

Preserving Work in the Face of Technological Change: *NLRB v. International Longshoremen's Association*¹ — The advent of containerized shipping brought major technological change to the ocean freight industry.² Prior to this development, ship cargo was loaded and unloaded piecemeal by longshoremen.³ A shipping company now can load and unload a ship which has its cargo consolidated into containers,⁴ then transfer the unopened container to rail or truck transportation.⁵ It is also possible for the shipper to provide containers to businesses which load them away from the pier.⁶ The result is an enormous increase in dockside cargo handling efficiency.⁷ Containerization, however, also threatened the job security of longshoremen.⁸ This threat to the stability of their jobs led the longshoremen to begin a lengthy strike against their employers at several eastern ports in the late 1960's.⁹ The agreement which the parties negotiated to end the strike included provisions on the handling of containers.¹⁰ In *NLRB v. International Longshoremen's Association*, the United States Supreme Court examined the validity of a revised version of those provisions,¹¹ which represented an attempt to resolve the problem of job stability during technological change through collective bargaining.

International Longshoremen involved two unfair labor practice actions, arising in the New York and Virginia-Maryland areas.¹² In both the New York and Virginia-Maryland cases, members of the International Longshoremen's Association (ILA) worked under collectively bargained agreements which included nearly identical provisions, entitled Rules on Containers (Rules).¹³ According to these Rules, if a container owned or leased by a company employing

¹ 447 U.S. 490 (1980).

² *Id.* at 494, 496.

³ *Id.* at 495.

⁴ *Id.*

⁵ *Id.* at 494-95.

⁶ *Id.* at 495-96.

⁷ *See id.* at 494-95.

⁸ *Id.* at 495.

⁹ The strike occurred in 1968. Brief for Respondents at 8, *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), *reprinted in* 13 LAW REPRINTS, LABOR LAW SERIES NO. 11 at 262 (1979/1980). It lasted 57 days in New York and up to 100 days in other ports. *Id.*

¹⁰ *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 893 (D.C. Cir. 1979).

¹¹ 447 U.S. at 498-99.

¹² Two New York freight forwarders and two trucking companies from Baltimore and Hampton Roads, Virginia brought separate actions before the National Labor Relations Board. *International Longshoremen's Ass'n v. NLRB*, 613 F.2d at 898. The NLRB proceedings are reported in *International Longshoremen's Ass'n*, 236 N.L.R.B. 525, 98 L.R.R.M. 1277 (1978) (New York), *International Longshoremen's Ass'n*, 231 N.L.R.B. 351, 96 L.R.R.M. 1636 (1977) (Baltimore and Hampton Roads). The International Longshoremen's Association and the Council of North Atlantic Shipping Associations (CONASA) were named as opposing parties in both actions. *Id.* CONASA was a regional bargaining association which represented local longshoremen's employer groups in negotiations with the International Longshoremen's Association (ILA). 447 U.S. at 496 n.10. The United States Court of Appeals for the District of Columbia considered appeals of the NLRB decisions together, because of their similarity. *See* 613 F.2d at 891 n.3.

¹³ 613 F.2d at 893 & n.17.

ILA members was to be unloaded within fifty miles of the pier, by persons other than those working for the beneficial owners of the cargo, the employer was required to permit its longshoremen to do the unloading on the pier.¹⁴ Similarly, if a container owned or leased by the employer of the ILA was to be loaded within fifty miles of the pier, by persons other than those working for the cargo's beneficial owners, the ILA employer was required to permit its longshoremen to do, or re-do, the loading on the pier.¹⁵ The agreements obligated the longshoremen's employers to pay \$1,000 to the ILA in liquidated damages for each container handled in violation of the Rules.¹⁶ The practical effect of the Rules was that 80 percent of all containers passed over the docks intact, while longshoremen loaded or unloaded the other 20 percent regardless of whether that work duplicated work done or to be done away from the pier.¹⁷

Certain inland freight businesses, perceiving that the Rules were depriving them of some of their usual work, brought the unfair labor practice proceedings which led to *International Longshoremen*.¹⁸ The freight businesses had either loaded or unloaded containers supplied by the employers of the longshoremen within fifty miles of the pier.¹⁹ In consequence, the employers were found liable under the Rules' provision that ILA members were allowed to reload or unload such containers.²⁰ After being assessed for the liquidated damages, the employers stopped using the inland freight businesses involved.²¹ As a result, the inland freight businesses initiated unfair labor practice proceedings with the National Labor Relations Board (NLRB or Board) against both the union and its employers.²²

The freight businesses alleged that the agreement containing the Rules on Containers violated sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act (Act or NLRA).²³ Section 8(b)(4)(B) prohibits those union activities with the object of forcing one employer to stop doing business with another

¹⁴ 447 U.S. at 498. See Rule 1 of the 1974 Rules on Containers, in *NLRB v. International Longshoremen's Ass'n*, 447 U.S. at 514-15 app.

¹⁵ 447 U.S. at 498. See Rule 1 of the 1974 Rules on Containers in *NLRB v. International Longshoremen's Ass'n*, 447 U.S. at 514-15 app.

¹⁶ 447 U.S. at 498.

¹⁷ *Id.* at 499. This practical effect of the Rules was due to the numerous exceptions to their general requirements. The most obvious reason for such a large percentage of containers passing over the docks without being opened by longshoremen was the fifty mile limit set forth in Rule 1. See text and notes at notes 14-15 *supra* for a description of Rule 1 and the limit. Rule 2 was devoted to a lengthy list of other containers which the longshoremen would allow to pass intact over the docks, including those containing a single manufacturer's goods, those containing household effects, and those containing the personal effects of military personnel. See Rule 2 of the 1974 Rules on Containers, 447 U.S. at 516-17 app.

¹⁸ 613 F.2d at 898.

¹⁹ 447 U.S. at 500-01.

²⁰ 613 F.2d at 899-900. See text and notes at notes 14-16 *supra* for a description of the applicable Rules provisions.

²¹ 447 U.S. at 500-01.

²² *Id.* at 501-02.

²³ 613 F.2d at 900-01. These provisions of the National Labor Relations Act are codified at 29 U.S.C. § 158(b)(4)(B) and § 158(e) (1976).

employer, unless the purpose of the activity is "primary."²⁴ Section 8(e) prohibits collectively bargained agreements in which an employer agrees to stop doing business with any person.²⁵ Thus the gist of the freight businesses' allegations was that the ILA, by imposing the contractual sanctions, had coerced its employers to stop doing business with the freight businesses.²⁶ This practice was allegedly forbidden by section 8(b)(4)(B).²⁷ Similarly, the employers, by becoming obligated under the Rules, effectively had agreed to stop doing business with freight businesses operating within the fifty mile radius.²⁸ Section 8(e), the freight businesses argued, prohibited employers and unions from making this type of agreement.²⁹ The ILA and its employers responded to these allegations by contending that sections 8(b)(4)(B) and 8(e) were not applicable to the contract clauses or to their enforcement because each came under the exception for a "primary strike or primary picketing."³⁰ The extent of this exception became the major issue in these two unfair labor practice actions.

²⁴ 447 U.S. at 503 & n.19. The pertinent part of § 8(b)(4)(B) provides that it is an unfair labor practice for a labor organization:

(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 . . . an object thereof is —

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, any primary strike or primary picketing; . . .

29 U.S.C. § 158(b)(4)(B) (1976).

²⁵ 447 U.S. at 503-04. The pertinent part of § 8(e) is as follows:

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 person, and any contract or agreement entered heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

29 U.S.C. § 158(e) (1976). Although § 8(e) does not explicitly mention agreements with a primary purpose, courts consistently have found that the section applies only to agreements with secondary objectives. 447 U.S. at 504.

