Legal Secondary Boycotts: Effect of the General Definitions Section of the Taft-Hartley Act on the Secondary Boycott Section

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"LEGAL" SECONDARY BOYCOTTS: EFFECT OF THE GENERAL DEFINITIONS SECTION OF THE TAFT-HARTLEY ACT ON THE SECONDARY BOYCOTT SECTION

INTRODUCTION

Section 8 of the Taft-Hartley Act provides in part

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) to induce the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to handle or work on any goods where an object thereof is (A) forcing any employer or other person to cease doing business with any other person." (emphasis added.)

Thus, section 8(b)(4)(A) makes the secondary boycott an unfair labor practice if the statutory provisions are violated. However, these statutory provisions are violated only when a labor organization induces the "employees of any employer," and then only if an object of the inducement is to force "any employer or other person" to cease doing business with any other person. Since the passing of the Taft-Hartley Act in 1947, a confusing and contradictory body of case law has developed on the question of what constitutes an "employer" or an "employee" within the meaning of section 8(b)(4)(A). This confusion has been the result of disputes as to whether the general definitions in section 2(2) and (3) of the act are determinative of the meaning of the words "employer" and "employee" as used in section 8(b)(4)(A).

Section 2 provides that when used in the act

"(2) The term 'employer' shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Labor Act.

"(3) The term 'employee' shall not include any individual employed as an agricultural laborer or any individual employed by an employer subject to the Railway Labor Act or by any other person who is not an employer as herein defined." 2

The National Labor Relations Board3 has consistently held that these definitions apply to section 8(b)(4)(A) as well as to any

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3. Herein referred to as the NLRB or as the Board.
other part of the act. Under this interpretation and in the case of first impression\(^4\) on the question, the NLRB held that employees of a railroad may be lawfully induced to strike in what would otherwise be an illegal secondary boycott, for the reason that the railroad is \textit{not} an "employer" within section 8(b)(4)(A) and therefore the protection of that section does not extend to it. On appeal, the United States Court of Appeals for the Fifth Circuit held that a railroad is an "employer" within the meaning of section 8(b)(4)(A) notwithstanding the specific exclusion of section 2(2); therefore, inducement of railroad employees contrary to the prohibitions of section 8(b)(4)(A) is an illegal secondary boycott.\(^5\) Both the interpretation of the NLRB and that of the court of appeals purported to be grounded in the plain words of the statute, in the legislative history of the statute and in desirable public policy. Thus was raised a problem which has yet to be solved, for the NLRB has refused to follow the Fifth Circuit Court of Appeals and has continued to hold that the parties specifically excluded by section 2(2) and (3) are not "employers" or "employees" for purposes of section 8(b)(4)(A). These holdings have resulted in secondary activities which might be referred to as "legal secondary boycotts."

This problem is one of major import in the field of labor law since railroads, federal and state governments, or agricultural producers are potential secondary parties to almost every labor dispute which might arise. Whether they can be secondarily picketed without violating the secondary boycott provision of the Taft-Hartley Act is a question of great strategic significance to unions and employers. Since extensive secondary picketing of these groups would substantially affect the flow of interstate commerce, it is also a question of great social and economic significance to the nation as a whole. The purpose of this Note is to examine the question and to evaluate the answers which the NLRB and the courts have given to it.

\textbf{PART I. DEVELOPMENT OF THE CASE LAW}

\textbf{A. Rice Milling: the first impression—}

The first published opinion construing the effect of the general definitions section of the Taft-Hartley Act on the secondary boy-

\(^4\) Teamsters Union, Local 201, AFL, \textit{and} International Rice Milling Co., 84 N.L.R.B. 360 (1949).

\(^5\) International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950), \textit{rev'd on other grounds}, 341 U.S. 665 (1951), 35 Minn. L. Rev. 215 (discussing another issue in the case).
cott section was the intermediate report of the NLRB trial examiner in the International Rice Milling Co. case.\(^6\) In that case the Teamster's Union was engaged in a primary dispute with the International Rice Milling Company. There was no doubt that both the union and the primary employer were covered by the Taft-Hartley Act. The secondary employers were the Missouri Pacific and Southern Pacific Railroads which had tracks running onto the primary employer's premises. Through threats and overtures of violence, the union induced the railroad employees to cease bringing trains onto the primary employer's premises with an object of forcing the railroad to cease doing business with the primary employer. International Rice Milling Co. filed unfair labor practice charges with the NLRB, the Board issued a complaint based on the charges, and the trial examiner was called upon to advise the Board whether this activity constituted a violation of section 8(b)(4)(A). In his report the trial examiner considered the plain words of the statute, its legislative history, and policy factors, and concluded that, when the Teamsters induced the railroad employees to strike with an object of forcing the railroad to cease doing business with the Rice Milling Company, it was engaging in an illegal secondary boycott under section 8(b)(4)(A) though both the railroad employees and employer are specifically excluded from the general definition of "employer" and "employee" in section 2(2) and (3) of the act.

**Plain words of the statute**—The trial examiner argued that generally in section 8 of the act the word "employer" is preceded by the indefinite article "an" or by the definite article "the," while in subsection (4) of section 8(b) the modifying adjective "any" preceded the word "employer." The inference drawn from this variation was that in section 8(b)(4)(A) the word "employer" was used in its generic sense so as to include all employers in fact, and not merely those within the section 2(2) definition. If this were not so, the trial examiner reasoned, subsection (4) of section 8(b) would modify "employer" with "an" and "the" as is done in the rest of section 8 of the act, rather than with the all-inclusive adjective "any." If the railroad qualifies under this interpretation of "any employer" then its employees are "employees of any employer" and both the inducement of the employees and the object of forcing their employer are prohibited by section 8(b)(4)(A).

