease doing business" which encompasses changes in business relationships as well as complete terminations of those relationships. This interpretation seems to be the product of the "balancing" test applied in common situs situations wherein the rights of the unions to protest are balanced against the rights of neutral employers to be free of interference stemming from the union's conduct. Reflecting an overriding concern for the interests of the neutral employer in such situations, the Court interpreted "cease doing business" as though it read "a change in the manner of doing business."

In a brief, but well reasoned dissent in *Burns*,[39] Justice Douglas criticized the Court's interpretation of Section 8(b)(4)(B), and argued that the Court should view the facts of the case in light of the actual words of the Act, rather than exercise judicial "interpolation." In Justice Douglas' view, by concluding that Local 825 sought to force Burns to "cease doing business" with White under the terms of the original contract, *Burns* makes an artificial application of the statute on the basis of a strained interpretation. This argument is persuasive in that the statute uses the phrase "cease doing business," which seems to denote total severance of a business relationship, not a "change in the manner of doing business," as *Burns'* less-than-total-cancellation interpretation would suggest. As Justice Douglas stated: "All [the union] wanted was the work, not a substitution of contractors nor a termination of contractual relationships between the contractors."[40]

The majority in *Burns* further concluded that in the event the general contractor would not or could not compel White to assign the disputed work, "[t]he clear implication of the [union's] demands was that Burns would be required. . . to terminate White's contract."[41] The Court found that the secondary pressure which Local 825 applied to the contractors who were not parties to the dispute was identical to that condemned in *Denver*.[42] In *Denver*, the union did not demand the termination of the non-union subcontractor's contract, but pressured the general contractor to make the construction an "all union" project. The Court reasonably concluded that the "only way" the "all union" demand could be effected was by the removal of the non-union element.[43] Similarly, in *Burns* no demand for cessation was made, but the Court concluded that the implication of the union's secondary pressure was that Local 825 sought the expulsion of White in the event the union employees were not assigned the desired work.

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38 Id. at 543-44.
39 400 U.S. at 306-08.
40 Id. at 307.
41 Id. at 305.
42 Id. at 304.
43 341 U.S. at 688.

In effect, *Burns* expands the holding in *Denver* and further restricts union activity. In *Denver*, union conduct was considered illicit secondary activity upon a factual determination that the "only way" the ultimate objective could be achieved was by cessation.[44] In *Burns*, the union conduct was held to be within the prohibition of section 8(b)(4)(B) upon considering the "foreseeable consequences" of the activity and finding that cessation was "a way" to achieve the work assignment. The Court's reliance upon *Denver*, however, seems misplaced. In *Denver*, the Court considered the objective which the union sought, and realized that what the union really wanted was the expulsion of the non-union employer. Having determined that the purpose of the strike was contrary to section 8(b)(4)(B), the Court then brought the means employed by the union in achieving that end within the purview of the statute. In *Burns*, the Court acknowledged that what the union really wanted was a job assignment. However, it seemed apparent to the Court that if White refused to give Local 825 the desired work, then the union wanted the subcontractor off the project entirely. In effect, the Court extrapolated the facts and decided the issue on the basis of what the union *might* do if it did not get the desired work—"If Burns was unable to obtain White's consent, Local 825 was apparently willing to continue disruptive conduct that would bring all the employers to their knees."[45]

In the dissenting opinion in *Burns*, Justice Douglas challenged the majority's reasoning and argued that the issue must turn on a "question of law"—whether the union activity had as its purpose a cessation of business between White and the other contractors. Justice Douglas urged that in *Denver* the union sought to force a subcontractor, in a position similar to that of White, "off the job," and that Supreme Court decisions have held that strikes to achieve that end brought the coercive means within the ban of section 8(b)(4)(B).[46] "The case here is plainly different. The aim was not to freeze out White or to close it down for an hour or for the duration. It was merely to get the work, whose assignment it controlled. . . ."[47] Thus, Justice Douglas maintained that the union's intent in conducting the disruptive activity is controlling in determining a "cease doing business" purpose, and that this intent must be considered in light of union demands, and not the "foreseeable consequences" of the disruptive conduct. This position finds support in the factual situation in *Burns* where the objective clearly was a work assignment from the primary employer. Union members were working for White and would lose their jobs in the event of White's expulsion from the project. Thus, not only would a termination of White's contract preclude Local 825

[44] Id.

[45] 400 U.S. at 305.

[46] Id. at 307. Justice Douglas cited International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694 (1951) and United Steelworkers of America, AFL-CIO v. NLRB (Carrier), 376 U.S. 492 (1964).