²⁶ Brief for Petitioner at 30, *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), *reprinted in* 13 LAW REPRINTS, LABOR LAW SERIES NO. 11 at 68 (1979/1980).

²⁷ *Id.*

²⁸ *Id.* at 25.

²⁹ *Id.*

³⁰ Brief for Respondents at 33, *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), *reprinted in* 13 LAW REPRINTS, LABOR LAW SERIES NO. 11 at 287 (1979/1980). See Brief for Respondent at 21, *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), *reprinted in* 13 LAW REPRINTS, LABOR LAW SERIES NO. 11 at 217 (1979/1980). The exception is set out in § 8(b)(4)(B) explicitly and implied in § 8(e). See notes 24-25 *supra* for the texts of the two sections and an explanation of § 8(e).

The labeling of certain influential activities of labor organizations as "primary" and others as "secondary" has a long history.³¹ The Supreme Court has established that union conduct is secondary, and therefore proscribed by section 8(b)(4)(B), if one of its objects is to affect the conduct of an employer other than the struck employer.³² This improper object could be achieved by forcing the struck employer to cease doing business with another employer.³³ Where the union's sole object is to influence the struck employer, however, there is usually no unfair labor practice,³⁴ even if its actions have an incidental effect on businesses with whom the employer has dealt.³⁵ In *International Longshoremen*, the struck employers were the companies employing the longshoremen. The other employers were the freight businesses with whom the struck employers had ceased dealing. Whereas section 8(b)(4)(B) applies to union conduct, section 8(e) applies to the contract between the union and its employer.³⁶ Determination of whether a union's objective in a contract provision is primary, however, is the same under both provisions. The objective is illegal under section 8(e) if one of its objects is to affect the conduct of an employer other than the contracting employer.³⁷ Of special importance in determining whether the actions of the union and its employers in *International Longshoremen* violated sections 8(b)(4)(B) and 8(e) was the Supreme Court's articulation of the "work preservation" concept, in an earlier decision, *National Woodwork Manufacturers Association v. NLRB*.³⁸ In that case, the Court held that when employees acted against their employer with the object of preserving work which they traditionally had done, they were not acting with the secondary objective of affecting a different employer.³⁹ Thus the objective of work preservation was deemed to be primary and therefore not proscribed by sections 8(b)(4)(B) and 8(e).⁴⁰

³¹ See *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620-33 (1967), which reviews this history at length in its discussion of the development of § 8(b)(4)(B).

³² *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 529 n.16 (1977).

³³ *Id.* at 530 n.17.

³⁴ *Id.* at 529 n.16.

³⁵ *Id.* In the context of union picketing against neutral businesses which deal in the struck employer's product, the Supreme Court has held that the otherwise legal picketing is a violation of § 8(b)(4)(B) if its effect would be to ruin the neutral business. *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 614-15 (1980). The Court reasoned that if the effect of the picketing was to force neutral businesses to choose between survival or ending their business relationship with the struck employer, then the union must have such coercion as an objective. *Id.* An objective to coerce neutrals, the Court noted, is illegal under § 8(b)(4)(B). *Id.*

³⁶ See text and note at note 25 *supra* for the text of § 8(e).

³⁷ *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 635 (1967). The Court held that § 8(e) was merely a measure to close the loophole which would allow a union to avoid the prohibitions of § 8(b)(4)(B) via a contract provision (rather than a strike) requiring an employer to stop business with a third party to whom the union objected. See *id.* at 634.

³⁸ 386 U.S. 612 (1967).

³⁹ *Id.* at 644-46. The District of Columbia Court of Appeals had already applied this concept in its decision in *Meat and Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964). In that case, Judge Wright upheld Union efforts to regain city delivery routes which it had lost when meat packing companies moved out of Chicago to outlying areas and changed their method of delivery. *Id.* at 714. The court found that the drivers were simply "recapturing" the routes which they had driven before the change. *Id.*

⁴⁰ See 386 U.S. at 644-46.

When it considered the cases brought by the freight businesses in *International Longshoremen*, the NLRB based its analysis on the work preservation concept, finding that the traditional work of longshoremen did not include the work of employees of the freight businesses.⁴¹ This finding led the Board to conclude that the Rules had no valid work preservation objective and therefore that they violated sections 8(b)(4)(B) and 8(e).⁴² On appeal, the District of Columbia Court of Appeals vacated and remanded the NLRB ruling,⁴³ holding that the scope of valid work preservation agreements was broader than the Board had determined.⁴⁴

The Supreme Court granted the Board's petition for certiorari.⁴⁵ In a five-to-four decision,⁴⁶ the Court held that to define the work in controversy in a work preservation dispute without focusing on the work of the bargaining unit employees⁴⁷ is an error of law under the work preservation doctrine.⁴⁸ It remanded the case for the Board to reconsider whether the Rules have a lawful work preservation objective, using a proper understanding of the work preservation doctrine.⁴⁹ *International Longshoremen's* significance lies not in its narrow holding, but rather in the Court's assertion that the work preservation doctrine⁵⁰ extends to employees who seek to preserve work which is not identical to their traditional work.⁵¹ This assertion is in direct conflict with the Board's prior view that there could be no valid work preservation purpose unless the very work claimed had once been performed by those claiming it.⁵² As a result of this change in the work preservation doctrine, the relatively simple task of determining whether employees had ever done the jobs which they were claiming has been replaced by a subjective examination of the relationship between the work performed before the innovation and the work to be preserved.⁵³

⁴¹ 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York); 231 N.L.R.B. at 364-65 (Baltimore and Hampton Roads) (decision of Administrative Law Judge (ALJ)).

⁴² 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277, 1278 (New York). 231 N.L.R.B. at 365 (Baltimore and Hampton Roads) (decision of ALJ).

⁴³ *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 914 (D.C. Cir. 1979).

⁴⁴ *Id.* at 908-09.

⁴⁵ 444 U.S. 1042 (1980). The decision to grant certiorari was in response to a conflict between the courts of appeal. 447 U.S. at 493. *Compare* *International Longshoremen's Ass'n, Local 1575 v. NLRB*, 560 F.2d 439 (1st Cir. 1977); *Humphrey v. International Longshoremen's Ass'n*, 548 F.2d 494 (4th Cir. 1977) and *International Longshoremen's Ass'n v. NLRB (Conex)*, 537 F.2d 706 (2d Cir. 1976) *with* *International Longshoremen's Ass'n v. NLRB*, 613 F.2d 890 (D.C. Cir. 1977).

⁴⁶ 447 U.S. at 522. Chief Justice Burger, joined by Justices Stewart, Rehnquist and Stevens, wrote in dissent. *Id.* at 522. Justice Marshall wrote the majority opinion. *Id.* at 492.

⁴⁷ 447 U.S. at 507.

⁴⁸ *Id.* at 511 n.26, 512

⁴⁹ *Id.* at 511-12

⁵⁰ See text and notes at notes 38-40 *supra* for a discussion of the work preservation doctrine.

⁵¹ 447 U.S. at 506.

⁵² See 231 N.L.R.B. at 364, 365 (in other work preservation cases, employees once had performed the work which they claimed); *International Longshoremen's Ass'n*, 221 N.L.R.B. 956, 960, 90 L.R.R.M. 1655, 1659 (work preservation cases distinguishable because employees in those cases previously had done work sought).

⁵³ 447 U.S. at 507.