The trial examiner made a second analytical attack on the troublesome words. He stated that part (A) of subsection (4) uses the words "forcing any employer or other person," and that

\(^6\) 84 N.L.R.B. at 362
the section 2(1) definition of "person" is broad enough to include railroads. It was reasoned that the words "any employer" in the introductory portion of subsection (4) and the words "any employer or other person" in part (A) of subsection (4) refer to the same employer and therefore the broader words of part (A) are construed as a controlling modification of the quoted introductory words; so the introduction really means, "to induce . . . the employees of any employer [or other person]." Since the railroad is a "person" within the act, the secondary boycott provision applies to it notwithstanding the exclusions of section 2(2) and (3).

Legislative history of the statute—The trial examiner found that there was no legislative history which directly indicated that the specific exclusions of section 2(2) and (3) were not meant to be applied to section 8(b)(4)(A). On the other hand, he found no legislative history which directly indicated that the exclusions were meant to be so applied. He argued that the prime reason for excluding railroads from the definition of "employer" was to make it clear that it was not intended that the Taft-Hartley Act should regulate the primary employer-employee relationships of railroads, which had long been satisfactorily handled by the Railway Labor Act. The trial examiner reasoned that it did not necessarily follow that Congress intended to deprive railroads and their employees of the protection of the secondary boycott provisions of the Taft-Hartley Act when there was no primary dispute which might be controlled by the Railway Labor Act. In effect, it was reasoned that while the Taft-Hartley Act was not meant to put additional controls on railroads, there is no indication that it was meant to deprive them of the rights that employers generally have, particularly when no regulation of the internal labor relations of railroads was involved.

Policy factors—The trial examiner argued that possibly no industry is more concerned with commerce than the railroad industry and that to exclude this major medium of commerce from the protection of section 8(b)(4)(A) would create an "illogical hiatus" in the law. Thus, secondary activity directed toward employers included by the general definitions section of the act would constitute an unfair labor practice, but similar activity directed toward railroads which are excluded by the general definitions section would not be an unfair labor practice. The trial examiner felt that such an interpretation would result in "an effect on commerce antipodal to that intended by Congress."

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8. 84 N.L.R.B. at 375.
When the *Rice Milling* case came before the NLRB it was held that there was no violation of section 8(b)(4)(A) because the general definitions of section 2(2) and (3) control, and railroads are, therefore, not employers within section 8(b)(4)(A). Further, the railroad workers are not employees within section 8(b)(4)(A). The Board stated that Congress had historically accorded railroads separate treatment and that the separate treatment ought to be preserved in this instance. It also pointed out that while the section 2(2) exclusion of railroads from the definition of "employer" was a holdover from the Wagner Act, the section 2(3) exclusion of railroad employees from the definition of "employee" was added by the Taft-Hartley Act in 1947. This appeared to the Board to constitute a sort of reaffirmation of the congressional intent to accord railroads separate treatment. The Board did not recognize or discuss the trial examiner's proposition that this exclusion of railroads was to preserve for the Railway Labor Act the regulation of their primary relations with their employees and not to expose employers to secondary pressures from which employers generally are protected by section 8(b)(4)(A). Also the specific exclusion of railroad employees in 1947 might be explained in another way. In 1947 Congress added a whole new provision to the NLRA, in which it set out for the first time certain unfair labor practices of unions. These unfair labor practices were more or less correlative to those of employers which were set out in section 8(a) as a carry over from the Wagner Act. Since Congress in 1935 had specifically excluded railroad employers from the definition of "employer" so that railroad unions could not use the Wagner Act in their primary disputes with railroad employers, Congress may have felt that equality of treatment between railroad employers and employees demanded that when it set out certain unfair labor practices of unions in section 8(b) in 1947 it should likewise specifically exclude railroad employees from the definition of "employee." Then a railroad employer could not use the new provisions of the act against a union when the union was precluded from using the old provisions of the act against the employer. However, it should be noted that this consideration relates only to the parties' primary relations with each other and not to the secondary activities directed against both of them by an unconnected labor organization, which might arise under section 8(b)(4)(A). In its brief decision the Board made no analysis of the problem other than summarily to

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state the two propositions set out above. It did not refute or even recognize the exhaustive analysis of the trial examiner.

When the *Rice Milling* case was appealed to the United States Court of Appeals for the Fifth Circuit, the court reversed the NLRB and adopted almost verbatim the opinion of the trial examiner as set out in his intermediate report. Thus the reasoning which the Board had apparently not considered important enough to discuss was used by the higher tribunal to support the overruling of the Board decision. But as its subsequent decisions were to indicate, the Board was not convinced by the Fifth Circuit Court’s opinion.

B. *Al J. Schneider Co.; Sprys Electric Co.* the NLRB defends its interpretation—

In the *Al J. Schneider Co.* case a public school board engaged the named company as a general contractor to undertake a construction project. A primary dispute arose between the International Brotherhood of Electrical Workers and Employer X, another contractor on the same project. The IBEW induced the employees of Al J. Schneider Co. to strike with an object of forcing the public school board to cease doing business with Employer X. There was no doubt that Al J. Schneider Co., Employer X, and the IBEW were covered by the Taft-Hartley Act. Consequently, the activities of the IBEW constituted inducement of the "employees of any employer" within section 8(b)(4)(A). The NLRB held that a public school board is a political subdivision of a state and, therefore, excluded from the section 2(2) definition of "employer." It also held that the school board was not a "person" within section 2(1). The general definitions of section 2 control the meaning of "employer" and "person" within section 8(b)(4)(A) and therefore the inducement was not with an object of forcing "any employer or other person" to cease doing business with Employer X. Consequently, the secondary activity was not a violation of section 8(b)(4)(A). Here the first requisite of section 8(b)(4)(A)—the *inducement* element—had been satisfied, but the second requisite—the *object* element—had not.