[47] 400 U.S. at 307.

from achieving the desired objective, but it is difficult to envision cessation as an alternate objective in light of the unemployment of union members which would ensue. On the other hand, it can be argued that Local 825 may be willing to risk White's expulsion on the possibility that White's successor would be willing to cooperate with the union so as to avoid the difficulties which its predecessor encountered. Such an argument, however, would amount to judicial speculation, and is not supported by the fact situation in *Burns*. If the union members were not working for White at the time they sought the job assignment, it would be reasonable to assume that Local 825 would be willing ultimately to seek a termination of White's contract; union members would lose nothing, regardless of the outcome of the dispute. But members of Local 825 do work for White and will lose their jobs if the subcontractor is put off the job. It is unreasonable to assume, without additional evidence, that these employees would be willing to risk such a loss on the mere possibility that a more cooperative subcontractor would replace White. As Justice Douglas pointed out in the dissent in *Burns*, "where the facts show only the jurisdictional dispute condemned by § 8(b)(4)(D) and no plan to close down White either permanently or for a day or even an hour, we should . . . hold that § 8(b)(4)(B) is not satisfied. . . ."[48]

Because of the Court's consistent refusal to overrule *Denver* and to consider the contractors at a construction site as allies, the *Burns* Court was presented with no difficulty in determining that Local 825's activity was secondary. The only problem which the Court faced was determining that an object of this activity was to compel one party to "cease doing business" with another in violation of section 8(b)(4)(B). However, it is submitted that this "consistent refusal" adhered to by the Supreme Court since *Denver* is incorrect. The unique structure

[48] Id. at 308. It should be noted that in its decision in *Burns*, the Supreme Court affirmed the Board's decision that Local 825 engaged in a jurisdictional dispute in violation of § 8(b)(4)(D). Justice Douglas concurred in this aspect of the case. Section 8(b)(4)(D) states in part:

> Section 158(b). It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4)(i) to engage in, or to induce or encourage any individual employee 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—
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> . . . .
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> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . .

29 U.S.C. § 158(b)(4)(D) (1964).

of the construction industry[49] indicates that the contractors are in fact allies and a refusal to treat them as such unduly restricts unions in their response to grievances. In *Burns*, the general contractor was responsible for hiring the subcontractors and for coordinating their work. Because it permitted the subcontractor's labor policy to be effected on the construction site, the general contractor should bear the responsibility for any disputes which occurred as a result thereof. "The job was said to be 'unfair'. The [general] contractor cannot separate itself from the conditions there so as to make the action by the [union] against it secondary; nor can the subcontractor."[50]

Subsequent to its decision in *Denver*, the Supreme Court, in *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB (General Electric)*,[51] gave its approval to the "related work" doctrine, which permits the picketing of a gate used solely by the employees of a neutral party at a common situs. The Supreme Court held that the picketing was permissible under section 8(b)(4)(B) if the work done by the men who use the gate is related to the "normal operations" of the employer.[52] This doctrine is similar, if not identical, to the ally theory. Both are predicated upon a unity of interest among the parties at a jobsite. However, the NLRB refused to apply the related work doctrine to the construction industry in *Building and Construction Trades Council of New Orleans (Markwell and Hartz)*.[53] In that case, union employees picketed a general contractor—primary employer. Even after separate gates were established for secondary employers, the union continued to picket all gates. The union argued that under the related work concept in *General Electric*, all the parties became allies instead of neutrals and that, therefore, the picketing of the gates used by the secondary employees was primary and not secondary. In refusing to apply the "related work" doctrine to the construction industry, the NLRB seemed to distinguish *General Electric* on the basis of ownership.[54] The NLRB reasoned that in *General Electric* the primary employer owned the premises, and the union was thereby permitted to involve neutral parties doing work related to that of the primary employer, whereas in *Markwell* the primary employer did not own the premises. The distinction which the NLRB draws is

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[49] See text at notes 22-25 supra.

[50] 186 F.2d at 337.

[51] 366 U.S. 667 (1961).

[52] Id. at 681.

[53] 155 N.L.R.B. 319 (1965).

[54] The Board said:

> Unlike *General Electric* and *Carrier Corp.*, both of which involved picketing *at the premises of a struck manufacturer*, the picketing in the instant case occurred at a construction project on which . . . the primary employer, was but one of several employers operating on premises owned and operated by a third party . . . . Picketing of neutral and primary contractors under such conditions, has been traditionally viewed as presenting a "common situs" problem.