This casenote will examine the Supreme Court's use of the work preservation concept in determining whether a union's activities or agreements aimed at maintaining employment during technological change are within the "primary" exceptions to sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act.⁵⁴ *National Woodwork Manufacturers Association v. NLRB* and other representative work preservation cases that preceded *International Longshoremen* will be examined to establish the context in which the principal case was decided. Next, the casenote will describe the opinions of the three bodies that considered *International Longshoremen*: the NLRB, the Court of Appeals for the District of Columbia, and the United States Supreme Court. The discussion will illustrate how differently these decisions approached work preservation analysis. Finally, the Supreme Court's reasoning in *International Longshoremen* will be analyzed. It will be submitted that the Court's attempt to stop the NLRB and certain circuit courts from applying sections 8(b)(4)(B) and 8(e) too stringently may be thwarted by its reliance on the work preservation concept rather than on a more complete consideration of the primary-secondary dichotomy underlying work preservation. The casenote will conclude with a proposal for a more complete and effective analysis based mainly on the primary-secondary concept, rather than on the work preservation theory.

I. THE WORK PRESERVATION DOCTRINE BEFORE *INTERNATIONAL LONGSHOREMEN*: *NATIONAL WOODWORK* AND *CONEX*

The *International Longshoremen* Court relied on two prior Supreme Court decisions in making its basic assumption that work preservation was a lawful primary objective.⁵⁵ The earlier of the two cases, *National Woodwork Manufacturers Association v. NLRB*,⁵⁶ was the one from which the Court quoted in setting forth the general rule on how to determine whether an agreement is lawful work preservation,⁵⁷ and was the seminal Supreme Court decision on work preservation. *International Longshoremen's Association v. NLRB (Conex)*,⁵⁸ decided by the Second Circuit, was the leading federal appeals court case applying the work preservation doctrine to the Rules on Containers at the time the Court of Appeals for the District of Columbia decided *International Longshoremen*.⁵⁹ The decisions of both the District of Columbia Circuit and the Supreme Court in *International Longshoremen* are to some extent a reaction to *Conex*. The next two sections describe the *National Woodwork* and *Conex* opinions and discuss their relevance to the *International Longshoremen* decisions.

⁵⁴ 386 U.S. 612 (1967).

⁵⁵ 447 U.S. at 504. The cases were *National Woodwork* and *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977).

⁵⁶ *National Woodwork* was decided in 1967, while *NLRB v. Enterprise Ass'n of Pipefitters* was decided in 1977. See notes 54-55 *supra*.

⁵⁷ See 447 U.S. at 504.

⁵⁸ 537 F.2d 706 (2d Cir. 1976).

⁵⁹ See note 45 *supra* for a listing of the relevant circuit court cases.

A. National Woodwork Manufacturers Association v. NLRB

In *National Woodwork*, Frouge, a general contractor, employed members of a carpenters' union under a collective bargaining contract⁶⁰ which stated that union members would not handle doors which had been fitted prior to being furnished on the job.⁶¹ The term "fitted" referred to the tasks of preparing a door for knob, hinges, and hanging.⁶² Traditionally, carpenters employed on the jobsite had performed these jobs,⁶³ but it was possible to buy pre-fitted doors from the manufacturer.⁶⁴ When the general contractor purchased the pre-fabricated type of door, the carpenters refused to hang them.⁶⁵ The general contractor therefore removed the doors and substituted blank doors, which the carpenters prepared, as usual.⁶⁶

The manufacturer of the doors was a member of the National Woodwork Manufacturers Association,⁶⁷ and that organization filed unfair labor practice charges with the NLRB concerning the events described above.⁶⁸ The charges alleged, *inter alia*, that the contract's "will not handle" provision violated section 8(e) of the National Labor Relations Act,⁶⁹ which prohibited any agreement whereby an employer agreed to stop doing business with another employer.⁷⁰ The charges also claimed that the union's enforcement of the provision violated the requirement of section 8(b)(4)(B)⁷¹ that a union not force any person to cease using the products of another manufacturer.⁷²

In its consideration of the section 8(b)(4)(B) issue, the Supreme Court held that the section barred union activity directed against a neutral employer,

⁶⁰ 386 U.S. at 615.

⁶¹ *Id.* & n.2.

⁶² *Id.* at 615.

⁶³ *Id.* at 615-16.

⁶⁴ *Id.* at 616.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See note 25 *supra* for the relevant text of § 8(e).

⁷⁰ 386 U.S. at 616.

⁷¹ See note 24 *supra* for the relevant text of § 8(b)(4)(B).

⁷² 386 U.S. at 616. The Board found for the carpenters on both the contract's "will not handle" provision and the enforcement of that provision. *United Bhd. of Carpenters and Joiners*, 149 N.L.R.B. 646, 657-58 (1964) (decision of Trial Examiner). The opinion stated that the "will not handle" provision did not concern employers with whom the general contractor had done business. *Id.* at 657. Rather, it served the legitimate economic interest of preserving unit work. *Id.* The Trial Examiner concluded that the provision had the lawful objective of work preservation and therefore was not prohibited by § 8(e). *Id.* He reached the same conclusion with regard to actions to enforce the agreement against Frouge, which had allegedly violated § 8(b)(4)(B). *Id.* at 657-58.

The Seventh Circuit reversed that decision only as to the § 8(e) claim. *National Woodwork Mfrs. v. NLRB*, 354 F.2d 594, 599 (7th Cir. 1966). In a confusing opinion, the court found § 8(e) controlling in the case, *id.* at 599, apparently because § 8(e) had no provision allowing primary activity, but prohibited only any agreement to boycott a product. *See id.* at 597-98. This interpretation of the lower court's meaning was also how the Supreme Court read the decision. *See* 386 U.S. at 618.

even if the immediate employer was the neutral party, when the activity directed against him was carried on for its effect elsewhere.⁷³ In the Court's view, the section did not, however, bar the incidental effects of primary activity.⁷⁴ On the section 8(e) issue, which concerned the contract itself rather than the act of enforcing it, the Court held that section 8(e) was a loophole-closing measure applicable to the same conduct as section 8(b)(4)(B).⁷⁵ It therefore did not prohibit employees' agreements requiring their employers to preserve for themselves work which they had done traditionally.⁷⁶

To support its holding with respect to section 8(b)(4)(B), the Court looked to the history of congressional action on the issue of labor's use of the boycott to involve an employer in disputes not his own.⁷⁷ It considered the Clayton Act,⁷⁸ and found that such "secondary" pressures had not been exempted from antitrust laws.⁷⁹ The Court pointed out that the Norris-LaGuardia Act of 1932 constituted a complete change from the Clayton prohibition of secondary activity by unions.⁸⁰ Norris-LaGuardia allowed union activity without regard to whether it was primary or secondary.⁸¹ According to the Court, however, labor abuses of this freedom to involve neutral parties in its disputes led to a prohibition of secondary activities in the Taft-Hartley Act, in the forerunner to section 8(b)(4)(B).⁸² The Court reviewed the extensive legislative history of the Taft-Hartley Act⁸³ to support its conclusion that Congress did not intend to limit primary activity.⁸⁴ The Court noted that union efforts to preserve its members' jobs usually were considered primary activity.⁸⁵ It went on to state, however, that it was not deciding how Congress might have viewed workers who carried on a boycott in order to acquire new job tasks when their own jobs were not threatened by the boycotted product.⁸⁶ Only as a final note to its discussion of section 8(b)(4)(B) did the Court point out that Congress later had added a specific proviso making the section inapplicable to primary activity.⁸⁷ A review of the equally extensive legislative history of section 8(e)⁸⁸ supported the Court's conclusion that that provision had the same scope as section 8(b)(4)(B).⁸⁹ Thus, just as section 8(b)(4)(B) did not prohibit employee actions

⁷³ *Id.* at 632.

⁷⁴ *Id.*

⁷⁵ *Id.* at 635.

⁷⁶ *Id.*

⁷⁷ *Id.* at 620.

⁷⁸ *Id.* at 621.

⁷⁹ *Id.* at 622.

⁸⁰ *Id.*

⁸¹ *Id.* at 622-23.

⁸² *Id.* at 623.

⁸³ *See id.* at 622-32.