The Fifth Circuit Court in the *Rice Milling* case had argued that a railroad excluded as an "employer" by section 2(2) was nevertheless a "person" within section 2(1). The main argument of the NLRB in the instant case was that a subdivision of a state govern-

10. See note 5 supra.
ment, excluded as an employer by section 2(2), is not a “person” within section 2(1). The NLRB reasoned that since section 2(1) expressly enumerated so many artificial entities as “persons” for the purposes of the act, then by a sort of negative implication state government must not be one, else it would have been expressly enumerated also.

Further, it argued that the interpretation that a state government is a “person” would throw section 10(b) of the act into conflict with section 8(a). Section 10(b) provides that any “person” may charge a labor organization with an unfair labor practice while section 8(a) provides that certain acts constitute unfair labor practices if they are committed by “an employer.” To construe state government to be a “person” but not an “employer” would mean that it could file a charge against a labor organization if that labor organization violated section 8(b), but the government agency could never be effectively charged with an unfair labor practice itself because “persons” who are not also “employers” cannot be guilty of an unfair labor practice under section 8(2). Since section 8(a) cannot be used to impose duties on “persons” who are not “employers,” the NLRB felt that section 8(b)(4)(A) should not be construed to give rights to “persons” who are not “employers.” To do so would be to violate “the scheme and policy of the Act, founded upon a structure of correlative rights and duties.”

The Board’s final argument to support its position that a state government subdivision is not a “person” was a resort to legislative history. After the adoption of the Wagner Act, in which section 2(1) read exactly as it does now, Senator Wagner introduced an amendment to section 2(1) which would have specifically included government agencies as “persons.” Since Congress did not adopt this amendment and did not revive the consideration at the time the Taft-Hartley Act was debated, the Board thought it should be inferred that there was a considered design not to include the government as a “person.”

In the Sprys Electric Co. case, analogous on its facts to the Schneider Co. case, the NLRB first expressly recognized the adverse decision of the Fifth Circuit Court of Appeals in the Rice Milling case. The Board stated that with due respect for the opinion of that court, it would rely on its reasoning in the Schneider case and hold exactly to the contrary. Now to clinch the split of authority

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12. 89 N.L.R.B. at 224.
13. 89 N.L.R.B. at 225.
it was only needed that some other circuit court decide in accordance with the NLRB. That is exactly what happened.

C. *Di Giorgio Fruit Corp.* the confusion is compounded——

In the *Di Giorgio* case there was a primary strike for recognition by an agricultural laborers' union against an agricultural producer. The union induced the employees of a grocery store and a food processing plant to strike with an object of forcing their employers to cease doing business with the agricultural producer. The NLRB held that the agricultural laborers' union did not violate section 8(b)(4)(A) because section 8 of the act proscribes secondary boycotts only when perpetrated by a "labor organization." Section 2(5) defines a "labor organization" as one in which "employees participate." Since agricultural laborers are not employees within section 2(3), their union is not a "labor organization" capable of violating section 8. Here the *inducement* and *object* elements of section 8(b)(4)(A) were both satisfied but the perpetrator of the inducement was not subject to the prohibition of section 8.

The NLRB then held that the unions at the grocery store and the food processing plant which observed the secondary picket lines *did* violate section 8(b)(4)(A). The basis of this holding was that the unions induced their member employees to cease handling Di Giorgio products in response to the secondary picket line. This inducement was with an object of forcing their employer to cease doing business with Di Giorgio, thus bringing the activity within the proscription of section 8(b)(4)(A). The Board wrote no opinion of its own, but adopted the trial examiner's reasoning:

"The Act does indeed produce the curious result that unions of 'employees' may call upon fellow unions to aid in forcing recognition pursuant to a certification and that the labor organizations which respond are free from prosecution under the Act, while those labor organizations which respond to the appeals of unions of agricultural laborers for aid in achieving recognition may be prosecuted for doing so, although the agricultural unions themselves are not subject to prosecution. However odd the result, the dictate of the statute is clear." (Emphasis added.)

On appeal, the United States Court of Appeals for the District of Columbia affirmed the decision of the NLRB. The court adopted a Board argument that it would be unfair to place the restrictions of section 8(b) on agricultural laborers' unions when

16. 87 N.L.R.B. at 749.
they were excluded from receiving the correlative benefits of section 8(a) of the act. This argument assumes that if the union is considered a "labor organization" for purposes of subsection 4(A) and (B) of section 8(b), it must also be considered as a "labor organization" for all purposes under section 8(b). That is, the court feels that for the sake of consistency in interpreting the words of the act, secondary activity of unions cannot be regulated without also regulating primary activities. This reasoning, that inclusion for one purpose is inclusion for all purposes, is also found in the opinion of the NLRB in the Schneider case.\textsuperscript{18} Once this first premise is established, it is then reasoned that the resultant restrictions on unions, while their employers are excluded from regulation, violates a policy of mutual benefits and burdens of both employer and employees which the act contemplates.

Beyond this the court relied on the plain meaning of the words of the statute, as the Board has always done. At the end of its opinion the court rationalized that the ultimate problem was for Congress. The court said it could not determine what ought to be done, it could only interpret what had been done. This interpretation, however, did not include any mention of what had been done in the Fifth Circuit decision in the Rice Milling case, which had been a part of the case law for one year and stood as the only court authority on the question.

D. The "piggy-back" case: the Supreme Court considers the question

In the "piggy-back" case\textsuperscript{19} an over-the-road carrier was engaged in the practice of detaching its loaded semi-trailers from their cabs and shipping them via railroad flat car to diverse points where they were again picked up by cabs and hauled over the road. The reason for this practice was economy of operation and it was referred to as "piggybacking;"\textsuperscript{20} hence, the popular case name. The Teamsters Union, which had a collective bargaining agreement with the carrier, objected to this practice because it resulted in loss of work to the union drivers. The union was engaged in a primary strike against the carrier and pursuant to that strike induced railroad employees to cease loading the trailers onto flatcars. The object was to force the railroad company to cease doing business with the primary employer. Thus, the facts were on all fours with

\textsuperscript{18} N.L.R.B. at 224.
\textsuperscript{20} This practice is becoming a matter of some concern in the transportation industry. See Time, December 10, 1956, p. 94.
those in the *Rice Milling* case and similar to those in the *Schneider* and *Sprys* cases.