Id. at 324.

arbitrary since ownership was not a decisive factor in the *General Electric* decision as evidenced by the Supreme Court's subsequent decision in *United Steelworkers of America v. NLRB (Carrier)*.[55] In *Carrier*, the union picketed the entrance to a railroad spur track, used exclusively by railroad personnel, which was located on a right-of-way owned by the railroad and adjacent to the struck employer's property. In finding that the union did not thereby violate section 8(b)(4)(B), the Court applied the "related work" doctrine, and held that the *General Electric* decision was controlling even though the gate was on the property of the neutral employer. "The location of the picketing is an important but not decisive factor. . . ."[56]

The *Markwell* decision only serves to perpetuate the attitude regarding the construction industry laid down in *Denver*, that is, "[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so."[57] *Denver* offers no substantiation for this attitude. The Court merely concludes that section 8(b)(4)(B) applies to the normal business dealings between a contractor and a subcontractor.[58] However, there seems to be some support for the ally theory in the legislative history of section 8(b)(4)(B): "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees."[59] (Emphasis added.) The interrelationship of the parties at a construction site indicates that they are not so "unconcerned." However, it has been suggested, with apparent accuracy, that only legislative action will be able to leap the hurdle which *Denver* has established.[60]

In conclusion, it is submitted that the Court erred in finding that Local 825's conduct had a "cease doing business" purpose contrary to the proscription of section 8(b)(4)(B). The Court's interpretation of "cease doing business" as being satisfied by an objective of less than a total cancellation of the business relationship between Burns and White, constitutes distortion of the wording of the statute, and is inconsistent with the facts of the case in that the union only sought a work assignment. By further finding that the union sought, in the alternative, a total cancellation of the business relationship between Burns and White, the Court ignored the facts of the situation and decided the case on the basis of an unlikely possibility. It is also sub-

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[55] 376 U.S. 492 (1964).

[56] Id. at 499.

[57] 341 U.S. at 690.

[58] Id. at n.19.

[59] Statement of Senator Taft concerning § 8(b)(4)(A) of the Labor Management Relations Act. 93 Cong. Rec. 4198 (1947). This section subsequently became § 8(b)(4)(B) when the Act was amended in 1959.

[60] NLRB v. Nashville Bldg. & Constr. Trades Council, 383 F.2d 562, 566 (6th Cir. 1967).

mitted that the Court's refusal to overturn *Denver* and to treat all of the contractors at the jobsite as allies indicates a continuing judicial disregard for the peculiarities of the construction industry.

THOMAS E. HUMPHREY

Gift Tax—Valuation—Political Contributions—*Stern v. United States*.[1]—Mrs. Stern, a resident of Louisiana, concerned about her state's lag in economic growth in comparison with other southern states[2] and about the effect upon her property and personal interests, and believing that this economic climate was caused by an adverse political situation, joined certain other Louisiana citizens to support the institution of a reform government within the state and the city of New Orleans. In pursuit of this objective, these individuals established an informal finance committee, chose one of its members to be "Treasurer," and made contributions to the Treasurer's bank account. The plaintiff's contributions were $44,600 in 1959 and 1960, and $16,250 in 1961.[3] These funds were spent by the Treasurer for handbills, posters and magazine and television advertising in accordance with the desires of the contributors, but at no time were funds given to the political candidates for their direct use or control.

In 1959, 1960 and 1961, the plaintiff, although filing federal gift tax returns, did not report these "contributions" as gifts. Instead, she attached to her tax return a note stating that these were not gifts but "expenditures which I made to protect my property and personal interests by promoting efficiency in Government,"[4] and that the disbursements were made by individuals acting in her behalf. Thereafter, the Commissioner of Internal Revenue determined that the contributions were gifts and assessed gift taxes accordingly. Upon paying these taxes, Mrs. Stern brought suit in district court seeking a refund of the amount paid. The court found that these expenditures were made "in the ordinary course of business" as defined in Treasury Regulation Section 25.-2512-8,[5] that there was no transfer of cash or property to any candidate

[1] 436 F.2d 1327 (5th Cir. 1971).

[2] The court noted that Louisiana's per capita income, which was 73% of the national average in 1950, had slipped to 71.7% in 1961, and placed 44th nationally; and that from 1950-1960, while Texas, North Carolina and Mississippi gained a total of 275,000 manufacturing jobs, Louisiana lost 2500 manufacturing jobs. Id. at 1328.

[3] The gift tax does not apply to the first $3,000 given to a donee per year, Int. Rev. Code of 1954, § 2503(b), nor to the first $30,000 given during the donor's lifetime. Int. Rev. Code of 1954, § 2521.

[4] 436 F.2d at 1329.

[5] Treas. Reg. § 25.2512-8 (1958) reads in part:

> Transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor. However, a sale, exchange, or other transfer of property made