⁸⁴ *Id.* at 632.

⁸⁵ *Id.* at 630.

⁸⁶ *Id.* at 630-31.

⁸⁷ *Id.* at 632. See note 24 *supra* for the relevant text of § 8(b)(4)(B).

⁸⁸ *Id.* at 635-44.

⁸⁹ *Id.* at 635.

with the purpose of preserving their traditional work, the Court found that section 8(e) did not prohibit agreements made for the same purpose.⁹⁰

Having determined that preservation of traditional work was an established primary objective,⁹¹ the Court stated the narrow issue of the case as whether, under all the surrounding circumstances, the objective of the carpenters' boycott and contract was to preserve work, or was to further union objectives elsewhere.⁹² The Court emphasized that in making this determination, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."⁹³ The Court then quickly concluded that the carpenters' sole objective was work preservation.⁹⁴ Thus, it affirmed the circuit court's decision that the activities of the carpenters did not violate section 8(b)(4)(B) and reversed the circuit court's decision that the carpenters' contract violated section 8(e).⁹⁵

National Woodwork appeared to find that the key factor in a primary-secondary analysis was determining whether the union's actions or its contract related solely to the immediate employer-employee relationship. Indeed, the *National Woodwork* Court considered this determination to be the "touchstone" of any such analysis.⁹⁶ Similarly, in its discussion of an earlier case as an example of secondary activity, the Court emphasized that the employees had no work preservation or other primary objective pertaining to their relations with their employers.⁹⁷ Thus, the *National Woodwork* Court did not view work preservation as the only way for a union to prove its objectives were primary. It was unclear, however, to what extent a union could claim that its objective of work preservation was a primary one. The Court merely stated that work preservation was traditionally a primary activity,⁹⁸ without commenting on the limits to this assertion. The facts of the case offered no real guidance on the limits of work preservation as a primary objective, since the carpenters in *National Woodwork* were seeking to do work in a form precisely the same as that which they had always done.⁹⁹

⁹⁰ *Id.*

⁹¹ *Id.* at 630.

⁹² *Id.* at 644.

⁹³ *Id.* at 645.

⁹⁴ *Id.* at 646.

⁹⁵ *Id.*

⁹⁶ *See id.* at 645.

⁹⁷ *Id.* at 629.

⁹⁸ *Id.* at 630.

⁹⁹ 447 U.S. at 505; 386 U.S. at 615-16.

Subsequent cases in the federal courts of appeal did not clarify the limits of the work preservation doctrine. In one of the first cases to consider the problem after *National Woodwork*, the Eighth Circuit upheld an agreement in which plumbers agreed to install only boilers which had not been pre-fabricated, because the pre-fabrication eliminated some of their traditional tasks. *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547, 549, 554 (8th Cir. 1968). *See generally* *Chamber of Commerce v. NLRB*, 547 F.2d 457 (9th Cir. 1978) (clause preserving

B. *International Longshoremen's Association v. NLRB (Conex)*

The limits of *National Woodwork's* endorsement of work preservation as a primary objective were explored by three circuit court opinions dealing with the same Rules on Containers at issue in *International Longshoremen*.¹⁰⁰ The earliest of those cases, *International Longshoremen's Association v. NLRB (Conex)*,¹⁰¹ was cited with approval by the two later cases.¹⁰² The *International Longshoremen* Court discussed specifically¹⁰³ the *Conex* ruling that it was an illegal secondary objective for a union to seek work traditionally done by employees whom it did not represent.¹⁰⁴

The *Conex* facts were almost identical to those in *International Longshoremen*. The ILA had assessed damages against two of its employers for their violations of the Rules on Containers.¹⁰⁵ In consequence, the employers stopped supplying empty containers to certain freight businesses¹⁰⁶ who, it appears, were operating within fifty miles of the pier. As in *International Longshoremen*, the freight businesses filed an unfair labor practice action,¹⁰⁷ charging that the Rules on Containers violated section 8(e) of the Act,¹⁰⁸ and that their enforcement violated section 8(b)(4)(B).¹⁰⁹

The *Conex* court found that the ILA's Rules on Containers could be met only if the work traditionally performed off-pier by employees outside the ILA

carpenters' work on modular homes not challenged by plaintiffs); *Local 636, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting v. NLRB*, 430 F.2d 906 (D.C. Cir. 1970) (agreement preserving certain work for employees on the job not challenged by Board). A recent case, also decided by the District of Columbia Court of Appeals did address the issue of a bargaining unit seeking work that was not identical to work it had done in the past. *Local 742, United Bhd. of Carpenters and Joiners of America v. NLRB*, 533 F.2d 683, 690 (D.C. Cir. 1976). The union had refused to install pre-machined plastic-clad doors unless paid a premium. *Id.* at 689. It claimed that the preparation of such doors was work which carpenters did at the jobsite. *Id.* at 688. The Board found no evidence that the carpenters traditionally had worked on any plastic-clad doors, and therefore held that the union's demand for a premium if it installed pre-machined plastic-clad doors was not work preservation. *Id.* at 689. The court disputed the Board's finding that no evidence supported the union's claim that the work was traditional. *Id.* They did not pursue this point, however. Instead they found that the door itself was unimportant as long as the work done to prepare it was the same as that traditionally performed by the carpenters. *Id.* at 690. The court recognized that distinguishing between a wood door and a wood door sheathed in plastic, *see id.* n.11, was too fine a line. The court observed, "[e]mployee rights would be lost whenever new advances in technology or industry practice altered the nature of a product but not the type of work required to install it." *Id.* at 690. *See Comment, Work Recapture Agreements and Secondary Boycotts: ILA v. NLRB (Consolidated Express, Inc.)*, 90 HARV. L. REV. 815, 823 & n.44 (1977).

¹⁰⁰ *See* cases listed at note 45 *supra*.

¹⁰¹ 537 F.2d 706 (2d Cir. 1976).

¹⁰² *See International Longshoremen's Ass'n, Local 1575 v. NLRB*, 560 F.2d at 445; *Humphrey v. International Longshoremen's Ass'n*, 548 F.2d at 499.

¹⁰³ 447 U.S. at 502.

¹⁰⁴ 537 F.2d at 711.

¹⁰⁵ *Id.* at 710.

¹⁰⁶ *Id.* at 711.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

was taken over and performed at the pier by ILA members.¹¹⁰ Pursuant to this finding, the court held that the Rules on Containers had an illegal secondary objective under sections 8(b)(4)(B) and 8(e).¹¹¹ The *Conex* court ruled that if a union's objective was to seek work to which union members were entitled, then that objective would be held to be primary.¹¹² If the union's objective was to obtain work traditionally done by other employees not represented by the ILA, however, that objective would be held to be secondary.¹¹³

The court's holding in *Conex* focused on the work which the union employees sought. It was therefore essential, the court found, to define the work in controversy precisely, in order to evaluate the union's claim to it.¹¹⁴ The traditional work of the ILA was found by the court to include loading and unloading containers on piers.¹¹⁵ In contrast, the court noted that the traditional work of freight businesses included loading and unloading containers off the pier.¹¹⁶ In view of these two findings, the court also found that the work of loading and unloading the containers in controversy was within the traditional work of the freight businesses.¹¹⁷ Further, it was clear to the court that the incidental loading and unloading of containers on the pier, which the longshoremen could claim as their traditional work,¹¹⁸ did not embrace the loading and unloading of containers off the pier.¹¹⁹ In light of the court's holding that a union objective to obtain work traditionally done only by other employees was secondary,¹²⁰ the implied conclusion of *Conex* was that the Rules on Containers had a secondary objective because they sought work traditionally done by other employees, but never done by longshoremen.