The railroad asked a Massachusetts state court to take jurisdiction on the ground that the NLRB decisions in the above cases indicated that the NLRB had decided that it did not have jurisdiction to act since a railroad was not an employer within section 8(b)(4)(A) and, therefore, was not entitled to protection under that section. The railroad reasoned that if the NLRB by its own decision did not have jurisdiction, the state court was free to act. The state court agreed with the argument, took jurisdiction and enjoined the union's picketing of the railroad as an illegal secondary boycott. The Massachusetts Supreme Court affirmed this decision and the union appealed to the United States Supreme Court on the jurisdiction question.

The Supreme Court stated:

"Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by so doing Congress intended to divest the N.L.R.B. of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person' they are entitled to Board protection from the kind of unfair labor practice proscribed by § 8(b)(4)(A)." (emphasis added.)

It was held that the Board's jurisdiction over this case was exclusive and the judgment of the Massachusetts Supreme Court was reversed.

It might appear that the Supreme Court had laid the problem to rest. But it was soon to be seen that the NLRB did not think so.

21. This raises the complicated problem of the applicability of the federal pre-emption doctrine. Where the NLRB declines, as a matter of discretion, to exercise its jurisdiction to the full extent provided in the act, it is not clear that state courts may act. See Lab. Rel. Expediter, 312c. The issue is pending decision of the United States Supreme Court in the case of Garmon v. San Diego Building Trades Council, 45 Cal. 2d 657, 291 P.2d 1 (1955), 41 Minn. L. Rev. 131 (1956), cert. granted, 351 U.S. 923 (1956), argued, January 16, 1957. See 25 U.S.L. Week 3209 (January 22, 1957). But where the NLRB declines to exercise jurisdiction because the activity is supposedly not within the scope of the act, as in the instant group of cases, there is no apparent reason for preventing state action. For the most current general summary and analysis of NLRB jurisdictional problems, see Lab. Rel. Expediter, 309-14.


23. 350 U.S. at 160.
E. Paper Makers Importing Co.—a reaffirmation of the NLRB position—

The Paper Makers case grew out of the long dispute between the United Automobile Workers and the Kohler Company of Kohler, Wisconsin. The City of Milwaukee, Wisconsin, a municipal corporation, owns and operates the docks at the Port of Milwaukee. The dock workers are represented by Local 2, American Federation of State, County and Municipal Employees. A ship loaded with raw materials consigned to Paper Makers Importing Company and destined for the Kohler Company docked at the Port of Milwaukee. The UAW and Local 2 induced the dock employees of the City of Milwaukee not to unload the ship, with an object of forcing Paper Markers and the City of Milwaukee to cease doing business with Kohler Company.

All the facts were stipulated and all procedures preliminary to a Board decision were waived with the understanding that the decision could be made on the stipulated facts. The Board stated in its decision that the parties appeared to agree that the unions' conduct would constitute a violation of section 8(b)(4)(A) if the dock workers of the City of Milwaukee were "employees of any employer" within the meaning of section 8(b)(4)(A). A more clearcut presentation of the issue could hardly be imagined.

The Board, in its first really comprehensive opinion on the issue, made an exhaustive analysis of the words of the statute, its legislative history, the arguments of the Fifth Circuit Court of Appeals in the Rice Milling case, all the prior Board decisions on the question, and the Supreme Court decision in the "piggy-back" case. Then the Board decided, as it always had before, that the definitions of section 2(3) and (3) control the meaning of the words used in section 8(b)(4)(A). Since a municipal corporation is excluded from the section 2(2) definition of "employer," its employees are likewise excluded from the section 2(3) definition of "employee;" and secondary inducement of those employees is not an illegal secondary boycott under section 8(b)(4)(A). This decision stands as the most recent development in the case law on the problem.


25. The Paper Makers case was cited in Local 327, Teamsters Union and B & S Motor Lines, Inc., 116 N.L.R.B. No. 117, Lab. Rel. Rep. (38 L.R.R.M. 1372) (1956) (holding independent contractors, excluded by § 2(3), are not "employees" within § 8(b)(4)(A)). However, since the NLRB made little analysis of the instant problem, the case is not helpful to this discussion.
PART II. ANALYSIS OF THE ARGUMENTS

A. Arguments from the plain words of the statute:

(1) Interpretations based on common meanings of the words—
Proponents on either side of the dispute claim that the problem can be solved by reading the plain words of the statute. This was the first argument made by the trial examiner in the Rice Milling case, and it was adopted by the Fifth Circuit Court of Appeals:

"Contrasting the usage of the word 'any,' as found in subsection (4), with the use of the indefinite article 'an,' as used elsewhere in the section, gives rise to the inference, we think, that Congress intended the word 'any' to embrace the class of employers as a whole, and not merely those within the definition of 'employer,' as set forth in Section 2(2) of the Act." 20

To this argument, the NLRB, in the Paper Makers case, replied:

"We cannot agree that the use of the 'any' preceding the word 'employer' in Section 8(b)(4)(A) has the significance attributed to it by the . . . Court of Appeals in the Rice Milling case. 'Any' is an adjective which means one indifferently out of a number. It is customarily considered to be synonymous with the indefinite articles 'a' and 'an.' . . . Indeed the conference report describing the operation of the new Section 8(b)(4) of the Taft-Hartley bill uses 'an' and 'any' interchangeably, thus following the dictionary meaning of 'any.' 27