A key aspect of the *Conex* opinion was its assertion that, to have a primary objective, a union could seek only to preserve work to which it was entitled.¹²¹ The opinion implied that if a union could claim that it traditionally had performed the work in controversy, then it would be entitled to seek the work as a primary objective, even if other groups also traditionally had done the same work. This implied rule explains why the opinion was careful not only to show that the work in controversy was traditional for employees of the freight businesses,¹²² but also to assert that the work did not fall within the ILA's traditional role, as the court had defined it.¹²³ The practical result of this approach

¹¹⁰ *Id.* at 712.

¹¹¹ *Id.* at 711.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 711-12.

¹¹⁶ *Id.* at 712.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 711.

¹²¹ *Id.*

¹²² *Id.* at 712.

¹²³ *Id.*

would be to prevent a union from claiming a primary work preservation objective unless it was seeking work which it actually had done before. This result occurs because a union contract or activity, with a purpose to obtain work somewhat different from that traditionally performed by union members, would be challenged if it affected other people already doing the work. In such a case, the challengers could assert tradition, while the union seeking to secure its jobs would have to admit that it had not previously performed the exact tasks sought. Under *Conex*, a union would never be entitled to preserve work in any way different from the traditional work of its members. The very restrictive view of work preservation adopted by the *Conex* court represented the position of all the circuit courts which had considered the containerization issue up to the time the NLRB began its consideration of the cases which were to become *International Longshoremen*.¹²⁴

II. NLRB v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

The decision of the District of Columbia Court of Appeals in *International Longshoremen* reversed the *Conex* trend by not finding the Rules on Containers violative of section 8(b)(4)(B) and 8(e).¹²⁵ The Supreme Court found similarly.¹²⁶ Neither court, however, held that the rules were legal. Rather, they criticized the restrictive analysis of *Conex* and the NLRB, recommended a better approach, and remanded.¹²⁷ This section will discuss briefly the Board decisions in the two cases which led to *International Longshoremen* and then describe the opinions of the District of Columbia Court of Appeals and the Supreme Court in some detail. The appeals court opinion presents ideas on work preservation which are useful in understanding the Supreme Court opinion and which may be of continued importance in this still-developing area. The ensuing description of the Supreme Court opinion will set out the most current authority on the work preservation doctrine, and will be followed by an analysis of the current status of that doctrine.

The Board's decisions in the two actions that comprised *International Longshoremen* were, in reasoning and result, identical to the *Conex* decision described above.¹²⁸ The NLRB found that the ILA's actions and the Rules which those actions sought to enforce were illegal under sections 8(b)(4)(B) and 8(e), unless they fit within the primary exceptions to those sections.¹²⁹ The Board analyzed the Rules and the ILA's actions exclusively in terms of work preservation.¹³⁰ It found that the longshoremen historically had not done the

¹²⁴ See cases listed at note 45 *supra*.

¹²⁵ 613 F.2d at 914.

¹²⁶ 447 U.S. at 512.

¹²⁷ *Id.*; 613 F.2d at 914.

¹²⁸ See text and notes at notes 101-24 *supra* for a discussion of the *Conex* opinion.

¹²⁹ 231 N.L.R.B. at 364 (decision of ALJ) (Baltimore and Hampton Roads). See 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York).

¹³⁰ 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York); 231 N.L.R.B. at 364-66 (Baltimore and Hampton Roads).

work in question.¹³¹ Since the ILA members could not assert that they had once performed the work of loading and unloading containers picked up by the freight businesses, the Board found that the Rules did not seek to preserve traditional work.¹³² Unable to label the Rules "work preservation," the NLRB concluded that the rules violated sections 8(b)(4)(B) and 8(e)¹³³ because they did not have a primary purpose.

On appeal, the Court of Appeals for the District of Columbia held that the NLRB could not, under the work preservation doctrine, ignore the traditional work patterns of longshoremen when defining the work in controversy, unless the new work was so unrelated to the old that it was a clear break with the past.¹³⁴ The court vacated and remanded both NLRB rulings for new proceedings consistent with the court's interpretation of the law.¹³⁵

The court also used the concept of work preservation. Its application of that idea, however, was considerably broader than that of the Second Circuit in *Conex* or that of the NLRB in its two rulings below.

Judge Wright, writing for the majority, first observed that agreements in which employees sought to preserve work threatened by technological advances were not considered illegal under the proscription against secondary boycotts contained in the NLRB.¹³⁶ He went on to state the issue of the case at hand as whether the Rules and their enforcement were used to acquire work traditionally done by the freight businesses rather than to preserve work for longshoremen.¹³⁷ He found that the first step in the "acquisition" versus "preservation" determination was to define the "work in controversy."¹³⁸ This process of definition, in turn, had to consider all surrounding circumstances.¹³⁹ In the circumstance of a technological innovation, Judge Wright found that the definition must take particular account of pre-innovation work patterns, since the key problem in applying the work preservation doctrine is rationalizing the innovation into traditional work patterns.¹⁴⁰ The NLRB erred, according to the court, because its definition of the work in controversy as loading and unloading of containers away from the pier¹⁴¹ was cast solely in terms of the work created by the innovation.¹⁴² Judge Wright found that such a definition made it impossible for those who worked before the

¹³¹ 236 N.L.R.B. at 526, 98 L.R.R.M. 1277 (New York); 231 N.L.R.B. at 353, 96 L.R.R.M. at 1637-38 (decision of Board) (Baltimore and Hampton Roads).

¹³² 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York); 231 N.L.R.B. at 365 (decision of ALJ) (Baltimore and Hampton Roads).

¹³³ 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York). See 1231 N.L.R.B. at 365 (Baltimore and Hampton Roads).

¹³⁴ *International Longshoremen's Ass'n v. NLRB*, 613 F.2d at 908, 910.

¹³⁵ *Id.* at 910, 914.

¹³⁶ *Id.* at 903.

¹³⁷ *Id.* at 908.

¹³⁸ *Id.*

¹³⁹ *Id.* at 909.

¹⁴⁰ *Id.* at 909, 910.

¹⁴¹ *Id.* at 908.

¹⁴² *Id.* at 909.

innovation to relate the new work to their traditional work patterns.¹⁴³ The NLRB's approach would be appropriate, according to Judge Wright, only if the innovation created work unrelated to past work patterns.¹⁴⁴

The appeals court opinion left the actual definition of the work in controversy to the NLRB.¹⁴⁵ It did not give specific guidance on how to rationalize the new work into traditional work patterns, except to state, as a possible definition of the work in controversy, "[t]he loading and unloading of ocean-borne cargo, with its directly related peripheral tasks such as sorting cargo. . . ."¹⁴⁶ Because the NLRB had determined that the Rules were illegal based on an erroneous definition of the work in controversy, the court remanded for the Rules to be considered using a correct method of definition.¹⁴⁷

Judge Wright, in his *International Longshoremen* opinion, made an implicit assumption when he declared the crucial question in work preservation cases to be how best to rationalize the work after the innovation into traditional work patterns.¹⁴⁸ He assumed that work preservation remained a primary objective, within the meaning of sections 8(b)(4)(B) and 8(e), even when employees demanded jobs that could not be reconciled into traditional work patterns without some rationalizing effort. This view stood in sharp contrast to the view of the *Conex* court, which was unwilling to accord the objective of work preservation primary status except where the work sought to be preserved was identical to the work performed before the technological innovation.¹⁴⁹ Judge Wright's rationalization approach looked for similarity between the traditional work and the work sought. The *Conex* court was unwilling to rationalize; it demanded that the traditional work and the work sought be identical.