"Congress has said explicitly that 'when used in this Act' the terms 'employer' and 'employee' shall have the meanings set out in Section 2(2) and 2(3), respectively. Congress has not said that the definitions contained in Section 2 were not to be applied to Section 8(b)(4)(A). If that had been its intent, it could easily have indicated as much by adding 'except in Section 8(b)(4)(A)' to the phrase 'When used in this Act.' That Congress did not utilize this simple device is persuasive evidence that it intended the definitions set forth in Section 2 to be applied throughout the Act without qualification or exception. 28

A sort of surrebutter to this is provided by the dissenting opinion in the Paper Makers case. It finds the dictionary definition of the word "any" to be, "indiscriminately of whatever kind . . . whichever one chance may select . . . with the implication that everyone is open to selection without exception . . . every . . . indicating the maximum . . . all; . . . the whole. . . ." 29

20. 183 F.2d at 25.
28. 38 L.R.R.M. at 1229.
29. 38 L.R.R.M. at 1233-34 n. 29. The dissenting opinion relies on Webster's New International Dictionary 121 (2d ed. 1947).
It is difficult to say whether one dictionary definition of "any" is better than another. This battle of the dictionaries is inconclusive.\(^3\) It is also difficult to say whether the use of the word "any" in section 8(b)(4)(A) indicates any particular Congressional intent, or whether the failure to provide for an exception to the exclusions in section 2(2) and (3) indicates an opposite intent. One argument seems as logical as the other. However, it might be noted that it is of no avail to interpret "any" broadly in order to include an otherwise excluded employer within the purview of section 8(b)(4)(A) unless his employees are included also. Since section 8(b)(4) requires the inducement to be of "the employees," specifically excluded employees such as railroad workers would not be brought within the purview of section 8(b)(4)(A) and inducement of them would not constitute a secondary boycott whether or not "any" is given a broad interpretation so as to cover the otherwise excluded employer. If Congress had intended to make section 8(b)(4)(A) applicable to otherwise excluded employers through use of the word "any" rather than "the," it would seem that it would also have used the word "any" rather than "the" to modify "employees" so that the inducement element as well as the object element of the secondary boycott provision would have been satisfied. Perhaps the failure of Congress to do this indicates that it did not consider the problem at all when it drew the two conflicting sections.

(2) Interpretations based on inference from other provisions of the act—A second technique of arguing from the plain words of the statute has been to point out the logical meaning of section 8(b)(4)(A) as it is read in conjunction with the rest of the act. Thus proponents of the broad interpretation of "any" could argue that although section 2(3) excludes certain groups from the definition of employee, that section specifically includes anyone whose work has ceased because of a labor dispute. Therefore, excluded groups, such as agricultural laborers, who have been induced to cease work with an object of creating a secondary boycott are specifically made "employees." It is reasoned that the inclusive language qualifies the exclusive language.\(^3\)

However, this argument can be refuted. Section 2(3), insofar as pertinent to the argument, provides that, "The term 'employee' shall include any individual whose work has ceased as a con-

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\(^3\) For a summary of the many possible meanings of "any," see C.J.S. Any (1936).

\(^3\) See the Di Giorgio case, 191 F.2d at 648.
sequence of, or in connection with, any current labor dispute . . .
but shall not include any individual employed as an agricultural
laborer. . . ." It seems more logical to argue that the exclusive
language which appears in the latter part of the sentence qualifies
the inclusive language which precedes it, rather than vice versa as
the above argument suggests. Further, if the suggested interpreta-
tion were adopted, it would result in including all the excluded em-
ployees for all purposes under the act and not merely for the
purpose of regulating secondary boycotts. This interpretation would
give no effect whatever to the exclusive language of section 2(3)
if the employee's work had ceased because of a labor dispute, and
the NLRB would be required to regulate even primary employer-
employee relations of farmers, for example. The argument was
rejected by the District of Columbia Court of Appeals as being
too contradictory of terms.32

A second argument of this kind is based on inference from
section 303 of the act,34 which gives "whoever shall be injured" by
activity proscribed by section 8(b)(4)(A) a right to bring a civil
suit for damages. It is reasoned that section 8(b)(4)(A) and
section 303 are meant to refer to exactly the same type of activity
and that the broad words, "whoever shall be injured," used in sec-
tion 303 must mean that section 8(b)(4)(A) was meant to be
read as applying to all employers and employees in the generic
sense of the words.35

The trouble with this argument is that it begs the fundamental
question. True, "whoever shall be injured" may sue, but only when
he is injured as a result of violation of the secondary boycott pro-
visions of the act. The provisions of the act have been violated only
when "employees" have been induced with an object of forcing
"employers." Thus it is not known whether one has been injured
until it is first determined who are "employees" and "employers." And
that is the determination which the "whoever has been in-
jured" language is supposed to help make. The reasoning is com-
pletely circuitous. It was rejected by the majority in the Paper
Makers case.36

Arguments of a similar nature have been made by proponents
of the narrow construction of "any." Thus the majority in the

33. 191 F.2d at 648.
 § 187 (1952).
35. See the dissenting opinion in the Paper Makers case, 38 L.R.R.M.
at 1234.
36. 38 L.R.R.M. at 1232.
Paper Makers case points out that if the Fifth Circuit Court's interpretation of "any" were adopted it would mean that the excluded groups were "employees" and "employers" for purposes not only of parts (A) and (B) of section 8(b)(4) but also of part (D). Part (D) makes it an unfair labor practice for a union to force "any employer" to aid it in a work jurisdictional dispute. It is argued that this interpretation would require the NLRB to step in to settle railroad work jurisdictional disputes as well as secondary boycotts involving railroads. If the Board were to do such a thing it would be completely intermeshed with the controls of the Railway Labor Act, since that act has its own provision for settling railroad work jurisdictional disputes. The NLRB would then find itself regulating disputes which have been clearly shown not to be within the purview of the Taft-Hartley Act. To avoid this dilemma is apparently considered good enough reason to interpret "any," as used in section 8(b)(4), narrowly and thereby steer clear of railroads altogether.

One answer to this argument is suggested by the dissent in the Paper Makers case. It is founded on the hypothesis that before the NLRB can determine whether section 8(b)(4) has been violated it must first find grounds for asserting jurisdiction over the parties. In all the secondary boycott cases relevant to the problem under consideration, the NLRB has had jurisdiction over either the primary or the secondary employer. If there were a jurisdictional dispute between two railroad unions, the NLRB would never have a covered employer over whom to assert jurisdiction in the first place. Therefore, these activities would remain within the exclusive control of the Railway Labor Act.

Thus answer to the argument seems to beg the fundamental question involved. The question is whether giving "any" a broad interpretation for purposes of parts (A) and (B) of section 8(b)(4) requires a similarly broad interpretation for purposes of part (D).
The dissent in the *Paper Makers* case says no, because the NLRB would not have jurisdiction over situations arising under part (D). The reason it would not have jurisdiction is that railroads are excluded from the act. But the problem is whether, in spite of the specific exclusion, a broad interpretation of “any” will include them for purposes of part (D), just as it is supposed to include them for purposes of parts (A) and (B). If it does, then the NLRB would have jurisdiction. It does not make sense to argue, as the dissent does, that railroads would not be covered by part (D) because the NLRB would not have jurisdiction. The Board would lack jurisdiction only if the conclusion that railroads are not covered is first conceded.

A better refutation of the majority argument in the *Paper Makers* case is that a broad interpretation of the word “any employer,” so as to provide protection against secondary boycotts, does not require that a similarly broad interpretation be given to a provision that deals with primary employer-employee relations. There are two justifications for this distinction. First, because the Railway Labor Act covers the primary relations contemplated by part (D), adequate regulation is already provided. But no other statute covers the secondary activity contemplated by parts (A) and (B), so this is more in need of regulation. Second, there is seemingly more need to extend the scope of the Taft-Hartley Act to protect a neutral employer who has no control over the causes of the primary dispute, than there is to extend it to provide protection to an employer who is a participant in the dispute and can bargain or resort to his own economic weapons to bring about a settlement of the strike. The neutral employer can only accede to the union’s demands or remain shut down by the secondary boycott, unless he is given protection under section 8(b)(4)(A).

(3) Interpretations based on prior judicial construction of the words—There is still a third technique of arguing from the plain words of the statute. That is to say that the words have a certain established meaning because a court of higher authority has already said that they have that meaning. This sort of argument was made with regard to the instant troublesome words. In *Phelps Dodge Corp. v. NLRB*, the United States Supreme Court held that the section 2(3) definition of “employees” excluding individuals, “whose work has ceased as a consequence of any current labor dispute” and who have obtained “substantially equivalent employp-
ment” does not control the meaning of the word “employees” as used in section 10(c) of the act. Therefore, an individual who has taken substantially equivalent employment may, nevertheless, be entitled to reinstatement to his old job under the words of section 10(c) which provide that “employees” may be reinstated.

The argument is that this case holds that the definitions of section 2(3) do not necessarily control the meaning of the defined words as they appear elsewhere in the act. Therefore “employer” and “employee” as used in section 8(b) (4) (A) may have a broader meaning than is ascribed to them by section 2(3). On analysis of the Phelps Dodge case, however, it is not quite so easy to arrive at this conclusion.

The holding of the Phelps Dodge case is that the section 2(3) definition need be applied to the word “employee” when used in another section of the act only when there is authority to do so “either in the policy of the Act or in some specific delimiting provision of it.” It has been argued that the specific exclusions of section 2(3) constitute such a specific delimiting provision. This argument is probably not sound, because it was those specific exclusions which the Phelps Dodge case held not to be applicable in the absence of a specific delimiting provision. Apparently the Supreme Court was referring to a specific delimiting provision relating back to section 2(3) in the section being interpreted. Even so, the second hurdle of the Phelps Dodge case must be overcome, for the section 2(3) definition may still apply if there is authority in the policy of the act for it to do so. In the instant group of cases, one of the questions is whether the policy of the act requires such an application. The policy of the act in regard to this question must be determined before the applicability of the Phelps Dodge holding can be decided. Then that holding can be cited as authority to support whichever reading is given to the words “employer” and “employee” as used in section 8(b) (4) (A). In short, while the Phelps Dodge case stands for the proposition that the section 2 definitions are not, of necessity, controlling throughout the act, it does not resolve the question whether they control section 8(b) (4) (A).

A more significant and difficult problem is whether the Supreme Court in the “piggy-back” case made a binding determination of the meaning of “employer” as it is used in section 8(b) (4) (A). In the Paper Makers case, the NLRB held that it did not. The

43. 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(c) (1952)
44. 313 U.S. at 191.
45. See the Di Giorgio case, 191 F.2d at 646.
46. 38 L.R.R.M. at 1230, 1232.
Supreme Court first stated that "since railroads are not excluded from the Act's definition of 'person' they are entitled to Board protection from the kind of unfair labor practice proscribed by § 8(b)(4)(A)." 47 Then the Supreme Court went on to say

"Whether the Act was violated is, of course, a question for the Board to determine. Even if petitioner's [the union's] conduct is not prohibited by § 8 of the Act, it may come within the protection of § 7, in which case the State was not free to enjoin the conduct." 48

The Supreme Court did not decide whether section 8(b)(4)(A) had been violated, but it did decide that a railroad was a "person" who could ask the Board to determine if section 8(b)(4)(A) had been violated in its case; and it did decide that a railroad was a "person" within section 8(b)(4)(A) and entitled to Board protection if that section had in fact been violated. When the Paper Makers case came before the NLRB, it apparently felt bound by the "piggy-back" decision to assert jurisdiction and to regard a municipal corporation as a "person" within section 8(b)(4)(A) (thus tacitly overruling the Schneider and Sprys cases) 49a just as the Supreme Court held a railroad was a "person" within that section. But this "person" is entitled to NLRB protection only when the section has been violated. Since the Supreme Court did not say a railroad was an "employer" the NLRB felt free to say that the section had not been violated because a municipal corporation, though a "person," is not an "employer" and thus inducement of its employees was not inducement of the "employees of any employer."