In a five to four decision, the Supreme Court affirmed the ruling of the District of Columbia Court of Appeals.¹⁵⁰ The Court held that the Board's definition of the work in controversy was an error of law under the work preservation doctrine¹⁵¹ because it did not focus on the work of the bargaining unit

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 910.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 613 F.2d at 910, 914. The Supreme Court's opinion in *International Longshoremen* addressed almost exclusively the problem of defining the work which the longshoremen wanted. See 447 U.S. at 505-09. Judge Wright, however, discussed four issues related to the work preservation doctrine, in addition to defining the work in controversy. 613 F.2d at 905. First, he determined that, on the facts of the case, the Rules were not calculated to achieve union objectives elsewhere. *Id.* at 911-12. He next found that the NLRB had not relied on the theory that a work preservation agreement does not itself immunize what is otherwise secondary activity, so he did not consider that issue. *Id.* at 912. The third issue which Judge Wright discussed was the right to control test. *Id.* He stated that an employer had to be able to control the disposition of the work which employees sought, in order for the employees' activity to be primary. *Id.* He found that the employers of the longshoremen did have such control. *Id.* at 912-13. Finally, under the heading "substantial evidence standard," Judge Wright observed that the issue at hand was not factual findings, but legal interpretation. *Id.* at 913.

¹⁴⁸ *Id.* at 909.

¹⁴⁹ See text and notes at notes 121-24 *supra* for a discussion of the *Conex* rule.

¹⁵⁰ 447 U.S. at 512.

¹⁵¹ 447 U.S. at 511 n.26, 512.

employees.¹⁵² The majority opinion, written by Justice Marshall,¹⁵³ began its analysis by focusing upon section 8(b)(4)(B) and 8(e) of the NLRA.¹⁵⁴ It described the two statutory provisions as limited to forbidding only secondary activity.¹⁵⁵ Having thus briefly set out the applicability of sections 8(b)(4)(B) and 8(e), Justice Marshall moved directly to a discussion of work preservation as one of the primary purposes protected by those provisions.¹⁵⁶ He supported this statement by reference to two earlier Supreme Court cases,¹⁵⁷ *National Woodwork* and *NLRB v. Enterprise Association of Pipefitters*.¹⁵⁸ These cases, according to the majority, established a two-part test for determining whether a union work preservation agreement is lawful: (1) the agreement must seek to preserve the employees' traditional work, and (2) the employer must be able to grant the jobs requested.¹⁵⁹

Turning to the first part of this test, the Court found the central issue in the work preservation analysis to be the identification of the work which the agreement seeks to preserve.¹⁶⁰ It found that issue to have been obvious in *National Woodwork*, because in that case the carpenters were demanding the same jobs that they had always performed.¹⁶¹ The majority went on, however, to find that the congressional intent to protect actions and agreements with the object of work preservation went beyond the *National Woodwork* fact pattern, to include actions and agreements seeking to preserve work in a form different from that of the employees' old tasks, while maintaining many of their work patterns.¹⁶² After making this observation, the Court held that the Board's approach to defining the work at issue in *International Longshoremen* was incorrect as a matter of law.¹⁶³ Endorsing Judge Wright's opinion below, the Court observed that the Board's focus on the work as done after the innovation prevented longshoremen from negotiating any agreement which allowed them to work on containers.¹⁶⁴

The opinion also set out the proper method of identifying the work in controversy in the context of a complex case of technological displacement.¹⁶⁵ The Court found that the "surrounding circumstances" language of *National Woodwork*¹⁶⁶ required that the identification of the work at issue take into account the

¹⁵² *Id.* at 507.

¹⁵³ *Id.* at 493.

¹⁵⁴ *Id.* at 503.

¹⁵⁵ *Id.* at 504.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 429 U.S. 507 (1977).

¹⁵⁹ 447 U.S. at 504.

¹⁶⁰ *Id.* at 505.

¹⁶¹ *Id.*

¹⁶² *Id.* at 505-06.

¹⁶³ *Id.* at 506-07.

¹⁶⁴ *Id.* at 508.

¹⁶⁵ *Id.* at 507.

¹⁶⁶ *Id.*

nature of the work both before and after the innovation.¹⁶⁷ Furthermore, in a case like *International Longshoremen*, where there were several interrelated types of work,¹⁶⁸ the Court asserted that the Board must focus on the traditional work of the union employees seeking to preserve work, not on the work of other employees doing the same or similar work.¹⁶⁹ The Court then left the problem of defining the work and went on to explain that the work preservation analysis, after identification of the historic work of the union and of the work in controversy, will require an evaluation of the relationship between the two types of work.¹⁷⁰ The determination of whether an agreement seeks to preserve only the traditional work of bargaining unit members will depend on how well the agreement achieves the objective of preserving "the essence of traditional work patterns."¹⁷¹ The Court further stated that in determining whether the Rules represented a lawful attempt to preserve traditional longshore work, the Board should be informed by an awareness of the congressional preference for collective bargaining as a method for resolving problems due to technological dislocation of work.¹⁷² The Court noted, also, that an agreement's validity depended on its legality, not its rationality and efficiency.¹⁷³ This was the extent of the Court's discussion of the first prong of its two-part test — whether an agreement has preservation of traditional work as its objective.¹⁷⁴

The Court did not examine the second prong of its test — whether the employer was able to grant the jobs which the union sought.¹⁷⁵ Because of the parties' erroneous conception of the work in controversy, the Court found that any consideration of the issue of the right to control that work would be premature.¹⁷⁶ The Court also declined to consider allegations that containerization had eliminated entirely the longshoremen's former work,¹⁷⁷ or that it was illegal for the longshoremen's employers to withhold containers on the basis of the Rules.¹⁷⁸ Thus, it remanded the case to the Board solely on the grounds of the Board's erroneous definition of the work in controversy.¹⁷⁹

Three justices joined Chief Justice Burger in his dissenting opinion, which also focused on the work preservation concept.¹⁸⁰ The dissent found that the different functions of containers required different methods of defining the work being sought, depending on what use was being made of the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at n.24.

¹⁷² *Id.* at 511.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 504.

¹⁷⁵ *Id.* at 504, 511-12.

¹⁷⁶ *Id.* at 512.

¹⁷⁷ *Id.* at 510-11.

¹⁷⁸ *Id.* at 512.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 522, 525 (Burger, C.J., dissenting).

containers.¹⁸¹ Containers, according to the dissent, sometimes functioned like a ship's hold, but at other times were like the trailer of a truck.¹⁸² Thus, the dissent found that the work in controversy had two definitions: the loading and unloading of ships, and the loading and unloading of trucks.¹⁸³ Without further explanation, the dissent then agreed with the Board's determination that the work which the disputed provisions of the Rules sought to control was the work of loading and unloading land-based transportation.¹⁸⁴

Having accepted the Board's definition of the work at issue,¹⁸⁵ the dissent then discussed the merits of the case and found that there was substantial evidence to support the Board's decision that the Rules on Containers and their enforcement violated sections 8(e) and 8(b)(4)(B).¹⁸⁶ Since the longshoremen had never before worked on the containers mentioned in the Rules, the dissent reasoned, they were perverting the work preservation doctrine by reaching out for work.¹⁸⁷ The dissent expressed fear that work preservation would swallow sections 8(b)(4)(B) and 8(e).¹⁸⁸ Apparently in reaction to the majority's assertion that there was a congressional preference for collective bargaining as the method for resolving disputes over dislocation of workers by technological change,¹⁸⁹ the dissent rejected the possibility that the Rules could be an acceptable collectively bargained compromise.¹⁹⁰ Justice Burger noted that the mere fact that an agreement was bargained collectively did not exempt it from the prohibitions of sections 8(b)(4)(B) and 8(e).¹⁹¹ The dissent was unwilling to accept an agreement which gave the union work that had never been performed by longshoremen.¹⁹²

Work preservation was the central theme of the analysis of *International Longshoremen* by the NLRB,¹⁹³ the District of Columbia Court of Appeals,¹⁹⁴ and both the majority¹⁹⁵ and dissenting¹⁹⁶ Supreme Court opinions. The application of the work preservation doctrine in these opinions broke down into

¹⁸¹ *Id.* at 522-23.