It is true that the Supreme Court did not specifically state that the railroad was an "employer" as well as a "person." But does the Supreme Court opinion have any meaning when it is interpreted as the NLRB interprets it? If the alleged secondary boycott in the "piggy-back" case was clearly within the proscription of section 8(b)(4)(A) except for the fact that the secondary employer was a railroad, and if the secondary boycott was carried out through inducement of the railroad's employees, 49 then it seems logical to say

47. 350 U.S. at 160.
48. Id. at 161.
49a. Since this Note was written the NLRB has expressly overruled the Schneider and Sprys cases on the strength of the "piggy-back" case, to the extent that they are inconsistent. Local 313, International Brotherhood of Electrical Workers, AFL-CIO and Furness Electric Co., Lab. Rel. Rep. (39 LRRM 1250) (1956); see Lab. Rel. Rep. (39 Analysis 73) (1956).
49. The NLRB apparently reads the facts of the "piggy-back" case so as to find that the secondary inducement was not of the railroads' own employees. This interpretation enables the Board to circumscribe the "piggy-
that the Supreme Court must have considered the railroad an "employer" and the inducement of its workers to be violative of the section. If it did not, then it was really saying that the railroad had a right to file a charge with the NLRB, but that it could never hope to obtain a remedy. It is not logical to interpret the decision as holding that the NLRB may not refuse to assert jurisdiction on the ground that the railroad has no right to complain because it is excluded from the purview of section 8(b)(4)(A), but must assert jurisdiction only for the purpose of telling the railroad that the act has no remedy for the complaint since the railroad is excluded from the purview of section 8(b)(4)(A). If this interpretation is correct, then the "piggy-back" decision is rendered largely ineffectual.

Furthermore, if the NLRB construction of the "piggy-back" case is accepted it would mean that secondary boycotts of excluded employers are illegal when accomplished through inducement of employees of an admittedly covered employer, as in the Schneider and Sprys cases, but legal when accomplished through inducement of the excluded employer's own employees as in the Rice Milling, "piggy-back," and Paper Makers cases. Perhaps this sort of distinction can be rationalized on the ground that the Board's only duty is to protect the covered neutral employer whose employees are being induced, and that protection of the excluded neutral employer is merely an incidental consequence of the Board's exercise of its duty to protect the former.

It is unfortunate that the issue, whether the definitions of section 2 control the meanings of words in section 8(b)(4)(A), came before the Supreme Court in such an oblique manner. The case back" holding. Then the Supreme Court would only have passed on the question whether a railroad which is forced to cease doing business with any person as a result of secondary inducement of admittedly covered employees rather than through inducement of its own employees, may invoke § 8(b)(4)(A). The Board's assumption that there was no secondary inducement of the railroads' own employees is probably founded on the Supreme Court's statement that the union had not "interfered in any manner whatsoever with the railroad's employees." See 350 U.S. at 160. But this language, read in context, seems clearly to be referring to interference with the primary relations of railroad's employees and the railroad, rather than to secondary inducement of the railroad's employees. Indeed the facts indicate that there was secondary inducement of the railroad's employees.

"Employees of [the railroad] were persuaded by [business agents of the union] not to load previously delivered trailers onto flatcars." Id. at 157

49a. Since this Note was written, a federal district court has held a federal government agency to be "any employer" within section 8(b)(4)(A), citing the "piggy-back" case. Douds v. Seafarer's Union, 39 LRRM 2537 (E.D.N.Y. 1957).

50. The dissenting opinion in the Paper Makers case finds the "piggy-back" case applicable on other grounds. See 38 L.R.R.M. at 1234.
was never before the NLRB and apparently the Supreme Court did not consider any of the NLRB or circuit court cases in point in making its ruling. The ruling on a question of jurisdiction rather than on the precise issue, the only partial disposal of the issue by express holding, and the extremely general wording in this case, leave it open to several interpretations. Like the Phelps Dodge case, it can be cited to support either point of view.

The simple truth is that the words of the statute are not plain. If they were, the instant body of case law would not have arisen, and as of this time, the decisions of the NLRB and the courts have not rendered their meaning clear. What the words "employer" and "employee," as used in section 8(b)(4)(A), mean depends on what Congress intended them to mean. Perhaps this can be determined by looking at the legislative history of the statute.

B. Arguments from the legislative history of the statute:

Proponents of either point of view on the problem at hand have done a great deal of talking about congressional intent as to the applicability of the section 2(2) and (3) definitions to section 8(b)(4)(A). But no one has quoted words from the Congressional Record or from committee reports which deal with the specific problem. All the discussion in these documents which deals with the intended effect of section 8(b)(4)(A) is confined to consideration of included employers. There is no mention of secondary boycotts against railroads or government agencies.

There is discussion which deals with the effect of secondary boycotts on farmers. But here it is contemplated that the union involved will be a covered "labor organization" and that the secondary inducement will be of the admittedly covered employees of a covered employer with an object of forcing the covered employer to cease doing business with the farmer. When the object of the inducement is to force "any employer or other person" to cease doing business with "any other person," there is an illegal secondary boycott. The farmer has always been considered "any other person" for this purpose. However, this legislative history does not indicate

51. Compare the Schneider case, 89 N.L.R.B. at 223, with the Rice Milling case, 183 F.2d at 25, 26.
52. Very recently, the problem was placed before Congress in the form of an explanatory statement accompanying a proposed amendment to the Taft-Hartley Act. See 102 Cong. Rec. 7191-92 (daily ed. May 7, 1956). No action has yet been taken on this proposed amendment.
53. This is recognized by the NLRB in the Schneider case. See 89 N.L.R.B. at 223 n. 13.
whether or not Congress intended that the proscription of section 8(b)(4)(A) should apply to a union which does not qualify as a "labor organization" under section 2(5). There is no indication whether or not the section 2(5) definition is meant to carry over to section 8(b)(4)(A). Therefore, the legislative history of secondary boycotts against farmers does not help to solve the problem of the Di Giorgio case.

When it is argued, for example, that it was the intent of Congress to exclude railroads from the protection of section 8(b)(4)(A) when they are neutral secondary parties to a primary labor dispute, the argument is based on the general exclusion in section 2(2) and (3) and on the legislative history justifying that general exclusion. The same is true of arguments which state that the legislative history indicates that government agencies are to be excluded from section 8(b)(4)(A) protection and that agricultural laborers' unions cannot violate that section. The legislative history of these exclusions does not relate to the effect the exclusion will have on the secondary boycott provision. These supposed arguments from legislative history are really only being used to lay down a hypothesis from which to make a policy argument. The hypothesis is that Congress intended to exclude these parties so far as their primary relations are concerned. The policy argument is that a similar congressional intent to exclude these parties from secondary boycott regulation should be inferred from the congressional treatment of the primary relations of the parties. Since neither the plain words of the statute nor its legislative history directly answer the instant question, it is necessary to resort to these considerations of policy to answer it, as the NLRB and the courts have done. But for the sake of clarity, these arguments should be identified as policy arguments and not confused with arguments as to the specific legislative history of the section involved. The question now becomes, what effect could Congress most reasonably be supposed to have intended if it had specifically considered the question involved. That is, what is good policy?

C. Arguments as to policy:

It is reasonably clear that the purpose of excluding railroads, agricultural laborers, and governments from the definitions of section 2(2) and (3) was to insulate the primary relations of these employers and employees from the regulatory scope of the Taft-Hartley Act. In the case of railroads, adequate regulation was
already provided by the Railway Labor Act.56 In the case of farmers, it has been suggested that Congress felt it unnecessary for the federal government to act as an intermediary between employer and employees since most farm operations are relatively small and the parties do not need government help to get together for economic bargaining.57 In the case of government, it was apparently felt that there was danger of labor's obstructing vital public functions by asserting the rights which the act guarantees.58

It is perfectly clear that section 8(b) (4)(A) was meant only to deal with secondary boycotts and not with the primary relations of an employer and his employees. This is well illustrated by the words of Senator Taft, the act's co-author:

“This provision [section 8(b) (4)(A)] 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. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.” (Emphasis added.)59

The case law supports this interpretation unqualifiedly.60

A third proposition is also relatively clear. Section 8(b) (4)(A) was intended to make all secondary boycotts unfair labor practices without distinguishing one type from another. Again in the words of Senator Taft:

“It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.”61

If the purpose of the exclusionary provision is to insulate certain primary relations from regulation, and if the purpose of section 8(b) (4)(A) is to regulate secondary boycotts only, but to regulate all of them, it would then seem that there would be no offense to the

56. See the trial examiner's intermediate report in the Rice Milling case, 84 N.L.R.B. at 373, and authorities cited there.
60. Even if the primary picketing incidentally affects secondary employers, there is no violation of § 8(b) (4)(A). The leading case is the United States Supreme Court decision in the Rice Milling case, which was appealed from the Fifth Circuit on this issue rather than the one discussed in the text. See 341 U.S. 665 (1951).
exclusionary provision to place the excluded parties within the scope of the secondary boycott provision. While the words of the act and its legislative history do not demand this interpretation, neither do they prevent it. It does not follow from this interpretation that the excluded parties must be included within the regulatory scope of the act for any other purpose than to prevent secondary boycotts.

This treatment would eliminate several inconsistencies that the NLRB interpretation creates. First, a union would not be able to circumvent section 8(b)(4)(A) by picking an excluded employer to exert secondary pressure against, thus exerting what would otherwise be illegal pressure on the primary employer. Second, covered neutral employers, whose employees are induced to strike with an object of forcing an excluded neutral employer to cease doing business with the primary employer, would be given the same protection that they would receive if the object of the inducement were to force another covered neutral employer to cease doing business with the primary employer. Third, all labor disputes would be localized and could not be extended so as to have a multiplier effect in impeding commerce, thus the general public would benefit. Fourth, this interpretation would eliminate "Alice in Wonderland" situations like that in the Di Giorgio case, where the covered union which responded to the secondary boycott was found to have violated section 8(b)(4)(A) while the non-covered union which instigated it was not.

**Conclusion**

The proper test is simply to ask whether the effect of the union's activity is to extend the primary dispute beyond the primary employer so as to exert pressure on neutral employers and employees who are not parties to that dispute. If so, then section 8(b)(4)(A) should be applied to restrain the activity and localize it to the interested parties. The words of the statute can just as well be read to allow this result as to prevent it. The result does not conflict with the Supreme Court decisions on the question. Indeed, some read these decisions to require it. There is no legislative history indicating that the act was not intended to be interpreted in this way. This interpretation provides consistent treatment for all parties in all secondary boycott situations, as the legislative history indicates Congress intended. The ultimate effect of this interpretation is to insure the free flow of commerce which is a fundamental goal of the Taft-Hartley Act.

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62. This is one of the prime objectives of the act. See 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1952)