¹⁸² *Id.* at 523.

¹⁸³ *Id.* at 525.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 529.

¹⁸⁷ *Id.* at 526.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 511.

¹⁹⁰ *Id.* at 528-29.

¹⁹¹ *Id.* at 529.

¹⁹² *Id.* at 525.

¹⁹³ 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York); 231 N.L.R.B. at 364-66 (decision of ALJ) (Baltimore and Hampton Roads).

¹⁹⁴ 613 F.2d at 892.

¹⁹⁵ 447 U.S. at 493.

¹⁹⁶ *Id.* at 522, 525 (Burger, C.J., dissenting).

two basic approaches. The Board and the Supreme Court dissenters simply determined the traditional work of the union claiming certain work and the traditional work of the workers who would be affected by the claim.¹⁹⁷ If the claiming union could not show that it traditionally had done precisely the same work as that already performed by the others, there could be no valid work preservation objective.¹⁹⁸ The circuit court and the Supreme Court majority opinion took a more complex view of the doctrine. Rather than simply determining the traditional work of those affected by the union's claim and comparing it to the union's traditional work, these opinions set out a more general method for defining "work in controversy." This definition focused on the traditional work of the claiming union.¹⁹⁹ The analysis then called for an effort to rationalize the work thus defined into the claiming union's traditional work.²⁰⁰ Both methods of analysis are apparently original. Nowhere in *National Woodwork* did the Court attempt to describe how to determine whether a union's objective is work preservation.

III. THE RATIONALE OF *INTERNATIONAL LONGSHOREMEN*

A. *Weaknesses in the Supreme Court's Use of the Work Preservation Doctrine*

The Supreme Court in *International Longshoremen* concluded that the Rules on Containers were not clearly illegal based on its perception of the work preservation doctrine. Questions arise, however, concerning the usefulness of the Court's method for determining whether a union's objective is work preservation, and its minimal effort to relate its decision to the primary-secondary rationale of sections 8(b)(4)(B) and 8(e).²⁰¹ This section will show that the Court's recommended method for determining whether a work preservation objective exists is so vague as to be nearly impossible to enforce. It will also describe how the Court has almost completely lost sight of the concept that a primary objective is any objective which relates to a dispute between an employer and his immediate employees.

A major problem with the *International Longshoremen* opinion concerns the practical application of the Court's view of work preservation by the Board. The Court held that the Board had erred in defining the work in controversy by failing to focus on the longshoremen's traditional work.²⁰² The appropriate method of definition, according to the Court, was for the Board to define the work sought in terms of the bargaining unit employees, not the work of others

¹⁹⁷ 447 U.S. at 524-25; 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York); 231 N.L.R.B. at 365 (Baltimore and Hampton Roads).

¹⁹⁸ 447 U.S. at 525-26; 236 N.L.R.B. at 526, 98 L.R.R.M. at 1277 (New York); 231 N.L.R.B. at 365 (Baltimore and Hampton Roads).

¹⁹⁹ 447 U.S. at 507; 613 F.2d at 909.

²⁰⁰ 447 U.S. at 507, 509; 613 F.2d at 909.

²⁰¹ See 447 U.S. at 504-05.

²⁰² 447 U.S. at 507, 511 n.26, 512.

doing similar jobs.²⁰³ The Court further ruled that the agreement's or action's legality would then turn on the historical and functional relationship between the old work and the new work.²⁰⁴ It is questionable, however, whether the Court's method of definition and analysis would prevent the evil at which it was aimed: the Board's foreclosure of any possibility of longshoremen negotiating an agreement which would permit them to do some loading and unloading of containers.²⁰⁵ Buttrressing the Court's holding was only a vague policy in favor of work preservation,²⁰⁶ and the Court admitted that the Board was free to determine how to apply this policy.²⁰⁷ Thus, *International Longshoremen* leaves the NLRB with the option of taking the longshoremen's traditional work into account when defining the work sought,²⁰⁸ while still claiming that it is impossible to rationalize the work sought with the longshoremen's traditional work patterns.²⁰⁹ Since, according to the Court, the legality of agreements alleged to have work preservation as their objective turns on the determination of whether traditional work patterns can be rationalized with work sought,²¹⁰ the Board could invalidate the contract. A court reviewing such NLRB decisions would find no error in the Board's application of the work preservation doctrine because, under *International Longshoremen*, the initial determination of the relationship between the traditional work and the work sought is left completely to the NLRB.²¹¹ Thus, nothing in the *International Longshoremen* opinion would prevent the NLRB from continuing to enforce the narrow view that employees may seek to preserve only jobs identical to those traditionally done.

Another problem with the majority opinion was its failure to explain clearly how its discussion of the work preservation doctrine related to the primary-secondary distinction made by sections 8(b)(4)(B) and 8(e) of the Act.²¹² The Court relied upon a perceived congressional policy in favor of work preservation as justification for extending *National Woodwork* to the facts presented in *International Longshoremen*.²¹³ It never considered how its extension of work preservation affected the problem of whether the longshoremen had been motivated by interests solely within their relationship with their employers. Yet the question of what interests motivated the bargaining unit is the basic issue in deter-

²⁰³ See *id.* at 507.

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 508.

²⁰⁶ See *id.* at 506. See also text and note at note 162 *supra* for a description of the Court's discussion of the work preservation policy.

²⁰⁷ 447 U.S. at 511.

²⁰⁸ See *id.* at 507.

²⁰⁹ See *id.* at 510 & n.24.

²¹⁰ *Id.* at 510.

²¹¹ See *id.*

²¹² See text and notes at notes 31-37 *supra* for a description of the primary-secondary distinction made in §§ 8(b)(4)(B) and 8(e).

²¹³ See text and note at note 162 *supra* for a description of the Court's discussion of congressional policy and work preservation.

mining whether a union's contract or activity was primary under sections 8(e) and 8(b)(4)(B), according to *National Woodwork*.²¹⁴

In summary, the Court in *International Longshoremen* set forth a complex method of defining the work in controversy and comparing it to traditional work. It is questionable, however, whether that complex method will achieve the Court's purpose to make work preservation a more broad and flexible doctrine than it was in the Board's decisions, because of the great discretion which the Board has in rationalizing work sought with traditional work. In addition, the Court did not attempt to relate its test for the legality of work preservation agreements to the primary-secondary distinction used in section 8(b)(4)(B) and 8(e) of the Act. These problems could have been avoided to a great extent if the Court had looked to *National Woodwork* to fashion a different method of analysis, focusing on the union's objectives.

B. *An Alternative Approach*

Instead of the present approach taken in *International Longshoremen*, the Court could have required the test for the legality of a union contract or its enforcement to be an application of the *National Woodwork* "touchstone" standard.²¹⁵ Under that test, a union's agreement, or its enforcement is not secondary, and therefore not in violation of sections 8(e) and 8(b)(4)(B), if it is addressed only to the labor relations of the employees vis-a-vis the contracting employer, rather than to furthering union objectives elsewhere.²¹⁶ The test would find that the ILA in *International Longshoremen* has objectives elsewhere if there is evidence to prove that the union's purpose in negotiating and enforcing the Rules was to use its immediate employers to pressure the inland freight companies to hire ILA members, or allow the ILA to represent freight company employees. Absent such evidence of an outside objective, the agreement or action would be legal. If it is shown that the work sought does not relate closely to the traditional work of union members, that showing would be relevant under the proposed test only as circumstantial evidence that the union has an objective to influence an employer whose employees do the work sought, in addition to any legal objective to influence the union's immediate employer. As described below, this test would have achieved the Court's goal of allowing employees threatened with displacement by technological advances to demand jobs somewhat different from those which they traditionally had done.²¹⁷ At the same time, this test effectively would eliminate the two major problems in-

²¹⁴ See 386 U.S. at 645. See also 429 U.S. at 529 n.16.

²¹⁵ The touchstone standard is set out in 386 U.S. at 644-45. See text and note at note 93 *supra*.

²¹⁶ See text and notes at notes 92 and 93 *supra* for a description of the touchstone standard in *National Woodwork*.

²¹⁷ 447 U.S. at 506.

herent in the majority opinion: creating a practical method of analysis, and relating its decision to the primary-secondary rationale of sections 8(b)(4)(B) and 8(e).

The use of this touchstone test would have allowed a well reasoned extension of *National Woodwork* to the facts of *International Longshoremen*. In *National Woodwork* the Court ruled that an objective to preserve work was legal unless there was an objective elsewhere.²¹⁸ In the latter case, the union's objective would be secondary and therefore illegal.²¹⁹ The proposed tests focuses similarly on the union's objective. The *National Woodwork* Court stated its touchstone test as follows: "[t]he touchstone is whether the agreement is addressed to the labor relations of the contracting employer vis-a-vis his own employees."²²⁰ It is apparent that the Supreme Court's major concern in *National Woodwork* was to determine the union's objective in its actions and agreements. Work preservation was therefore not important in and of itself, but only because it was not an objective designed to further union interests outside the immediate relationship between contracting parties. Thus, *National Woodwork* stood for the proposition that the doctrine of work preservation was only one way to determine whether the purpose of a union agreement was primary.

In addition to being supported by the language of *National Woodwork*, the touchstone test would have been more practical to apply than the Court's work preservation analysis in *International Longshoremen*. The touchstone test involves the relatively straightforward factual determination of whether a union's contract or its actions were designed to accomplish goals beyond the immediate employer-employee relationship. This determination would constitute a finding of fact, which courts are directed by statute to review under the substantial evidence standard.²²¹ The relative ease with which the touchstone test can be applied was demonstrated by the District of Columbia Court of Appeals, which had little trouble in finding that the Rules on Containers were not intended to achieve some secondary ILA goal,²²² such as organizing the employees of the inland freight businesses. In *International Longshoremen's Association, Local 1575 v. NLRB*,²²³ another of the circuit court cases involving the Rules on Containers,²²⁴ there was undisputed evidence that the union had pressured the freight businesses to hire its members.²²⁵ The court noted that this evidence would allow the Board to easily conclude that the union had an illegal objective to organize the freight businesses.²²⁶ In sharp contrast to

²¹⁸ 386 U.S. at 644.

²¹⁹ *Id.* at 645.

²²⁰ *Id.* (footnote omitted).

²²¹ See 29 U.S.C. § 160(e), (f) (1976).

²²² 613 F.2d at 912.

²²³ 560 F.2d 439 (1st Cir. 1977).

²²⁴ See note 45 *supra* for a list of the other circuit court cases on the Rules on Containers.

²²⁵ 560 F.2d at 445.

²²⁶ *Id.*

evaluating evidence that the union has some outside objective is the process, required in *International Longshoremen*, of judging the relationship of two types of work.²²⁷ This vague concept gives no guide to the NLRB, or to a reviewing court, as to the limits of Board discretion.²²⁸

Requiring the Board to focus on the union's objective in seeking to preserve work, rather than on the relationship between the traditional and the work sought, also would accord with section 8(b)(4)(B) and 8(e). Those sections both recognize that unions may legally engage in activities or contracts which have a primary objective.²²⁹ The essence of the definition of primary is whether the purpose of the union activity or contract relates only to the employer-employee relationship.²³⁰ In contrast, the *International Longshoremen* opinion gives the Board broad discretion on an issue — the relationship between old and new work — which began merely as an analytical tool for determining whether a primary objective existed. By making the resolution of this issue dispositive, the Court has enabled the Board to find illegal a union activity or contract which has absolutely no secondary motive under the touchstone definition. Thus, the Court has replaced the statutory test of primary motive with a test of its own making, based on the relationship of the work sought to the work done in the past.²³¹

The proposed alternative would not require the court to reject its view that some relationship between the work sought and work previously done is relevant to the legality of the union's actions. Rather, the new test would consider the relationship between old and new work as circumstantial evidence of the union's objectives vis-a-vis its immediate employer. A longshoremen's union might negotiate a contract which required its employer to hire and train longshoremen to repair damaged containers, instead of sending them to a welding contractor. The lack of any relationship between the traditional work of longshoremen and welding implies that the contract provision had an objective of using the longshoremen's immediate employer to aid the longshoremen's union in efforts to have welding contractors hire its members. This is a dispute outside the immediate relationship of the longshoremen and their employers; therefore, the evidence that the work sought is unlike the traditional work tends to show that the contract provision is illegal. In the case of welding versus longshoremen's work, such evidence might be dispositive. When the distinction between old and new work is more subtle, however, as in the *International Longshoremen* situation, such circumstantial evidence appears weak. The weakness is in the attempt to find that the ILA had an objective to

²²⁷ See 447 U.S. at 507, 509.

²²⁸ See text and notes at notes 170-73 *supra* for a description of the Court's analysis based on the relationship of two types of work.

²²⁹ See text and notes at notes 31-37 *supra* for a discussion of the primary-secondary distinction in §§ 8(b)(4)(B) and 8(e).

²³⁰ See text and notes at notes 31-35 *supra* for a discussion of the definition of "primary."

²³¹ 447 U.S. at 507.

force the inland freight businesses to hire its members based only on a contract provision designed to protect a limited share of the work lost to containerization. To make a reasonable case under the proposed test, further evidence would be required. Such evidence could be testimony by employees of the inland freight businesses that the ILA had recently attempted to organize them, or had attempted to replace their existing union. By requiring this type of evidence, rather than looking only to a subjective determination of how similar two types of work are, the new test goes to the heart of the primary-secondary issue under sections 8(b)(4)(B) and 8(e): whether the union had some objective elsewhere when it negotiated the contract, or took the action, in question.²³²

CONCLUSION

In *NLRB v. International Longshoremen's Association* the Supreme Court found that the work preservation doctrine should be applied by defining the work at issue in terms of the traditional work of the employees seeking new work, and then determining how well the two types of work relate to each other. The Court gave no real directions to the NLRB, however, on how this comparison of types of work should be made. Thus, the NLRB retains great discretion in determining how sections 8(b)(4)(B) and 8(e) should be applied. The extent of this discretion raises a serious question as to whether the Court's underlying view of work preservation as a flexible, fairly broad, doctrine will be put into effect. In addition, the Court's concern for the relationship of two types of work focuses on an issue which may or may not prove that the union had an objective outside its immediate employer-employee relationship. Yet it is that determination of the union's objective which indicates that a union agreement or action is primary, and therefore legal under sections 8(e) or 8(b)(4)(B).

A superior alternative to the test adopted by the Court in *International Longshoremen* is the touchstone definition of primary. Under that test, a union's agreements or actions are legal under sections 8(e) and 8(b)(4)(B) if the union's sole objective therein relates to its immediate employer, rather than some third party. This test finds strong support in *National Woodwork Manufacturers Association v. NLRB*, it can be applied practically, and its relations to the primary-secondary distinction in sections 8(b)(4)(B) and 8(e) is clear. Furthermore, the Court's concern for finding some relationship between the union's objective and its traditional work can be incorporated into the proposed test, but in a role properly inferior to the primary-secondary issue of determining whether the union has an objective outside the employer-employee relationship.

THOMAS L. BARRETTE, JR.

²³² See text and notes at notes 31-37 *supra* for a discussion of the primary-secondary distinction in §§ 8(b)(4)(B) and 8(e).